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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY NEVILLE PEART FOR

JUDICIAL REVIEW

KERR J

Introduction

[1] This is an application by Neville Peart, a prisoner currently serving a sentence of imprisonment in HMP Magilligan, for judicial review of the decision of the Parole Board for England and Wales refusing his application for parole.

Background

[2] On 28 November 1997 the applicant was arrested in England on charges of importing drugs. While on remand awaiting trial on those charges he was transferred to Scotland to face two charges of assault. He pleaded guilty to those charges and was sentenced on 6 May 1998 to a period of five years and six months imprisonment on each charge, the sentences to run concurrently.

[3] On 21 May 1998 the applicant was transferred from Scotland to England under the Crime (Sentences) Act 1997 on a restricted basis. The transfer document specified that the applicant would remain subject to the law of Scotland relating to release from prison, supervision while released on licence and recall from release on licence. For all other purposes he was subject to the rules and regulations governing prisons in England.

[4] On 22 July 1998 the applicant was convicted by a jury of three offences of importing drugs. He was given three concurrent sentences of nine years and six months, three years and five years. It was ordered that these offences

should be served concurrently with the sentence that had been imposed in Scotland.

[5] On 11 March 1999 the applicant was transferred to Northern Ireland. This was again on a restricted basis. Once again the transfer document specified that he would remain subject to the provisions relating to release and supervision that applied in England and Wales. He was transferred to HMP Maghaberry on 24 March 1999 and from there to HMP Magilligan on 23 September 1999.

[6] On 8 January 2002 two thirds of the sentence imposed in Scotland expired. Section 1 (2) of the Prisoners and Criminal Proceedings (Scotland) Act 1993 provides: -

> "After a long term prisoner has served two thirds of his sentence the Secretary of State shall release him on licence."

A "long term prisoner" is defined by section 27 of the Act as a person serving a sentence of four years or more. The applicant would have been entitled to be released on 8 January 2002, therefore, if he had only been serving the sentence imposed by the Scottish court.

[7] In April 2002 the applicant was notified that he would become eligible to apply for parole in October 2002 and was invited to make application for parole, which he duly did on 7 April 2002. A prison assessment form was completed for the Parole Board. This was in glowing terms. It recorded that he had attended a drugs awareness course and the STOP (the Stop, Think and Change) programme. The probation officer's report for the Parole Board was also in positive terms. It referred to anger management as being an "outstanding target" from his sentence plan. On this point the probation officer stated: -

> "As Mr Peart's sentence has progressed there has been no evidence of anger problems and Mr Peart himself feels that this is not a relevant issue for him. I believe that Neville Peart has made sincere efforts to address his offending behaviour whilst in prison and while he is currently waiting assessment for the enhanced thinking skills programme as an alternative to anger management this would not be regarded as essential to be undertaken prior to release."

[8] On 9 August 2002 the Parole Board wrote to the applicant informing him that they had found that he was not suitable for early release on licence.

The letter acknowledged that the applicant had used his time constructively in prison but concluded that he had not fully addressed "the factors that led him to commit a serious offence of violence, within his stormy relationship with the victim". The letter concluded with the following paragraph: -

> "The panel is of the view that Mr Peart remains too high a risk of violence, particularly towards his ex partner, to justify early release at this time. He should complete the thinking skills course for which he has applied and further explore his attitude to his ex partner in preparation for his next parole review. Parole denied."

The judicial review application

[9] The applicant advanced four principal arguments.

1. The English Parole Board did not have jurisdiction to deal with the Scottish sentence.
2. The decision to refuse parole was unreasonable in the *Wednesbury* (*Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223) sense.
3. The refusal of parole constituted a violation of article 5 of the European Convention on Human Rights
4. The Parole Board failed to give adequate reasons for its decision.

Jurisdiction

[10] It was common case that the transfer document by which the applicant moved from Scotland to England required that decisions as to the applicant's release from prison on the Scottish sentence were to be taken as if the applicant were still subject to the provisions applicable for those purposes under the law of Scotland. But Mr Maguire on behalf of the respondent argued that when the English Parole Board came to consider the question of the applicant's parole it was bound to treat the sentences passed in Scotland and those passed in England as a single term of imprisonment under section 51 (2) of the Criminal Justice Act 1991. Thus the Board was required to deal with the application for parole on the basis that the applicant's suitability for release should be determined not only in relation to the offences for which the applicant had been sentenced in England but also taking into account the Scottish offences.

[11] The Parole Board is constituted under section 32 (1) of the 1991 Act. It is required by section 32 (2) to advise the Secretary of State for the Home Department with respect to any matter connected with the early release or recall of prisoners. Under section 32 (6) the Secretary of State may give

directions as to the matters to be taken into account by the Board in advising him. For the purposes of this case the relevant directions are as follows: -

> "1. In deciding whether or not to recommend release on licence, the Parole Board shall consider primarily the risk to the public of a further offence being committed at a time when the prisoner would otherwise be in prison and whether any such risk is acceptable. This must be balanced against the benefit, both to the public an the offender, of early release back into the community under a degree of supervision which might help rehabilitation and so lessen the risk of re-offending in the future. The Board shall take into account that safeguarding the public may often outweigh the benefits to the offender of early release.
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> 2. Before recommending early release on licence, the Parole Board shall consider whether:
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> (1) The safety of the public will be placed unacceptably at risk. In assessing such risk the Board shall take into account:
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> (a) the nature and circumstances of the original offence;
> (b) whether the prisoner has shown by his attitude and behaviour in custody that he is willing to address his offending behaviour by understanding its causes and its consequences for the victims concerned, and has made positive effort and progress in doing so;
>
> …"

[12] Section 51 (2) of the 1991 Act as amended provides: -

> "For the purposes of any reference in this Part, however expressed, to the term of imprisonment to which a person has been sentenced or which, or part of which, he has served, consecutive terms and terms which are wholly or partly concurrent shall be treated as a single term if—

(a) the sentences were passed on the same occasion; or
(b) where they were passed on different occasions, the person has not been released under this Part at any time during the period beginning with the first and ending with the last of those occasions."

Mr Maguire argued that the effect of this provision is that the applicant's two terms of imprisonment were to be treated as one; the Board was therefore required to consider the two sets of concurrent sentences as a single term.

[13] An identical provision to section 51 (2), section 27 (5) of the Prisoners and Criminal Proceedings (Scotland) Act 1993, applies to Scotland. The enactment of this subsection suggests that the respective provisions are designed to apply only to sentences passed in the same jurisdiction. Neither section 51 (2) of the 1991 Act nor section 27 (5) of the 1993 Act applies in the other jurisdiction –see section 102 (4) of the 1991 Act and section 48 (5) of the 1993 Act.

[14] At the time that the English Parole Board was deciding in April 2002 whether to recommend the release of the applicant, the issue of parole on the Scottish sentence had expired because he was entitled to be released unconditionally in relation to that sentence on 8 January 2002. If Mr Maguire's argument were accepted, however, that issue would be revived because the Scottish sentence would be deemed to be part of the single term that the Parole Board had to deal with in determining whether to recommend the applicant's early release.

[15] I cannot accept the suggestion that the effect of section 51 (2) of the 1991 Act is to require the English Parole Board to treat the sentence imposed in Scotland as forming part of the single term it was required to consider in recommending whether the applicant should be released. Quite apart from the fact that two separate provisions (said in each item of legislation not to apply in the other jurisdiction) were deemed appropriate for England and Wales and Scotland, so to hold would involve either a parallel jurisdiction in both jurisdictions over both sets of sentences or the nullifying of the terms on which the applicant was transferred from Scotland to England.

[16] It does not follow, however, that the English Parole Board was required to ignore the Scottish sentence or the offences for which it was imposed. The Direction from the Home Secretary contains the instruction that the Board consider *primarily* the risk to the public of a further offence. It seems to me that the Board cannot fulfil that function if it fails to have regard

to a previous conviction that bears directly on the issue of possible re-offending.

[17] Mr Treacy suggested that the Board was obliged to confine its consideration to the possibility of the applicant committing further drugs offences but I cannot accept that argument. The Direction enjoins the Board to consider whether there is a risk to the public of *a* further offence; to restrict the Board to a consideration only of the type of offence for which the prisoner is serving his current sentence and to require the Board to ignore any other offence which might indicate a strong propensity to re-offend would impose an artificial fetter on the Board's function and potentially seriously undermine the efficacy of the parole system.

[18] An interesting question arises as to whether the Board's decision can be allowed to stand if it wrongly considered that it was bound to treat the two sentences as a single sentence for the purposes of section 51 (2) of the 1991 Act. The letter from the Board of 9 August 2002 refusing parole stated: -

> "Mr Peart was sentenced to nine and a half years for importing Class A and Class B drugs, to run concurrently with a five and a half year sentence for offences of violence against his ex-partner and her female friend"

The letter then went on to deal with the circumstances of both sets of offences. On behalf of the respondent Mr Maguire submitted that the Board was "mandated" by the legislation to treat both sets of sentences as a single sentence.

[19] Notwithstanding his submission as to the effect of the legislation Mr Maguire claimed that it had not been established that the Parole Board had in fact treated both sets of sentences as a single sentence and he reminded me that it was for the applicant to establish this, referring to *Supperstone & Goudie* on Judicial Review at 17.8, where it is stated that "throughout the course of the hearing, the legal burden of proof (as distinct from the evidential burden), remains on the applicant".

[20] The tenor of the letter from the Parole Board makes it unmistakably clear, in my opinion, that it considered that both sets of sentences should be regarded, for the purpose of the Board's deliberations, as a single sentence. I am satisfied that the Board considered that it should deal with the question of the applicant's entitlement to parole on the Scottish sentence. For the reasons that I have given, I consider that the Board was wrong to follow this course. What is the effect of that error?

[21] The Board was obliged to take account of the circumstances of the offences for which the applicant was sentenced in Scotland. It was required to make an assessment of the impact that those offences had on the risk of the applicant's re-offending. This is essentially the same exercise as that which the Board carried out, albeit in the mistaken belief that it was necessary to treat both sets of sentences as a single sentence. It is inconceivable that the Board would have reached a different conclusion if it had approached the question in the proper manner.

[22] I am satisfied, therefore, that if the Board had confined its consideration of the Scottish sentences to an assessment of their relevance to the issue of the applicant's propensity to re-offend, it would have arrived at the same conclusion that it in fact reached, *viz* that the risk of that occurring militated against a recommendation that he should be released on parole. Although, therefore, I am satisfied that the Board approached its task on an erroneous basis, I consider that, since it would have reached the same conclusion if it had dealt with the matter in the correct way, I should exercise my discretion to refuse the applicant relief on this ground.

Was the decision *Wednesbury* unreasonable?

[23] The applicant claimed that the Board had failed to take into account that he had been unable to participate in the enhanced thinking skills course because no places were available, rather than any reluctance on his part. It was also pointed out that the probation officer considered that it was not essential that he undertake this while in custody. The applicant was willing to submit to a condition on the grant of parole that he should undertake this course. He is entitled to be released in any event on 18 May 2004, his non-parole eligibility date. If that date arrives without the applicant having been accommodated on a course in prison there will be no opportunity to require him to take the course.

[24] A number of other matters were canvassed by the applicant as having been ignored by the Parole Bord. These included that he was not being given priority for the enhanced thinking course because the Prison Service did not believe that he posed a risk of further offending associated with a recurrence of loss of control and the fact that the ETS course had not been included in the applicant's sentence management plan.

[25] There is no evidence that the Parole Board failed to have regard to these matters. Information relating to them was available in the papers considered by the Board. The fact that explicit reference to them is not found in the letter communicating its decision is not to be taken as an indication that it ignored these matters. In a further letter to the applicant's solicitors of 29 August 2002 the Board acknowledged the difficulties that prisoners experience in attending courses and the fact that it is frequently not the fault

of prisoners that they are unable to secure a place on programmes such as ETS. It was clearly alive to the fact that the applicant had not been able to secure a place on the course.

[26] The offences that gave rise to the Scottish sentences were extremely serious. The applicant claimed to be unable to remember having inflicted the injuries on his former partner although she had been stabbed no fewer than eighteen times. There is evidence that he was prone to violent outbursts in the past. Although he has been well behaved while in prison and appears to have used his time constructively, one could not say that the Parole Board's decision that he should undertake an enhanced thinking course which would address anger management before he was considered for parole was unreasonable.

Article 5

[27] Article 5 of the European Convention on Human Rights guarantees the right to liberty and security of person. It provides that no one shall be deprived of his liberty except in accordance with a procedure prescribed by law. The applicant claims that the Parole Board has violated this right by having regard to the Scottish sentence which is, to all intents and purposes, spent. The effect of the Parole Board's decision, the applicant says, is to increase the penalty of the Scottish sentence.

[28] The fundamental flaw in this argument is that it fails to take account of the fact that the applicant is still liable to be detained on the sentence imposed in England. The Parole Board has jurisdiction to deal with the case on account of the English sentence but it must take its decision as to whether the applicant should be recommended for release on licence by having regard, inter alia, to the circumstances of the Scottish offences.

[29] Article 5 (1) (a) recognises that the detention of a person after conviction by a competent court is lawful. It is well established that where a person is convicted and is sentenced to a period of imprisonment which the court considers commensurate with the offence, the decision of the sentencing court constitutes the necessary compliance with article 5 – see *De Wilde, Ooms & Versyp v Belgium* [1970] 1 EHRR 373. In this case the detention of the applicant is on foot of the order of the English court. No violation of the applicant's article 5 rights arises, therefore.

Reasons

[30] In *R v Secretary of State v Home Department ex parte Lillycrop & others* [1996] EWHC Admin 281, the Divisional Court in England said this about the giving of reasons by the Parole Board: -

> "In our judgment the decision letter should contain a succinct and accurate summary of the reasons leading to the decision reached. When formulating their reasons the members of a panel are not required to create some elaborate formal exegesis, or a detailed analysis of the facts they have considered and the application of those facts to the relevant law. The purpose of the reasons is to tell the prisoner in broad terms why parole has not been recommended, bearing in mind that in most cases the prisoner will himself have been provided with the documentation available to the Board."

[31] I agree with this analysis. The essential reason that the Board refused to recommend parole in Mr Peart's case was that they considered that there was an unacceptable risk that he would resort again to violence, particularly in relation to his former partner. The Board considered that it was necessary that he undertake the ETS course before parole could be recommended. Both these reasons were communicated to the applicant. I consider that the requirement to give reasons was fulfilled, therefore.

Conclusions

[32] Although I have decided that the Parole Board did not have jurisdiction to treat the Scottish sentences as forming a single sentence with the sentences imposed by the English court, I have concluded that the Board was required to take into account the circumstances of the Scottish offences and that it was bound to have reached the same conclusion if it had dealt with those sentences in the proper fashion. In the exercise of my discretion I therefore refuse judicial review on that ground. None of the other grounds advanced on behalf of the applicant has been made out and the application must be dismissed.