Judgment 60/2004 **(1) Webster (2) Singleton v Chairman of the Parole Review Committee – Royal Court (Civil Action File 872 – 15 December, 2004**

Parole Review Committee (Guernsey) Law, 1989 – judicial review of refusal to grant parole – Wednesbury unreasonableness alleged – legislative framework for parole – history of the legislation reviewed – lack of statutory guidance to the Committee – relevance of changes in English legislation – human rights issue – applications refused – need for Home Department to review the parole system in light of this judgment.

IN THE ROYAL COURT OF GUERNSEY

The 15th day of December, 2004 before Sir de Vic Carey, Bailiff; sitting alone.

Between

DAVID ANTHONY WEBSTER

("Applicant")

v.

CHAIRMAN OF THE PAROLE REVIEW COMMITTEE

("Respondent")

and

HARRY MARTIN SINGLETON

("Applicant")

v.

CHAIRMAN OF THE PAROLE REVIEW COMMITTEE

("Respondent")

WHEREAS on the 25th and 26th day of October, 2004 the Bailiff considered the Applicants' request for a Judicial Review of the Respondent Committee's decisions in respect of the said Applicants and heard thereon Advocate J.A.S. White, Counsel for David Anthony Webster and Advocate M. Baudains, Counsel for Harry Martin Singleton and Advocate R. McMahon, Counsel for the Respondent Committee, and WHEREAS on the 26th day of October, 2004 the Bailiff upheld the said decisions of the Respondent Committee, the Bailiff this day handed down written judgment for his decision in the terms attached hereto.

S. M. D. ROSS
Her Majesty's Deputy Greffier

Approved Text

IN THE ROYAL COURT OF GUERNSEY

SITTING AS AN ORDINARY COURT

Between:

DAVID ANTHONY WEBSTER

Applicant

v

CHAIRMAN OF THE PAROLE REVIEW COMMITTEE

Respondent

and

HARRY MARTIN SINGLETON

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v

CHAIRMAN OF THE PAROLE REVIEW COMMITTEE

Respondent

Advocate for David Anthony Webster: J. A. S. White

Advocate for Harry Martin Singleton: M. Baudains

Advocate for the Respondent: R. McMahon

Judgment of the Bailiff on the Applicants' request for a Judicial Review of the Respondent Committee's decision

Date of Hearing: 25th and 26th October, 2004
Date judgment handed down: 15th December, 2004

Introduction

1. These are two applications for judicial review of decisions of the Parole Review Committee ("the PRC") declining to grant parole to the two Applicants. I directed that the two appeals be heard together and as the two Applicants were legally aided I dispensed in their case with a requirement that they swear affidavits setting out the factual situation relating to their applications for parole, which in any event were not subject to any material dispute. I also asked Mr. McMahon to respond to the applications in view of the fact that the date upon which these two applicants had become first entitled to be considered for parole had passed Whilst I do not wish to quarrel with the provisions of Practice Direction No. 3 of 2004 relating to judicial review applications, I consider that we are still in the early stages of developing the law of judicial review in this island and that there are occasions such as here where the procedure can usefully be simplified in order to get the matter considered by the Court without undue formality and unnecessary generation of paper and consequent cost to

the legal aid fund. I did therefore not go through the preliminary consideration as to whether or not these applications were suitable for review as required by the practice direction.

Background to the applications for Parole

2. The Applicants are a couple of middle aged men from Weymouth who were apprehended coming off the Ferry on a day trip carrying differing quantities of cannabis resin with them. They were detected and went through the usual process of appearing before the Royal Court. They were each sentenced to 2 years and 9 months imprisonment to run from the date of their apprehension in October 2003. There is no indication that they were more than couriers. Webster claimed that he had been commissioned by a lady whom he only knew as Big Mama to bring the contraband. Singleton had a slightly different story to the effect that a man called James or Jim supplied him with some cannabis resin, which he had ordered, while travelling from Weymouth on the boat and that indeed it was his intention to take the cannabis resin back to Weymouth. They told a somewhat different story at their trial and I am not now concerned with issues of their credibility. At their trial the Court had the benefit of probation reports, which as always in such cases revealed a sad and chaotic way of life, which has tempted them to commit such serious offences. Singleton seems to have had a drug problem as well as a drink problem. Webster just drank far too much. Singleton claims to be retired and Webster unemployed. Although the substance abuse problems of both men has affected their lifestyle and their behaviour neither has found himself in the kind of serious trouble that they both found themselves in October 2003 when they came off the fast ferry carrying cannabis resin. Under the provisions of the Parole Review Committee (Guernsey) Law, 1989 and the Ordinance of 1991 made thereunder the two Applicants became eligible for parole.

The legislative framework

3. The scheme of the parole system is briefly that persons sentenced to less than fifteen months are not eligible for consideration for parole but persons sentenced to longer terms are eligible for parole after they have served one-third of their sentence or ten months whichever is the less. The practice is that documentation is prepared in support of parole applications some time ahead of the parole eligibility date so that the PRC can consider the matter in good time. It is appropriate to read section 2 of that Law of 1989.

> "2. It shall be the general duty of the Committee, subject to the provisions of any Ordinance made under section 3 of this Law, to be responsible for:
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> (a) the release on licence of persons serving sentences of imprisonment in the Island of Guernsey ("prisoners") whose cases have been referred to it by the States Home Department, on the grounds of their industry, good conduct, or likelihood of leading a good and useful life after release;
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> (b) the recall of such prisoners released on licence;

(c) the conditions to be attached to such licences, including the variation or revocation of such conditions; and

(d) any other matter connected with the release on licence or recall of such prisoners."

4. The Law goes on to give wide enabling powers to the States to legislate, which they have done with the enactment of the Parole Review Committee Ordinance, 1991.

The decision of the PRC

5. The PRC duly considered the applications from the two Applicants on 1st September, 2004. All the reports were favourable to the extent that both had during their relatively short period in prison made serious efforts to address their lifestyle and their drinking problems. They had gone out on day release to work at States projects and were well spoken of. One of the problems with people who receive fairly short terms of imprisonment like this is that after their apprehension they remain on remand for several months whilst the case against them is prepared, they are committed for trial and brought before the Royal Court to indicate their plea. It is only after a plea of guilty or a finding of guilt on conviction that the social inquiry reports can be prepared. There is a considerable pressure on the Royal Court to find dates for criminal trials although to be fair to the system, guilty pleas are generally processed with reasonable speed, in the case of these Applicants, however, they were not sentenced until March this year and so they became first eligible for consideration for parole some five months later in September.

6. The PRC gave consideration to the matter and decided that because of the history of alcohol abuse by both applicants parole should not be granted on the first date. Instead parole consideration will be deferred until February which date was selected because it lay six months before the earliest release date (i.e. after the prisoners had served two-thirds of their sentence – in this case twenty-two months). The Law requires review at this stage as a matter of course.

The history of the legislation

7. It is worth reverting to the history of this piece of legislation. Guernsey has a system whereby prisoners sentenced in Guernsey Courts can serve their sentences either in Guernsey or the United Kingdom. Until Les Nicolles was built the majority of long-term prisoners were transferred to England. Over twenty years ago in 1984 the unfairness of not having a parole system in Guernsey when one existed in England was noted and drawn to the attention of the States by the Prison Board (Billet d'Etat VII of 1984). Things moved fairly slowly. In 1986 the Prison Board presented a policy letter (Billet d'Etat XXI Article XIV) proposing the introduction of a parole system in Guernsey. The reasons for the need for the system are well set out. The Prison Board was not suggesting that the reasons why they had parole in England were necessarily the right ones, but it was conscious of the unfairness if prisoners in Guernsey

were not able to get parole when prisoners transferred to England were. Broadly therefore it recommended adoption of the system then pertaining in England. This provided that persons became eligible for consideration for parole after they had served one-third of their sentence or ten months whichever is the greater. The drafting of the implementing ordinance took time and the Parole Review Committee Ordinance was enacted in 1991. The Ordinance of 1991, as amended, sets out a cumbersome procedure for dealing with applications for parole including the preparation of lengthy dossiers with reports from various people but excluded for some reason the sentencing remarks of the presiding judge in the Royal Court or the Court of Appeal where the sentence has been reviewed there. To be fair to the PRC and its officers, who seem to have faithfully followed what is done in England, similar problems seem to have existed there which were only highlighted in the notorious case of R (Martin) v. Parole Board 2003 EWHC 1512 (Admin).

8. Significantly nowhere in the Guernsey parole legislation was there any no provision for guidance to be set out for the PRC. The Ordinance is completely silent on the criteria to be adopted. This is to be contrasted with England where there is a statutory duty on the Home Secretary to give guidance, albeit in the widest and most general terms, to the Parole Board as to how it is to discharge its duties. Perhaps the explanation for this is to be found in the fact that when the legislation was both proposed and enacted there was no proper assessment of the merits of the parole system. The Policy Letter of 1986 does touch on the principles behind parole, but the driving force in introducing the legislation appears to have been to remove the unfairness of having different parole regimes in England and in Guernsey, when in effect prisoners could be interchanged between the two jurisdictions to serve their sentences. The total lack of statutory guidance to the PRC as to how it was to discharge their functions did not entirely pass the States by.

The birth of the PRC

9. We have to move on to Resolution of the States of February 1991 Billet d'Etat V, Article XI. In its report to the States of Deliberation the then Advisory and Finance Committee recorded that that Law had been brought into force and that parole was a new concept in Guernsey. It proposed that Mr. Stuart Bampton be appointed as the first Chairman of the PRC. At the outset of this hearing, as part of the disclosure exercise adopted following McGonnell v. U.K. [ECHR] 2000 and contemplated further in the recent decision of Davidson v. Scottish Ministers, I indicated that I was Procureur from 1982 to 1992 and had been involved with the drafting of the original legislation. I further distinctly recall discussing the appointment of Mr. Bampton as the first Chairman of PRC. He was well known in Guernsey because he had just retired as the head of the Home Office Department responsible for relations with the islands and fortuitously he had in his earlier career served for a time as Secretary to the Parole Board. Again nothing was said in the February 1991 Report about the criteria for grant of parole.

10. A typically Guernsey solution was adopted of bringing somebody in from outside who knew something about the matter in hand and leaving it to him to develop the system using his expertise but without any particular local input or guidance.

The workings of the PRC

11. In the early days Parole was according to the records sparingly granted. Things moved on. It will be noted from the Law of 1989 that it was the function of the Prison Board (as predecessors to the present Home Department) to refer cases to the PRC for review, and it appears that in the beginning that not all prisoners were referred. I am told today that, as a matter of practice, all but exceptional cases are referred to the PRC for review at the earliest review date. This avoids any criticism that the Home Department is being discriminatory against a particular prisoner and, obviously, as it is officers of the Home Department who run the Prison they may not want to engender friction with prisoners by appearing not to put forward promptly cases for parole and further, not with good reason speaking favourably of the progress made in prison.

12. The PRC therefore seems to have a different type of task facing it to what was originally conceived. It is now faced with a situation where every prisoner is put up for parole at the earliest opportunity and the PRC without any formal mandate as to how it is to discharge its duties decide whether or not he should be released. It is hardly surprising therefore in this complete vacuum that some officer of the PRC decides to look up what is going on in England. The position is clearly set out in paragraph 2 of Mr. Ozanne's affidavit which reads as follows (I am quoting from the Webster affidavit although it is not materially different from that filed in reply to Mr. Singleton's application):-

> "As mentioned in paragraph 8 of the Applicant's Cause, the PRC conducted a review of the legislation under which it operates and its practices and forwarded it to the then President of the Advisory and Finance Committee under cover of my letter of 28th May, 2003, intending the Report of the review to be published in a Billet d'Etat, which it then was, as set out in paragraph 8 of the Cause. The PRC has also adopted as best practice the content of the Probation Circular 42/2003, a copy of which is produced and shown to me marked "DJO1". The PRC attempts to keep abreast of developments in the law and practice relating to making parole decisions as and when recommendations are made by prison and probation authorities in the United Kingdom. In this way its decision-making is broadly consistent with that of other jurisdictions insofar as there is a comparable position in Guernsey. The principal task for the PRC is the assessment of risk, which in turn involves balancing the risk of re-offending with the benefit to the prisoner and to the public of early release back into the community."

13. Interestingly, Mr. Ozanne does not make any reference to the guidance given by the Secretary of State for the Home Department to the Parole Board but he does make reference to Probation Circular 42/2003, the significance of which I really do not understand save that it the perhaps helps to justify the Committee's decision in this particular case. I do not see how the PRC can even if it feels that it can look to what the Home Secretary is advising the Parole Board in England, take upon itself to be guided by a Home Office circular to a totally different Department namely the Probation Service in England under a document which is essentially

dealing with recall of prisoners who are on licence. As I have indicated the only significance of referring to this seems to me the reference to risk levels by consuming alcohol in paragraph 36 thereof, which I will come on to later.

14. I can see the logic in looking over one's shoulder at the English system in the early days of the parole review system when the paramount consideration was avoiding unfairness between prisoners who were transferred from Guernsey to England and vice versa to serve their sentences. However in my judgment it was totally unsound to try and borrow from the guidance given in England when reaching decisions for early release in Guernsey, such decisions being based on considerations other than maintaining consistency, without having any statutory authority for adopting that guidance.

The present English position

15. Worst still, what nobody in Guernsey appears to have taken onboard, is the fact that in England parole for persons serving sentences of less than four years has been abolished. Instead such persons are released automatically after serving one-half of their sentence. Parole is reserved for cases involving longer sentences and more particularly for cases involving persons who are given longer than normal sentences or indeterminate sentences because the sentencer has taken the view that they present a special risk to the community. [By coincidence since the hearing, whilst presiding over the States of Deliberation, I have become aware of a further piece of proposed new legislation in the Projet de Loi entitled "The Criminal Justice (Supervision of Offenders) (Bailiwick of Guernsey) Law, 2004", which deals with supervision of offenders and for the introduction of extended supervision of violent and sexual offenders. This Projet contemplates an enhanced role for the Parole Board in these kinds of cases.]

16. We therefore have the opposite to what happened in the 1980s, namely that if people are transferred to England they are eligible for parole after half their sentence has been served and that is automatic whereas in Guernsey they become eligible for consideration for parole after only one-third of their sentence has been served.

17. I have deliberately not looked at the records which H.M. Greffier holds relating to prisoners who have been granted parole but it seems from the whole line presented by Mr. McMahon who represents H.M. Procureur in this case that prisoners are regularly being released after only having served one-third of their sentence. He makes the point that these people are still subject to licence and have got to behave, but to the average prisoner imprisonment is all about being locked up and the consequent loss of one's liberty. The risk of losing it again is ever present particularly with the vulnerable and damaged and whilst there may be certain supervisory requirements of the parole period and certain commendable protections put in

place to try and obviate immediate re-offending the vast majority of members of the public and, I would suggest, prisoners would regard the sentence having been served and the debt paid to society the moment the prison gates are first opened.

18. As I have indicated it appears we now have a situation where in Guernsey prisoners may be paroled after having served only one-third of their sentence whereas in England there is no right to be released until one-half has been served in the case of prisoners who are sentenced to less than four years. I confess I am not clear about those who have been sentenced to a term of more than four years but who do not fall into the special provisions relating to sexual and violent offenders.

19. I find it strange that no one picked up this change in the English Law when the Advisory and Finance Committee presented the audit report on the PRC to the States in 2003. I would however accept that the PRC is a quasi-judicial non-political body engaged in an exercise of applying the Law and it cannot be criticised for acting in a reactive way in its approach to its duties. What I do find quite extraordinary is neither Her Majesty's Procureur nor senior staff of the Advisory and Finance Committee which was responsible for putting forward the PRC's report, on what is alleged to be a human rights audit of its activities, did not pick this matter up and report properly to the States.

20. Mr. McMahon says in his submissions that no human rights issue is engaged in this case. With respect to the Crown Advocate, I do not agree. I consider that for any public body to have the right to decide between a person's liberty and their incarceration without having any proper statutory guidance or basis for making a decision in that regard does engage issues of human rights. However, I bow to Mr. McMahon's views and accept in any event that the human rights law is not in force.

Conclusions

21. However, I must come back to these two unfortunate applicants. They complain that that Committee has acted irrationally and perversely in the Wednesbury sense (Wednesbury Corporation v. Associated Picture Theatres Limited [1946]) by hesitating from granting them parole at the first review date. I revert to the affidavit of Mr. Ozanne (again I quote from the response to Mr. Webster's application).

> "10. The PRC noted that the Applicant's application for parole was supported by the persons mentioned in paragraph 10(e) of the Cause. This was expressly recognised in the notification sent. However, each of those recommending release on licence qualified their recommendation by commenting about the Applicant's potential difficulties on release, his vulnerability and the level of risk of him re-offending.
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> 11. Accordingly, despite the recommendations, as the PRC is an independent body charged with a duty to protect the public, it has to weigh all the factors relevant to

> taking a decision on an application for parole. The PRC's task is to determine whether, and if so at what level, there is a risk of re-offending or of the prisoner behaving in a manner that would or could undermine the purposes of supervision whilst on licence. It should be remembered that the time spent on release on licence is time that would otherwise be spent in prison as part of the sentence imposed by the Court. The PRC conscientiously took into account all the information placed before it and decided that the factors against granting the Applicant's application at the earliest time of his eligibility for parole still outweighed the positive aspects of his response whilst in Prison."

22. I further have to say in the case of Mr. Webster I am not very impressed with paragraph 5 of the affidavit relating to the affray charge, which seems to have been nothing more than a domestic disorderly. Be that as it may the crux of Mr. Ozanne's reasoning is to be found in paragraph 7 of his affidavit where, in my view, mistakenly, he relies on guidance given in the probation circular, which I consider to be of no application in Guernsey. However, he is worried that this applicant and his fellow applicant, Mr. Singleton are likely to re-offend because they are addicted to alcohol and in the case of Mr. Singleton perhaps also drugs. The nub of Mr. Ozanne's affidavit is that PRC applying its own adopted criteria, has come to the conclusion that there is a real risk of these being two men re-offending on their release.

23. In passing I have noted a further issue identified by Mr. Ozanne in the exercise of his Committee's discretion that of "being charged with a duty to protect the public". Again this duty is one that the PRC has selected for itself. I cannot find any reference to it in the legislation. Anyway the long and short of all this is that the PRC takes the view that the Applicants should serve a further six months before being considered for parole.

24. Is that a decision that is so unreasonable when taken in isolation? I have carefully read again all the papers relating to these two applicants. They have clearly been chastened by having been convicted and imprisoned for what Guernsey regards as a serious offence of drug smuggling. As is not unusual with offenders who do not have grave personality or behavioural problems when they are removed from the temptations and distractions of the world outside, they have knuckled down to life as prisoners, albeit that they have only been sentenced prisoners since March of this year. It is further clear that there is no complaint about the way in which they have served their sentences. I cannot accept that this is, as the Applicants seem to suggest, the sole issue with which the PRC is to concern itself.

25. In my judgment the PRC must be allowed greater discretion. It regards these two gentlemen as vulnerable and at serious risk from re-offending. Although I personally have found the whole structure under which the PRC operates open to question for the reasons that I have ventilated herein, at the end of the day I cannot say that the PRC which is acting in good faith, doing its best to consider applications for parole, has acted unreasonably in the Wednesbury sense by saying to these two Applicants that notwithstanding the progress made in prison, it

still has serious reservations as to whether they are ready to enjoy the privilege of early release from Prison, to enable them to return successfully to the communities from which they have come. It is for that reason that I announced, at the end of the hearing before me, my decision that the applications would fail. I do accept that if I were to decide otherwise it would mean that by a stroke of the judicial pen the Parole Board would be faced with the situation of giving automatically parole to all persons who have served one-third of their sentence, unless the strongest of reasons for their further incarceration were put forward. I do not believe that is what the States intended when it introduced the parole system however imperfectly it achieved its object.

26. My judgment therefore must be taken away by the Home Department, not the PRC because it is not principally to blame for the state of affairs, which has been exposed in this judgment. In a criminal justice system that must be kept as lean and efficient in the use of resources as possible, it seems to me that England has for once got it right by removing from the parole system cases involving sentences of less than four years. This view is reinforced in the light of the increased level of post release supervision of all offenders that is shortly to be introduced by the new Law referred to in paragraph 15. There is also the issue of consistency. The Royal Court which is the only sentencing body whose decisions form the subject matter of parole applications agonises over the appropriate length of sentence in every case in a struggle not only to be fair but also consistent. This is particularly relevant in cases involving the importation and supply of drugs which provide the majority of cases coming before the Royal Court. The Court of Appeal robustly reviews the conclusions of the Royal Court as reflected in the presiding judge's carefully drafted sentencing remarks and does not hesitate from adjusting sentences imposed below as appropriate. There is an unfairness if after that process has been gone through another body with no particular expertise in the area of criminal sentencing is by exercise of the parole discretion is empowered to introduce a further review of the time to be served by a particular offender. It also seems illogical to limit the automatic release provisions to sentences of less than four years. There is no procedure in Guernsey for separating out cases where sentences of four years and less are called for from those where longer periods of imprisonment are appropriate. Whether in the event of keeping parole solely for cases involving extended sentences or periods of supervision, the PRC would still have a future to deal with the relatively few cases of persons sentenced to extended sentences is a matter for political decision.