Neutral Citation Number: [2018] EWHC 2089 (Admin)

Case No: CO/2461/2018

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/08/2018

Before :

MR JUSTICE MOSTYN

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Between :

The Queen on the application of PAUL WAKENSHAW	**Claimant**
- and –	
SECRETARY OF STATE FOR JUSTICE	**Defendant**
- and –	
PAROLE BOARD OF ENGLAND AND WALES	**Interested Party**

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Matthew Stanbury (instructed by **Swain & Co**) for the **Claimant**
Kate Gallafent QC & Jason Pobjoy (instructed by **GLD**) for the **Defendant**
Tom Cross (instructed by **GLD**) for the **Interested Party**

Hearing date: 26 July 2018

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Approved Judgment

Mr Justice Mostyn:

1. The claimant has a long record of criminal offending. On 23 October 2009 he received an indeterminate sentence of imprisonment for public protection. He has served the minimum term stipulated within his sentence. His continued detention is periodically reviewed by the Parole Board to determine his suitability for release. In these judicial review proceedings he claims that the Parole Board lacks the requisite independence under the common law and article 5(4) of the European Convention on Human Rights. In fact, he does not seek to prevent his current review going ahead; indeed he expressly says he wishes it to. His claim is more fundamental: it is that he cannot receive a fair trial at the hands of this quasi-judicial body for various reasons. The substantive relief that he seeks is a declaration that the Board is not an objectively fair adjudicative body. However, he seeks interim relief going wider than this substantive relief. He seeks an interim order from me that would halt the selection process of a new Chair of the Board.

2. I indicated at the conclusion of the hearing that the application for such an interim order would be refused, for reasons to be given by me in writing, together with my written decision on the claimant's application for permission to seek judicial review. This judgment gives those reasons and that decision.

3. The catalyst for this claim was the abrupt resignation of the previous Chair of the Board, Professor Nick Hardwick, on 27 March 2018 following a meeting between him and the Secretary of State for Justice, in the wake of the Worboys controversy. That controversy is fully described in the decision of the Divisional Court in *R (DSD and others) v the Parole Board for England and Wales and others* [2018] EWHC 694 (Admin). The facts are well-known, and I do not need to repeat them here.

4. The independence of the Parole Board has been previously challenged in judicial review proceedings. See the decisions of the Divisional Court and the Court of Appeal in *R (Brooke and another) v Parole Board (and another)* at respectively [2007] HRLR 1239 and [2008] 1 WLR 1950. Certain criticisms were made in those proceedings about the constitution of the Board and of its works. It is the claimant's case that the steps since taken (or to be taken) have not cured (or will not cure) the problems that were identified by the court.

5. There is no dispute about the law. Not only must the procedures of a judicial body be actually fair but to the reasonable observer they must appear to be fair: see para 20 of the Court of Appeal judgment in *Brooke* where Lord Phillips of Worth Matravers CJ stated "a court must be and be seen to be both independent and impartial." This is the standard of objective independence.

6. The grounds now relied on by the claimant (some originally pleaded have fallen away) are as follows:

    a) The Parole Board remains sponsored by the Ministry of Justice. As the Ministry is an invariable party to proceedings before the Board, it cannot be said that there is an appearance of fairness where the Ministry sponsors the Board.

    b) The process of appointment to the Board is flawed.

    c) Tenure once appointed is too short and too precarious.

d) The power of the Secretary of State to give directions to the Board impugns its independence.

7. I can deal with (a), (b) and (d) quite briefly as I am satisfied that there is no merit in these points.

8. So far as sponsorship by the Ministry is concerned the Court of Appeal in *Brooke* stated that that of itself did not impugn the independence of the Board: see paras 70, 92 and 97. The sole concern in that case was that the sponsor of the Parole Board was also the head (in effect) of the National Offender Management Service (NOMS). In para 97 the Court of Appeal stated that "the fact that the Board has to work closely with NOMS requires that it should be manifestly independent of NOMS". That impugned congruence is now no longer the case and the Board now is manifestly independent of NOMS. The sole problem having been resolved I am clear that it cannot properly be re-argued that by virtue of the fact of sponsorship alone the independence of the Board is impugned.

9. The appointments process, whether of members of the Board or its Chair, is described with clarity in the witness statement of Margaret Garrett who is the head of the Ministry of Justice's public appointments team. The process is very familiar. Under Schedule 19 of the Criminal Justice Act 2003 the Secretary of State is required to appoint the members, including the Chair, of the Board. What now happens is that for the appointment of the Chair there is constituted an advisory assessment panel comprising a senior official, a High Court judge and two independent members. For other applicants the advisory panel comprises a departmental official and an independent member. Applications are sifted on paper by the panel. Those who survive the sift are interviewed. Following the interviews, the pool is reduced to to a handful who are presented to the Minister for his choice. The Minister has to be given a choice; this would suggest that he cannot be presented with a single candidate, although this is, surprisingly, possible. The Minister is permitted to meet any candidate before or after the interview by the panel. The Minister is allowed to reject the appointable candidates put up to him for his choice and to appoint someone else but were he to do so he must consult the Commissioner for Public Appointments and must justify that decision publicly. That power has never been exercised for any appointment to the Parole Board[1]. After the Minister has made his decision the successful candidate may be invited to attend the House of Commons Justice Select Committee.

10. Plainly, given that Parliament has mandated that the Secretary of State must make the appointment, this process is actually abundantly fair and impartial, and would be seen by the reasonable observer to be as such. As the Divisional Court said in *Brooke* at para 33 the appointment arrangements "are quite consistent with objective independence".

11. I turn to the question of directions given to the Board by the Secretary of State pursuant to section 239(6) Criminal Justice Act 2003. This gives the Secretary of State the power

1. Professor Hardwick was appointed Chair in March 2016. He was a non-judicial Chair. His predecessors Sir David Calvert-Smith and Sir David Latham were appointed respectively in 2012 and 2009 immediately following their retirement from the High Court bench. The appointment procedure then in force was that a judicial Chair was nominated by the Lord Chief Justice, and then confirmed by the Secretary of State.

to give the Board directions as to the matters to be taken into account by it in discharging its functions. In giving any such directions the Secretary of State must have regard to the need to protect the public from serious harm from offenders and the desirability of preventing the commission by them of further offences and of securing their rehabilitation. In the Court of Appeal in *Brooke* it was held at para 55 that such directions would be legitimate provided that they were "legally relevant". In this case, the claimant takes issue with the directions issued by the Secretary of State in April 2015 as to how the Parole Board should consider a prisoner's suitability for open conditions. This question is in fact reserved to the Secretary of State, and is not a matter for the Parole Board directly. However, the Secretary of State is entitled pursuant to section 239(3) of the 2003 Act to seek the advice of the Parole Board, and in that event it is the duty of the Board to give its advice. The April 2015 direction provide guidance about the factors which the Secretary of State wants the Board to focus on when formulating its advice. It is important to emphasise that here the Board acts as an adviser. It is not "an independent court" making the relevant decision, and it is here that a fallacy creeps into the claimant's case, for at para 87 of its statement of facts and grounds it states: "it must be for the Board, as the independent court, to determine whether and to what extent a period of open conditions is necessary in preference to release". The Board is not however operating as an independent court when giving its advice. Further, in my judgment the April 2015 directions do not give an impermissible steer to the Board as to how it should formulate its advice.

12. I turn to issue (c), namely the question of tenure.

13. In the last recruitment exercise in 2016 some new members were appointed for a tenure of three years and some were appointed for four years. A number of existing members were reappointed as part of the open recruitment process, also for three or four years. At the same time certain judicial members were appointed by the Minister; their tenure seems to have been open ended.

14. Members hold their position "during good behaviour". In *Brooke* the term of appointment was for three years, renewable for three years. The terms of appointment then in place provided that the Secretary of State could terminate the appointment if he was satisfied that the member has:

    a) failed satisfactorily to perform his/her duties; or

    b) become for any reason incapable of carrying out his/her duties; or

    c) been convicted of any criminal offence; or

    d) conducted himself/herself in such a way that it is not fitting that he/she should remain a member; or

    e) acted in contravention of the Board's code of conduct.

15. At para 42 the Divisional Court held that the relatively short term of appointment (i.e. three years renewable for a further three years) coupled with the power to remove where the Secretary of State was satisfied that the member has failed satisfactorily to perform his/her duties without any procedure for determination of the merits meant that for that reason alone the provisions for tenure failed the test for objective independence.

16. I was shown during the hearing the appointment letter for Professor Hardwick dated 26 January 2016. Those terms of appointment say that the Secretary of State may remove the Chair from office if he is satisfied that he:

    a) has failed without reasonable excuse to discharge the functions of his or her office for a continuous period of at least three months; or

    b) has been convicted of an offence; or

    c) is an undischarged bankrupt; or

    d) is otherwise unfit to hold his office or unable to discharge its functions.

    Although I was told at the hearing that these revised terms were generic and would have applied to the appointment of all panel members, subsequent investigations have shown that this is not the case. Remarkably, the terms of appointment have remained exactly as they were at the time of the *Brooke* case (see para 14 above), and which were a key reason leading to the declaration that those provisions for tenure failed the test for objective independence. I was told that the failure to amend the terms was an "oversight" and that:

    > "… the Ministry of Justice will, as a matter of urgency, consider with the Parole Board whether (a) the terms of appointment for all current Parole Board Members should be amended, so that they reflect the terms of appointment for the previous and forthcoming Parole Board Chair; and (b) ensure that the terms of all future appointments reflect the terms of appointment for the Parole Board Chairs."

17. Plainly, those unamended terms fall foul of the declaration made in the *Brooke* case. I will render my judgment on the footing that the "new" terms are in fact in place or very shortly will be.

18. I was told that if a member were removed from office there would be some kind of internal review of the decision made available, although I was not given any details or shown any documents at the hearing. Following the hearing I was given a copy of the Parole Board's complaints procedure. This is aimed at people who deal with the Parole Board who are dissatisfied with non-judicial decisions made by it. It provides for a complaint to be considered initially by a complaints officer and, if dissatisfaction remains, for the response to be considered by a senior reviewer who is an independent, non-executive member of the Board's management committee. The procedure is not easily to be construed as supplying a means of redress when a member is removed by the Secretary of State.

19. Certainly, there is no formal machinery in place for the merits of a removal decision to be challenged in an independent and impartial forum. It would seem that the only recourse to justice in such circumstances given to an aggrieved member removed from office would be to commence judicial review proceedings. Plainly, recourse to an

employment tribunal would not be possible as the appointment is not governed by an employment contract.

20. Before me Ms Gallafent QC argues that the objectionable discharge provision (see para 14(a) above) has now gone (or is going), so the problem identified by the Divisional Court no longer applies. However, Mr Stanbury argues that this is merely a semantic distinction. The exact words may have gone (or be going) but the power is virtually the same under the new terms of appointment which allow the Secretary of State to remove a member if he is satisfied that he or she has failed without reasonable excuse to discharge the functions of his or her office for a continuous period of at least three months (see para 16(a) above) or is unable to discharge the functions of the office (see para 16(d) above).

21. I agree with Mr Stanbury. In my judgment, the relatively short period of appointment (three or four years, renewable for three or four years) coupled with the power of the Secretary of State to remove a member if he is satisfied that he or she has failed without reasonable excuse to discharge the functions of his or her office for a continuous period of at least three months, or is unable to discharge the functions of the office, without recourse to any procedure or machinery to determine the merit, or otherwise, of a decision to remove him or her on one or other of these grounds, means that in this regard the provisions for tenure continue to fail the test of objective independence. I think that the reasonable, albeit well-informed, observer could conclude that the short term of appointment, coupled with the precarious nature of the tenure, might wrongly influence a decision that had to be made.

22. An insight into the precarious nature of the tenure is given by the resignation of Professor Hardwick as Chair of the Board on 27 March 2018. Professor Hardwick was not removed pursuant to the terms of his appointment; he resigned. However, it is said by the claimant that Professor Hardwick was coerced by the Secretary of State into resigning; and, indeed, Professor Hardwick says as much in a statement made by him on 20 June 2018. This was, it is suggested, a plain case of constructive dismissal.

23. In his statement Professor Hardwick explains that on 27 March 2018 an advance copy of the judgment of the Divisional Court was received by the parties. He goes on to say:

> "30. The Justice Secretary asked to see me at about 4.30 that afternoon. The meeting lasted about 15 or 20 minutes. I met him on my own. He was accompanied by one other person I did not recognise. The Justice Secretary told me he thought my position was untenable. I told him I did not think it was. We discussed this for a few minutes. I was not clear why he reached that conclusion. I told him I thought it was his job to protect judicial decision-making. He told me twice that he did not want to get "macho" with me. I am certain he used that precise word twice and I remember it because I thought it was an odd phrase to use. I understood it to be a clear threat.
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> 31. I was quite clear I did not have an option to remain as Chair of the Parole Board although I wanted to do so and so I agreed to resign. We discussed how any announcement should be made. He suggested I should explain I have volunteered to resign. I said

> I wanted to make it clear I had not resigned voluntarily and that I believed I was still capable of leading the Parole Board.
>
> 32. I returned to the Parole Board office, drafted a resignation letter and sent it to the Justice Secretary that evening. I did not seek or receive any financial settlement."

24. The accuracy of that statement has not been disputed before me.

25. In his resignation letter Professor Hardwick stated: "you told me that you thought my position was untenable."

26. On Sunday, 22 April 2018 the Secretary of State appeared on the Andrew Marr show, on that occasion hosted by Nick Robinson. I have a transcript of the discussion. Part of it reads as follows:

> "[Nick Robinson]: But you effectively sacked the guy who was the head of the Parole Board, Nick Hardwick, he said, 'I did not resign willingly, I resigned because the Justice Secretary' – you – 'said I had no choice.' So once again officials pay the price.
>
> [The Secretary of State]: Well, I think in that case what Worboys has revealed is although there were many good things that were going on at the Parole Board there were a number of problems, and that requires a more fundamental review of the Parole Board rules and my belief was that required new leadership in the Parole Board."

It can be seen that, if not explicitly then certainly implicitly, the Secretary of State accepted that he had "effectively sacked" the Chair of the Parole Board.

27. It is important to recognise that while the role of the Chair of the Parole Board is largely one of leadership, the occupant of the office still has significant judicial functions. Further, it would not be appropriate to consider the role and status of the Chair separately from the role and status of other members of the Board. All the members of the Board, including the Chair, are members of a quasi-judicial body in respect of which there must be complete objective independence. Nothing in the *Brooke* decision justifies any distinction being drawn in respect of the Chair on the one hand, and the other members on the other.

28. There is nothing new about executive interference in the tenure of judges. I give two historical examples. From the earliest patents down to the Long Parliament in 1641 tenure of the judges of the King's Bench and Common Pleas was always at the King's pleasure: "*quamdiu nobis placuerit*"[2]. However, that was not the case in respect of the Barons of the Exchequer. From the time of the Tudor period they were granted during good behaviour: "*quamdiu se bene gesserint*". In 1628 Charles I became dissatisfied with the judgment of the Chief Baron, Sir John Walter, in the case of the Parliamentarians imprisoned for seditious speeches in Parliament and ordered him to surrender his patent. He refused to do so, on the ground that his grant was for good

[2] On 15 January 1641 Charles I "condescended" to a petition from the Long Parliament praying that, for all judges, tenure during good behaviour be substituted for that during pleasure.

behaviour and that he should not be removed without a proceeding on a writ of *scire facias* (a predecessor of the modern remedy of judicial review) to determine whether he did *bene se gerere* or not. Charles I did not want to risk a trial and therefore allowed Baron Walter to retain his office and his revenues as Chief Baron until his death about a year later. However, the King commanded him to stay away from the court and not to perform his functions as a judge.

29. History repeated itself in 1672 when Charles II tried to remove Sir John Archer from the Court of Common Pleas. Archer held his patent during good behaviour and refused to surrender it without a *scire facias*. Rather than face a trial the King followed his father's example and ordered Sir John to forbear to exercise the office of a judge either in court or elsewhere and appointed another judge to fill his place[3].

30. It was as a result of many such episodes that Parliament enacted in clause III of the Act of Settlement 1701 that: "judges commissions be made *quamdiu se bene gesserint* and their salaries ascertained and established but upon the address of both houses of parliament it may be lawful to remove them". That has been the fundamental rule underpinning the independence of the judiciary ever since. Article III of the U.S. Constitution (1788) is to the same effect: "the Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services a Compensation which shall not be diminished during their Continuance in Office."

31. In my judgment it is not acceptable for the Secretary of State to pressurise the Chair of the Parole Board to resign because he is dissatisfied with the latter's conduct. This breaches the principle of judicial independence enshrined in the Act of Settlement 1701. If the Secretary of State considers that the Chair should be removed, then he should take formal steps to remove him pursuant to the terms of the Chair's appointment.

32. I therefore grant permission to the claimant limited to seeking a declaration as follows:

> "That the period of appointment (three or four years, renewable for three or four years) of Parole Board members coupled with the power of the Secretary of State to remove a member if he is satisfied that he or she has failed without reasonable excuse to discharge the functions of his or her office for a continuous period of at least three months, or is unable to discharge the functions of the office, without recourse to any procedure or machinery to determine the merit of a decision to remove him or her on one or other of these grounds, means that the provisions for tenure of Parole Board membership fail the test of objective independence."

33. Given that I have gone into the matter in some depth I would like to think that it would be possible for the parties to agree a consent order incorporating the declaration.

[3] These and many other cases are discussed in C. H. McIlwain's monograph *The Tenure of English Judges*: The American Political Science Review Vol. 7, No. 2 (May 1913), pp. 217-229.

34. I turn to the application for interim relief. Even though I am satisfied that the claimant is arguably entitled to the declaration set out above it by no means follows that I should halt the current competition to select a new Chair of the Board. I have already pointed out that the claimed interim relief appears to go wider than the substantive relief which is sought. If a declaration in the terms set out above is made, then there will need to be further changes made to the terms of appointment of members. I think all that would be needed is to provide for a fully independent and impartial review to examine the merits of a removal. That amendment would have to be made available to all existing as well as future members.

35. In fairness, Mr Stanbury only gently pressed this application, perhaps recognising that it was a disproportionate response to the mischief which he had identified. I am not satisfied that the balance of convenience militates in favour of such a disruptive remedy. The application for an interim injunction is therefore refused.

36. That concludes this judgment.