Case No: CO/6826/2006

Neutral Citation Number: [2006] EWHC 2413 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Manchester Crown Court
Crown Square
Manchester M3 3FL

05th October 2006

Before :

The Hon. Mr. Justice McCombe

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Between :

THE QUEEN (on the application of K)	**Claimant**
- and -	
THE PAROLE BOARD	**Defendant**

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(Transcript of the Handed Down Judgment of
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Ian Wise (instructed by the Legal Department of the Howard League for Penal Reform) for the Claimant
Richard Smith (instructed by Treasury Solicitors) for the Defendant

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Judgment

Mr Justice McCombe :

1. This is an application for permission to apply for judicial review brought on behalf of a 15 year old young man, whom I shall call "K". By order dated 16 August 2006 Mr Kenneth Parker QC, sitting as a Deputy Judge of this court, ordered that the application for permission should be heard as soon as possible after 18 September 2006, with the substantive hearing to follow if permission be granted. In my view, the issues raised by the intended application for judicial review are clearly properly arguable. I grant permission to apply accordingly. I have heard argument as on a substantive application.

2. K challenges a decision of the defendant Board made on 5 June 2006 that he was not suitable for early release.

3. On 25 October 2005 in the Crown Court at Manchester K was sentenced by His Honour Judge Hammond, under Section 228 of the Criminal Justice Act 2003, to an extended sentence of four years detention, consisting of a custodial term of two years and an extended licence period of a further 2 years. The sentence was passed in respect of offences to which he had earlier pleaded guilty, namely three offences of robbery, one offence of possession of an imitation firearm at the time of commission of an offence and one offence of handling stolen goods. He also asked for other robberies and an offence of attempted robbery to be taken into consideration. It appears that the offences were committed by K, in company of a group of other young people; the offences consisted principally of street robberies involving the theft of mobile telephones from members of the public.

4. As is apparent, K is very young to have committed such offences (in some cases when aged only 13) and to have received a sentence of this nature. His home is in the Fallowfield area of Manchester, where he had been living with his parents and two older sisters. He has an older brother who, it appears, lived with his paternal grandparents. His father has a substantial criminal record and had spent up to 12 years of K's early life in custody. His older brother has also spent periods in custody. The area in which he lived is one of high prevalence of crime.

5. At the time of sentence K had already spent a substantial period in custody on remand and became eligible for consideration for parole on 30 May 2006. With commendable expedition, the defendant considered K's application, to which I shall return, by 5 June 2006. As I have said, the decision made was to refuse his release.

6. From the time of his remand into custody in June 2005, K was accommodated in a local authority secure children's home at Kingston-upon-Hull. Evidence indicates that K has had little contact with his family while in custody. The dossier before the defendant on K's parole application has been before me in its entirety. It shows that K was subject to three internal sentence reviews on 3 November and 2 December 2005 and on 28 February 2006. The documents show that in the period of his detention K has made very substantial educational and personal progress, both in his personal life and in his approach to his offending. In November 2005, at the early age of 14, he attained GCSE passes in Maths and English. He has also engaged upon the Duke of Edinburgh award scheme and other constructive development programmes.

7. On 17 January 2006 K made formal application to be considered for parole at the date when he became eligible for the same. His application form is before the court. The form informed K that if he made an application reports would be obtained from the establishment where he was detained, the police and the probation service or social services for forwarding to the Board. The form continued:

> "You will have an opportunity to see those reports and then make written representations in support of your application about 4 months before your PED [parole eligibility date]. About 3 months before your PED, a member of the Parole Board will visit your establishment to discuss your case with you and the Parole Board will then meet to reach a decision…"

It will be seen that there is no reference there to any possibility of inviting the Board to hold an oral hearing. Nothing is said about any assistance that might be available to an applicant in making his representations. The document contains a clear representation that the applicant will be visited by a member of the Board to discuss the case.

8. Two reports were made available to the Board in this case. The first was from Mr. Roy Walker, the manager of the home at which K was and is accommodated. That report is dated 8 February 2006. The second was from Mr. Rifat Shaheen from the Probation Service in Manchester and is dated 3 April 2006. Mr. Walker's report recognised K's excellent progress in prison which has never been in issue. However, the report noted that K had "raised the problems of how he can return home without being drawn into that (gangland) lifestyle". Mr. Walker expressed the concern that K would not be able to resist the adverse pressures. His conclusion was:

> "It is my view that [K] is highly likely to return to being involved in anti-social and offending behaviour at this time, despite the progress he has made at Sutton Place. I do not believe that [K] will be able to resist the pressure to become involved in gang related activities and that he does not have enough support in the community or at home to help him do so. There would need to be a structured and intensive package of support and supervision to help [K] make a successful transition back into the community."

9. Mr. Shaheen recognised the problem identified by Mr Walker and acknowledged by the Claimant himself. However, he considered that the problem could be managed if K was released. His conclusion was:

> "Given the excellent progress made in relation to specific offence focused work and victim empathy, and engagement with MMAGS [Manchester Multi-Agency Gang Strategy] it is my assessment that [K's] risk of harm to the community has reduced and could effectively be managed in the community. Therefore I am supporting [K's] application for Parole."

He also said in the same report that he had discussed the matter with Mr. Walker and with another probation officer, who had been involved with K's case in the past in Manchester, and both were reported as supporting Mr. Shaeheen's recommendation.

In a witness statement recently made in these proceedings, Mr. Walker disagrees with this comment: see paragraphs 4 and 5 of that statement. However, that witness statement was not of course before the Board when it considered K's case. On the face of it all relevant reporting officers were supporting K's application.

10. In his own witness statement K says this about the parole application process:

> "My parents did not attend any of the review meetings leading up to my parole. My dad could not attend as he was in custody. Indeed my dad has not visited in all the time that I have been at Sutton Place. My mother was unable to attend as she had to work 8am until 6pm. Social services agreed that they would provide financial assistance so that my family could visit but they did not ever pay any money out.
>
> When I first got sentenced no one knew how long I would have to serve. Eventually LASCH [Local Authority Secure Children's Home] staff told me that I could apply for parole and that if I was unsuccessful on the first occasion I could reapply each month thereafter.
>
> At first I was told that it would be unlikely that I would be successful in applying for parole. As my behaviour and conduct improved, the staff at LASCH and at the Youth Offending Team thought that I deserved a chance and that I had made significant improvements while I had been at the LASCH.
>
> I was told that reports about me had been written by the staff at the LASCH and the YOT. A link worker called Sue showed me the LASCH report and later my link worker Richard went through the whole dossier in about one hour. I wrote my letter to the parole dossier on the evening after I had been through the dossier. I had no assistance in writing the letter and I simply wrote down my thoughts.
>
> In regards to the dossier, I did not understand all of the language used in the reports and I am not sure if I understood all that had been written about me. I did not understand the technical or more complex points in the reports. I thought that it was confusing as one of the reports seemed to say that I was doing really well but yet I shouldn't be let out.
>
> No one talked to me about my right to an oral; hearing. I was told that I should expect a visit from someone at the Parole Board but no one ever came to see me. I was not given any explanation as to why this did not occur."

11. K availed himself of the opportunity to make representations. He said this:

"Before I came into custody, I was an aggressive person and didn't care very much for the things around me. I didn't think about how others were feeling and what they were going through, I was a self-centred person who thought no-one could stop me, but later on after being in custody, things changed. I looked back on my previous offences and thought how cowardly I behaved, so I wanted to change. I found that I was capable of doing and there's where I achieved my GCSE's 18 months early.

I thought that if I changed I could get farrer in life and thought of my ambitions, which was becoming a mechanic and becoming a success in life. I got support staff and other agencies which showed me the real me I thought that I desperately needed to change to succeed in a positive way on life. I changed my attitude towards staff and other peers. I became more of a positive role model towards others and put my life to one straight positive road to succeed positively in life. I also got into education more and got interested even more. My anger has now been controlled by myself and have become less influenced to negative behaviour.

Whilst being in here I've thought about my offences and my victims. I've thought very deeply and felt very sorry and felt like I've been a coward towards my victims and the community around Manchester. I have wrote a letter apologising to my victims and feel ashamed of what I've done. I've thought about how they fealt and what it would be like if it happened to me. I feel very sorry for this and feal very foolish for what I've done. The offences which I did made me feel like a bully and I'll give all my apologies to my victims and since been in here its give me time to think deeply about my actions.

If I was released I would intend to stay away from crimes by having associates also would like to go to school to keep myself out of trouble and get farrer in life. I would also ask if associates weren't allowed on my premises or to be allowed with them.

I would like to have another chance into the community which I'm willing to do all supervision order and YOT appointments and all licence conditions.

I want to stay way from crime to be a better person and achieve something in life. I want to go to college and do a mechanics course and to do this I'm willing to obey all licence conditions and keep myself out of trouble. I'm willing to have a strict curfew and would take all supports from all agencies."

12. As already stated, the Board refused K's application for parole. Their reasons can be summarised by quoting the final two paragraphs of the written reasons supplied:

> "The Board gave all the information careful examination. It is apparent that during his time detained in the Secure Home [K] has been advantaged by the support and supervision of the environment as well as by the educational, social and other opportunities of which he has made excellent use. His risk is further contained by his intelligence, inter-personal skills and insight which can flourish while he is in the Safe Centre. However, [K] is still a child of almost 15 and is extremely vulnerable in the community. There is a strong possibility that if he is released at PED all the excellent work he has achieved will soon be ruined by gangland peer-pressure. He would be returned to a family in which the male members are pro-criminal role models and the female members appear to have limited control over [K's] behaviour and associates. [K] is at a high personal risk of intimidation and possible physical harm from other gang members and is, as yet, ill-equipped to resist or flee that socio-environmental pressure.
>
> The Board concluded that by remaining detained in a secure environment [K] can continue to build on the progress he has made in gaining educational qualifications, thinking skills and maturity, all of which should equip him on his release next year to make positive informed choices for his future. The Board commends [K] for his positive response to this sentence and can identify his potential for success in life. To protect his chances of sustaining the positive change and to protect the public from the likelihood of his reversion to crime during the period he would otherwise be detained, the Board refused parole. The short term benefits of early release are outweighed by the longer term dangers it would attract."

13. On the present application, three points are taken in challenge to the Board's decision:

> "(i) The Defendant failed to give the Claimant a fair hearing in that (a) it did not take into account his representations and (b) he was not given the assistance of an adult in the consideration of his application for parole, (c) he was not given the opportunity to have an oral hearing,
>
> (ii) The Defendant's decision to refuse the Claimant parole was irrational and/or based on a mistake of fact in that it predicated on the Claimant remaining at the Safe Centre if parole was refused, and
>
> (iii) The Defendant erred in approaching the Claimant's for parole in welfare grounds as opposed to those grounds which are mandated in the Secretary of State's Directions to them."

14. I gave permission at the hearing (without opposition from the defendant) to add sub-paragraph (c) to paragraph (i) (above) of the pleaded grounds. I refused permission, however, for a further amendment to be made to paragraph (iii) which sought to

allege that "the Parole Board failed to properly balance (sic) relevant and irrelevant factors". In my view, it would have been unjust to the defendant to permit this further amendment which would have greatly widened the scope of the challenge (a) to question the board's reliance upon a document called a "Core Profile" of K, (b) to criticise a failure to enquire as to whether the concerns expressed could be met by licence conditions, (c) to allege that the consideration given to the case was superficial, and (d) to allege a failure properly to enquire into the reasons why Mr. Walker had apparently changed his mind. I took the view that, in the case of this expedited hearing, the defendant had not had opportunity fully to meet such a wider challenge, if so advised, by evidence. In the end, after I had briefly announced my decision to refuse the further amendment, Mr. Wise conceded that the point was in essence covered anyway by his procedural objection that K had not been given adequate adult support to address questions of the relative relevance and irrelevance of parts of the dossier which may, therefore, have led the Board to be inadequately assisted by argument on such matters.

15. As will become apparent, I take the view that this claim must succeed on the grounds set out in paragraph (i)(b) and (c) above. As a result, it will be necessary to direct a re-consideration by the Board of K's application. It is not, therefore, necessary to go on to consider the grounds in paragraphs (ii) and (iii).

16. I turn to the legal background.

17. The Parole Board is presently constituted under Section 239 of the 2003 Act. That section provides (so far as material) as follows:

> "(1) (a) The Parole Board is to continue to be, by that name, a body corporate and as such is –
>
> (a) to be constituted in accordance with this Chapter, …
>
> (3) The Board must, in dealing with cases as respects which it makes recommendations under this Chapter or under Chapter 2 of Part 2 of the 1997 Act, consider—
>
> (a) any documents given to it by the Secretary of State, and
>
> (b) any other oral or written information obtained by it;
>
> and if in any particular case the Board thinks it necessary to interview the person to whom the case relates before reaching a decision, the Board may authorise one of its members to interview him and must consider the report of the interview made by that member.
>
> (6) The Secretary of State may also give to the Board directions as to the matters to be taken into account by it in discharging any functions under this Chapter or under Chapter 2 of Part 2 of the 1997 Act; and in giving any such directions the secretary of State must have regard to—

> (a) the need to protect the public from serious harm from offenders, and
>
> (b) the desirability of preventing the commission by them of further offences and of securing their rehabilitation."

18. Section 247 of the Act provides for prisoners, such as K, who are serving extended sentences under Section 228, as follows:

> "(1) This section applies to a prisoner who is serving an extended sentence imposed under section227 or 228.
>
> (2) As soon as—
>
> (a) a prisoner to whom this section applies has served one-half of the appropriate custodial term, and
>
> (b) the Parole Board has directed his release under this section,
>
> it is the duty of the Secretary of State to release him on licence.
>
> (3) The Parole Board may not give a direction under subsection (2) unless the Board is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined."

19. Directions have been given by the Secretary of State, pursuant to what is now Section 239(6) (see above). Paragraph 1 of those directions states:

> "In deciding whether or not to recommend release on licence the Parole Board shall consider primarily the risk to the public of a further offence being committed at a time when the prisoner would otherwise be in prison and whether any such risk is acceptable. This must be balanced against the benefit, both to the public and the offender, of early release back into the community under a degree of supervision and which might help rehabilitation and so lessen the risk of re-offending in the future. The Board shall take into account that safeguarding the public may often outweigh the benefits to the offender of early release."

Paragraph 2 of the directions goes on to specify particular matters to which the Board must have regard in addressing its task in any particular case. It is clear from the terms of its decision in this case that the Board had many of those specified points well in mind in refusing to direct K's release.

20. I reject the criticism made that the Board did not consider K's representations. In my view, there is no evidential basis for so alleging. The summary grounds of defence, verified by a statement of truth, states that the representations were in the parole dossier and points out that the Board expressly states that it considered all the information before them. It is true that the written reasons do not expressly allude to K's written representations. However, I consider that it is inconceivable that they

were not read and borne in mind by those considering K's case. The representations, well expressed by K, covered much of the ground that was well documented throughout the materials. K states his progress since being in custody, which was not in issue. He stated his desire to avoid the associations that had led him to offend- the core issue in the case. Those questions are fully and adequately addressed in the Board's reasons for rejecting the application and, in my view, the decision is not vitiated by a failure to refer to the representations specifically.

21. I do, however, consider that there is substance in the criticisms advanced in paragraphs (i)(b) and (c) and (ii) quoted in paragraph 13 above. In short, I consider that the Board failed adequately to ensure that K had had the offer of proper adult assistance in making his representations; it gave him the impression that he would be visited by a member of the Board, but that did not happen; it failed to invite him to make representations asking for an oral hearing if, with proper guidance, he so wished; finally, it seems from the face of the application form itself that the Board gave the impression that it was not going to address the question of whether an oral hearing was desirable. Before expanding on those views, I shall set out some of the relevant authorities, to which I was helpfully directed by Counsel.

22. It seems clear from the terms of Section 239(3) of the 2003 Act that it is left to the discretion of the Board to decide whether an oral hearing or an interview with the applicant is desirable. I also bear in mind the words of Lord Mustill in **R v Home Secretary, ex p. Doody** [1994] AC 531 at p. 561A:

> "The court must constantly bear in mind that it is to the decision maker, not the court, that Parliament has entrusted not only the making of the decision but also the choice as to how the decision is made."

23. The rules of "fairness" in such matters are summarised by Lord Mustill a little earlier in his speech in the same case as follows:

> "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 oft-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are for 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. ”

24. Those principles were re-examined in the context of the recall to custody of prisoners previously released on licence in **R (West & ors.) v Parole Board** [2005] UKHL 1. I note the caveat registered by Mr. Smith of Counsel, who appeared for the Board in this case, namely that the case was indeed one which considered cases of prisoners previously afforded their liberty, rather than a case like the present where a the release of a person still in custody is in issue. Further, I note his submission that those were cases in which there were clear disputes of fact, e.g. as to whether licence conditions had or had not been broken.

25. I have re-read and considered the passages in the speeches of Lord Bingham, Lord Slynn and Lord Hope to which I was referred. It is, in my judgment, desirable to set out paragraph 35 of the speech of Lord Bingham, where his Lordship said,

> “The common law duty of procedural fairness does not, in my opinion, require the board to hold an oral hearing in every case where a determinate sentence prisoner resists recall, if he does not decline the offer of such a hearing. But I do think the duty is as constricted as has hitherto been held and assumed. Even if important facts are not in dispute, they may be open to explanation or mitigation, or may lose some of their significance in the light of other new facts. While the board’s task certainly is to assess risk, it may well be greatly assisted in discharging it (one way or the other) by exposure to the prisoner or the questioning of those who have dealt with him. It may often be very difficult to address effective representations without knowing the points which are troubling the decision-maker. The prisoner should have the benefit of a procedure which fairly reflects, on the facts of his particular case, the importance of what is at stake for him, as for society.”

26. Next, it is worth noting the comment made by Lord Slynn at paragraph 50 of the speeches in **West**, “On any view the applicant should be told that an oral hearing may be possible though it is not automatic…”. Of course, that did not happen here. Indeed, to the contrary, the application indicated that after the making of written representations the Board would proceed to a decision. The wording of the form may be a hangover from the period of what Lord Hope described as “institutional reluctance” on the part of the Board to deal with cases orally: see paragraph 66 of the speeches.

27. It is not necessary to take a view as to whether an oral hearing was or was not necessary in the present case. In my judgment it is sufficient to note that K was never told that an oral hearing might be possible and, further, it appears to me (if only from the wording of the form) that the question of the desirability or otherwise of such a

hearing may never have been addressed by the Board at all. Further, the Board gave the clear impression that K would be visited by a member of the Board before a decision was taken; that never happened. As K says in his witness statement, no one explained why he had not received a visit.

28. Those matters may well have been enough, in my view, to vitiate the fairness of the procedure in this case. However, the matter goes further. At the relevant time K was 14 years old. In my view, Mr. Wise of Counsel, who appeared for K, was correct to submit that the Board was obliged to be particularly scrupulous in observing its obligations of fairness in a case concerning the liberty of one so young. Mr. Smith submitted that the application was simply a routine application which the Board could easily conduct on the papers without more. In my view, it is just such routine approach which was at fault here.

29. Most importantly in this context K appears to have been given minimal guidance in understanding the parole dossier and was given no assistance at all in formulating his representations. To make the right to make representations of any value to a 14 year old, he must to my mind be given (or at least be offered) adult assistance in making them. As K tells us in his statement, he simply wrote out his letter to the Board without any assistance at all; he did not even have the opportunity to show his product to some well-meaning adult. In my view, this failing renders a 14 year old's right to make representations nugatory. This manner of proceeding compares unfavourably with the well-known safeguards afforded to children, through the presence of an appropriate adult, in interviews by the police.

30. It is right to observe, as Mr. Wise submitted, that the law may frequently require more exacting standards of fairness on the part of authorities dealing with children than would be necessary or appropriate in the case of an adult. This emerges from **R (SP) v Home Secretary** [2004] EWHC 1418 Admin (Jack J) and [2004] EWCA Civ 1750 (Court of Appeal). Moreover, the common law obligations of fairness towards children may also be informed by reference to the UN Convention on the Rights of the Child and the Beijing Rules, as relied upon by Lord Bingham in **Dyer v Watson** [2004] UKPC D1 at paragraph 61. It is to be noted that Article 12 of the Convention provides:

> "Article 12
>
> 1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
>
> 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."

In my view, the Convention must there be envisaging that the opportunity to be heard must be rendered effective by the provision of appropriate adult assistance where possible. It is not in my view necessary to specify what the nature of such assistance should be; that too may vary from case to case. However, I would have expected minimum standards of fairness to afford a possibility for the dossier to be gone through scrupulously by an adult with the child; for the strengths and weaknesses of the child's case to be identified. Assistance should be offered in formulating and reviewing any written representations, including representations asking for an oral hearing if that appears desirable. The final product should also be looked at by an adult and advice given where appropriate before any document is delivered to the Board.

31. In some cases, I was given to understand, formal legal advice may be available under the legal aid scheme. However, even if that is not available, I consider that minimum standards of care for a child such as K would require the offer of the provision of assistance from a well-meaning adult in putting the child's "best foot forward" in a case such as this. In the present circumstances, that obligation would fall upon the prison authorities and not the defendant Board. But, it remains the obligation of the Board to ensure that appropriate assistance has been provided, or at least offered, before it reaches its decision. If assistance has been declined the Board can at least be so informed and can take that into account.

32. I do not accept the submission made by the defendant that such an obligation would have required the Board to enter into correspondence or to provide assistance itself. Its only obligation is to ensure that the applicant has at least the offer of adult assistance with his representations and, if that offer has been declined, to know that fact. I reject further the Board's submission that, "…it is not necessary in the circumstances of routine applications for parole for further assistance to be provided by the defendant…there is little or nothing that assistance to the Claimant would have added…". It is just this approach to the case as merely one of "routine" that is the problem in this case. Moreover, we cannot know what the result of an offer proper assistance might have be in such cases if no such offer is made.

33. In my view, for these reasons, the decision of the Board cannot stand and must be quashed. It is not necessary to go into the other grounds of challenge. The case must be reconsidered by a freshly constituted panel in accordance with directions which I hope will be agreed. If agreement cannot be reached, I shall of course hear Counsel further or will receive their written submissions as may be most convenient.