Case No: CO/5331/2017

Neutral Citation Number: [2018] EWHC 410 (Admin)
IN THE HIGH COURT OF JUSTICE
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 2 March 2018

Before :

MR JUSTICE WALKER

- -

Between :

Michael Davenport	Claimant
- and -	
The Parole Board of England and Wales	Defendant

- -
- -

Mr Richard Reynolds (instructed by Bhatt Murphy Ltd.) for the claimant
There was no appearance for the defendant

Hearing date: 28 February 2018

- -

JUDGMENT

MR JUSTICE WALKER:

A. Introduction

1. This claim for judicial review concerns a decision of the Parole Board for England and Wales ("the Board") dated 16 August 2017. The decision followed an oral hearing before a panel of the Board on 15 August 2017. At that time, the claimant was almost 16 years past his 15-year minimum term for a murder he committed in 1986. The main ground for seeking judicial review concerns an allegedly unlawful approach adopted by the panel when considering the circumstances leading to the claimant's recall on 13 January 2017 from a period on licence. In the present judgment, however, I am principally concerned with the question whether the Secretary of State for Justice should have been named as an interested party in these proceedings.

2. The claimant's application for permission to proceed came before Mr Philip Mott QC, sitting as a deputy High Court judge, for consideration on the papers. By an order dated 12 December 2017 he granted permission to proceed on the main issue identified above, along with two other grounds which criticised the reasoning of the panel when concluding that release should be refused. A further ground, which complained of the panel's decision not to recommend the claimant's transfer to open conditions, was rejected.

3. In his order ("the permission order") Mr Mott QC made observations which included the following:

> 1. The claimant has had a chequered career in custody, but on 20 June 2016 he was released on licence from his life sentence. That release was ended when his licence was revoked on 13 January 2017. Since then he has been held in closed conditions.
>
> 2. The immediate trigger for his recall was a complaint by a female occupant of the accommodation where he lived, which led to charges of harassment being brought against the claimant. Following the recall, those charges were dismissed by a Magistrates' Court on 27 February 2017.
>
> 3. The failure to prove charges to the criminal standard does not in any way prevent the allegations being taken into consideration at a subsequent Parole Board hearing. The issues and the standard of proof are different. But if the Board feels able to rely on part of the complaint (as it expressly did here), it is at least arguable that there should be a careful analysis of the material submitted, and that the claimant is entitled to know what parts of the allegations were accepted by the Board, and why. In this decision there appears to be no analysis of the evidence, nor specific findings related to the issues and standard of proof applicable to that hearing.
>
> 4. In addition, the finding that the claimant has "an inability to identify and maintain appropriate interpersonal social boundaries" does not automatically lead to the conclusion that

> he poses "a high risk of serious harm to members of the public and to known adults". It does not appear that the decision explains this step.
>
> 5. All this means that the decision may be reviewable for lack of reasons. It does not mean that the conclusion is wrong or irrational. This does not seem to be a case which clearly pointed to release. If the conclusion was rational (and sufficiently explained), I see little prospect of arguing successfully that the claimant should have been moved to open conditions. I therefore refuse permission on this ground."

B. The Acknowledgment of Service

4. The permission order was made after consideration of an acknowledgment of service filed by the Board on 17 November 2017. Section A of the acknowledgment of service requires the defendant to tick an appropriate box. Box number 4 states:

> "The defendant… is a court or tribunal and intends to make a submission."

5. This box was ticked by the Board. In section C of the form, the Board set out its submission. With the addition of numbering in square brackets for convenience, the submission was as follows:

> "[1] The Parole Board is not defending the claim. It is part of the litigation strategy of the Parole Board to adopt a neutral position at pre-action stage and to not actively defend the matter should it proceed to judicial review. This was clearly set out in the pre-action protocol response letter dated 18 September 2017.
>
> [2] It is well-established that where Article 5[4] is engaged the Parole Board sits in a judicial capacity as a court for the purposes of its review. It is further an established principle of common law that the role of judicial decision-making bodies as defendants in judicial review proceedings is not, save in exceptional cases, to contest the proceedings (Brooke LJ in *R (Davies) v HM Deputy Coroner for Birmingham (Costs)* [2004] 3All ER 543 sets out the history). The role of the decision-making court is simply to provide the reviewing court with relevant information where necessary (Brooke LJ in *R (Stokes) v Gwent Magistrates' Court* [2001] EWHC Admin 569). The judicial body may explain matters relating to its jurisdiction, practice or procedure. It might also provide factual information about a judicial case.
>
> [3] Unless the court (Parole Board) or tribunal plays an adversarial role in proceedings, it should not be liable for costs – *R (Davies) v HM Deputy Coroner for Birmingham (Costs)*, specifically para 47 (iii):

> 'If, however, an inferior court of tribunal appeared in the proceedings in order to assist the court neutrally on questions of jurisdiction, procedure, specialist case-law and such like, the established practice of the courts was to treat it as a neutral party, so that it would not make an order for costs in its favour or an order for costs against it whatever the outcome.'

> [4] In line with its judicial status and in reliance on *R (Davies) v HM Deputy Coroner for Birmingham (Costs)*, it has been the Board's published litigation strategy since April 2013 (amended August 2015) to decide on a case by case basis whether to defend a judicial decision, but as a statement of general purpose to not normally defend judicial decisions, but judicially adopt a neutral stance.

6. In section B of the form the Board was required to insert the name and address of any person it considered should be added as an interested party. This section of the form was left blank by the Board.

C. The status of the Secretary of State for Justice

7. Rule 2 of the Parole Board Rules 2016 states:

> 2. Interpretation
> In these rules –
> ...
> "*Party"* means a prisoner or the Secretary of State;"

8. As a party under the rules it would have been open to the Secretary of State for Justice to make oral representations at the hearing before the Board or submit written representations for the purposes of that hearing. In the present case the Secretary of State for Justice did not take either of those courses.

9. The hearing of the present claim was fixed to take place on 28 February 2018. When considering the papers on 27 February 2018 I was concerned at the lack of any appearance by a party with an interest in defending the claim. As is apparent from section B above, the Board's acknowledgment of service had not suggested that the Secretary of State for Justice should be added as an interested party. Similarly, the claim form in section 2 had not identified the Secretary of State for Justice as an interested party.

10. I asked both the claimant's legal team and the Board's legal team whether the Secretary of Sate for Justice had been given notice of these proceedings. The answer from the claimant's legal team was that the claimant's side had not notified the Secretary of State for Justice. Three reasons were given. For convenience I shall call them reasons [A], [B] and [C]:

> [A] We did not consider the [Secretary of State for Justice] to be an interested party in the sense of being directly affected by the claim (CPR 54.1(2)(f));

> [B] The [Board] did not identify [the Secretary of State for Justice] as an interested party in the acknowledgment of service; and
>
> [C] The [Secretary of State for Justice] did not appear to be an interested party in the authorities cited in our Grounds of Judicial Review and our skeleton argument.

11. The Board confirmed that it had not identified the Secretary of State for Justice as an interested party in the present case. It added that the Secretary of State for Justice was not aware of these proceedings.

12. As to reason [C], I accept that in several reported cases similar to the present case a decision was made by the court after hearing the claimant's side only. The judgments in those cases do not state that the Secretary of State for Justice had been identified as an interested party.

13. It seemed to me that the claimant and the Board, and possibly those involved in the other cases referred to above, may have overlooked paragraph 5.1 of Practice Direction A to CPR 54. That paragraph states:

> *Interested Parties*
>
> 5.1 Where the claim for judicial review relates to proceedings in a court or tribunal, any other parties to those proceedings must be named in the claim form as interested parties under rule 54.6 (1)(a) …

14. This was drawn to the attention of the parties in the present case. Within a matter of hours the court was much assisted by written submissions from Mr Richard Reynolds, counsel for the claimant. Paragraph 2 of those written submissions stated:

> 2. The claimant accepts:
>
> i. That the Parole Board, when deciding whether to re-release a recalled indeterminate sentence prisoner, possesses the essential features of a court within the meaning of Article 5(4) of the European Convention of Human Rights (see *R (Osborn) v Parole Board* [2014] AC 1115, in the Authorities Bundle, Tab 15 at [103]), and therefore is a court or tribunal within the meaning of CPR 54 Practice Direction A, paragraph 5.1;
>
> ii. That the Secretary of State for Justice was a party to the claimant's Parole Board case under the Parole Board Rules 2016; and
>
> iii. Consequently, that the claimant should have sent the Secretary of State a copy of the letter before claim for information, named him in the claim form as an interested party and served him with the claim form.

15. In the written submissions the claimant's representatives apologised to the court and to the Secretary of State for Justice for their failure to identify the Secretary of State for Justice as an interested party. The submissions explained that the mistake in failing to do this had arisen because the Secretary of State for Justice had not appeared before or submitted representations to the panel, and because the Secretary of State for Justice did not appear to have been identified as an interested party in recent High Court decisions.

16. I have no doubt that the claimant is right to concede that the Secretary of State for Justice is an interested party. Under CPR 54.1(2)(f) an interested party is "any person (other than the claimant and defendant) who is directly affected by the claim". There are occasionally cases where it is difficult to apply this test despite the helpful discussion in *R v Liverpool City Council ex parte Muldoon* [1996] 1 WLR 1103. If there were any room for doubt in a case of the present kind, however, that doubt is removed by the express words of paragraph 5.1 of Practice Direction 54A (see above).

17. CPR 54.6 (1) requires the claimant to state in the claim form:

> (a) The name and address of any person [the claimant] considers to be an interested party; …

18. This is an obligation which must not be ignored. Moreover, careful consideration must be given by claimants and defendants to the identification of potential interested parties.

19. The role of the Secretary of State for Justice as an interested party in cases of the present kind is particularly important. There are two features of that role which call for mention.

20. The first feature is that the Secretary of State for Justice is the guardian of the public interest. The Public Protection Casework Section of the Ministry of Justice has valuable expertise in relation to both legal and practical aspects of Parole Board decision making. It is in the public interest that assertions made by claimants are examined by that casework section in order to determine whether there are points which ought to be put before the court in response to what has been asserted on behalf of the claimant.

21. Second, the Secretary of State for Justice has an important role in assisting the court. Among other things, where it is clear that something has gone wrong, it is important for the Secretary of State for Justice to recognise this and to draw the matter to the attention of the Board. In such circumstances all parties may agree that the decision of the Board should be quashed. If so, the overriding objective will be served by following the procedure for agreed final orders in paragraph 17 of CPR 54 Practice Direction A. Under that procedure the parties will provide the court with a proposed agreed order and, among other things, a short statement of the matters relied on as justifying that order. The court will then make the order if satisfied that this is the appropriate course.

22. There are also practical advantages if the Secretary of State for Justice is identified as an interested party. For example, under the pre-action protocol this will mean that the

Secretary of State for Justice has early notice of the complaint, as a recipient of the letter before claim. In addition, identification of the Secretary of State for Justice as an interested party may remove possible doubts about the entitlement of the Secretary of State for Justice to seek permission to appeal from a decision of the High Court.

D. The way forward

23. The claimant's written submissions invited the court to conclude that there was no real possibility that the Secretary of State for Justice, if informed of these proceedings, would seek to oppose any of the relief sought. I do not consider that it would be right in the present case to accept that invitation. It gives insufficient weight to the important role of the Secretary of State for Justice described in section C above.

24. However, after consideration of the claimant's skeleton argument, I have been able to form a provisional view of the merits of the case. In that regard, the factors identified in observations 3 and 4 in the permission order appear to me to be powerful and, subject to the provision of an answer to them, to require that the Board's decision be quashed.

25. In these circumstances I have made an order that the claimant has permission to amend the claim form to identify the Secretary of State for Justice as an interested party, and must file and serve the amended claim form on the Secretary of State for Justice no later than noon on 2 March 2018. My order abridges the time for filing and service of an acknowledgment of service by the Secretary of State for Justice, but extends the time within which detailed grounds of defence (if any) must be filed and served. Unless an acknowledgement of service is filed indicating an intention to defend the claim, the matter is to come back before me so that I can consider an appropriate order. If, however, the Secretary of State for Justice files an acknowledgment of service indicating an intention to defend, then the parties are to submit a joint note which is to be put before a different High Court judge for consideration of appropriate directions.

E. Conclusion

26. Pursuant to my order the Secretary of State for Justice will now have been named as interested party in an amended claim form, and will have received a full set of relevant materials. It will now be for the Secretary of State for Justice to fulfil the important duties identified in section C above. What happens after that will depend upon whether or not the Secretary of State for Justice files an acknowledgement of service indicating an intention to defend the claim.