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

[2019] EWHC 779 (Admin)

Case No: CO/3677/2018

Courtroom No. 7

2 Redcliffe Street
Bristol
BS1 6GR

Monday, 18th March 2019

Before:
THE HONOURABLE MR JUSTICE ANDREW BAKER

B E T W E E N:

R (ex parte GARY DELANEY)

Claimant

and

THE PAROLE BOARD OF ENGLAND AND WALES

Defendant

and

THE SECRETARY OF STATE FOR JUSTICE

Interested Party

MR D GARDNER appeared on behalf of the Claimant
The Defendant and the Interested Party did not appear and were not represented at the hearing

JUDGMENT
(Approved)

Mr Justice Andrew Baker:

1. The Claimant, Gary Delaney, is a lifer. He was convicted of a murder and sentenced to a mandatory life sentence in July 2006. The murder was committed in October 2005 when Mr Delaney, who had had something of a career in boxing, was working as door security. He assaulted a patron by a sufficiently violent punch that the jury was sure he had intended really serious injury, and tragically his victim fell backwards, striking his head on the ground, resulting in death.

2. Mr Delaney's minimum term was set at 11 years, less time served on remand, with the result that he became eligible to be considered for release from October 2016. It is possible to infer that Mr Delaney, stating this in general terms, must have responded well to custody, and the evidence before the court such as it is in relation to his time in custody seems to confirm that. It is possible to infer that in general terms anyway from the very fact that he was released on licence as quickly as in February 2017, only four months after the expiry of his tariff.

3. The matter now comes before the court because in late October 2017, Mr Delaney's licence was revoked. He was recalled to custody following his arrest on 29 October 2017 on suspicion of a series of incidents of domestic violence against a woman with whom he had struck up a relationship following his release. The allegations were of a relatively serious nature, including allegations that there had been a wrist fracture, a perforated ear drum, and an act of urinating on the complainant.

4. Mr Delaney challenges, with permission granted on the papers, the decision letter dated 18 June 2018 by which a panel of the Parole Board concluded that it would not direct that he be re-released on licence, and it would not recommend that he be transferred to open conditions.

5. Mr Gardner, who appears today for Mr Delaney, in most helpful and succinct submissions, puts the case for Mr Delaney as follows:

    a. Firstly, and principally, the Parole Board has adopted a 'Wednesbury unreasonable' conclusion as to the risks Mr Delaney poses if re-released. That conclusion, Mr Gardener submits, and I agree, fundamentally infects the entirety of the decision letter, if it was a flawed conclusion. That is because, in substance, the sole effective basis of the conclusion that Mr Delaney should not be re-released is that the risks the panel concluded that he would present if re-released were unacceptably high. In addition, the overwhelming factor in the balance when considering whether to recommend transfer to open conditions was, in the view of the panel, those same risks, which the panel concluded were such as could not at present be safely managed under open conditions.

    b. Secondly, the decision letter betrays an unlawfully inadequate set of reasons for the conclusion as to risks reached. In reality, as it seems to me, there is nothing in this second ground if the first ground is not made out. The valid challenge to this decision letter as regards the assessment of risks, if there be a valid basis for challenge, is that the reasons for the conclusion as to risk given by the panel do not lawfully justify the conclusion reached, rather than that one cannot discern

sufficiently from the decision letter what those reasons were in the first place.

c. Thirdly, as a separate and independent ground of challenge to the decision not to recommend a transfer to open conditions, the Parole Board panel has in that regard, in effect, leapt from its conclusion as to risks, which Mr Gardener rightly accepts is one factor to which the panel must have regard, to the conclusion that a transfer to open conditions cannot be recommended. That conclusion, it is said, was reached without pausing between the two to consider other factors that the Parole Board, under the applicable Standing Directions, was obliged to consider. The submission as a result is that in substance the panel has not conducted a balancing exercise at all, that being the type of exercise required in respect of a consideration whether to recommend transfer to open conditions. It has, so it is said, wrongly adopted an approach that the threshold assessment of risk, even if it is not itself a flawed assessment, is sufficient without more to preclude any recommendation for open conditions.

6. In relation to the panel's assessment of the risks Mr Delaney would present if re-released, the panel summarised, in the decision letter, the circumstances reported to the police resulting in Mr Delaney's arrest on suspicion of domestic violence as I have already mentioned. It took evidence from DS Fuller, the officer in charge of the possible new criminal case against Mr Delaney that might have arisen out of those allegations. The key passages in the decision letter, displaying the Parole Board panel's assessment of the matter and its reasoning, were then as follows:

> "14) Although the initial complaints had been recorded through the body worn video system when police originally attended the house on 29 September, as Mr Fuller put it, through no lack of trying, the police were unable to obtain any evidence which could be satisfactorily used in court, and as a result the decision not to proceed had to be taken. He told the panel that there were reasonable grounds for believing that you had been guilty of violent offending; having heard his evidence and seen the documents the panel has little doubt that that was correct. Mr Fuller told the panel that in the police view, there was truth in the allegations made against you, but the police have been unable to prove them. He also said that in his view, if in the community, you would pose a serious risk of violence to [the complainant], if there was any resumption of your relationship with her and give rise to high risk. The panel was impressed by Mr Fuller's careful and measured evidence and accepts it. It is clear that the concession as to the reasonableness of the recall was sensible and, it could be said, inevitable.
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> 15) You denied use of any violence. You said that you could only remember the events of the night when the police were called, 29 October. You accepted that there had been much drinking and told the panel that [the complainant] would get boisterous and erratic after drinking. You agreed that you had heated arguments with her but said that you had never "lifted a finger to her". Your denial was unconvincing; the panel does not seek to make a finding of fact as to what happened between you and her; but it is clear that the original complaints to the police may well have been true and that you pose a real risk of violence in an intimate relationship."

7. The panel's approach, that is to say, was not to make any finding as to what had actually happened but nonetheless to treat the fact that the allegation, denied by Mr Delaney, had been made against him as, in itself, a matter from which it could conclude that there was real risk. This approach found repetition when the panel, under the heading of 'Current Risks', reviewed the recommendations of both Mr Delaney's offender supervisor and his offender manager, in their evidence, that he be re-released (albeit subject to carefully considered conditions).

8. Referring to Mr Delaney's offender manager, Ms Berry, the panel said as follows:

> "20) Ms Berry assesses your risks of serious harm in the community as high to the public and to known adults. ***She said, and the panel agrees, that the allegations which lead to your recall had increased your risks.*** The most prominent problem appears to be your lack of emotional regulation and anger management; ***your reported conduct*** towards [the complainant] ***is, in that sense, offence paralleling***, and needs to be addressed on a one to one basis, which in her view, could be undertaken on release to approved premises which she recommends. However, she accepts that there are real prospects that if released, you and Joanne would get together quickly, and that would create imminent risk." (my emphasis)

9. To be fair to the panel it also referred, in that 'Current Risks' section of the decision letter, to a somewhat emotional reaction, it may be overreaction, displaying some anger, that Mr Delaney displayed in relation to an unrelated aspect of his factual circumstances when that was explored with him at the hearing. There is, however, no indication in the decision letter that that flashpoint within the hearing would have been sufficient on its own to cause the panel to reach the conclusions that it did concerning the risks of violence it decided that Mr Delaney posed.

10. Mr Gardner advances the proposition, in my judgment a sound proposition, that the fact of an allegation of violence against a lifer on licence cannot properly, in itself, found a conclusion that he presents any particular type or degree of risk of being violent. That is ultimately for the simple and sound reason that an allegation is just an allegation. That would be true, indeed, even if the allegation led to a charge and a pending prosecution. In this case, for the reason articulated by the panel at paragraph 14 of its decision, there never was any prosecution, let alone any active prosecution pending when the panel was considering the matter. Whilst the evidence before me, perhaps, does not pin this detail down fully, my reading of both the decision letter and the evidence I have such as it is, suggests it is more likely than not that Mr Delaney was never even charged, rather that the sequence of events was one of complaint, arrest, re-call to custody (which in itself is not challenged) and then some six weeks or so later, a decision by the police simply to take no further action.

11. Mr Gardner cites for his proposition, which I have accepted, three decisions of this court: *Broadbent v The Parole Board of England and Wales* [2005] EWHC 1207 (Admin), especially at [26]-[29]; *R (J) v The Parole Board* [2010] EWHC 919 (Admin) especially at [48]; and *R (McHale) v The Secretary of State for Justice* [2010] EWHC 3657 (Admin) especially at [16]. In my judgment Mr Gardner is correct not only as to the proposition of law that he advances, but also that on the facts of this case, the Parole Board panel has not

identified, or in reality even attempted to identify, what, other than the fact of the allegation, it thought justified the conclusion it reached as to risk. To the contrary, and most startling in its agreement with Miss Berry's assessment of risk to which I have already referred at paragraph 20 of the decision letter, the panel endorsed the notion she advanced 'that the allegations which led to your recall have increased your risks'.

12. Mr Gardner accepts, not least in the light of passages in the judgments of the court to which I have just referred, that the Parole Board is not required in law in every case to consider making, or actually to make, any finding of fact that acts of further violence have been committed, in order to justify a finding that the lifer in question does present some identifiable, specific and present risk of violence. However, in my judgment, he is correct to submit that if as in the present case there is nothing in the undisputed facts surrounding the allegations to justify that conclusion, then the panel cannot rely simply on the fact, nature, or seriousness of the allegation as leading to any conclusion one way or the other. In such a case as the present, the panel must in reality either disregard the allegation as being so far as it can see no more than an allegation, or undertake an investigation and consideration of any evidence that may be presented to it of the conduct of the offender, enabling it to make at least some findings of fact as to what did happen by reference to which, as a factual basis for any conclusions, it might then consider the question of risk.

13. The starkness of the decision letter in its express decision not to make any relevant finding, but to go no further than a conclusion that there may have been truth in the allegations (but then equally there may have been none), and its flawed logic that the allegations led to an increase in risks, means it is impossible to say whether – and the argument on this judicial review has not considered this in any detail – there was before the panel evidence it was entitled to treat as admissible sufficient to enable it to make findings about Mr Delaney's behaviour that might have justified the conclusions as to risk it reached. It suffices for the purposes of this judicial review to say that the starkness of the erroneous approach of the panel in this decision letter means that the decision letter must be and will be quashed.

14. In those circumstances, it is not necessary for me to consider in detail the separate decision within the letter whether to recommend a transfer to open conditions. As I indicated at the outset, whether or not that aspect of the decision letter is susceptible independently of challenge, by reference to the approach the panel ought to have taken to that type of decision, on any view the decision actually made was overwhelmingly influenced by the assessment of the risk posed by Mr Delaney and I have now held that to have been a flawed assessment.

15. By reference to *R (Hill) v The Parole Board* [2012] EWHC 809 (Admin), *R (Hutt) v The Parole Board* [2018] EWHC 141 (Admin), and the applicable Directions to the Parole Board under Section 32(6) of the Criminal Justice Act 1991, Mr Gardner submits, correctly in my judgment, that the question of whether to recommend the transfer of a lifer to open conditions is different in kind to the question whether to direct his release. In particular, the Directions require the Parole Board to take four main factors into account in an evaluation of the risks of transfer against its benefits; hence the reference to this type of decision as a balancing exercise, not merely an assessment of a threshold condition such as applies to the question whether the lifer poses a sufficiently low level of risk to the public that it is no longer necessary that he be confined.

16. The four factors that must be taken into account, set out at paragraph 5 of the Parole Board Directions, are:

> "a) the extent to which the lifer has made sufficient progress during sentence in addressing and reducing risk to a level consistent with protecting the public from harm, in circumstances where the lifer in open conditions would be in the community, unsupervised, under licensed temporary release;
>
> b) the extent to which the lifer is likely to comply with the conditions of any such form of temporary release;
>
> c) the extent to which the lifer is considered trustworthy enough not to abscond;
>
> d) the extent to which the lifer is likely to derive benefit from being able to address areas of concern and to be tested in a more realistic environment, such as to suggest that a transfer to open conditions is worthwhile at that stage."

17. In *R (Hill) v The Parole Board* the Parole Board panel appears not to have adverted at all to, and therefore on the face of things seems not to have appreciated the existence of, the separate balancing exercise to be undertaken, different in kind to the consideration of the simple threshold issue for a release. In *R (Hutt) v The Parole Board* the Parole Board panel appears to have adverted to, and therefore on the face of things recognised the existence of, the separate test and its different nature, but then proceeded to give it no consideration. It is not clear to me that this is so stark a case as either of those.

18. In the decision letter in this case, the Parole Board panel did identify and state in acceptable terms the two different tests it would be called upon to consider:

> "4) … the panel is empowered to direct your release if the evidence demonstrates that your risks have reduced to the point at which it is no longer necessary for the protection of the public that you should continue to be detained in prison. If that point is not reached then the panel may recommend your transfer to open prison if, after carrying out a balanced consideration of your risks to the public and the benefits of progressing your rehabilitation into the community, and of any risks that you might abscond, the panel concludes that your risks can safely be managed in open conditions."

19. Mr Gardner is right to submit that the consideration of, and application of, the separate test for whether Mr Delaney's transfer to open conditions should be considered was very brief. He is also right to observe that it is contained within the single paragraph under the heading 'Conclusion' with which the panel completed its work.

20. In that paragraph, the panel reiterated its conclusion, clear from its preceding discussion of Mr Delaney's case, that the risks of violence were too high to justify release, having "*not reduced to the point at which it is no longer necessary for protection of the public that you should be detained in prison.*" That, as I have said, is a flawed conclusion, by reference to Mr Gardener's primary ground of challenge that I have upheld. The concluding paragraph

continued:

> "Those risks could not at present be safely managed in open conditions. In such conditions it is highly likely that you would, again, be in contact with [the complainant], would seek to see her during leave and would thus create the same risks as on release. There is a further risk to members of your family with whom you are deeply angry, accordingly for the reasons set out above, the panel has concluded that it should not direct your release and should not recommend to the Secretary of State that you be transferred to open prison."

21. It involves the drawing of an inference against the Parole Board to say that because of the brevity of that final statement the panel overlooked or failed properly to apply the separate balancing exercise test it had identified at the outset of the decision letter, when coming to make its decision as to transfer. As it seems to me, the better reading of the letter is that it is implicit in the reference in that brief conclusion to open conditions and the focus the panel therefore had on the management of risks in those conditions, that it had well in mind, in effect it was taking as read in Mr Delaney's favour as applicant for transfer, considerations of his likelihood of complying with conditions, his trustworthiness in relation to absconding and the likelihood that he, for his part, would derive benefit from being in open conditions.

22. On a relatively fine balance, therefore, for undoubtedly it would have been better for the reasoning to be more fully articulated, I would not conclude that the Parole Board panel erred in the decision not to recommend transfer to open conditions, by failing to conduct any or any proper balancing exercise, as is the ground of challenge raised in relation to that decision. As it seems to me, on that fine balance, the better reading of the decision letter is that the panel was well aware of the balancing exercise that was required to be undertaken, and well aware of the matters that went in Mr Delaney's favour in that exercise, however upon its assessment of the risks he presented, they outweighed, indeed overwhelmed, those factors in his favour. The need to protect, in particular, the domestic violence complainant, and also to some extent members of Mr Delaney's own family as assessed by the panel, were sufficiently great and imminent as to overwhelm the other factors in the balancing exercise.

23. Had the assessment of those risks itself been sound, it would not have been appropriate to uphold a challenge to the final part of the decision by which the requested recommendation for a transfer to open conditions was refused. As it is, however, that assessment of risks was fundamentally flawed, and all parts of the decision were affected by that flawed assessment.

24. For those reasons, this claim succeeds. The Parole Board decision of 18 June 2018 must be quashed and, subject it may be to assistance from Mr Gardner as to a precise form of words, I am minded to direct that a differently constituted Parole Board panel re-hear the 2018 parole review of Mr Delaney's case as soon as possible.

End of Judgment

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This transcript has been approved by the judge.