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IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

[2020] EWHC 433 (Admin)



No. CO/335/2020

Royal Courts of Justice

Tuesday, 4 February 2020

Before:

LORD JUSTICE DINGEMANS

MR JUSTICE FORDHAM

B E T W E E N :

THE QUEEN
ON THE APPLICATION OF
MARIE MCCOURT

Claimant

- and -

PAROLE BOARD FOR
ENGLAND AND WALES

Defendant

- and -

(1) SECRETARY OF STATE FOR JUSTICE

(2) IAN SIMMS

Interested Parties

MR J. THACKER (instructed by Thompsons Solicitors) appeared on behalf of the Applicant.

MR N. CHAPMAN (instructed by the Government Legal Department) appeared on behalf of the Respondent.

MR J. POBJOY (instructed by the Government Legal Department) appeared on behalf of the First Interested Party.

MS J. CECIL (instructed by Tuckers Solicitors) appeared on behalf of the Second Interested Party

J U D G M E N T

LORD JUSTICE DINGEMANS:

- 1 This is the hearing of an urgent application made on 30 January 2020 by the claimant Marie McCourt, who I refer to as Mrs McCourt, for a stay of the release on licence and conditions of the second interested party, Ian Simms, who I will refer to as Mr Simms. The latest information suggests that this licensed release is due to take place sometime later today, and it is now 15.50 hours. Mrs McCourt also seeks disclosure of relevant documents relating to the Parole Board decisions and reconsideration and case management directions.
- 2 The defendant is the Parole Board and they have appeared to deal with issues relating to disclosure of the documents. The first interested party is the Secretary of State for Justice, and he has adopted a neutral stance following the rejection of his request for reconsideration of the Parole Board's initial decision to direct the release of Mr Simms. He has been represented before us in this matter in case the Court required assistance with any issues relating to case management.
- 3 I should make clear at the outset that we are not considering whether to grant permission to apply for judicial review. This is because Mr Simms, who is also represented before us, has not yet had an opportunity to respond to the statement of facts and grounds lodged on behalf of Mrs McCourt. This application has been case managed by Supperstone J, who made various orders leading to this short hearing today.
- 4 The relevant factual background is that Mrs McCourt was the mother of Helen McCourt, who I will refer to as Helen, who was aged 22 on 9 February 1988. On that day, Mr Simms murdered Helen and disposed of her body in a location which has, despite extensive searches by the police and by Mrs McCourt's family and friends, never been discovered. The evidence shows that Mrs McCourt's principal interest is to recover Helen's body and provide her with a Christian burial.
- 5 Mr Simms was convicted of Helen's murder on 14 March 1989 following a trial at Liverpool Crown Court. Mr Simms was sentenced to a mandatory sentence of life imprisonment, and he was ordered to serve a minimum of 16 years, less time spent on remand, before the Parole Board would consider whether he should be released. Mr Simms, who was aged 32 years at the time of the offence, is now aged 63 years. He has, in fact, served over 30 years of imprisonment and, in 2016, he was transferred to an open prison and he has, on occasions, been released on temporary licence and on conditions with which he has complied.
- 6 On 21 November 2019 the Parole Board, in what was their sixth or seventh consideration of his case and, following a hearing at which the Board considered a 693 page dossier of information on Mr Simms, recommended his release on licence. Mrs McCourt makes complaints that she was not given adequate notice of the hearing, had to prepare her victim personal statement in a short period of time, was not given access to the dossier, and had restrictions placed on what could be reported to her by her counsel, who had observer status at the hearing. At the hearing, Mrs McCourt read her victim personal statement and her counsel appeared with observer status having given the various undertakings.
- 7 Following the decision of the Parole Board after the hearing on 21 November 2019, the first interested party, the Secretary of State for Justice, made an application for the decision to be reconsidered. Mr and Mrs McCourt also made an application for the decision to be reconsidered, and the Parole Board reconsidered the decision dated 21 November 2019 and, by a decision dated 8 January 2020, the reconsideration assessment panel at the Parole Board rejected the reconsideration and upheld the original decision dated 21 November

2019. This meant that the Secretary of State became subject to a statutory duty to release Mr Simms. Mrs McCourt was notified of the decision by letter dated 8 January 2020 but was also told that Mr Simms would only be released once all the elements of a robust release plan were in place.

- 8 It is apparent, therefore, that Mr Simms will absent an order from this Court be released on licence and will be, among other restrictions, subjected to a requirement to reside at a specified address, subject to a curfew, required to report on a daily basis, required to wear an electronic tag, and prevented from making contact with Mrs McCourt's family. He will also be subjected to MAPPA Level 3 monitoring.

The grounds of challenge

- 9 It is apparent from the statement of facts and grounds that Mrs McCourt complains, first, that the procedure adopted leading to the Parole Board hearing was flawed because of the reasons set out earlier and, secondly, that the decisions was *Wednesbury* unreasonable, so that the decision should be quashed and set aside.

Relevant legal principles relating to the stay

- 10 It is permissible to grant a stay preventing the release of a prisoner, see *R (DSD & Anor) v The Parole Board of England and Wales* [2018] EWHC 694 (Admin), 2019 QB 285, which concerned John Worboys, a licensed taxi driver in London who had committed serious sexual offences. The power to grant a stay is set out in the Civil Procedure Rules part 54.10(2) which provides a power to the Court to stay a decision so that the process can be challenged, see *R v Secretary of State for Education and Science, ex parte Avon County Council* [1991] 1 QB 558.
- 11 It is right that a stay is not an injunction but, in this case, a stay would have the effect of preventing the release on licence and subject to conditions of Mr Simms in the way that an injunction would. We therefore consider it right, in the absence of full argument on the powers of this court to interfere on an interim basis with the statutory duty on the Secretary of State to release Mr Simms, to approach this application by applying the relevant principles for the grant of an injunction, see the **White Book** at 54.10.4 and *R v Her Majesty's Inspectorate of Pollution, ex parte Greenpeace* (1) [1994] 1 WLR 570. Indeed, it became common ground in argument that this was the proper approach to take.
- 12 The principles governing the grant of interim stays or interim injunctions to restrain a public authority from acting in a way which is contended to be unlawful was considered by the Privy Council in *BACONGO v The Department of the Environment of Belize* [2004] 1 WLR 2839 where Lord Walker, giving the judgment of the board, noted at para.35 that the Court should approach the matter in accordance with the approach set out in *American Cyanamid v Ethicon* [1975] AC 396 as modified by the public law element of the case, which is a special factor.
- 13 This approach has been followed in other cases, see the judgment of Sir John Thomas, President of the Queen's Bench Division, in *Ismail v Secretary of State for Defence* [2013] EWHC 3032, [2014] ACD 34 at para.21 and para.22, and *R (FD) v X Metropolitan Borough Council* [2019] EWHC 3481 (Admin) para.21 to para.25.

- 14 We are therefore required to consider the matter on the balance of convenience, and to consider:
- i. whether there is a serious issue to be tried;
 - ii. whether damages would be an adequate remedy for Mrs McCourt;
 - iii. whether damages would be an adequate remedy for Mr Simms;
 - iv. where the balance of convenience lies.
- 15 Special factors can be taken into account in individual cases. In public law cases, it is appropriate to take into account the wider public interest. In this case, it is also relevant to take into account that this is a decision which involves issues of release from detention.
- 16 Mr Thacker submitted that the substantive application is based on risk to the public. He submitted that if Mr Simms is released pending a determination then Mr Simms will be at large, and he submitted that the *status quo* in this case was to maintain imprisonment. He submitted that Mr Simms' risk was unknown because he had not addressed his behaviour.
- 17 Ms Cecil, appearing on behalf of Mr Simms, submitted that Mr Simms had already been released on temporary licence and that the risk had been managed and all risks had been adequately monitored. Ms Cecil submitted that the *status quo* was to leave the decision of the Parole Board undisturbed so that Her Majesty's Prison and Probation Service could carry out their statutory duty to release Mr Simms.
- 18 In this case it is clear that, as far as the merits of a serious issue to be tried are concerned, we are not in a position to make any proper assessment. Both parties agreed with that approach, and therefore we approach this on the basis that there is a serious issue to be tried. This will need to be determined when the judge, deciding whether to grant permission, addresses the merits. So far as damages are concerned, it is perfectly plain that damages would not be an adequate remedy for either party. So far as Mrs McCourt is concerned, she believes that, if released, Mr Simms will never disclose the location of Helen's body, although it is fair to point out that the Parole Board, relying on expert psychologists, considered that Mr Simms will never disclose the location of Helen's body even if he is never released.
- 19 So far as Mr Simms is concerned, if he is detained because the Court stays his release, he will continue to be imprisoned without any remedy if the claim is ultimately dismissed.
- 20 Each case must be determined on its own facts. We accept that there are some apparent similarities with *DSD* involving, as it does, the case of a release of a prisoner following a consideration by the Parole Board, but there are also obvious differences. *DSD* concerned different offences, different periods of imprisonment, and a different path through the prison estate, and different matters which were not taken into account by the Parole Board. In this case we take particular account of the fact that, if Mrs McCourt succeeds in this claim and we express no views on the merits for the reasons given above, then, subject to remedy, a potential remedy is that Mr Simms can be recalled to prison and, indeed, he, like any prisoner released on licence, is always subject to recall. We also take account of the fact that, if the claim for judicial review fails or if no relief is granted, a lawful release of Mr Simms will not have been implemented.
- 21 As indicated above, each case will turn on its own facts and circumstances. The release on licence and subject to conditions which, it might be noted, includes a curfew and a tag in

this case, is a matter to be considered. We take account of the fact that Mr Simms has already been released on temporary licence subject to conditions with which he has complied and returned to custody. Doing the best we can on the material that is before us in the time that is available to us, and reflecting the public interest, we consider that the least worst option in this case is to refuse a stay and therefore not interfere with the release which will take place pursuant to statute.

- 22 I turn now to consider the issues of disclosure. Mrs McCourt sought disclosure of various documents. The Parole Board, in their submissions, appended a draft order which provided for the release of documents subject to conditions to ensure that matters of sensitivity were protected. So far as Mrs McCourt was concerned, she also sought additionally to refer to counsel's notes and to have those disclosed to the Court, and a transcript of the hearing, and the Parole Board also agreed. The Secretary of State made no active submissions in this respect but the application was resisted on behalf of the second interested party, Mr Simms, who submitted that disclosure should not become routine in cases of this sort, stating it would be unfortunate if the delicate balance set by the new rules was upset by permitting the disclosure of documents just because a claim for judicial review was granted.
- 23 Rather like our decision in relation to the issue of a stay or interim injunction, each case must be approached on its own facts. We are not laying down any general rule that disclosure ought to be given whenever there is a challenge to a decision of the Parole Board. However we take into particular account the fact that the defendant, the Parole Board, has to have regard to its duties of candour and has proposed this draft order, and we consider that disclosure is necessary in the public law sense for the purposes of this claim, and we will therefore direct that disclosure be given on the terms of the draft order as modified to include counsel's notes and the transcript of the hearing, subject to same protective provisions.
- 24 I turn finally to the issue of case management. It is apparent that, following the further disclosure, the claimant will need to amend her statement of facts and grounds to rely on any material which she considers assists her public law challenge to the defendant's decision, and thereafter the defendant and the interested parties should, if so advised, have permission to put in summary grounds of response. The matter can then be referred on the papers to the judge to decide whether to grant permission to apply for judicial review and to deal with other case management directions, including issues of expedition. We have also been told that, if permission is granted, there will be an application for a cost-capping order and, no doubt, submissions can also be provided for that by the single judge.
- 25 The only thing that now requires to be dealt with is a timetable dealt with and for someone at the Bar, and I should record I am very grateful to all appearing this afternoon for their assistance, to volunteer to produce the order.
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CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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This transcript has been approved by the Judge