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CO/10896/2007

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

Royal Courts of Justice
Strand
London WC2A 2LL

Thursday, 24th March 2009

B e f o r e:

HIS HONOUR JUDGE JARMAN QC

Between:

THE QUEEN ON THE APPLICATION OF WILKINSON_

Claimant

v

SECRETARY OF STATE FOR JUSTICE_

Defendant

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Mr H Southey (instructed by Stephenson Solicitors LLP) appeared on behalf of the
Claimant

Miss K Gallafent (instructed by the Treasury Solicitor) appeared on behalf of the **Defendant**

J U D G M E N T

1. HIS HONOUR JUDGE JARMAN QC: The claimant in this matter is aged 62, having been born on 20th December 1946. On 30th January 1987 at Newcastle Crown Court he was sentenced to life imprisonment for murder. The circumstances were that the claimant beat a man to death. He and an accomplice lured the victim to woodland and the claimant beat the victim to death with a hammer. He left the body hidden in the forest. Throughout his imprisonment the claimant has continued to deny that he was guilty of that offence. He brings a claim for judicial review against the Secretary of State for Justice in respect of a failure to hold an oral hearing on the issue of his recategorisation from a Category A prisoner; for such he has remained since sentence.
2. A number of matters were initially taken in the claim, but on 9th June 2008 Mr Andrew Nicol QC, sitting as a Deputy High Court Judge, ordered that permission be granted in relation to the issue of failure to hold an oral hearing.
3. The background can be shortly stated. The claimant's minimum term was set at 20 years. That has now expired. As a consequence, he is entitled to regular reviews by a panel of the Parole Board ("the Panel"). It is said on his behalf that his opportunity to make progress has been impeded by the fact that he is detained in Category A conditions.
4. One of the annual reviews of the Panel was held on 5th December 2006. The reports before the Panel recommended that the claimant should be recategorised. The Panel heard oral evidence from the claimant, his personal officer, the Probation Officer dealing with his case and also the prison psychologist. It considered the papers that had been prepared as part of a review in 2006.
5. The decision of the Panel is a detailed decision. It sets out the background, the present circumstances and the presentation. It referred to risk assessments. In paragraph 11 of the decision it is recorded that the Panel was presented with two conflicting set of reports and a risk assessment: those prepared for the claimant's first post-tariff review which painted a favourable view of the risk and the recent reduction of risk on the one hand, and on the other those prepared for the claimant's Category A status since the Panel review started in late 2005. The papers for Category A status review had been prepared in June 2006. The conclusion reached as to the risk by the Category A Status Review Team was clearly at odds with that reached at about the same time by those who prepared reports for the post-tariff review, according to the Panel.
6. The Panel then went further into the question of risk assessment. The claimant freely accepted in front of the Panel that his past behaviour and offending, both recorded and unrecorded, was appalling and that his risk levels were very high. The Panel considered that steps should be taken to test his contention that most of the convictions recorded in his name were in fact convictions of his twin brother who had since deceased. The claimant explained to the Panel that he no longer felt it necessary to undertake proposed offending behaviour work that the prison psychologist had recommended him to be assessed for. The courses, namely ETS, CALM, CSCP, and CARATs work, were not, as the claimant saw it, required by him. He contended that he had undertaken appropriate course work since 1995. He demonstrated that his

thinking skills were now appropriately directed. He had made progress in writing and attained academic achievements.

7. The Panel further heard from the claimant's personal officer, who said that there had been major change in the claimant's personality. He was now a calm individual, always approachable, a calming influence on the wing and someone who spent all his time in the cell working and writing. That personal officer also stated to the Panel that all security information which suggested that the claimant was argumentative and surly and incited others to react against prison rules was at least five years old. The Panel then dealt with the Senior Probation Officer and his evidence, that of the prison psychologist and the Lifer Manager.
8. The decision recorded that the Panel considered the decision letter of the Category A Review Team. The letter, and the decision that a downgrading could not be justified until there was convincing evidence of a significant reduction in the claimant's risk of re-offending in a similar way if unlawfully at large, was based on significantly less and less favourable material than the material that was presented to the Panel. Without undertaking a review of the differences, the Panel noted that the most recent psychologist risk assessment was not apparently considered by the team, although that was available. The Panel concluded that the risk levels had reduced considerably in recent years and that report writers who gave evidence to the Panel were correct in assessing the claimant as no longer presenting the type of risk that suggested that he should remain located in Category A conditions. However, it went on to record that the reduced risk could not yet be tested for any length of time in conditions of lower security and the risk areas particularly associated with violence, weapons and criminality still needed further work and risk reduction. It was hoped that the Category A Review Team could soon be given another opportunity to consider the security category in light of that decision and of the evidence presented to the Panel. The report concluded that matters of security categorisation were not within the remit of the Parole Board panel.
9. Following that, reports were obtained for a further review of the claimant's categorisation. Those reports noted that an OASYs risk assessment had concluded that the claimant was a low risk in the community, save for known adults. Known adults were said to be at a medium risk from the claimant. The reports also confirmed that the claimant's recent behaviour record in prison was a good one.
10. On 5th May 2008 representations were sent by the claimant's solicitors in support of the re-categorisation and, amongst other things, an oral hearing was asked for to review that issue. On 4th June 2007 the Local Advisory Panel ("LAP") at the prison where the claimant was detained recommended that he should be recategorised as a Category B prisoner. On 17th October 2007 the Secretary of State notified the claimant that it had been decided that he should remain categorised as a Category A prisoner. No oral hearing was held at that stage. The decision was based upon the papers.
11. Amongst other points, the following were made. Firstly, the Secretary of State did not consider that the claimant's good behaviour, on a cumulative basis, could provide evidence of an appropriate reduction in risk, but was satisfied that evidence was also

needed that the claimant had made progress addressing the risk factors relating to the violence. Further, the Secretary of State considered that no accurate assessment could be made of the claimant's insight into his risk factors or a significant change in his level of dangerousness. The reports prepared for the Panel review and the Panel's recommendations were noted, but it was felt that those did not provide evidence that the claimant had achieved significant insight into offending or achieved significant progress towards addressing those risk factors. The Director noted that the Panel reviews were not concerned with assessing the prisoner's risk should he be unlawfully at large, which of course is the specific purpose of the Security Category Review.

12. It was accepted that in certain cases an oral hearing might be what was called "the fairest means of determining a prisoner's security category", but it was stated that there were no grounds for an oral hearing of the claimant's then present security category review.
13. On 6th December 2007 these judicial review proceedings were commenced, following which the Secretary of State filed an acknowledgment of service. The following points were made. Firstly, the claimant's circumstances were not exceptional so as to require an oral hearing. Secondly, there was no new material before the Secretary of State that was not before the Panel. Thirdly, the fact that the Panel had disagreed with the Secretary of State was reasonably commonplace and not the sort of exceptional circumstance which justified an oral hearing. In light of those matters, the failure to hold an oral hearing was not unfair.
14. After permission to apply for judicial review was granted, as I have indicated, on 12th June 2008 the LAP at the prison where the claimant is detained again considered his case. What it concluded on that occasion was that there had been no developments since the last review, and accordingly no grounds on which to recommend that the claimant's categorisation should change. On 23rd July 2008 the Secretary of State took a fresh look at the claimant's categorisation. Again, there was no oral hearing. The Secretary of State concluded that there had been no significant development in risk reduction since the last review. Whilst it was accepted that the Panel had, beyond its terms of responsibility, recommended a progressive move, it was not considered that that recommendation invalidated the reasons given by the Director and Review Team for maintaining the Category A status.
15. In advancing the claimant's case in this hearing, Mr Southey, on his behalf, puts forward three main reasons why he says that procedural fairness in the circumstances of this case required an oral hearing to be held. Firstly, the claimant is a lifer past the minimum term. Secondly, the recommendation of the Panel that there should be a recategorisation, albeit that this went beyond its remit, was after an oral hearing at which the claimant and others on his behalf gave evidence. Thirdly, and a related point, is that all those who knew the claimant and dealt with him day in, day out recommended recategorisation and, of course, there were a number of such persons who gave evidence before the Panel. Mr Southey recognises that the exception to such recommendation is the second review by the LAP but he submits that, having regard to the decision of the Secretary of State not to recategorise, there was little that the LAP could do other than to note that there was no change since that decision.

16. That is the factual circumstance in which I have to consider, as is accepted on both sides, whether procedural fairness in this case does require an oral hearing to be held. Miss Gallafent, on behalf of the Secretary of State, emphasised that the test is one of requirement.

17. I was taken first of all to the policy framework. Rule 7(1) of the Prison Rules 1999 (SI 1999 No.728) provides that:

"Prisoners shall be classified, in accordance with any directions of the Secretary of State, having regard to their age, temperament and record and with a view to maintaining good order and facilitating training and, in the case of convicted prisoners, of furthering the purpose of their training and treatment as provided by rule 3."

18. The prison service policy regarding the categorisation process for Category A prisoners is set out in the Prison Service Order 1010, which defines a Category A prisoner in the following terms:

"Category A prisoner is a prisoner whose escape would be highly dangerous to the public or the police or the security of the state, and for whom the aim must be to make escape impossible . . ."

19. I was referred to authorities by both counsel. First, I was taken to the **R v Secretary of State for the Home Department ex parte Duggan** [1994] 3 All ER 277. That concerned a Category A prisoner and an annual review of his categorisation. In that case there was a refusal to release reports upon which that decision was taken and the issue was whether the prisoner was entitled to disclosure of the reports and to be informed of reasons for the decision. It is common ground that the regime is now different and I must be careful to recognise that fact. The judgment of Rose LJ says this at page 288 A:

"I am unable to accept that there is any material practicable distinction between a decision of the Parole Board in relation to release of a life sentence prisoner and a decision of a governor that a lifer should be Category A. There are of course the distinctions, procedural and otherwise, to which Mr Richards drew attention, but both decisions as it seems to me bear directly upon a prisoner's prospect of release. In this respect prisoners in Category A are in a different position from prisoners in Categories B, C or D. It is wholly improbable that the Parole Board would recommend the release of a Category A prisoner. Indeed, Mr Richards accepted that there is no known instance of this occurring, although there have been three instances of the Parole Board inviting reconsideration of the categorisation of a Category A prisoner who had applied for parole. In any event, it is inconceivable that the Secretary of State would sanction the release of a Category A prisoner even if the Parole Board had so recommended."

20. Then comes a decision which both parties regard as key to the issue which I have to decide, although each counsel has drawn a different conclusion from this authority. It is **R (Williams) v Secretary of State for the Home Department** [2002] EWCA Civ 498; [2002] 1 WLR 2264. That authority considered recategorisation of a Category A prisoner. The issue there was whether the prisoner in such a decision was entitled to an oral hearing and full disclosure of reports. I pause to observe that in the present case there is no issue but that all relevant reports have been properly disclosed to the claimant. In the judgment of the court, at paragraph 14, this was said:

"Governor Robson agreed that the appellant's categorisation was stopping his progress. He pointed out that 'this Catch 22 situation' was 'unique to Category A prisoners', adding, 'there is nothing he can do here'. Judge Pugsley, the Chairman, recognised that there was a 'terrible impasse'. 'The problem', he said, 'is that because we cannot re-write . . . categorisation, if we feel the categorisation is essentially marring a realistic prospect, it is our duty to say so'."

Then at paragraph 22 the court said this:

"Every prisoner is subject to security categorisation, which affects the conditions in which he is detained. For this appellant, the process is dealt with by the Category A Committee and the Category A review team. In effect these are internal bodies, part of the Prison Service, administering the prisons and organising their security. Like the panel, their concern is public safety. The focus, however, is different. They consider the risk to the public if the prisoner were to escape. If the consequence would be high public danger, the appropriate category is Category A.

23. As a matter of jurisdiction, there is in theory no legal restriction to prevent the panel from exercising its functions under s28 in relation to a Category A prisoner, and directing his immediate release. The reality is different. The panel's judgment is bound to be better informed if the prisoner has been progressively re-categorised, and his response to decreasingly stringent conditions of detention observed and reported. Moreover, under section 32(6) the Criminal Justice Act 1991, the panel is subject to a statutory obligation to take account of any relevant directions issued to it by the Secretary of State while discharging its statutory functions."

Then at paragraph 24:

"These directions reflect practical realities. We are not surprised to be told that with the exception of the release of three prisoners under the 'Peace Process' in Northern Ireland, no Category A prisoner serving a sentence of life imprisonment has been released. Certainly, as far as the panel is concerned, the conclusion of the Categorisation Committee or review team inevitably has a direct and marked impact on its decision."

Then comes a key passage at paragraph 31:

"Apart from the disquieting impression that the two decision making bodies concerned with this appellant were not working with the same material, the risk highlighted by this appeal is circularity. The post tariff discretionary life prisoner may be trapped in an unending process. This risk is mitigated by recognising that there are exceptional cases in which (subject to public interest immunity issues), the material available to the review team, in particular the reports on him, rather than their gist, should be disclosed and the prisoner permitted an oral hearing. The successful operation of this system depends on the review team, and since January 2001, the Head of the Category A review team, correctly identifying the case or cases which should be regarded as exceptional.

32. Mr Owen submitted that the decision that this was an ordinary or normal rather than an exceptional case was wrong. Unlike Harrison J, we agree that the review team failed to recognise the special circumstances of this case. At the risk of repetition, the appellant was a post tariff life sentence prisoner. An open hearing before the panel, which had resulted in conclusions favourable to him, was followed by a closed hearing before the review team. On the basis of reports which had not been available to the panel or been made available to the appellant or his legal advisers, the review team reached conclusions adverse to him which were seriously damaging to his prospects of release. In rejecting the application for an oral hearing, the review team misdirected itself by elevating the theory of the panel's statutory jurisdiction disproportionately above the practical realities, and over emphasising the differences between its own functions and those of the panel, without sufficiently recognising the link between them. The likely recommendation of the review team was foreshadowed by the 'gist' document. Once notice of the panel's decision had been received, the review team should have recognised an obvious prospect of a major inconsistency between their respective conclusions. An oral hearing would have enabled the reasons for the contradictory views to be examined on behalf of the appellant and for the contents of any adverse reports to be directly addressed. In the final analysis the review team would, of course, have reached its own decision, but an oral hearing, and proper disclosure, would have ensured that the decision was the result of a better informed process, and the conclusions, and the reasons for them, would then have been received with correspondingly greater confidence."

21. Then there is the decision of **R (West) v Parole Board** and **R (Smith) v Parole Board**, two conjoined appeals reported at [2005] 1 WLR 350. That was a decision of the House of Lords and related to the revocation of a prisoner's licence and a recall to prison of determinate sentence prisoners released on licence. I have been reminded by Mr Southey that that is a different context to the present one which I must consider. Moreover, he accepts, as indeed Lord Bingham pointed out at paragraph 30 of his speech, that in considering what procedural fairness requires, context is important and

account must first be taken of the interests at stake. At paragraph 35 Lord Bingham said this:

"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 not 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."

22. As Miss Gallafent points out, that does not translate precisely to the facts of this particular case. Nevertheless, it does seem to me that some guidance, exercising the care which I should exercise, can be drawn from that passage. In particular, it does seem to me that the reference to the assessment of risk being assisted by an oral hearing and exposing the prisoner to questioning, and in particular exposure to questioning of those who have dealt with him, are of some assistance in the present case.
23. Finally, I have been referred to **R (on the application of H) v Secretary of State for Justice** [2008] EWHC 2590 Admin, which came in the first instance before Cranston J, in which Mr Southey again appeared on behalf of the claimant. At paragraph 18 Cranston J, referring to the **Williams** case, said this:

"In the court's reasoning, it was the exceptional circumstance of the case which led to its finding that there should have been an oral hearing before the Category A Review Team. Those exceptional circumstances were that there were contradictory views expressed by the Parole Board and the Category A Review Team with the obvious prospects of a major inconsistency between their respective conclusions. Moreover, adverse reports had not been disclosed to the claimant or his advisors."

Then, dealing with that part of Lord Bingham's speech in **Smith** which I have quoted, at paragraph 21 Cranston J said this:

"Lord Bingham's statement of principle makes clear that common law standards of procedural fairness affecting an oral hearing are flexible, may change over time, and in general terms depend on the circumstances of the case. Clearly oral hearings are not required in all or even most cases, but importantly the context in which procedural fairness is being considered is determinative. There is no test of exceptionality. One considers the interests at stake and also the extent to which an oral

hearing will guarantee better decision-making in terms of the uncovering of facts, the resolution of issues, and the concerns of the decision-maker. Cost and efficiency must also be considered, often on the other side of the balance."

24. Cranston J went on to set out five particular factors in the context of that case which required, he said, an oral hearing. Firstly, the claimant, as here, was a Category A prisoner. Secondly, the claimant, as here, had a tariff which had expired. Cranston J noted that because of the combination of those points, delay moving from Category A conditions was highly likely to delay his eventual release. Thirdly, on two occasions in that case the local prison had recommended that the claimant should be recategorised. In the present case it has done so on one occasion, but not on a second occasion, in the circumstances I have already described. Fourthly, the approach of a Category A Review Team may well benefit from the closer examination which an oral hearing could provide. After all, said Cranston J, the local prison had responsibility for the care of the claimant and its views on risk and its management are matters which might be better tested by way of oral hearing. Finally, in that case the claimant was an in a Protected Witness Unit, which is not the case here. Cranston J concluded that the cumulative effect of those five factors tipped the balance in favour of an oral hearing. Miss Gallafent emphasises that the phrase used was "tipping the balance".
25. Miss Gallafent has submitted that Cranston J was wrong in setting out those five factors and was wrong in that he misinterpreted the decision of **Williams**. On that basis, the Secretary of State in the **H** case appealed to the Court of Appeal. Permission to appeal was granted by Mummery LJ in November 2008, but by the time that the matter came to the Court of Appeal it had become academic. It was urged upon the Court of Appeal that the appeal should nevertheless be heard, because there was a point of principle at stake. Counsel for the Secretary of State made that submission. The Court of Appeal on that occasion, however, found the precise facts are always going to be very important in a case of this kind, and the important question whether an oral hearing should be required in a case like this should be decided in a case where the facts really matter, not in a case where the facts have moved on.
26. Mr Southey was recorded as accepting on instructions that it would be difficult to say that the case was of any general application, because of the five specific factors in which Cranston J relied, and the decision should not be taken as a precedent for any wider concept of any oral hearing than the judge ordered in the particular circumstances of the case.
27. I take note of those particular comments and I am concerned here with particular facts of this claim and not of other cases. Miss Gallafent has submitted that the case of Williams has been misunderstood. Firstly, it does not apply here because there is no issue of non-disclosure. More importantly, however, she submits that this is not an impasse case, in the sense that the reason the claimant has not progressed through the system is not because of his categorisation but because he has not availed himself of courses which have been available to him, in the manner I set out at the outset of this judgment. Moreover, the exceptional circumstances set out in that judgment were, in

part at least, not exceptional circumstances in the true sense but rather the effect of holding an oral hearing.

28. It seems to me that I need not decide the finer points of that argument. In my judgment, this is a case where procedural fairness requires that an oral hearing should take place; not just because of the fact of the claimant has now served over 20 years in Category A and has passed his minimum term, but also because of the point made by Mr Southey that the reports before the Panel were from people who dealt with the claimant day in and day out. In my judgment, procedural fairness does require, especially after the Panel had made its recommendation (albeit beyond its remit) after hearing such people, that the Secretary of State should conduct an oral hearing to have the benefit of such evidence. In my judgment, that cannot be categorised as simply the effect of a decision to conduct an oral hearing. It is an important factor, in my judgment, to show why the conduct of such a hearing is required in this case.
29. Accordingly, in my judgment, the limited ground for which permission was given by Mr Andrew Nicol QC is made out and there has been a procedural irregularity in this case because of the failure to hold an oral hearing.
30. I am sorry it has taken so long and I am sorry to have kept everybody.
31. MR SOUTHEY: My Lord, can I thank the court staff on behalf of the Bar.
32. HIS HONOUR JUDGE JARMAN QC: Certainly. Thank you.
33. MR SOUTHEY: My Lord, I have two applications. The first, I suspect is uncontroversial. The first application is for the claimant's costs, obviously to be assessed if not agreed. The second application, which may be controversial, is a Legal Services Commission assessment.
34. MISS GALLAFENT: My Lord, I can confirm that neither are controversial. We do apply for permission to appeal on this matter. Permission was, of course, granted by Mummery LJ in relation to the **H** case. Your Lordship has declined to decide the meaning of **Williams**. We say this is critical and your Lordship has erred in not finding that we are right in our consideration, but we say erred having not decided it, finding that nevertheless an oral hearing was required. This is a point of principle as to whether an oral hearing is required. We do accept that particular decisions turn on their own facts but, as my submissions have made clear, we would say there are not such exceptional circumstances and **Williams** should be followed and applied. In particular, we say it is fatal to the application for an oral hearing. On those grounds, we would ask for permission to appeal.
35. HIS HONOUR JUDGE JARMAN QC: Do you have anything to say, Mr Southey?
36. MR SOUTHEY: My Lord, yes. As I understood your Lordship's judgment, your Lordship has sought to apply -- and we say has applied faithfully -- the **Williams** judgment. Your Lordship's judgment is a judgment which turns on its own facts. As the Court of Appeal demonstrated in **H**, it is difficult to make a broad point of principle

in these cases. If there is an appeal, and we submit there is not, that is a matter which is perhaps better decided by the Court of Appeal.

37. HIS HONOUR JUDGE JARMAN QC: I am afraid I agree, Miss Gallafent. I do feel that this is a case which turns on its own facts. If you can persuade the Court of Appeal otherwise then it is open to you. I will order that the defendant pay the claimant's costs, to be assessed if not agreed, and a Legal Services Commission assessment.
38. MISS GALLAFENT: I am grateful.