Neutral Citation Number: [2019] EWHC 2710 (Admin)

Case No: CO/2565/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/10/2019

Before :

MR JUSTICE PUSHPINDER SAINI

- -

Between :

THE QUEEN	**Claimant**
(ON THE APPLICATION OF WELLS)	
- and -	
PAROLE BOARD	**Defendant**

- -
- -

Rebecca Filletti (instructed by **GT Stewart**) for the **Claimant**
The Parole Board, Defendant, did not appear and was not represented

Hearing dates: 15 October 2019

- -

Approved Judgment

MR JUSTICE PUSHPINDER SAINI :

This judgment is divided into 10 sections as follows:

I. Overview and the Facts

1. This is an expedited application for judicial review of the decision of a panel of the Parole Board ("the Panel") dated 2 April 2019 ("the Decision"). By the Decision the Panel decided not to direct the release of the Claimant, Mark Wells. The Claimant argues that the relevant Panel of the Board ("the Panel") misdirected itself in law in the Decision (Ground 1) and also committed a number of additional public law errors which I address in numbered Grounds 2-4 below.

2. In accordance with its Litigation Strategy document (revised in August 2015), the Parole Board, as a quasi-judicial body, has decided to maintain neutrality in the proceedings. The Secretary of State for Justice, served as an Interested Party by the Parole Board, has also adopted a neutral position. They accordingly did not appear before me or provide any substantive representations on the issues.

3. The Claimant, aged 48 years, is currently serving an indeterminate sentence of imprisonment for public protection (IPP) at HMP High Down. That sentence was imposed on 27 September 2005 by His Honour Judge Martineau sitting in the Crown Court at Blackfriars upon the Claimant's conviction for the offence of robbery. The circumstances surrounding this offence were as follows. On 20 May 2005 the Claimant and his co-defendant were en route to the co-defendant's uncle's house when they approached the victim and demanded money and cigarettes from him. The Claimant took the victim's wallet containing bank cards. The Claimant demanded that the victim go to a cash point to draw money, however, the victim managed to escape. The Claimant subsequently accepted that he was under the influence of crack cocaine and alcohol at the time of the offence. He entered a guilty plea at the earliest opportunity.

4. As appears below, the Claimant's history of offending required the imposition of an indeterminate sentence but the Judge set the Claimant's minimum tariff at a relatively modest period of 2 years. This expired on 27 September 2007. The Claimant had by the time of actual first release date served a period of 12 years and 8 months. He was released on 20 November 2017 but subsequently recalled on 26 January 2018.

5. The reasons for recall were, in summary, that the Claimant had failed to comply with his licence condition requiring that he confine himself to his approved address between certain hours; that he had discharged himself from rehabilitation on 25

January 2018 and failed to make contact with his probation officer to inform him of the change in circumstances. The Claimant was at large for 2 months but no offences were committed during this time. There is evidence that the Claimant may have been under the influence of drugs during some of this time. Substance abuse, both drugs and alcohol, are features of the Claimant's history and form the backdrop to his offending.

6. The oral hearing which culminated in the Decision under challenge took place on 2 April 2019. The Claimant was legally represented and also gave oral evidence. Although the Parole Board refused to direct his release they did recommend a transfer to open conditions.

7. The circumstances in which the Judge imposed an indeterminate sentence appear from his sentencing comments. I set them out because they explain the prior offending of the Claimant and also express the Judge's views as to how long one might expect the Claimant to be in custody:

> "Mark Wells, as far as you are concerned I regard my hands as being tied by Parliament, and they intended that the court's hands should be tied in the circumstances set out in the Criminal Justice Act and the relevant provisions of it in 2003. It seems to me that bearing in mind your relevant previous convictions – robbery in 1989, wounding in 1990, affray in 1990, assault occasioning actual bodily harm in 1998, robbery in 2001, possessing a bladed article in as recently as February 2003 – some of these offences require me to assume that you pose a significant risk of harm to members of the public; I must assume that unless it would be unreasonable to conclude that you do pose such a risk. You just committed an offence of robbery; it does not appear that you have a weapon, but matters can very easily escalate when a robbery takes place, particularly if there is resistance by the victim and violence falls to be used by the robbers. It seems to me looking at the totality of your convictions, the ones I have mentioned, the carrying of a bladed article relatively recently as I have said already is a short step between carrying such an article in a public place and using it if a confrontation arises suddenly and unexpectedly. Therefore I cannot conclude that it would be unreasonable to say there is no such risk.
>
> The Parole Board will consider your case after 2 years and they may or may not come to the conclusion that you are fit to be released. If they take the view about your past offences that the more serious is a long time ago and more recent offences of violence have been less serious, they may well permit your release… If they do not release you, then it is an indefinite sentence, there is no guarantee you have release, but I would be very surprised – since there are many cases far worse than yours of extreme gravity where somebody would be kept in custody for a very long period. I very much doubt if you are in that bracket".

8. It is of some relevance that the Claimant has completed a substantial number of following Accredited Offending Behaviour Programmes since he was sentenced for the substantive offence, including:

(i) ETS (Enhanced Thinking Skills) (2007)
(ii) CALM (Controlling Anger and Learning to Manage it) (2007)
(iii) ADTP (RAPT Alcohol Dependency Treatment Programme) (2011)
(iv) TSP (Thinking Skills Programme) (in community in open conditions, 2010)
(v) RESOLVE (2015)
(vi) Pathways Recovery Group (2015)
(vii) AA (Alcoholics Anonymous) (2015, 2017/ 2018)
(viii) NA (Narcotics Anonymous) (2017/ 2018)
(ix) Bridge Programme (2018)

9. In terms of context, it is important to record the conclusions of an earlier Parole Board panel. A Parole Board hearing (the Claimant's sixth review) took place on 19 October 2017. In the decision letter dated 23 October 2017 directing release the Parole Board concluded:

> "Your offender manager assessed you as posing a high risk of serious harm to the public. Your offender supervisor considered that risk of serious harm was at a medium to high level.
>
> OVP indicated a medium likelihood of violent reoffending.
>
> In the panel's view, you present a medium risk of serious harm and reoffending. The panel agreed that substance misuse would be the trigger for an escalation in risk.
>
> …
>
> You are assessed by the panel as posing a **medium risk of serious harm and reoffending**.
>
> You have previously failed to progress through open conditions on three occasions and the panel has not identified any benefits of you returning there… Your release was recommended by all witnesses and a risk management plan is in place to address those risks that you continue to present.
>
> The panel is satisfied that it is no longer necessary for the protection of the public that you remain in prison."
>
> (emphasis supplied)

II. Evidence before the Parole Board

10. There was a substantial amount of historic and current evidence before the Parole Board. I have considered that material. I will set out below such of that evidence as appears to me to be relevant to the Grounds of challenge relied upon in this claim.

11. Prison psychologist, Dr. Emilia Morton in her report dated 11 January 2019 stated:

> "It is my judgement that Mr Wells' risk for future violence is highly dependent on him remaining abstinent. It is my assessment that Mr Wells' risk of re-offending using violence is low if he does not relapse into substance dependency.
>
> …
>
> I have not recommended Mr Wells to remain in closed conditions, as it is my assessment that his level of risk does not indicate the need for it. In conversations with a treatment manager for the adapted moderate intensity programme New Me Strengths+, Ms Green at HMP Bullingdon, she is concerned that Mr Wells has completed several moderate intensity violence reduction programmes to a level of probably saturation. As this is the case, Mr Wells would probably be found unsuitable to attend an additional programme concerning reduction of further violence."

12. Independent psychologist, Jennifer Bamford said as follows in a report dated 6 January 2019:

> "In my opinion, essential strategies are those that relate to substance misuse specifically. The imminence of this risk in closed and open prison is low and in the community is assessed as low - moderate. In my opinion, Mr Wells' risk can now be safely managed in the community with the recommendations outlined below
>
> …
>
> It is my considered opinion, based on risk assessment, that Mr Wells' risk can now be safely managed in the community if he were released to a rehabilitation environment or to an AP with plans for a moderate – high level of support for his substance misuse. Detailed recommendations are outlined above in section 7 of this report."

13. In a Memorandum of Agreement dated 21 March 2019, both psychologists agreed on the following:

> "- Both psychologists felt that Mr Wells demonstrated good insight but that his ability to apply this learning at times of acute stress is somewhat impaired, possibly due to his cognitive limitations, and that he requires support to try and integrate his learning into real life scenarios/settings.

> …
>
> - Both psychologists recommend that Mr Wells be transferred to a residential rehabilitation unit in the community.
>
> - Both psychologists agree that release to an AP could be safely manageable if sufficient support around substance misuse was available, but this is a secondary recommendation to residential rehabilitation.
>
> - Both psychologists agree that open conditions is not necessary, nor is it the most supportive of environments for Mr Wells."

14. Rebecca Feek, Offender Supervisor, in the Sentence Planning and Review Report dated 14 September 2018, concluded that:

> "Mr. Wells has completed a number of custodial interventions prior to his release on licence including the Thinking Skills Programme (TSP), RESOLVE, Controlling Anger & Learning how to Manage it (CALM) and Rehabilitation for Addicted Prisoners trust (RAPt) 12-Step Programme.
>
> Mr. Wells' last instance of violence was an adjudication on 21/08/2014 when he was found fighting with a prisoner. Whilst Mr Wells was non-compliant on licence, there is no evidence to suggest that he was violent or had committed any further offences.
>
> …
>
> I would assess that Mr. Wells' risk is manageable in the community whilst residing at an Approved Premises and attending the local Drug Support Team… A licence condition to comply with drug testing would assist in assuring that Mr. Wells is managing his risk of relapse into Substance Misuse."

15. Offender Manager, Rachel Horton, prepared a report dated 1 March 2019 in which she observed:

> "A previous Psychological Assessment (05/08/15) has highlighted that Mr Wells has borderline/ low levels of intellectual functioning which could impact on his ability to learn from programmes he undertakes. He has never completed any adapted programmes.
>
> …
>
> Since being in custody, Mr Wells has completed the Bridge Programme and the feedback has been positive from group facilitators. They have highlighted that he engaged well on the programme and was able to demonstrate appropriate insight

> around his addiction problems and future triggers leading to relapse.
>
> I would concur with the Psychology Report and believe the most supportive move for Mr Wells, at this stage, would be to engage in a residential rehabilitation unit in the community.
>
> …
>
> I do not believe that Mr Wells would benefit from a move to open conditions as it would not allow him to continue to build upon the work he has undertaken around substance misuse in closed conditions.
>
> …
>
> Lastly, I assess that his risk is manageable in the community. Therefore, it is no longer necessary for the protection of the public for him to remain in custody."

III. The Decision

16. The following passages from the Decision are of some importance and I set them out in full in order for the Grounds of challenge and my reasons to be properly understood.

17. Between paras.6-8 the Panel set out its detailed reasons on the issue of risk. Omitting certain immaterial parts of these sections, the Panel observed as follows (with my emphasis):

> "Your OGRS score places you in a group with a medium risk of reoffending. A recent OASys assessed you as having a medium risk of general and violent reoffending and a medium risk of serious harm to the public. Both psychologists assessed you as presenting as a **low to medium risk of future violent offending** and do not consider that our risk is imminent. **The panel agree that your risk of causing harm is not imminent** but considered that your risk of further violence may be underestimated given that you are yet to demonstrate that you can maintain a period of stability in the community. The key warning sign that your risks were increasing would be a lapse into substance misuse.
>
> …
>
> **Both psychologists recommended that you be released into residential rehabilitation or, as a secondary recommendation, to approved premises with support around substance misuse. Neither considered that open**

conditions was necessary or would be the most supportive environment for you… **Ms Feek and Ms Horton both recommended that you be released, ideally to residential rehab.**

…

[T]he panel had concerns that you have progressed to open conditions three times and been released once and on each occasion have not been able to maintain your motivation to avoid substances. One (sic) the most recent occasion you had dropped out of contact as you relapsed into substance misuse which meant that the warnings signs could not be picked up. **The panel did not share the confidence of witnesses that you had learnt from previous experiences where you thought you would be able to manage but could not**… The panel concluded that the proposed plan, be it approved premises or third stage rehab, was not likely to be able to manage your risks, particularly as it did not offer the level of support and monitoring that you had previously been released with. The panel reached this conclusion having also carefully considered whether the option of a "trail monitoring" electronic tag could assist in managing the inevitable elevation in risk if you were to again drop out of contact. **However, bearing in mind that you would only need to remove the tag**, it decided that greater internal controls on your part were essential before you could be safely in the community.

…

The index offence was a serious matter and was part of a pattern of violent and aggressive behaviour, often associated with substance misuse. You have made good progress in addressing your risk factors but have repeatedly struggled to put that knowledge into practice. The panel appreciated that you had not been violent for a considerable time. However, you have continued to display active risk factors associated with your use of violence. **You also have not yet built the protective factors which would be key to helping you live an offence free life in the future.** As a result, the panel concluded that your risks could not be safely managed in the community. Having taken into account the written and oral evidence the panel considers that you need to remain confined for the protection of the public and did not direct your release.

The panel concluded that the benefits of a move to open conditions outweighed your risks and recommended that you be transferred to open conditions."

IV. Legal Framework

18. Section 32 of the Crime (Sentences) Act 1997 provides in material part:

> "(4) The Secretary of State shall refer to the Parole Board – the case of a life prisoner recalled under this section.
>
> (5) Where on a reference under subsection (4) above the Parole Board directs the immediate release on licence under this section of the life prisoner, the Secretary of State shall give effect to the direction."

19. Under section 28(6)(b) of the Crime (Sentences) Act 1997, the Parole Board shall not give a direction for the release of a life sentence prisoner unless:

> "the Board is satisfied that it is **no longer necessary** for the protection of the public that the prisoner should be confined." (emphasis supplied)

20. It follows that the Parole Board can only direct the release of a life sentence prisoner if it is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined. So, the danger posed by the prisoner must be of re-offending that would cause serious harm to the public and the level of risk that would justify post-tariff detention, is a substantial, or more than a minimal, risk. I will return to case law on IPP sentences below.

21. Following the Supreme Court's judgment in the case of *Osborn & others v Parole Board* [2013] UKSC 61; [2014] A.C. 1115, the Parole Board issued a document entitled *'Practical Guidance for referral of cases to an Oral Hearing 2013'*. It is material that the guidance states:

> "When dealing with cases concerning post-tariff indeterminate sentence prisoners, it should scrutinize ever more anxiously whether the level of risk is unacceptable, the longer the time the prisoner has spent in prison following the expiry of his tariff."

V. Ground 1: misdirection in law

22. Although not put precisely in these terms, it appears to me that the Claimant's first ground can more clearly be formulated as essentially a submission that the Decision, on its face, reveals a misdirection in law. Counsel for the Claimant had termed this ground as "illegality" in her clear and helpful written grounds but, as discussed at the hearing, it is in fact a more simple complaint of misdirection in law.

23. As set out in more detail above (see para. [17]), the Panel observed in a crucial concluding paragraph that:

> "You also have not yet built the protective factors which would be key to helping you live an offence free life in the future." (underlining supplied)

24. In my judgment, it is hard to avoid the conclusion that the Panel misdirected itself in law as to the hurdle which they considered the Claimant had to overcome. Reading this paragraph in the context of those preceding it, in my reading of the Decision the Panel appears to have considered that it had to be satisfied that that there was essentially **no** risk of reoffending. That cannot be correct in law.

25. In R (Brooke) v PB [2008] EWCA Civ 29; [2008] 1 W.L.R. 1950 at [53] Lord Phillips CJ observed:

> "Judging whether it is necessary for the protection of the public that a prisoner be confined is often no easy matter… it does not require that a prisoner be detained until the board is satisfied that there is **no risk** [emphasis in the original] that he will re-offend. What is necessary for the protection of the public is that the risk of re-offending is at a level that does not outweigh the hardship of keeping a prisoner detained after he has served the term commensurate with his fault. Deciding whether this is the case is the board's judicial function."

26. The Panel's approach does not to my mind faithfully apply the terms of the statute or this important judicial guidance. Rather than evaluating whether the Claimant would be "offence free" (effectively, no risk of reoffending), they should have instead assessed whether any potential risk was proportionate with his continued detention.

27. In my judgment, as a post-tariff IPP prisoner, Mr Well's continued detention depended upon whether he posed a risk of committing offences that may occasion serious harm. That is, offences of serious violence like his index offence: R (Sturnham) v Parole Board [2013] 2 A.C. 254, per Lord Carnwath at para. 45. The question being: is there is a risk to life and limb from which the public needs protection by way of the Claimant's continued detention? That is very different from asking whether the Claimant would remain "offence free".

28. I accordingly conclude that the first Ground succeeds and that is enough to justify the quashing of the Decision. I will now however turn to consider the further Grounds argued before me.

VI. Ground 2: irrationality and reasons

29. I have set out the evidence before the Panel at some length above. That was necessary in order to properly assess the rationality challenge. The essential submission is that in the light of that evidence the Panel's conclusion that Mr Well's risks could not be safely managed in the community was irrational. As I explain below, I prefer to approach this Ground 2 (the rationality challenge) and the Ground 4 challenge (reasons challenge) together.

30. As is obvious, a rationality challenge in public law is always a substantial challenge for a Claimant; and particularly so, when dealing with a specialist quasi-judicial body which will have developed experience in assessements of risk in an area where caution is required.

31. A modern approach to the Associated Provincial Picture Houses Ltd v Wednesbury Corporation (1948) 1 K.B. 223 (CA) test is not to simply ask the crude and unhelpful question: was the decision irrational?

32. A more nuanced approach in modern public law is to test the decision-maker's ultimate conclusion against the evidence before it and to ask whether the conclusion can (with due deference and with regard to the Panel's expertise) be safely justified on the basis of that evidence, particularly in a context where anxious scrutiny needs to be applied.

33. I emphasise that this approach is simply another way of applying Lord Greene MR's famous dictum in Wednesbury (at 230: "no reasonable body could have come to [the decision]") but it is preferable in my view to approach the test in more practical and structured terms on the following lines: does the conclusion follow from the evidence or is there an unexplained evidential gap or leap in reasoning which fails to justify the conclusion?

34. This may in certain respects also be seen as an aspect of the duty to give reasons which engage with the evidence before the decision-maker. An unreasonable decision is also often a decision which fails to provide reasons justifying the conclusion.

35. I should also emphasise that under the modern context-specific approach to rationality and reasons challenges, the area with which I am concerned (detention and liberty) requires me to adopt an anxious scrutiny of the Decision: see Judicial Review (Sixth Edition), Supperstone, Goudie and Walker at para.8.12.

36. Applying the above approach, I consider that both a rationality and reasons challenge succeed in this case.

37. My reasoning is as follows:

    (i) Both psychologists assessed the Claimant as presenting a low to moderate risk of future offending and did not consider risk as imminent (this assessment of imminence was accepted by the Panel);
    (ii) A recent OASys assessed that the Claimant presented a medium risk of general and violent reoffending, this was not an increase from previous assessments;
    (iii) Both psychologists, the offender manager and the offender supervisor supported release, no professional supported a referral to open conditions instead (notably, there was no evidence being presented to the contrary);
    (iv) The Panel seems to have failed to indicate what conclusion they reached regarding risk, simply stating that they 'considered that [his] risk of further violence may be underestimated'; there is a lack of a specific conclusion on risk from the Panel itself in this regard;
    (v) The Panel did not apparently conclude that risk had increased since the previous decision to release;
    (vi) There had been no allegations that he has acted in a violent manner either inside or outside custody since 2014;
    (vii) The Claimant had not been arrested for committing any violent offences whilst released, despite being unlawfully at large for two months;
    (viii) Points (vi) and (vii) are particularly powerful and needed to be engaged with by the Panel.

(ix) The Claimant had completed a full range of offender behaviour programmes during his incarceration, including in the period between recall and the panel date, so much so that he has been described as *"*saturated*"* (see the report of Dr. Morton to which I make reference at para. [11] above);

(x) Importantly, the Panel did not identify any further courses that needed to be undertaken prior to any future panel meeting;

(xi) Although of course not binding, I have set above that at an earlier oral hearing 19 October 2017, another panel carefully analysed all the evidence and risk assessments and directed release. They confirmed that they did not identify any benefits of returning to open conditions. They could only have reached their conclusion to release having satisfied themselves that there were no outstanding areas of core risk that needed to be addressed.

38. I accept that the Panel was not bound by the expert evidence before it but I consider that the extent of the reasoning given by the Panel for coming to conclusion that the risks posed by the Claimant could not be managed in the community fell below an acceptable standard in public law.

39. Although made in the context of general civil litigation, the observations of Henry LJ (for the Court of Appeal) in the well-known case Flannery v Halifax Estate Agencies Limited [2000] 1 WLR 377 (CA) at 381B-D are apposite (see also the helpful summary in the notes to CPR Part 35 at para.35.05.5 of the White Book, Vol.1).

40. The duty to give reasons is heightened when the decision-maker is faced with expert evidence which the Panel appears, implicitly at least, to be rejecting. I also consider that departure from an earlier reasoned recent decision from another Panel required some explanation.

41. I accordingly conclude that the Panel's decision failed to reflect the evidence before it or to explain in more detail why such evidence was being rejected. The rationality and reasons challenges as formulated above under Ground 2 succeed.

VII. Ground 3: relevant considerations

42. I can deal with this Ground more briefly. It is argued that little consideration appears to have been given to assertions that there is a low level of intellectual functioning and the associated capacity to benefit from mainstream offending behaviour work (which goes directly to assessing the most supportive environment to reduce risk). It is complained that the Claimant's intellectual capacity is mentioned just once in passing in the Decision as follows:

> "You have been assessed having a borderline / extremely low level of intellectual functioning although have been able to engage in mainstream programmes."

43. I reject this challenge. I do not consider the Panel needed to address this point again. It referred to the matter sufficiently and I do not accept it failed to consider a relevant matter.

44. A separate matter concerns the fact that it was indicated in the oral hearing that the Claimant would be willing to wear a tracking device or monitoring bracelet to alleviate fears of the panel. It is argued that the Panel failed to place any weight on this potentially significant protective factor, instead just remarking that a device could just be removed. It is said that the Panel did not take into account the safeguards and security invariably in place, that removal of a bracelet can be charged as criminal damage, an offence in itself, and that removal would inevitably alert the relevant team.

45. I reject this challenge. I consider that the Panel would have been well aware of the fact that removal of a device would not be straightforward and that adverse consequences would follow if the Claimant took such a step.

46. Finally, it was argued that the Panel placed too little emphasis on the fact that the Claimant had not been arrested nor committed any violent offences during his time in the community, even when unlawfully at large. Counsel however accepted that this was simply another aspect of the rationality challenge which I have addressed under Ground 2 above.

47. I accordingly dismiss the Ground 3 challenges.

VIII. Ground 4: inadequate reasons

48. The argument under Ground 4 is that the Panel failed to indicate what conclusion they had reached regarding level of risk, simply stating they, 'considered that [his] risk of further violence may be underestimated'.

49. The Claimant argues that given that the assessment of potential risk is fundamental to the decision regarding release, the review process and indeed the decisions of potential future panels, this reasoning is wholly inadequate.

50. As I have concluded above, I consider that there is merit in the reasons challenge which I considered as an aspect of Ground 1. The complaint about the failure to make a finding on level of risk falls within that Ground. See paragraph [34(iv)] above.

IX. Conclusion

51. For the reasons given above, I will make an order granting the Claimant the following relief:

    (i) The decision of the Defendant dated 2 April 2019 is quashed;
    (ii) The Interested Party shall refer the Claimant's application for release to a fresh panel of the Defendant;
    (iii) Detailed assessment of the Claimant's publicly funded costs.
    (iv) Permission to apply to vary para. (iii).

52. The permission to apply to vary para. (iii) in relation to costs is given in the light of the fact that I am informed by Counsel for the Claimant that R (on the application of

Gourley) v Parole Board [2017] EWCA Civ 1003 is subject to a further appeal on the question of the Parole Board's liability for costs when it remains neutral in judicial review proceedings.

53. Finally, I would respectfully suggest that the reconsideration take place on an expedited basis given that the Claimant will at the date of my judgment have been in prison for almost 14 years in circumstances when his minimum tariff was 2 years.