

Judgment 24/2011

**Alan Michael John Baker v Chairman of the Parole
Review Committee – (Civil Action File 1606) –
Royal Court – 11th August 2011**

Parole Committee Review (Guernsey), Law, 1989 and Ordinance, 1991, as amended – application for Judicial Review – seeking to quash decision of the Parole Committee’s decision as an unreasonable exercise of their power – decision quashed – Court directed that the matter be remitted.

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

The 11th day of August 2011 before Richard John Collas Esquire, alone

ALAN MICHAEL JOHN BAKER

Applicant

-v-

**CHAIRMAN OF THE
PAROLE REVIEW COMMITTEE**

Respondent

Whereas on 9th August the Deputy Bailiff considered an application for Judicial Review and heard thereon Advocates A J Ayres and L Evans counsel for the Applicant and Respondent respectively and whereas on 10th August the Deputy Bailiff gave judgment in the terms attached hereto and QUASHED the decision of the Parole Review Committee the Deputy Bailiff this day DIRECTED that the matter be remitted to the said Committee and ORDERED costs on a recoverable basis in favour of the Applicant.

**S M D ROSS
H M Deputy Greffier**

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

(ORDINARY DIVISION)

Between

ALAN MICHAEL JOHN BAKER

(“Applicant”)

-v-

CHAIRMAN OF THE

PAROLE REVIEW COMMITTEE

(“Respondent”)

Date of hearing: 9th August 2011

Judgment handed down on: 10th August 2011

Before: Richard John COLLAS Esq., Deputy Bailiff

Application for Judicial Review

Advocate for the Applicant: A J Ayres

Advocate for the Respondent: L Evans

Cases, texts and Statutes referred to:

Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1KB 223

Walters v States Housing Authority [1997] 24.GLJ.76

The Parole Review Committee Ordinance, 1991, as amended

Bradley v Parole Review Committee (2005-06), GLR 335

Webster v Parole Review Committee (Royal Court, 15 December 2004)

R v Parole Board, X ex P. Bradley [1991] 1 WLR 134 at page 146

1. On 9th July 2010, Alan Michael John Baker (“the Applicant”) was sentenced by the Royal Court to a term of 3 years and 9 months imprisonment, effective from the 26th November 2009, having pleaded guilty to an Indictment containing a single count of manslaughter.
2. On 25th February 2011, the Applicant became eligible for parole under the provisions of the Parole Review Committee (Guernsey) Law, 1989. He applied for parole at the first available opportunity by filing an application for release on parole five months beforehand, that is on 13th September 2010. The application was heard by the Parole Review Committee (“PRC”) on 16th February 2011. The PRC decided to refuse the application and it issued its written decision two days later on 18th February.
3. The Applicant issued an application for judicial review of the PRC’s decision, which was first returnable in the Royal Court on 6th May 2011, when I granted leave to apply for judicial review. Directions were given for the lodging of the relevant documents, skeleton arguments and authorities. The application for judicial review came before me for hearing on 9th August, the Applicant having applied in the meantime to amend the application. The application for amendment was unopposed and the hearing therefore proceeded on the basis of the amended cause.

4. The Applicant sought an order quashing the decision on the grounds that it was an unreasonable exercise of the PRC's powers. Counsel were agreed that the standard of unreasonableness to be established was in accordance with Wednesbury principles, not the test for Jurat unreasonableness as that has become known following the decision of the Court of Appeal in Walters v States Housing Authority [1997] 24.GLJ.76.
5. The letter recording the decision of the PRC is not a lengthy document. It is about 1½ pages in length. The initial paragraphs gave background information relating to the manslaughter offence and the Applicant's previous convictions. It went on to say that the Committee had considered and noted the details in the reports contained within the Parole Dossier including the Applicant's comments on the Dossier.
6. The letter then records the PRC's decision and reasons in the following terms:

“Decision and Reasons

The Committee noted that there was support from the authors of the reports for release on parole, the reasons for not supporting parole at this time included:

- *Mr Baker has received an advisory warning in April 2010 and an adjudication in August 2010, which suggests a lack of adherence to the Prison regime and lack of consequential thinking.*
- *He has a history of violent offending and also of breaching previous orders through reoffending.*
- *Mr Baker is assessed as posing a significantly high likelihood of reoffending and a risk of harm to the public. His behaviour is still noted to be unpredictable, impulsive and still suffers from mood swings which may be exacerbated by his new medication for aggression.*
- *Concern was shown that Mr Baker was still minimising his offence and appeared to lack an appropriate level of victim empathy.*

The Committee did not consider that Mr Baker satisfied the criteria for parole at this time, namely that he would remain offending and drug free for the duration of his parole licence.

Parole was therefore refused.

The Committee considered the following conditions proposed by Probation, namely:

- *Attend all appointments arranged for you with the Mental Health and/or Medical practitioner, and cooperate fully with any care of treatment they recommend.*
- *Attend the Criminal Justice Drug Service as directed and comply with drug testing and treatment as required.”*

7. The criteria for parole referred to in the decision are to be found in a document published in Billet XVI of 2003 entitled “*Review of the Parole Review Committee (Guernsey) Law, 1989 and The Parole Review Committee Ordinance, 1991, as amended*”. The review was conducted by the PRC in consultation with Her Majesty's Procureur, the Prison Governor and the Chief Probation Officer by way of an audit of the local parole legislation and practice to ensure they were, so far as is possible, compatible with the Island's obligations under the European Convention on Human Rights. The factors which have become known as the parole criteria are set out in six sub-paragraphs in paragraph 8 of the report. The criteria are not to be found in any legislation. I referred to them in Bradley v Parole Review Committee (2005-06), GLR 335 where I said that “*The States were not asked to approve [the criteria]:*

the significance of their publication in the Billet is that it brought them into the public domain. They are also set out in a booklet published by the PRC and entitled “Your Questions Answered – information for prisoners applying for parole””.

8. Paragraph 8 of the review reads as follows:

“Parole is a form of discretionary release which includes a period of supervision in the community under licence conditions. Before recommending early release on licence, the Committee takes into account, as a basis for best practice, the directions issued by the Parole Board for England and Wales, that is whether:

- (1) The safety of the public will be placed unacceptably at risk. In assessing such risk the Board shall take into account:
 - (a) the nature and circumstances of the original offence;*
 - (b) whether the prisoner has shown by his attitude and behaviour in custody that he is willing to address his offending behaviour by understanding its causes and its consequences for the victims concerned, and has made positive effort and progress in doing so;*
 - (c) in the case of a violent or sexual offender – whether the prisoner has committed other offences of sex or violence, in which case the risk to the public of release on licence may be unacceptable;*
 - (d) that a risk of violent or sexual offending is more serious than a risk of other types of offending.**
- (2) The longer period of supervision that parole would provide is likely to reduce the risk of further offences being committed.*
- (3) The prisoner is likely to comply with the conditions of his licence.*
- (4) The prisoner has failed to meet the requirements of licensed supervision, temporary release or bail on any previous occasion and, if so, whether this makes the risk of releasing him on licence unacceptable.*
- (5) The resettlement plan will help secure the offender’s rehabilitation.*
- (6) The supervising officer has prepared a programme of supervision and has recommended specific licence conditions.”*

9. The report went on to say at paragraph 11 that *“the Committee looks at the person as a whole, how he may have changed, and how he is likely to cope on release. No one factor is decisive”.*

10. It can be seen from paragraph 8, that the criteria have been copied from England and Wales. Counsel therefore submitted that decisions of the English courts regarding the interpretation of the criteria are relevant and should be persuasive in Guernsey. I would add that care needs to be taken when looking at English parole decisions because, as Carey B said in Webster v Parole Review Committee (Royal Court, 15 December 2004), the parole regime in England and Wales is very different from our own.

11. In relation to the first of the criteria, Advocate Ayres, appearing for the Applicant, submitted that the PRC had applied an absolute standard effectively that no risk to the public would be acceptable which, he submitted, is wrong both in law and in principle. There can never be a complete absence of risk to members of the public; even people who have never offended commit offences. Further, he submitted that the purpose of attaching conditions to a Parole

Licence is to reduce any risk and hence the existence of the PRC's power to do so supports his submission that some level of risk is acceptable.

12. Advocate Ayres drew my attention to the English decision in R v Parole Board, ex p. Bradley [1991] 1 WLR 134. The case was concerned with the release on licence of a prisoner serving a discretionary life sentence. However, Advocate Ayres submitted that the approach to risk adopted in that case must be applicable in the present case. Advocate Evans agreed and I respectfully adopt what the Court said at page 146:

“But that leaves still wholly undefined the level of risk required to justify continued detention of post-tariff discretionary lifers. Yet undefined we fear it must remain. Unless the required test is expressed in percentage terms (in the same way that likelihood arguably implies more than 50 per cent.), which is surely impossible, it seems inevitable that one can say really no more than this: first, that the risk must indeed be “substantial” (Mr. Fitzgerald’s fall-back position), but this can mean no more than that it is not merely perceptible or minimal. Second, that it must be sufficient to be unacceptable in the subjective judgment of the Parole Board to whom Parliament has of course entrusted the decision – the decision, that is, whether to recommend release on licence, which recommendation is itself a necessary precondition to the exercise of the Secretary of State’s final discretion. Third, that, in exercising their judgment as to the level of risk acceptable, the Parole Board must clearly have in mind all material considerations. Certainly one such consideration should be the intrinsic and increasing unfairness of leaving the prisoner languishing in gaol, ex hypothesi for longer than punishment requires, unless there is sufficient public risk to justify this.

What it all comes to is this. The Parole Board have to carry out a balancing exercise between the legitimate conflicting interests of both prisoner and public.”

13. The PRC has not expressly stated in its decision letter, how it approached the question of risk but, in my view, the matters identified in the bullet points indicate to me that the PRC identified what it considered to be a degree of risk which was more than minimal and which, in the view of the PRC, was unacceptable. In the final paragraph of its letter, the PRC mentioned the conditions proposed by Probation so, although the PRC did not say so, I presume that it concluded that the level of risk it had identified could not be reduced sufficiently even by imposition of the conditions recommended by Probation.
14. The Chair of the PRC swore an affidavit after the Applicant instituted judicial review proceedings on 27th May 2011. In paragraph 4 she explained the concerns held by the PRC concerning the risks surrounding the Applicant's behaviour both within the community and in custody. My conclusion about the PRC's approach is supported by what the Chair said in that paragraph.
15. Advocate Ayres submitted that the PRC failed to take account, or failed to take sufficient account, of many positive factors that pointed in favour of granting the Applicant's application for release on licence; the application was supported by the authors of reports submitted to the PRC, including the Probation Officer. Instead, the PRC in its decision letter appears to have focused on a number of negative factors without giving sufficient credit for those in his favour.
16. On behalf of the PRC, it can be said that the decision letter noted that it had taken account of all the reports and it specifically noted that there was support from the authors of the reports

for release on parole. The affidavit of the Chair of the PRC also indicates that the PRC took account of the many positive factors.

17. Whilst the decision letter highlights the reasons for not supporting release on parole, in my view, that does not indicate it has given undue weight to those factors ignoring all the positive factors. The PRC has listed the negative factors in an attempt to explain to the Applicant why his application was refused.
18. Advocate Ayres criticised the fourth bullet point in the decision letter and in particular the statement that the Applicant was still minimising his offence and appeared to lack an appropriate level of victim empathy. In my opinion, there is evidence that the Applicant is still minimising his involvement in the offence. The Prison Assessment for the Parole Review Committee dated 22 December 2010 at Tab 13, page 80, states that he said he was attacked and fought back in self defence. Earlier, he had told the Probation Officer who wrote the Social Enquiry Report for the Royal Court that he pushed the victim, (page 45) and acted in self defence (page 46). Such statements are inconsistent with his plea of guilty to the charge of manslaughter. The Court noted he had not pursued self defence and he was sentenced on the basis that the blow he struck was more than a push, it was a punch hard enough to fracture the victim's jaw in two places. On that basis, the PRC were entitled to conclude that he is minimising the offence and consequently, to say that the level of empathy he feels for his victim is questionable, even though he shows remorse for the victim and his family.
19. In his oral submissions, Advocate Ayres highlighted the third bullet point in the decision letter and in particular the second sentence thereof: *"His behaviour is still noted to be unpredictable, impulsive and still suffers from mood swings which may be exacerbated by his new medication for aggression"*. There was no evidence before the PRC, he submitted, to show that the Applicant experiences mood swings exacerbated by his new medication.
20. It is necessary for me at this point to explain why the Applicant was receiving new medication. The recommendation came from Professor Stephen Martin MBBS MRCPsych MEWI, a Consultant Psychiatrist, who prepared a report for the Royal Court while the Applicant was awaiting sentencing. Professor Martin's report is referred to in the Social Enquiry Report dated 9th July 2010, prepared for the sentencing Court; the Social Enquiry Report is included in the Parole Dossier but Professor Martin's report was not. That is perhaps unfortunate because Professor Martin's report might have contained information relevant to the PRC's decision making. For example, in the Social Enquiry Report, the Probation Officer said that she was aware of the Applicant's personal and family background which was described in detail in Professor Martin's report and therefore she felt it was not necessary to repeat that information in her report. Without Professor Martin's report, the PRC did not have the benefit of the full details of the Applicant's personal and family background.
21. In paragraph 15 the Probation Officer said the following about the conclusions reached by Professor Martin:

"Professor Martin states that there is a very strong background of brain disorder that has made him bad tempered for most of his life, which certainly pre-dated drug and alcohol problems. Mr Baker needs to continue to address his attitudes towards the use of violence as well as his use of alcohol and drugs. He needs to continue to develop the skills of anger management that he has learnt during past supervision in prison and in the community. Professor Martin has the opinion that with enough psychopharmacological effort, as described in his report, there is a strong chance that with careful, long term compliance with an effective medication regime, Mr

Baker's problems could be controlled very well. Therefore, the risk of harm to the public would be reduced."

22. The sentencing court did not, in its sentencing remarks, reveal any of the contents of Professor Martin's report. It merely said "*the most effective mitigation lies in the actual circumstances of the incident, although we have given proper attention to the report of Professor Martin*", thereby implying that the court found some mitigation in Professor Martin's report.

23. In the Parole Dossier there were a number of references to Professor Martin. At Tab 9, page 58, in the Applicant's parole application form (written by himself) he said:

"I have seen Dr Steven Martins, a professor from the UK, and he has opened my eyes properly to a brain condition I have which increases aggression and he has recommended I be put on a certain medication which I am taking and have been since I saw him and it has helped me a lot. Whilst in jail I have been confronted on a number of occasions and I have walked away and dealt with it properly which I would f (sic) never done in my past but my past is my past and behind me now all I look at is my future."

24. Tab 19 contains a report from the Prison substance misuse worker who says the following at page 98:

"During my assessment of Mr Baker he disclosed his diagnosis of Organic Personality Disorder and the Psychiatric Report states that it is "...a long term pervasive pattern of maldaptive behaviour, due to physical brain abnormality, manifested particularly due to mood swings and dyscontrol of an extreme temper capacity. These symptoms have doubtless at times been worsened by intoxicification with opiates and Diazepam, and confounded by the withdrawal from those substances."

25. The Probation Officer prepared a Parole Assessment Report which is at tab 20 in which she said the following at page 101:

"Mr Baker has co-operated fully with Prison Healthcare in addressing the medical issues referred to in the Social Enquiry Report and is now taking prescribed medication recommended by Professor Stephen Martin. This would appear to be having the desired effect and it is anticipated that he will continue with his treatment."

Also at page 102:

"Assessment of the likelihood of re-offending of those who have been incarcerated has to remain as per the SER, particularly when individuals have had no opportunity to demonstrate, outside the confines of the Prison, that they have made positive changes to the factors that have been identified at the SER point. However, it should be noted that Mr Baker has taken steps to address all of the factors that were identified at that stage and has also had the benefit of new medication, which was recommended by Professor Martin, the specialist Consultant Psychiatrist. One can only anticipate the probability that the likelihood of re-offending has been reduced and that the risk of harm that was outlined in the SER will also have reduced considerably. The applicant has always engaged with supervision and completed his last period of supervision successfully prior to his commission of the current offence."

He is confident that he can manage his behaviour now that his illness has been discovered because he can identify symptoms and has developed his coping strategies. He is committed to compliance with the conditions of a Parole Licence, including additional conditions, to ensure his achievement of further reduction of risk.”

26. The Applicant has been receiving Psychotherapy whilst in Prison from Sarah Craske MSc M.Th. Post Grad Dip. Social Work UK Registered Psychotherapist. She prepared a report which is undated, but appears to have been prepared in connection with the parole application and hence was, I assume, written in or about January 2011. She said the following:

“CURRENT ASSESSMENT

Prior to the trial, Mr Baker was assessed by a Specialist Psychiatrist, Dr Martin who is based in the UK. Mr Baker had been expressing concern for some years about his tendency to becoming aggressive. These episodes he felt were cyclical in nature. Dr Martin identified that Mr Baker has a condition which was exacerbated by a head trauma sustained in adolescence when he was hit on the side of his head by the blunt side of an axe. This has resulted in the build-up of calcium deposits in his skull and other parts of his body which are likely to provoke cyclical phases of aggression and mood disorder.

In his report, Dr Martin advised the court that Mr Baker should have been referred for a specialist assessment following the head injury when he continued to experience aggressive feelings and difficulty in controlling his mood as the medications he was taking were unlikely to be effective in treating Mr Baker’s condition. A brain scan showed that Mr Baker had sustained a significant trauma but there had been no follow up treatment by a specialist in this area. Mr Baker had sought Psychiatric help in the period leading up to this offence as he recognised that he was struggling but Dr Martin’s assessment states that Mr Baker was not appropriately diagnosed or medicated for his condition so any previous interventions were unlikely to have been effective.

Since Dr Martin’s assessment Mr Baker has been reviewed regularly in the prison by Dr Costen. His blood is tested at intervals to monitor the levels of calcium and he is trying out medications recommended by Dr Martin as being likely to ameliorate his condition and help him gain greater control over his moods reducing the likelihood of further aggressive behaviours. Unfortunately Mr Baker has had adverse reactions to some medications so finding the right medications in combination has not been entirely straight forward although he thinks that progress is being made.”

27. The Dossier contains another report prepared by Ms Craske at Tab 18 entitled “*Choices and Challenges Booster Report concerning Alan Baker*”. The report is also undated. I assume it was prepared at, or shortly after, the completion of the Choices and Challenges Booster Programme undertaken by the Applicant. I therefore assume that it pre-dates the report prepared by Ms Craske specifically for the PRC. At page 94, Ms Craske wrote “*Mr Baker remains prone to mood swings although this is more in control than it has been*”. Later on the same page under a heading “*Problem Solving*”, Miss Craske wrote:

“In the ‘Problem Solving’ section Mr Baker chose the issue of his brain condition which was highlighted in a Specialist Psychiatric report prepared for his trial. As a consequence of this assessment Mr Baker now believes that his previous problems with aggressive and out of control behaviour were in part the result of a brain injury

sustained in a serious assault when he was an adolescent. Mr Baker realises he needs to remain under psychiatric supervision as he is currently trying out medications recommended in the specialist assessment. He recognises that he is dependent in the immediate future on the support and advice of professionals until he is settled in a regular treatment pattern.”

28. Counsel were unable to identify, and I have been unable to find, any statement in the report to the effect that the Applicant’s mood swings may be exacerbated by his new medication for aggression. Unfortunately, the PRC do not state in their decision letter the basis for such a statement. If it is the case that the statement was one of their own opinion, based upon the evidence put before them, it is unfortunate they did not say so, and that they did not set out the information relied upon by them in reaching such a conclusion.
29. In my view it is not an opinion which they could reasonably have reached on the basis of the information contained in the Dossier. The evidence shows that progress was being made with the medication, but there was no medical opinion confirming whether it is working satisfactorily. It may be too early to state whether the new medication will satisfactorily address the behavioural problems which have led to the Applicant’s offending in the past. Mr Baker said the medication has helped him a lot. The Probation Officer said it “*would appear to be having the desired effect*”. The sources relied upon by the Probation Officer included discussion with Prison Healthcare and hence her statement may be based upon information from a medical source although she does not say so. Ms Craske is more reserved in her report where she wrote that the Applicant “*thinks that progress is being made*”, but offered no opinion of her own, possibly because she is not qualified to do so (although she did not say that).
30. It is unfortunate that the PRC did not have the benefit of a medical report. Dr Costen, a Psychiatrist, has been administering the medication in accordance with the recommendations of Professor Martin. She would have been best placed to provide an opinion as to the effect of the medication that has been prescribed since Dr Martin made his recommendations. The PRC would no doubt have been assisted in their decision making if they had had a recent report from Dr Costen, just as they may have been assisted if they had had sight of Dr Martin’s report.
31. The PRC can only act on the basis of the information supplied to it and, as I have said, the information contained in the Dossier did not support the conclusion that the Applicant’s mood swings may be exacerbated by his new medication for aggression.
32. In the absence of a factual basis for it, that finding must be impugned as irrational. It is likely to have had considerable bearing upon the PRC’s consideration of the parole criteria. It is relevant to several of the parole criteria, including the risk the Applicant poses to the safety of the public, the risk of further offending, his ability to comply with the conditions of his licence and generally whether he will be rehabilitated in the community.
33. I have a discretion as to whether to refer the matter to the PRC for further consideration and I will hear submissions from Counsel as to how that discretion should be exercised.
34. I wish to comment on one additional matter. During the course of his oral submissions, Advocate Ayres made some reference to the quality of the decision letter issued by the PRC. When I read the letter, I was a little surprised by its brevity. In my view it contains enough, but only the bare minimum, needed to explain the decision. I wish to reiterate what I said in Bradley:

“Quoting a passage in the judgment of Hutchison, J. in R. v. Sefton Metrop. B.C., exp. Cunningham (5), which reads (23 H.L.R. at 543):

“The provisions of the regulations as to the duty to give reasons are clear. In a context such as this it is plain on authority that the reasons need not be elaborate; they need not be the sort of reasons that one would expect to find, for example, in a judgment of the court, but they should be sufficient to enable the parties to appreciate that the relevant matters have been taken into consideration and to understand why it is that they have succeeded or failed as the case may be.”

Similarly, in R. v. East Devon D.C. Housing Benefit Rev. Bd., ex p. Gibson (3), the learned Master of the Rolls said (25 H.L.R. at 494):

“[I]t must be recalled that the review body is a lay body, whether or not it has a legal clerk, and its reasons cannot fairly be required to display the skills which a legal draftsman would be expected to bring to them. It is enough if they convey the substance of the Review Board’s decision and the reasons for it, however inexpertly these are set out.”

Likewise, the PRC is a lay body with some part-time administrative support, but with no legally qualified clerk; so it is enough if the reasons it gives for its decisions are sufficient to enable the applicant to appreciate that the relevant matters have been considered and to understand why she has failed.”

35. Counsel suggested that in a later decision which has not been reported, I may have expressed different remarks. If I did, that was not intentional. In my view, the principles which govern the contents of the decision letter are, and always have been, as I stated in Bradley.
36. It has become the practice that the Chair of the PRC files an affidavit in reply to an application for judicial review, where leave has been given for the application to proceed. That practice began, as far as I can recall, in order to enable the PRC to put before the Court evidence as to its approach to a parole application and the principles it applies when considering applications. Such evidence has been helpful to the Court. However, I wish to emphasise that the decision letter forwarded to an Applicant must be sufficient to explain the decision and the reasons for it. A subsequent affidavit cannot be a substitute for a satisfactory decision letter.