In The Supreme Court of Bermuda

CIVIL JURISDICTION

2009: No. 362

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW
AND IN THE MATTER OF THE DECISION OF THE PAROLE BOARD TO REFUSE TO RELEASE MARTIN CASHMAN ON LICENSE
AND IN THE MATTER OF THE FAILURE OF THE PAROLE BOARD TO REASSESS WHETHER MARTIN CASHMAN IS NOW ELIGIBLE FOR RELEASE ON LICENSE
AND IN THE MATTER OF DIRECTIONS GIVEN TO THE PAROLE BOARD BY THE MINISTER OF LABOUR HOME AFFAIRS AND HOUSING INSOFAR AS THEY RELATE TO FOREIGN PRISONERS SEEKING RELEASE ON LICENSE

B E T W E E N:

MARTIN CASHMAN

Applicant

-v-

(1)THE PAROLE BOARD

(2) THE MINISTER OF LABOUR HOME AFFAIRS
AND PUBLIC SAFETY

Respondents

JUDGMENT

(In Court)

Date of Hearing: June 4, 2010

Date of Judgment: July 9, 2010

Mr. Eugene Johnston, J2 Chambers,
for the Applicant

Mr. Melvin Douglas, Deputy Solicitor-General,
for the Respondents

Introductory

1. The Applicant is a British National who was convicted on February 24, 2004 following a trial before a judge and jury of importation and possession of diamorphine (heroin) with intent to supply on October 5, 2003. On the date of his conviction, he was sentenced to 11 years imprisonment. By Notice of Application dated October 29, 2009, the Applicant applied for leave to seek judicial review of various decisions and sought the following relief:

    (a) an order of certiorari quashing the Refusal Decision and/or the Policy Decision and/or the Executive Direction;
    (b) an order of mandamus compelling the Parole Board to determine that the Applicant is eligible for release on parole and/or compelling the Parole Board to prescribe time limits within which it will review applications;
    (c) a declaration that (i) the Parole Board has a discretion to decide whether foreign prisoners may be released on parole notwithstanding the absence of any reciprocal agreement between Bermuda and the prisoner's country of origin, and/or (ii) that the Minister had no power to make the Executive Direction and/or (iii) that in the interests of fairness the Parole Board ought to fix time limits for reviewing applications for parole.

2. The Chief Justice granted leave by Order dated November 3, 2009. By Summons dated December 1, 2009, the Respondent applied to set aside the grant of leave. This application was heard before me on February 5, 2010 when I set aside the grant of leave as respects the challenge to the Minister's alleged Executive Direction, which the Applicant was not adamant about pursuing in any event. Otherwise, the application to set aside the grant of leave was refused. However, I also directed that the principal issue which appeared to fall for determination was the legality of the Board's view that section 12 of the Prisons Act did not empower it to grant parole to foreign prisoners in their country of origin.

3. What falls for determination was summarised in the Plaintiff's counsel's Skeleton Argument as follows:

"*The three decisions still under challenge are these:*

> ***3.1.*** *First, the Board's decision to refuse Cashman's release on license dated on or around August 2007 ('the Refusal Decision');*
>
> ***3.2.*** *Second, the Board's continuing policy to refuse foreign prisoners' release on license unless a reciprocal agreement is in place between Bermuda and that foreign prisoner's country of origin which governs the transfer of prisoners for the purpose of imposing and monitoring licensing conditions ('the Policy Decision');. and*
>
> ***3.3.*** *Third, the Board's refusal to reconsider whether Cashman should be released on license ('the Re-Determination Decision').*"

4. Mr. Johnston is to be commended for adopting a practice which it is to be hoped other counsel will see fit to emulate; namely, submitting a DVD containing electronic copies[1] of not only his Skeleton Argument, but his authorities and all the evidence as well.

The evidence

5. In his First Affidavit sworn on October 28, 2009 in support of the present application, the Applicant deposes that prior to the offence of which he was convicted in Bermuda he was a London taxi driver and had no previous convictions. He lived with a wife and two children and near both his mother and sister. When he began his sentence he was told by Prison staff that he would be able to apply for parole having served 1/3rd of his sentence, just like any Bermudian prisoner. He maintained his innocence, contending that he had been tricked by a friend whom he had subsequently attempted to assist the police to bring to justice. He applied for parole after completing one third of his sentence. At the meeting, he provided the Board with a copy of a letter from the United Kingdom Probation Service offering to supervise the Applicant on a voluntary basis if he was paroled in Bermuda and returned to the United Kingdom. After this application was refused, he sought legal representation; one lawyer withdrew, and his second firm unsuccessfully sought legal aid, refusal coming on July 3, 2009. His sister then had to raise funds for the present application.

6. In paragraph 9 of the Applicant's Affidavit, he deposes as to his belief as to why he was refused parole as follows:

> "*I understand the reason for this denial was that I was a foreign national, and if given parole, I would be deported back home, where the Parole Board would be unable to monitor whether I complied with the various conditions they impose upon those who are granted release on license. This is the reason provided to many foreign inmates after 1/3 of their time in Bermuda's prisons are already served. This is also the position taken in the Parole Board Annual Report 2008 [12-27]. The relevant section of the report [26] says this:*
>
> > *As at December, 2008,* 27 *foreign nationals remain incarcerated* in *Bermuda; mainly on*

[1] In accessible pdf format.

> *conviction for drug offences; however, although the Board sees such persons when they reach their Parole Eligibility) Date, as the purpose of parole is supervised license and the Board cannot guarantee such supervision outside of Bermuda the Board is unable, within the terms of the Act, to grant parole to foreign nationals"*

7. The Applicant crucially relies on the quoted passage in the Board's Report as evidence of the continuing policy of which he complains. Other supporting evidence for his case generally is exhibited to his Affidavit. His sister wrote a letter dated May 6, 2007 confirming that she could provide the Applicant with both employment and accommodation in London upon his release. The Director of the London Headquarters of the National Probation Service wrote a letter to the Applicant's London Solicitors dated May 18, 2007 confirming the Service's willingness to supervise the Applicant if paroled "*on a purely voluntary basis*". Dame Jennifer Smith as Chairman of the Board sought clarification of the May 18, 2007 letter by letter dated July 3, 2007 and (a) pointed out that the UK was responsible for Bermuda's internal and external security, and (b) asked whether "*in your opinion the possibility exists for a Board to Board arrangement or, alternatively, for a prison to prison arrangement.*" The UK Probation Service's response dated July 23, 2007 merely reiterated that in the absence of statutory powers, any assistance they provided would be on a voluntary basis and unenforceable.

8. It appears from a September 10, 2007 letter from the Board Chair to the Applicant's London solicitors, that after this correspondence with the National Probation Service (which was triggered by a letter from the Applicant's sister), the Board met with the Applicant "*and informed him that we would continue to work on his case-he indicated his desire for parole and affirmed that he was not interested in repatriation (which is an option)*". According to Board Minutes dated June 18, 2007, the Applicant appeared for his first interview before the Board, the Board noted that his "*Parole Eligibility Date was 8th June 2007*" and that although his "*Earliest Release Date is 5th February 2011, he has rejected repatriation to the UK noting that if he is repatriated to the UK, he will not be eligible for parole until he has served half his sentence.*" His application was deferred with the board agreeing to contact the UK Probation Authorities through the Minister and the London Headquarters directly.

9. Not only did the Board seek to assist the Applicant, but the Minister (presumably at the Board's prompting) did as well. Permanent Secretary for the Ministry of Labour Home Affairs and Housing Derrick Binns' December 1, 2009 Affidavit exhibits a June 26, 2007 letter from his predecessor, Marva-Jean O'Brien, to the then Governor. This letter, which appears to a have attached a copy of the UK Probation Service's May 18, 2007 letter, stated in material part as follows:

> "*As Bermuda is an Overseas Territory some arrangement should exist between the UK and Bermuda to monitor parolees who are returned to the UK.*
>
> *I write to ask if you would look into this matter as we do have UK foreign nationals who are eligible for parole, having served 1/3 of their sentence, but are unable to be paroled because no arrangement exists, with the UK.*"

10. What happened after that initial enquiry is not addressed in evidence; however, the Binns Affidavit does note that the Minister "*is unable to find a response by HE the Governor to our letter*" (paragraph 5). The Affidavit of Clark Minors (a Parole Board member as of January 1, 2008) dated March 4, 2010 was sworn on behalf of the Board, and significantly deposed as follows:

> "*6. That the Board accepts that it does have a discretion to determine whether a foreign prisoner should be released on license after such prisoner becomes eligible for release on license within Bermuda under section 12 of the Prison Act, 1979 (the Act) and that this discretion may be exercised whether or not a reciprocal agreement exists between a foreign prisoner's place of origin and Bermuda.*"

11. This concession was legally significant, the Minors affidavit making it clear that the Board primarily relied in evidential terms upon the Affidavit sworn by Dame Jennifer Smith on December 1, 2009. The latter Affidavit exhibited the same documents exhibited to the Applicant's Affidavit. In addition to commenting briefly on the course of the application for parole, the Smith Affidavit avers that the passages in the Board's Annual Report 2008 relied upon by the Applicant as evidence of the existence of a policy not to grant parole abroad in the absence of reciprocal arrangements with the country concerned merely reflect the Board's view of the law (paragraph 9). It is also stated :

> "*10. The Board has not refused to reconsider whether the Applicant is eligible for parole since the Board has not made a decision with regard to the Applicant's initial application on whether to release him on license within Bermuda because the Board understood through the Applicant and his ...solicitor that he was not seeking parole within Bermuda. The Board remains willing to hear the Applicant with regard to his parole application after the Applicant has had the opportunity to amend his application for parole particularly but not limited to his plans for accommodation and ability to financially support himself.*"

12. So the evidence makes it clear that is in reality common ground between the parties that the Board has implicitly refused the Applicant's application for parole in his country of origin based on the Board's view that the Act does not permit this to happen absent reciprocal agreements in place between Bermuda and the UK. It is also common ground that the Board would be willing to favourably consider parole in Bermuda if the Applicant is able to find accommodation and financially support himself. In the course of argument it was further clarified that the Board's position about local parole for a non-Bermudian prisoner is of course also subject to the Minister furnishing the necessary Immigration approvals against a traditional policy background according to which foreign prisoners with no right to reside in Bermuda are ordinarily required to leave Bermuda upon their release.

Findings: applicable law

13. With the local parole option highly speculative due to the fact that no application has been made as well as the fact that there is no basis for this court to conclude that such an application would have any real prospects of success, one key legal issue falls for determination. Is the Board correct in its view that it has no lawful power to release the Applicant on parole in his country of origin without reciprocal arrangements being in place in Bermuda and the UK?

14. The central statutory provisions are found in the Prisons Act 1979. The main provisions governing eligibility for parole are set out in section 12 of the Act, which provides as follows:

> "***Release on licence; fixed term***
> *12 (1) Without prejudice to sections 13 and 14, but subject to subsection (2) the Parole Board, having given due consideration to any recommendation made by the Commissioner of Prisons, may, in respect of any prisoner direct that instead of the prisoner being granted remission of his adjudged term of imprisonment under section 10, such prisoner shall, at any time on or after having completed one-third of his adjudged term of imprisonment, be released on licence under this section, but the provisions of this section are subject to section 70P of the Criminal Code.*
> *(2) Subsection (1) shall not apply to a prisoner serving a term of imprisonment for life (other than a term of imprisonment imposed by a court martial) or a prisoner who has been sentenced to be detained during Her Majesty's pleasure.*
> *(3) A prisoner eligible for release on licence under this section shall be considered, in the first instance, three months prior to the due date on which he first becomes so eligible, and thereafter at such intervals as may be deemed appropriate by the Parole Board.*
> *(4) A person released on licence under this section shall until the expiration of his adjudged term of imprisonment be under the supervision of a probation officer or of such society or person as may be specified in the licence and shall comply with such other requirements as may be so specified; except that the Parole Board may at any time modify or cancel any such requirements.*
> *(5) If before the expiration of his adjudged term of imprisonment the Parole Board is satisfied that a person released has failed to comply with any requirement for the time being specified in the licence, the Parole Board may by order recall him to a prison; and thereupon he shall be liable to be detained in a prison until the expiration of his adjudged term of imprisonment and, if at large, shall be deemed to be unlawfully at large.*
> *(5A) Where the Parole Board has recalled a prisoner to a prison*

for failure to comply with any requirements specified in the licence, the prisoner shall be entitled to appear and be heard in person before the Parole Board, before a final decision is made on whether he will be recalled to prison.
(6) The Parole Board may release on licence a prisoner recalled to and detained in a prison under subsection (5) at any time before the expiration of his adjudged term of imprisonment; and subsections (3) and (4) shall apply in the case of a person released under this subsection as they apply in the case of a person released under subsection (1).
(7) Notwithstanding anything in this section, where the unexpired part of the adjudged term of imprisonment of a person released under subsection (1) is less than six months, subsections (3), (4) and (5) shall apply to him subject to the following modifications—

(a) the period for which he is under supervision under subsection (4), and is liable to recall under subsection (5), shall be a period of six months from the date of his release under subsection (1);

(b) if he is recalled under subsection (5) the period for which he may be detained thereunder shall be whichever is the shorter of the following periods—

(i) the remainder of such period of six months; or
(ii) the part of the adjudged term of imprisonment which was unexpired on the date of his release under subsection (1), reduced by any time during which he has been so detained since that date,

and he may be released on licence under subsection (6) at any time before the expiration of that period.

(8) For the purposes of this section—

(a) a person ordered to be committed to prison—

(i) in default of payment of a sum adjudged to be paid on a conviction or of the amount of a recognizance; or
(ii) by reason of any refusal or inability to enter into a recognizance,

shall be treated as having been sentenced to a term of imprisonment for the term for which he is so committed;
and
(b) consecutive terms of imprisonment shall be treated as one term."

15. Under this provision, a prisoner becomes eligible for parole after completing a third of his sentence, if granted parole is released conditionally subject to supervision and is liable to recall for breach of his parole conditions. The Applicant's case is that section 12 is ambiguous as to whether it applies to release to a prisoner's country of origin or solely to parole within Bermuda. Because a narrow construction would discriminate against foreign prisoners on the grounds of their place of origin, section 12 must be construed in the broader manner. The Respondent's case is that it is clear that section 12 only applies to parole rights being exercised within Bermuda. The following provision is said to establish the only legal framework within which a foreign prisoner may be released on parole in his country of origin:

> "***Transfer to or from Bermuda; release on licence***
> *14A (1) Where the Minister is satisfied that reciprocal provisions have been made by the law of any of the countries listed in the Schedule (in this section referred to as "the listed countries") for the release of prisoners on licence or parole (whatever nomenclature is used) and for their supervision after having been released and until the adjudged term of imprisonment expires, the Minister may—*
>
> *(a) transfer from a prison in Bermuda, a prisoner who is a citizen or permanent resident of any of the listed countries, and who is eligible for release on licence or parole under section 12, 13 or 14;*
>
> *(b) arrange for the conveyance of the prisoner by as direct a route as possible to the listed country of which he is a citizen or permanent resident;*
>
> *(c) receive on transfer from any such country by a similar route as in paragraph (b), a person possessing Bermudian status serving a term of imprisonment in that country who is eligible for release on parole or licence under the applicable provisions of its law.*
>
> *(2) A prisoner who is transferred to Bermuda under this section shall be subject to the provisions of this Act relating to his supervision while on licence or parole, recall to prison or revocation of his licence or parole and shall, for such purposes, be deemed to have been released on licence by the Minister upon the date when he landed in Bermuda pursuant to the transfer.*
>
> *(3) The Minister may, by order, add to or remove from the Schedule, the name of any country.*
>
> *(4) Section 6 of the Statutory Instruments Act 1977 shall not apply to an order made under this section.*"

16. This provision expressly deals with the release of foreign prisoners on parole to be served in their country of origin. It explicitly applies where reciprocal provisions have been made under the law of the prisoner's country of origin for parole in relation to a prisoner transferred from Bermuda. In other words, the law of the country of origin must

presumably replicate the crucial supervision and recall powers of the Bermudian statute, while Bermudians serving sentences abroad can be returned home to serve license periods here.

17. The present application only gets off the ground at all because it is difficult to resist the instinctive judicial reaction that there is something inherently unfair about a scenario under which foreign nationals from countries which do not have reciprocal legislation meeting the requirements of section 14A who would otherwise qualify for release on license must serve "longer" sentences than Bermudian prisoners or prisoners from section 14A compliant countries. Mr. Johnston sought to refine this raw reliance on elemental notions of fairness by contending that: (a) it was ambiguous whether or not section 12 applied only to release on license within Bermuda; (b) if section 12 of the 1979 Act was construed in conjunction with section 14 as only permitting release on license within Bermuda, this would interfere with fundamental rights under the Constitution; accordingly (c), the ambiguity must be resolved in favour of construing section 12 as encompassing release on license abroad in cases where the requirements of section 14A are not met. Mr. Douglas reminded the Court that in some circumstances the literal rule of construction suffices and no need to resort to supplementary cannons of construction arises. To the extent that it was not clear that section 12 applied only to parole within Bermuda, the Deputy Solicitor-General relied on the presumption against legislation having extra-territorial effect.

Findings: does section 12 of the Prisons Act 1979 unambiguously apply to parole within Bermuda only?

18. Reading the provisions of section 12 together with those of section 14A, I find that it is clear that section 12 does not empower the Parole Board to release foreign prisoners on license in their countries of origin. From the natural and ordinary meaning of the words of section 12 in their wider statutory context, the whole concept of parole entails the 'carrots' of (a) early release and (b) supervision, backed up by (c) the 'stick' of recall for breach of the license conditions. Section 14A empowers the Minister to transfer foreign prisoners to their country of origin where legal provisions are in place for their release on license under conditions analogous to those which exist in relation to parole in Bermuda under the 1979 Act. Section 12 may not be fairly read as conferring on the Parole Board the discretionary power to release prisoners on license in circumstances where the carrot of early release is granted without the stick of recall for breach of conditions. This would be release subject to toothless supervision and would be fundamentally incompatible with the concept of parole as defined by section 12.

19. Further and in any event, I accept Mr. Douglas' submission that the presumption against construing legislation as having extra-territorial effect fortifies the natural and ordinary meaning of the words of section 12. The Respondents' counsel aptly relied upon the following *dictum* cited in Bennion, '*Statutory Interpretation*' (Butterworths: London, 1984) at page 496:

> " *'Unless Parliament has conferred on the court that power in language which is unmistakeable, the court is not to assume that Parliament intended to do that which might seriously affect foreigners who not resident here and might give offence to foreign governments'*[2]."

20. In my judgment there is nothing in section 12 of the 1979 Act which demonstrates Parliament's intention to legislate for the supervision of prisoners released on license abroad and their recall to prison for breach of license terms in a seriously arguable manner, let alone in an "*unmistakeable*" manner.

21. Mr. Johnston, clearly cognisant of the vulnerabilities of the Applicant's construction of section 12 to these powerful arguments, opened his oral submissions with an impressive exegesis on why section 12 narrowly construed was inconsistent with the Constitution. This turned the correct approach to construing a statutory provision on its head. The starting point is to determine whether there is any ambiguity; it is only if this question is answered affirmatively that the any inconsistency with fundamental rights can be taken into account as informing the final meaning to be assigned to the statute. Mr. Douglas again identified the pivotal principles, relying in this regard on the following passage in *Bennion* (at page 560):

> "*In interpreting an enactment, a two-stage approach is necessary. It is not simply a matter of deciding what doubtful words mean. It must first be decided, on an informed basis, whether or not there is a real doubt about the legal meaning of the enactment. If there is, the interpreter moves on to the second stage of resolving the doubt. (The experienced interpreter combines the stages, but notionally they are separate).*"

22. The following interpretative principles, set out in Mr. Johnston's Skeleton Argument, cannot justify the construction the Applicant relies upon in all the circumstances of the present case:

> "***22.*** *It is respectfully submitted that the court will be unable to interpret s.12 of the PA 1979 without considering four well-known, and interrelated, interpretative principles:*

[2] Lindley MR in *Re A B & Co* [1900] 1QB 541 at 544-545.

22.1. *The first is that all laws must be given an interpretation consistent with the Bermuda Constitution Order 1968 ("the Constitution") where this is possible;*

22.2. *The second is the principle of legality, ie. that the legislature is presumed to legislate in accordance with the common law. Accordingly, general or ambiguous words do not oust fundamental rights;*

22.3. *The third is the presumption that the legislature intends to comply with its international obligations;*

22.4. *The fourth is the presumption that penal statutes should be construed against the Government when there is any potential to limit the vested rights of individuals unless the statute is overwhelmingly clear that the rights affected are to be limited.*"

23. I find that there is no or no real doubt about the meaning of section 12 in terms of its geographical sphere of operation. It unambiguously applies to prisoners released on license in Bermuda. No need to consider whether section 12 of the Prisons Act 1979 contravenes any provisions of the Bermuda Constitution arises for determination in the context of the present application for judicial review.

Findings: the Applicant's grounds

The Policy Decision

24. Paragraph 16 of the Applicant's Grounds states as follows:

> "*16. Firstly, the Policy Decision acts as an unlawful fetter on the discretion of the Board when it is supposed to be exercising powers imposed on it by s.12 of the PA 1979. Secondly, the substance of the Policy Decision abdicates the Boards functions to the MLHAH. The MLHAH has the power to define 'a listed country'. In truth then, as far as foreign prisoners are concerned, their release is dependent upon the will of the MLHAH. Thirdly, the Policy Decision could only be promulgated under an error of law. The Board must have conflated its powers under s.12 (1) with powers given to other public bodies under s.14A of the PA 1979. Fourthly, the Policy Decision is unreasonable. Because of its extremely limited nature, the decision fails to recognise that there are numerous relevant considerations that are not taken into account, and irrelevant considerations that are. In addition the oppressiveness of the Policy Decision is an important factor mitigating against its lawfulness.*"

25. These complaints are all grounded on a construction of section 12 which I have rejected. The Applicant can only contend that the Policy Decision (of not releasing prisoners

incarcerated in Bermuda on license and returning them for the license period to their place of origin save where the requirements of section 14A are met) is unlawful if the powers conferred by section 12 are being misapplied. I find that the Policy Decision is based on a correct analysis of the law which requires section 12 to be read with section 14A as circumscribing the conditions under which an overseas prisoner may be lawfully released on license and returned to their country of origin with a view to serving their parole period abroad.

The re-determination decision

26. The re-determination decision is formulated as follows in the Applicant's grounds:

> "*18. The Re-determination Decision fails to appreciate the importance of s.12(3) of the PA 1979. The Board is mandated to frequently re-evaluate whether a prisoner is eligible for parole. This duty creates an obligation on the Board to set out in a policy document the appropriate timeframe in which such re-determinations will be conducted in relation to certain classes of prisoner.*"

27. This complaint must also be rejected on evidential and legal grounds. Firstly, it is necessary to have regard to the primary legal finding that section12 does not apply to prisoners such as the Applicant who is seeking to be both (a) released on license and (b) returned to the UK for the duration of his license term. Secondly it is necessary to have regard to the undisputed evidence that the Applicant has declined to amend his initial application and to seek release on parole in Bermuda. So even if the Respondent Board might in certain circumstances be required to re-determine applications, it is difficult to see how any such duty was engaged in relation to the Applicant's case. Accordingly the Applicant lacks to sufficient interest to allege either the existence of a duty to formulate a review policy or a breach of such policy.

The Refusal Decision

28. As far as the Refusal Decision is concerned, the Grounds open with the following statement:

> "*38. It has already been said (see §15 above) that if the Policy Decision is unlawful, so is the Refusal Decision. This is because no lawful decision can come from an unlawful policy. But the Refusal Decision is unlawful on two further grounds, ie because it was (i) illegal and/ or (ii) unreasonable.*"

29. The complaint is then elaborated in the paragraphs that follow. In brief, the Refusal Decision is said to be illegal because relevant considerations were not taken into account and irrelevant matters were taken into account. It is said to be unreasonable applying the higher level of scrutiny applicable when fundamental rights are at stake, in the present case the right not to be discriminated against. Supplementary to the differential treatment as a foreign prisoner point, it is contended that the Refusal Decision was unreasonable because (a) the weight the Board gave to various factors was wrong and (b) the decision

was oppressive. The Respondents contended that the application had never been finally determined and that it was simply pending. On any sensible view of the facts, the application has been constructively refused.

30. The relevant complaints, however, are all implicitly based on the premise that the policy of refusing parole rights to be exercised in their country of origin to foreign prisoners is based on a legally flawed interpretation of section 12 of the Prisons Act. Once that premise is rejected and this Court has found that the Refusal Decision was based on a correct interpretation of the law, the Applicant's illegality and irrationality arguments collapse like a pack of cards. This aspect of the Applicant's claim is also refused.

Does the Applicant have arguable grounds for alleging a contravention of his section 5 and/or 12 of the Bermuda Constitution rights?

31. Some attention must be given to the issue of whether or not the Applicant does have arguable grounds for contending that the differential treatment he complains of contravenes his right to liberty under section 5 and/or his right not to be discriminated against under section 12 of the Constitution. This is not just in deference to the arguments advanced by his counsel; in addition, important case management issues arise in relation to how constitutional points can best be disposed of when they arise in cases where an applicant has to exhaust their judicial review remedies before seeking relief under section 15 of the Constitution.

Bermuda Constitution- Section 5

32. The most obvious ground for seeking to attack the differential treatment accorded to foreign prisoners under the Prisons Act 1979 is that of unlawful discrimination. However, Mr. Johnston advanced the interesting argument that the right not to be deprived of one's liberty save in accordance with law was infringed because the length of a foreign prisoner's time in custody depended on whether or not the Minister concluded reciprocal arrangements as envisaged by section 14A:

> "***34.*** *Section 5(1) of the Constitution is a close ally to art.5(1) of the Convention. The Convention jurisprudence makes clear that if the MLHAH controls the grant of an inmate's parole that would make the prisoner's detention arbitrary. In R (James) v Justice Secretary, Lord Hope said that where the statutory regime "breaks down entirely, with the result that the Parole Board is unable to perform its function at all" a prisoner's detention would be arbitrary and therefore contrary to art.5(1) of the Convention. Lord Hope reached his conclusion because in such circumstances there would be no way to bring an end to a prisoner's sentence "in the manner that his original sentence contemplated". The princip*[al] *aim of art.5(1) of the Convention—and by extension s.5(1) of the Constitution—is to protect against arbitrary detention: see Weeks v United Kingdom.32 This viewpoint has been supported in the Court of Appeal in Robinson v The Queen.*

35. *For a detention to be proper there must be a sufficient causal connection between the detention and the purpose for which detention was effected. Therefore, a period of detention will be arbitrary if it continues for reasons completely unassociated with the purposes of sentencing set out in s.53 of the Criminal Code. As mentioned above, it is no part of the purposes of sentencing to penalise a person because of their nationality.*"

33. Although Mr. Douglas refused to be drawn into advancing the Respondent's position on the substance of this constitutional argument, this submission on behalf of the Applicant cannot be dismissed out of hand. One possible answer to the section 5 complaint as a discrete point is that when sentence is passed in respect of foreign national to whom section 14A does not apply, there is no uncertainty as to the length of sentence he will serve. This complaint nevertheless raises an arguable constitutional point.

Bermuda Constitution-section 12

34. The Applicant's counsel set out the following arguments in relation to section 12 of the Constitution in his Skeleton Argument:

"***36.*** *As far as discrimination is concerned, s.12 of the Constitution is the cousin of art.14 of the Convention. But art.14 is narrower in some respects. In ways the Constitution provides greater protection. But in the circumstances of this case the two provisions should be construed the same.*

37. *Neither the Constitution nor the Convention requires a state to provide prisoners with the opportunity of parole. But if the state creates a parole regime, it must operate it in a non-discriminatory way. Furthermore, not only must like cases be treated alike; but cases which are significantly dissimilar must be treated differently. This may oblige the Government to take positive action to redress an obvious imbalance between those comparing treatments. This requirement is most evident in a case where there is an imbalance on account of race and/or national origins. Of greater importance is the assessment made in DH v Czech Republic that in a modern, pluralistic democracy there is no justification for racial imbalances manifested through direct or indirect discrimination.36 As such, as a public body, the courts are duty bound to act in a manner destined to stamp out discrimination of this variety. Comments made by Kawaley J in Marshall v Wakefield are apposite here.*"

35. Mr. Douglas' broad-brush response to this point, which he again declined to deal with on its merits before it was formally before the Court for determination, was that section 12 permitted discrimination in favour of Bermudians. Section 12 provides as follows:

"Protection from discrimination on the grounds of race, etc.
12 (1) Subject to the provisions of subsections (4), (5) and (8) of this section, no law shall make any provision which is discriminatory either of itself or in its effect.

(2) Subject to the provisions of subsections (6), (8) and (9) of this section, no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.

(3) In this section, the expression "discriminatory" means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, place of origin, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

(4) Subsection (1) of this section shall not apply to any law so far as that law makes provision—

(a) for the appropriation of revenues or other funds of Bermuda or for the imposition of taxation (including the levying of fees for the grant of licences);

(b) with respect to the entry into or exclusion from, or the employment, engaging in any business or profession, movement or residence within, Bermuda of persons who do not belong to Bermuda for the purposes of section II of, this Constitution;

(c) for the application, in the case of persons of any such description as is mentioned in subsection (3) of this section (or of persons connected with such persons) of the law with respect to adoption, marriage, divorce, burial, devolution of property on death or other like matters that is the personal law applicable to persons of that description; or

(d) whereby persons of any such description as is mentioned in subsection (3) of this section may be subjected to any disability or restriction or may be accorded any privilege or advantage which, having regard to its nature and to special circumstances pertaining to those persons or to persons of any other such description, is reasonably justifiable in a democratic society.

(5) Nothing contained in any law shall be held to be inconsistent with or in contravention of subsection (1) of this section to the extent that it requires a person to possess Bermudian status or belong to Bermuda for the purposes of section 11 of this Constitution or to possess any other qualification (not being a qualification specifically relating to race, place of origin, political opinions, colour or creed) in order to be eligible for appointment to any office in the public service or in a disciplined force or any office in the service of a local government authority or of a body corporate established directly by any law for public purposes.

(6) Subsection (2) of this section shall not apply to anything which is expressly or by necessary implication authorised to be done by any such provision of law as is referred to in subsection (4) or (5) of this section.

(7) Subject to the provisions of subsection (8) of this section, no person shall be treated in a discriminatory manner in respect of access to any of the following

places to which the general public have access, namely, shops, hotels, restaurants, eating-houses, licensed premises, places of entertainment or places of resort.

(8) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision whereby persons of any such description as is mentioned in subsection (3) of this section may be subjected to any restriction on the rights and freedoms guaranteed by section 7, 8, 9, 10 and 11 of this Constitution, being such a restriction as is authorised by section 7(2)(a), 8(5), 9(2), 10(2) or 11(2)(a), as the case may be.

(9) Nothing in subsection (2) of this section shall affect any discretion relating to the institution, conduct or discontinuance of civil or criminal proceedings in any court that is vested in any person by or under this Constitution or any other law."

36. Section 12 provides that laws may not discriminate on the grounds of, inter alia, "*place of origin*". Section 12 broadly speaking only permits discrimination in favour of Bermudians in relation to employment and the right to remain in Bermuda. Section 12(8) expressly permits limitations to the right to complain of discrimination in relation to the enjoyment of fundamental rights to the extent that such rights may be restricted by sections 7-11 of the Constitution, *but not section 5* (nor indeed section 6). Because there is no established framework within which foreign prisoners can be released on parole in Bermuda, it is clearly strongly arguable that section 12 as applied to the Applicant discriminates against him on the grounds of place of origin.

37. The only obvious justification for treating foreign prisoners differently as regards parole rights appears to arise under the following subsection of section 12:

> "*(4) Subsection (1) of this section shall not apply to any law so far as that law makes provision—*
>
> > *(d)whereby persons of any such description as is mentioned in subsection (3) of this section may be subjected to any disability or restriction or may be accorded any privilege or advantage which, having regard to its nature and to special circumstances pertaining to those persons or to persons of any other such description, is reasonably justifiable in a democratic society.*"

38. On an application for relief under section 15 of the Constitution, once an applicant makes out a prima facie case of a contravention of his section 12(1) and/or (2) rights, it will likely be for the Crown to discharge the evidential onus of justifying the contravention within subsection 4(d) or any other subsection which applies. It would be in the context of such an evidential exercise that the Respondents would be expected to answer the various questions posed by the Applicant's counsel, for instance, how many prisoners are there in Bermuda of what nationalities? If the Applicant was an exceptional British

national (and resident), it might be argued that it is justifiable for there to be no reciprocal arrangements for release in place, for example.

Case management: how to deal with constitutional questions raised on judicial review applications

39. Subject to any Practice Directions which the Chief Justice may issue in this regard, consideration should be given to the following practice where a judicial review applicant wishes to complain of a breach of fundamental rights as an alternative remedy in the event that an overlapping judicial review application fails. These observations are made having regard to this Court's duty to actively manage civil cases under Order 1A of the Rules.

40. The problem is that applications for relief for breach of fundamental rights protected by Part I of the Constitution must be made under section 15 of the Constitution. The proviso to section 15(2) states that "*the Supreme Court shall not exercise its powers under this subsection if it is satisfied that adequate means of redress are or have been available to the person concerned under any other law.*" Just as an applicant for relief under the European Convention on Human Rights ("ECHR") must first exhaust their remedies under domestic law, a section 15 applicant must demonstrate that the ordinary law affords him no adequate means of redress. This rule ought to have far greater rigidity in its application to an applicant under the ECHR who is seeking relief from an international tribunal than it has within the national sphere. A far more flexible approach ought to be adopted by this Court to judicial review applications which raise constitutional issues, as it is the same tribunal which competent to adjudicate both the non-constitutional and the constitutional applications.

41. Such an approach was adopted in *Fay-v- Governor* [2006] Bda LR 66 and *Fay –v-Governor* [2006] Bda LR 65 where I heard an application for judicial review and constitutional relief together. In that case the constitutional point was raised as a substantive point from the outset and it was reasonably clear that it would have to be determined. In the present case the constitutional points were raised as an aide to interpretation only; it was not clear prior to the hearing that these points would have to be determined. Because an application under section 15 must be by originating summons and requires no leave, while a judicial review application under Order 53 requires leave and entails different originating process, the two species of application cannot be combined in the same originating application document. Nevertheless where an applicant for judicial review wishes to raise a constitutional point as an aide to statutory interpretation and, if the judicial review application fails, to seek substantial constitutional relief, the following approach ought perhaps to be adopted.

42. An application under section 15 ought to be filed at the same time as the Order 53 application, so that the two applications can (if appropriate) be heard together. This will likely be appropriate in all cases where: (a) the judicial review application is opposed; and/or (b) the judicial review application is not demonstrably a very strong case; and (c) the urgency of the judicial review application being heard on its merits is not

incompatible with a fair hearing of an application under section 15 of the Constitution. The merits of the judicial review application will usually be relevant to this case management exercise because dealing with constitutional matters at the same time as a judicial review application will involve additional costs which ought to be avoided if it seems improbable at the interlocutory stage that the need for relief under section 15 will actually arise.

43. In other words, in cases where the judicial review applicant who also files under section 15 meets the comparatively low threshold for obtaining leave but the assigned judge's provisional view is that the judicial review application has only modest prospects of success, the applications ought to be directed to be heard together. When the provisional view ought to be formed by this Court will likely vary from case to case. Sometimes the appropriate direction may be clear at the leave stage; sometimes the position may only be clear after the filing of evidence on the judicial review application. However, unless an application under section 15 is filed from the outset, in cases where it is reasonable to do so, the Court is unlikely to be able to give informed directions as to whether or not the judicial review and constitutional applications ought to be heard together. It also ought not to be forgotten that the parties have a duty to assist the Court to achieve the overriding objective under Order 1A, and the question of whether or not a judicial review application will or will not succeed can always form the subject of an agreement.

44. If this somewhat novel suggested approach had been adopted by counsel and the Court in the present case, it is possible that an application under section 15 would have been heard together with the present judicial review application or instead of it altogether. The way the matter did proceed was, nevertheless, entirely consistent with the Rules and the existing practice of this Court. It is now a matter for the Applicant and his legal advisers as to whether or not he chooses to pursue a constitutional application, having failed to obtain judicial review relief.

Conclusion

45. The Applicant's application for judicial review is refused. His case was based on the premise that section 12 of the Prisons Act 1979 applied to release on license abroad and that the Respondents' contrary interpretation and application of the statute to his case was wrong in law. The Court has accepted the Respondents' interpretation of the statute, for the reasons advanced by Mr. Douglas on their behalf. It follows that the errors of law complained of have not been made out and the application fails.

46. Mr. Johnston for the Applicant has raised arguable questions as to whether or not the differential treatment afforded to foreign prisoners who cannot be released on parole to their home countries under section 14A of the 1979 Act contravene the Applicants rights under section 5 and/or section 12 of the Constitution. Substantive relief for any contravention of such rights is only potentially available by way of an application under section 15 of the Constitution, not by way of a judicial distortion of the unambiguous provisions of section 12 as read with section 14A of the Prisons Act.

47. I will hear counsel as to costs.

Dated this 9th day of July, 2010

KAWALEY J