IN THE SUPREME COURT OF JUDICATUREQBCOF 97/0752/D
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
CROWN OFFICE LIST
(Mr Justice Forbes)

Royal Courts of Justice
Strand, London WC2

Wednesday, 3rd December 1997

B e f o r e :

THE MASTER OF THE ROLLS
(LORD WOOLF)
LORD JUSTICE HOBHOUSE and
LORD JUSTICE MANTELL

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IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

R E G I N A
-v-
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

ex parte MICHAEL McAVOY — Applicant/Appellant

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MR E FITZGERALD QC and MISS P KAUFMANN (instructed by the Prisoners Advice Service, London EC1) appeared on behalf of the Appellant Applicant.
MR K PARKER QC and MISS D ROSE (instructed by the Treasury Solicitor, London SW1) appeared on behalf of the Respondent.

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J U D G M E N T
(As Approved by the Court)

Wednesday, 3rd December 1997

LORD WOOLF, MR:

The Issue

This appeal raises a point of principle as to the process for the categorisation of prisoners. The principle raises the question as to what information the prison service is required to provide to the prisoner to enable him to make representations as to his categorisation when that is to be reviewed.

The prisoner says that he should be provided with copies of all the material supplied to the review body prior to his making representations or, if that is not possible, at least that he should be given the names of those who have provided the information. In both cases it is recognised that exceptions would have to be made if the information which would otherwise have to be provided falls within the categories of information in relation to which public interest immunity is available.

The Home Secretary, on the other hand, contends that it is sufficient if the gist of the material which is to be placed before the review body is made available to the prisoner and, in addition, the prison authorities are prepared to consider providing additional information if the special circumstances make that appropriate.

Both sides on this appeal accept that, in order to determine the point of principle raised, the court must determine what is required in order to make the procedure of categorisation or re-categorisation fair. The process of categorisation or re-categorisation is required to be conducted fairly.

The Background

The appeal is from a judgment of Mr Justice Forbes given on 21st March 1997. He set out in his judgment the facts clearly and precisely, examined the relevant authorities and, having done so, came

to the conclusion that there was no obligation on the Secretary of State to do more than was done in this case. This was basically to provide the appellant with the gist of the case which was going before the review body.

The appellant was convicted of an extremely serious offence. On 2nd December 1984 he was convicted at the Central Criminal Court of armed robbery of gold bullion and diamonds valued at £26m from the Brinks Mat Security Depot. On the following day he was sentenced to 25 years' imprisonment. In due course he was categorised as a Category A prisoner, and he has remained within that category ever since. Initially, he was also classified as being a High Escape Risk prisoner. However, that classification was reduced to the Standard Escape Risk category in December 1995. On 16th June 1995 the fourth decision by the Parole Board was reached in his case, which was to refuse parole.

The process of categorising a prisoner takes place annually. In October 1995 reports were compiled by the reporting officers at HM Prison Frankland for use at the annual review which was due to take place in December 1995. On 13th November 1995 the appellant was supplied with the gist of the material which had been prepared for that review.

I should set out the contents of that document, because it gives an indication of the type of information which is made available to a prisoner. It reads:

> "Your security category review will take into account the nature and circumstances of the offence, length of sentence and previous convictions.
>
> Our records show that on 3 December 1984 at the Central Criminal Court, you were sentenced to 25 years' imprisonment for robbery.
>
> Previous convictions include offences for burglary.
>
> Reports towards this review have been prepared by Frankland prison staff, although it is noted you transferred to Full Sutton on 22 September 1995.

> Reports state that whilst at Frankland you were the subject of a series of reports to security department as detailed below: ..."

Eight different incidents are then set out, but I do not need to do more than give two specimens: one being "trying to cause problems on wing re telephones"; the other being "possible trouble over the new searching system". The `gist statement' then goes on:

> "Reports suggest you had a clear connection with a group of subversive high risk prisoners whose alleged drugs dealing and racketeering activities were said to be seriously disrupting the regime. However, one report does describe you as polite and constructive.
>
> It is said that you began one-to-one work with the probation department in terms of your offending behaviour. You have apparently impressed staff with your motivation to address your offending behaviour and that this suggests a shift in your attitude to your offending. Reports note you are open and honest regarding the offence and have realised the negative impact of your crime.
>
> Because of your progress in addressing your offending, and the length of sentence you have served, there is some support for downgrading of your security category. However, the overall recommendation is that due to the serious nature of the offence, until there is further evidence of diminished risk you should remain category A.
>
> With regard to escape risk classification, however, it is the consensus view, expressed in reports, that your escape potential is now such that high escape risk classification is no longer warranted.
>
> Your case will be referred to the Category A Committee."

I would draw attention to the fact that that statement emphasises the importance of the offence and the fact that the review had been prepared by staff at Frankland Prison; that there were a number of incidents in which it is suggested the prisoner had played a part; that it indicates matters which are in his favour, in addition to setting out certain background matters which would obviously be considered to be adverse.

With the assistance of the Prisoners Advice Service, representations were made on behalf of the appellant dated 4th December 1995. Those representations are impressive, and they deal with the

matters contained in the gist statement in some detail. The document deals in particular, so far as is practical, with each of the identified incidents, and it goes on to indicate that there is no evidence that the appellant caused any trouble whatsoever. It adds that the appellant had only been found guilty of one disciplinary offence over 12 years. It suggests that the appellant had striven to address his offending behaviour over the past year and it encloses a copy of a report from the probation officer. It then concludes with these words:

> "The overall thrust of the gists is that my client has not been recommended for downgrading because of the nature of his offence. However, some twelve years have passed since he was convicted, and in that time he has maintained good custodial behaviour, and has progressed in terms of addressing his offending behaviour. If downgrading is refused on the basis of the original offence, I would ask that the Committee expressly states this in their decision and sets out the course of action that my client should take in order that downgrading may take place.
>
> I look forward to hearing from you."

The impression that I obtain from that response to the gist statement is that the Prisoners Advice Service have been able because of that statement to put forward meaningful and useful representations on behalf of the appellant.

On 22nd February 1996 a written statement of reasons was given to the appellant setting out the decision on the review. It sets out the fact that the recommendation of the committee, approved by the Director of Security, was that the appellant was to remain in Category A but that his escape risk classification would be reduced. It sets out in some detail how the committee came to its conclusion, and I should refer to one paragraph of the decision which seems to me to be of importance. It reads:

> "The Committee noted that there were differences of opinion as to whether a downgrading of your security category could be justified and it recognised that you had begun one-to-one counselling with the Probation Department in terms of addressing your offending behaviour. However, in considering all the information available in your case, the Committee took the view that the serious nature of the present offence could not be overlooked. It concluded that while some progress had been made in addressing your offending behaviour, evidence of further

> sustained progress in this area and further evidence of diminished risk would be required before a downgrading of your security category could be justified."

I draw attention to that paragraph in particular because it indicates that it was the nature of the offence the appellant had committed which was central to the decision as to whether he should remain in Category A.

It is that decision which is the subject of the application for judicial review which has led to this appeal.

However, before the judge and before this court there was also placed the statement which was prepared for the following year's review. That was accompanied by a letter of 17th December 1996. I need do no more than say that that gist statement was very much on the same lines as the previous one and that it provided the same sort of information. However, it included the fact that there was a recommendation by the governor of Full Sutton Prison that the appellant's security category should be downgraded, and it again concentrated on the nature of the offence which the appellant had committed.

The argument which Mr Fitzgerald has advanced on behalf of the appellant is founded upon the previous decisions which have been made in this area by the courts. He did not submit that any particular injustice had been sustained by the appellant other than that involved in the method by which the re-categorisation takes place. His attack was on the approach adopted by the prison service in making information available to a prisoner.

The Process of Categorising Prisoners

For that reason, it is important to know something more about the categorisation process. The information as to that is provided by an affidavit sworn on behalf of the Home Secretary. That

indicates that all convicted adult male prisoners are placed in one of four security categories, which are A, B, C or D. Category A is the highest security category and is reserved for inmates whose escape would be highly dangerous to the public, the police or the security of the State, no matter how unlikely that escape might be, and for whom the aim must be to make escape impossible.

It is also indicated that those prisoners who are categorised as Category A are divided into three classes, depending on the extent to which they are regarded as an escape risk. Those are Standard Escape Risk, High Escape Risk and Exceptional Escape Risk. Standard Escape Risk is the classification applied to most Category A inmates. High Risk are a small proportion of Category A prisoners. They have a history and background which suggest that they have both the ability to plan an escape and the determination to carry it out. There is usually current information to suggest that they have associates or resources which can be used to plan and carry out an assisted escape attempt. There is usually also information that the inmate or his associates have had access to firearms or explosives and have been willing to use them in committing crime or in avoiding capture. Category A High Escape Risk inmates are likely to be major criminals, such as terrorists belonging to substantial organisations, armed robbers, major drug dealers, etc. We do not need to concern ourselves with the Exceptional Escape Risk classification because the appellant was never within that category. However, they are in general criminals who pose a particularly grave danger to the public and who are regarded as extremely valuable members of their organisations or groups. They are inmates who would be strongly motivated to attempt to escape.

As I have indicated, the review takes place annually. It is normally conducted by a Category A review team, which refers to the committee only those cases in which the overall recommendation of the reports is to downgrade or where the case of the particular prisoner has not been before the committee for five years. That is the normal procedure, but it can be varied. In fact, the appellant's case did not conform to the normal criteria for reference to the committee. The appellant's case was, exceptionally,

referred to the committee because of the representations which were made on his behalf. It is emphasised that this illustrates that the procedure is flexible.

The Authorities

The authorities which Mr Fitzgerald relies upon commence with the decision in R v Parole Board, ex parte Wilson [1992] 1 QB 740. That was a case in which the applicant had been given a discretionary life sentence. Despite the fact that his case had been reviewed on a number of occasions by the Parole Board, at the age of 76 he was still in prison. He sought declarations as to his right to be provided with disclosure of "reasons, reports or facts adverse to his request for release". It is important to emphasise that in his case the penal period of his discretionary life sentence had been served and he was being retained in prison because it was not considered that it was appropriate for him to be released on licence as he still constituted a danger to the public.

The judgment of this court in that case was given by Taylor LJ. Having set out the background facts, he stated at p.751 that, unless otherwise bound by authority, he would unhesitatingly hold that fairness does require disclosure to the applicant of the reports to be presented to the Parole Board on his next review. The court came to the conclusion that in the circumstances of that case it was right to hold that the applicant should be informed of all reports that would be placed before the Parole Board in its consideration of the case.

The next case which is relied upon by Mr Fitzgerald is the leading decision of the House of Lords in R v Secretary of State for the Home Department, ex parte Doody [1994] 2 AC 531. In that case the House of Lords was considering the position of four prisoners who had received mandatory life sentences, and the issue was what information should be made available to them in relation to the review of their release.

The views of their Lordships is contained in the speech of Lord Mustill, the contents of which are very familiar to those involved in this area of the law. Having examined the issues in considerable detail, Lord Mustill summarised what was at stake before their Lordships' House. In a passage at p.560 he asked:

> "What does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive that (1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer."

I draw particular attention to the reference by Lord Mustill in that passage to "the gist of the case which he has to answer". It is apparent from what I have already said that what is under challenge here is an approach of only providing the gist of the case which the present appellant has to answer. It is not necessary for me to repeat further passages in Lord Mustill's speech in that case. I do, however, also draw attention to what he said at p.564, beginning at the top of that page.

The result of that case was that the Secretary of State was required to afford the prisoner serving a mandatory life sentence the opportunity of submitting written representations as to the period he should serve for the purpose of retribution and deterrence before the Secretary of State set the date of the first

review of the prisoner's sentence; and that, before giving the prisoner the opportunity of making representations, the Secretary of State was required to inform him of the period recommended by the judiciary as the period he should serve for the purposes of retribution and deterrence, and of any other opinion expressed by the judiciary which would be relevant to the Secretary of State's decision as to the appropriate period to be served; but that the Secretary of State was not obliged to adopt that judicial view although, if he departed from it, he was to give reasons for doing so.

The next case to which I should refer is the case of R v Secretary of State for the Home Department, ex parte Duggan [1994] 3 All ER 277. That was a case which involved a prisoner who was serving a mandatory life sentence who was categorised as a Category A prisoner and also as Standard Escape Risk. It is significant that the approach of the Divisional Court in that case was that there was no material practical distinction between a decision of the Parole Board in relation to the release of a life sentence prisoner and the decision of a prison governor that he should be Category A.

The first judgment of the Divisional Court in that case was given by Rose LJ. In the course of his judgment he accurately indicated the consequences to a prisoner of being placed in Category A. At p.280 he said:

> "It is common ground that a prisoner in category A endures a more restrictive regime and higher conditions of security than those in other categories. Movement within prison and communications with the outside world are closely monitored; strip searches are routine; visiting is likely to be more difficult for reasons of geography, in that there are comparatively few high security prisons; educational and employment opportunities are limited. And as, by definition, a category A prisoner is regarded as highly dangerous if at large, he cannot properly be regarded by the Parole Board as suitable for release on licence."

Having indicated that that was the consequence of a prisoner being placed in Category A, it is not surprising that the Divisional Court took the view that the approach indicated by Lord Mustill in the Doody case should be applied equally to a prisoner whose review of categorisation was under

consideration. It is right to note that it was accepted on behalf of the prisoner that to provide the gist of the material relied upon was sufficient.

However, the approach of Rose LJ perhaps appears clearest from a passage at p.288 towards the end of his judgment, where he said:

> "Clearly, speedy categorisation of those who may be dangerous is essential in the public interest. Those placed in category A will almost always, if not inevitably, be serving substantial sentences, so that the impact of initial categorisation is unlikely materially to affect their prospects of release. I see nothing unfair in that initial categorisation being undertaken without the substance of reports being revealed or reasons being given. But on the first and subsequent annual reviews, fairness, in my view, requires that the gist of reports be revealed in order to give the opportunity for comment and that reasons be given subsequently."

Finally, I should refer to a short passage in R v Secretary of State for the Home Department, ex parte Creamer and Scholey (unreported, 21st October 1992), a decision of the Divisional Court, because it is also a case which is relied upon by Mr Fitzgerald. He relies in particular on a passage in the judgment also given by Rose LJ. At that time Rose LJ was constrained by a decision in Payne v Lord Harris [1981] 1 WLR 754. Having regard to that decision, he said:

> "If the matter were free from authority, I would, as I have already indicated, have no hesitation in concluding that, in 1992, subject to necessary exceptions arising, for example, from public interest immunity or where disclosure of material in a medical report might damage the patient, mandatory life prisoners, like discretionary life prisoners, should be entitled to see the material before the Board on review, on recall and on post recall. A prisoner's right to make representations is largely valueless unless he knows the case against him and secret, unchallengeable reports which may contain damaging inaccuracies and which result in continuing loss of liberty are, or should be, anathema in a civilised, democratic society."

That decision, of course, is one which has been overtaken by subsequent cases, but the opinion which Rose LJ expressed as to the desirability of not dealing in secret with matters which affect the liberty of the subject is one which I would wholly endorse and one on which Mr Fitzgerald builds his

submissions. Mr Fitzgerald says that, when the authorities to which I have referred are considered in the light of what is happening in practice in relation to prisoners who are seeking parole, there can be no justification now for the Home Secretary not adopting a more open stance in regard to the review of the categorisation of prisoners. He draws attention to the fact that openness was advocated in the first of the cases that I cited.

Mr Fitzgerald then says that the practice on consideration of parole is now to make available to prisoners in the present position of the appellant the material upon which the Parole Board acts. He submits that if that can be done in relation to parole, it can equally be done in relation to the categorisation process, and that if it can be done, it should be done, because, as Rose LJ pointed out, the practical consequence of being a Category A prisoner is that you do not obtain parole. It is inconsistent with your being granted parole that you should properly be categorised as a Category A prisoner. He submits that, fairness being a flexible concept, the experience in the area of parole means that this court should now require the Home Secretary to adopt the same policy that he adopts in relation to parole to the categorisation process.

Conclusions

For my part, I accept that it is desirable, when something has the impact which being placed in Category A has on a prisoner, that the approach should be to ensure, so far as practical, that fairness is achieved. However, in considering whether in any particular situation the procedure which is adopted is fair or unfair, one has to reach a decision not only in the light of the situation of the prisoner, but also in the light of the practical considerations which must apply to the proper running of a prison. The very fact that we are talking about prisoners who have been categorised as Category A indicates that they are among those who are the most dangerous within the system. There can be considerable difficulty within the prison service in the managing of those prisoners. If you return to the case of

Duggan, one finds there is in Rose LJ's judgment at p.282 a reference to a certificate which was made in that particular case by the Secretary of State describing certain of the problems that arise and explaining why it is necessary for certain information to be treated as confidential.

Although the categorisation does have an effect on the outcome of an application for parole, there are distinctions in the nature of the process. The result of a favourable decision on parole is that the prisoner is released. The change in categorisation does not have that effect. The body which carries out the process of review of categorisation is different from the body which carries out reviews for the purposes of parole. The former is a purely internal administrative body, the other is a body which has an independent element. The decisions of the Parole Board can have an effect upon categorisation and, if the Parole Board indicates that a prisoner should be in more open conditions, that is taken into account by the committee responsible for downgrading a prisoner's security categorisation.

These are all factors which have to be taken into account in deciding whether the present distinction in the way the two decisions are made is one which is acceptable. However, in the end it seems to me that the question this court has to answer is whether the procedure which is in fact adopted on the review of categorisation is one which complies with the requirements of fairness, having regard to the nature of the exercise being carried out. As to that, I have no doubt, having seen the material in this case, that the way the process was carried out in this case was perfectly satisfactory and perfectly fair.

I can see difficulties for the prison services in adopting the approach which the appellant would urge upon them of normally disclosing all the material which is relied upon and, whenever it was appropriate to do so, seeking public interest immunity. A procedure of that nature seems to me to be inconsistent in that it is too formal for the sort of administrative decision which is being reached in relation to categorisation.

The House of Lords in the Doody case endorsed an approach which involved providing the gist of the material relied upon rather than the actual material itself. It seems to me that in a great many cases the interests of a prisoner will be fully protected if the procedure envisaged by Lord Mustill in Doody is adopted. In my judgment the procedure which is being followed at present by the prison service in relation to the review of the category in which a prisoner is placed accords with Doody. That is a perfectly satisfactory procedure, particularly and most importantly because, where appropriate, the Secretary of State or those responsible for the review in practice are prepared to reconsider, in the circumstances of any particular case, whether additional information should be made available.

In my judgment what is done in pursuance of that policy provides sufficient safeguards for a person in the position of the appellant. It does not seem to me that he should receive either the actual information or the names of those providing that information. It is sufficient if the gist of the reports plus any special information is provided to him.

Accordingly, I would dismiss this appeal.

LORD JUSTICE HOBHOUSE: I agree with the judgment of my Lord, the Master of the Rolls. The procedures followed in this case and the policy of the Department in my judgment comply with the requirements of fairness as explained in the speech of Lord Mustill in R v Secretary of State for the Home Department, ex parte Doody [1994] 2 AC 531. I also agree with the judgment delivered by Mr Justice Forbes in the Divisional Court.

It follows that I consider that this appeal should be dismissed.

LORD JUSTICE MANTELL: I also agree that this appeal should be dismissed for the reasons given.

Order: appeal dismissed; legal aid taxation for the appellant applicant.