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Abstract
In Roberts v Parole Board [2005] UKHL 45 (7 July 2005) the House of Lords was asked whether the legal procedure for parole of even the vilest criminals should remain transparent and accord with natural justice under domestic law and/or the European Convention on Human Rights. In powerfully persuasive dissents, Lord Bingham and Lord Steyn struck a powerful plea for human rights. Alas, the majority, Lord Woolf, Lord Rodger Earlsferry and Lord Carswell were the appeasers, echoing popular sentiment, well illustrated both in the UK and in this country by the hue and cry that follows the release of paedophiles into the community.

Keywords
Roberts v Parole Board, human rights of prisoners, rights of criminals, United Kingdom

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CASE NOTE

CONVICTED MURDERERS LOSE THEIR HUMAN RIGHTS. ROBERTS v PAROLE BOARD

By Paul Gerber[*]

In *Roberts v Parole Board* [2005] UKHL 45 (7 July 2005) the House of Lords was asked whether the legal procedure for parole of even the vilest criminals should remain transparent and accord with natural justice under domestic law and/or the *European Convention on Human Rights*. In powerfully persuasive dissents, Lord Bingham and Lord Steyn struck a powerful plea for human rights. Alas, the majority, Lord Woolf, Lord Rodger Earlsferry and Lord Carswell were the appeasers, echoing popular sentiment, well illustrated both in the UK and in this country by the hue and cry that follows the release of paedophiles into the community.

Turning to the facts, in 1966 the appellant was convicted on three counts of murder. The victims in each case were unarmed police officers, killed in cold blood, when, in the course of their duty, they stopped a car in which the appellant and two accomplices were travelling to commit an armed robbery. Suffice it to note that early in 2000, the appellant was transferred to an open prison on the recommendation of the Parole Board ('the Board'). A further review by the current Board began in September 2001. On 1 October 2001, the Board provided the appellant's solicitors with a parole dossier, containing a number of reports, all favourable to the appellant, and recommended that he be immediately released on life licence. However, the very next day, the appellant was removed from open to closed conditions, where he has since remained. Although the appellant has received a general indication of the allegations against him which led to his removal, as Lord Bingham noted in his dissenting speech: 'these have not been the subject of any criminal or disciplinary charge, they have not been investigated at any adversarial hearing and they have been consistently challenged by the appellant'. [2]

It was not until April 2002 that the Secretary of State for the Home Department notified the appellant that what has been referred to as 'the sensitive material' would only be disclosed to the Board for purposes of any parole review, and would be

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withheld from him and his legal representatives. The ground upon which this material would be withheld was that the safety of the source of information would be at risk if the material were to be disclosed. The issue the House of Lords was asked to determine was the procedure the Parole Board should adopt in dealing with 'the sensitive material' when reviewing the appellant's application for parole.

The background that raised the human rights issue has been succinctly set out in Lord Bingham's speech:

> The trial judge rightly describes these crimes, which aroused widespread public outrage, as heinous and suggested that the case was one in which the appellant might never be released. He formally recommended that the appellant serve at least 30 years, and in due course the Home Secretary of the day fixed 30 years as the appellant's punitive or tariff term. That term expired in 1996, when the appellant was aged 60. The fifth review of his case by the Parole Board, still current, began in September 2001, and this appeal concerns the procedure to be followed in that review. The issue to be determined by the House is agreed to be whether the Board, a statutory tribunal of limited jurisdiction, is able, within the powers granted by the *Criminal Justice Act 1991* (UK), and compatible with article 5 of the *European Convention on Human Rights* (EHCR) (a) to withhold material relevant to the appellant's parole review from the appellant's legal representatives and (b) instead, to disclose that material to a specially appointed advocate, who would represent the appellant in the absence of the appellant and his legal representatives, at a closed hearing before the Parole Board. [1]
>
> On 15 November 2002 Scott Baker LJ, as vice-chairman of the Board, decided that before a decision was made on the procedure to be adopted in respect of the sensitive material before the Board, that material should in the first instance be disclosed to a specially appointed advocate agreeable to both parties, who could then make representations on the disclosure issues. The sensitive material was not to be disclosed to the appellant or his legal representatives or anyone else without the consent of the Board. … With the agreement of the appellant and the Secretary of State, the Attorney-General appointed Mr Nicholas Blake QC to act as "independent counsel", in effect as a special advocate. In an advice written for the Board before seeing the sensitive material, Mr Blake advised that resort to the special advocate procedure infringed ordinary standards of fairness. After seeing the sensitive material, he submitted to the Board that it be disclosed to the appellant's solicitors. [5] [6]

Since the issue is one of principle, turning on how the Board performs its functions and its ability to perform its statutory role, it is proposed to gloss over the various hearings before the Board and the Court of Appeal, confining itself to the present appeal before their Lordships, who heard submissions on behalf of the appellant, the Secretary of State, (who appeared in the appeal as an interested party), the Board, and on behalf of JUSTICE, which was granted leave to intervene. The House received no submission from Mr Blake or any specially appointed advocate, nor did it read or receive submissions on the sensitive material, which was agreed did not involve any threat to national security.

The appellant's argument relied on four grounds. First, it was submitted that as a mandatory life sentence prisoner who has served his punitive or tariff term, he has the right under domestic law to be released if and when it is judged that he can safely be released without significant risk to the safety of the public, risk to life and limb being the sole ground for continued detention, relying on *R v Lichniak* [2003] 1 AC 903; secondly, he has the right 'to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful'. This right is enshrined in article 5(4) of the *European Convention* and was accepted by all their Lordships:

> Thus a tariff-expired manadatory life sentence prisoner such as the appellant has a right to bring proceedings to challenge the lawfulness of his continued detention and a right to be released, no matter what the enormity of the crime or crimes for which he was imprisoned, if he is judged to present no continuing threat to the safety of the public. per Lord Bingham. [11]

The Board, although not in the ordinary sense a court, was nevertheless accepted as being a 'court' for purposes of article 5(4) in the appeal because it has the power to *direct* the release of a tariff-expired mandatory life sentence prisoner, as distinct from merely *advising* or *recommending* such release.

The third limb of the appellant's argument claimed that the Board has no power to create and apply a special advocate procedure to the detriment of a life sentence prisoner's legal right to an adversarial hearing, absent express legislative authority. This is because the use of the special advocate indefinitely to determine a prisoner's liberty is not a necessary implication of the Board's statutory function.

In his fourth submission, the appellant claimed that both at common law and article 5(4) ECHR, there is a core, irreducible, minimum entitlement for any life-sentence prisoner to be able effectively to test and challenge any evidence that decisively bears

on the legality of his detention. By proceeding to determine his parole review by use of a special advocate, the Board was claimed to be acting unlawfully and contrary to section 6 of the *Human Rights Act 1998.*

Dealing with the first limb of the appellant's submission, and quoting from the Lord Bingham's dissenting speech:

> The ordinary principle governing the conduct of judicial enquiries in this country is not, in my opinion, open to doubt. In Re K (infants) [1963] Ch 381, 405-406, Upjohn LJ expressed it thus: [16]
>
> > It seems to be fundamental to any judicial enquiry that a person or other properly interested party must have the right to see all the information put before the judge, to comment on it, to challenge it and if needs be to combat it, and try to establish by contrary evidence that it is wrong. It cannot be withheld from him in whole or in part. If it so withheld and yet the judge takes such information into account in reaching his conclusion without disclosure to those parties who are properly and naturally vitally concerned, the proceedings cannot be described as judicial.

Lord Devlin, when the case came before the House of Lords on appeal ([1965] AC 201) referred at p237 to 'the fundamental principle that the judge should not look at material that the parties before him have not seen'. His Lordship, when referring to the ordinary principles of a judicial inquiry, continued at p238:

> They include the rules that all justice shall be done openly and that it shall be done only after a fair hearing; and also the rule that is in point here, namely, that judgment shall be given upon evidence that is made known to all the parties. Some of these principles are so fundamental that they must be observed by everyone who is acting judicially, whether he is sitting in a court of law or not; and these are called the principles of natural justice. The rule in point here is undoubtedly one of those.

After an exhaustive review of numerous decisions of the European Court, Lord Bingham concluded that the procedure the Board proposed to adopt would infringe the principles of natural justice discussed in those cases.

> In view of what the European Court in *Garcia Alva v Germany* (2001) 37 EHRR 417 called "the dramatic impact of deprivation of liberty on the fundamental rights of persons concerned", I would doubt whether a decision of the Board adverse to the appellant, based on evidence not disclosed even in outline to him or his legal representatives, which neither he nor they had had any opportunity to challenge

> or rebut, could be held to meet the fundamental duty of procedural fairness required by article 5(4). [19]

That left the question whether the Board even had the *power* to adopt the procedure it proposed. After a lengthy review of the history of the Board, first established by section 59 of the *Criminal Justice Act 1997* (UK), Lord Bingham concluded:

> There was nothing in the legislation which expressly authorises the Board to hold an oral hearing to review tariff-expired mandatory life sentence prisoner's application for parole in a manner that does not accord with well known principles of natural justice. [24] … the course proposed - and so far adopted - in the conduct of the appellant's parole review involves a substantial departure from the standards of procedural fairness which would ordinarily be observed in conducting a review of this kind. It would, in my opinion, violate the principle of legality, strongly relied on by (counsel for the appellant), and undermine the rule of law itself, if such a departure were to be justified as incidental or conducive to the discharge of the Board's functions. [25] … In my opinion the procedural course proposed in the Board's decision letter of 13 June 2003 was one it had no power to adopt. I would accordingly allow the appeal and quash that decision. [32]

In an equally powerful dissent, Lord Steyn agreed with the views expressed by Lord Bingham. Suffice it for present purposes merely to cite the opening of his Lordship's speech: In *United States v Rabinowitz*, 339 US 56 (1950) at p69 Justice Frankfurter observed:

> "It is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people." Even the most wicked of men are entitled to justice at the hands of the State. In the comparative league of grave crimes those of Roberts rank at the very top.

The majority who dismissed the appeal were prepared to adopt a more flexible approach to administrative law. Thus Lord Woolf held that whilst an administrative body was required to act fairly when reaching a decision that could adversely affect those who are the subject of the decision: '*This requirement of fairness is not fixed, and its content depends upon all the circumstances and, in particular, the nature of the decision which the body is required to make.*' [40] Citing R v H [2002] 2 AC 134, a case which considered these principles in the context of a criminal trial, his Lordship noted that at a preparatory hearing, the Crown sought a ruling as to whether material could be withheld from disclosure to the defence on the ground of public interest immunity. The judge in that case ruled that the hearing should not be conducted in open court in the presence of the defendants, and that a special independent advocate (SAA) should

be appointed to introduce an adversarial element into the hearing. This was done to avoid a violation of article 6 of the *European Convention*. An appeal against that ruling failed. Somewhat ironically, it was Lord Bingham who, in giving the opinion of the Committee, made a number of important statements of principle relevant to the different context in which the Board operates, which Lord Woolf adopted in the instant case in dismissing the appeal, particularly Lord Bingham's statement that:

> 18. Circumstances may arise in which material held by the prosecution and tending to undermine the prosecution or assist the defence cannot be disclosed to the defence, fully or at all, without the risk of serious prejudice to an important public interest. The public interest most regularly engaged is that in the effective investigation and prosecution of serious crime, which may involve resort to informers and undercover agents, or use of scientific or operational techniques (such as surveillance) which cannot be disclosed without exposing individuals at risk of personal injury or jeopardising the golden rule of full. [41]

After reviewing the Board's statutory framework as set out in the *Crime (Sentences) Act 1997* (UK) Lord Woolf concluded:

> Section 28(6) sets out clearly that nature of the Board's "responsibility". In exercising that responsibility, the Board is required to make a practical judgment, "balancing the hardship and injustice of continuing to imprison a man who is unlikely to cause serious injury to the public (if this is the case) "against the need to protect the public … In other than a clear case this is bount to be difficult and very anxious judgment. But in the final balance, the Board is bound to give preponderant weight to the need to protect innocent members of the public against any significant risk of serious injury." (R v Parole Board, Ex p Watson [1996] 1 WLR 906, 916-917 per Sir Thomas Bingham MR). [46]

Lord Woolf declaimed:

> My Lords, in determining the point of principle we are asked to decide, we cannot ignore the reality of certain criminal activity today. For example, the lives of the sources of essential information which the Board requires, if it is to safeguard society can, in some cases, be at grave risk if their identities are revealed. Not all legal advisors can be trusted. …" [49]

After reviewing the Rules made under the 1991 Act, his Lordship concluded that they empowered the Board '*to direct non-disclosure if the Board is satisfied, in an exceptional situation, that there is no alternative, if the public interest is to be protected*'. [56]

In dealing with the appellant's submission that there was no statutory authority for the appointment of SAAs before the Board, his Lordship rejected the submission that, merely because the Board satisfied the requirements of a 'court' for purposes of article 5(4) ECHR, this did not alter its domestic law status or the controlling principles of administrative law that apply to limit the Board's procedural vires:

> Bodies such as the Board have an implied power under domestic law to control their own procedures so as to deal with a person in the position of the appellant as fairly as the circumstances permit. The use of a SAA, in an exceptional case, can assist the achievement of this. [66]

Dealing with what Lord Woolf described as the appellant's 'core submissions', his Lordship accepted that both at common law and under article 5(4) ECHR there was 'a core, irreducible minimum entitlement' for any life sentence prisoner to be able effectively to test/challenge any evidence which decisively bears on the legality of his detention. However, his Lordship concluded that:

> …what the Board does, if the need exists, to protect the safety of the public interests in, for example, a life threatening situation, is not necessarily inconsistent with achieving the minimum in question. There is an issue as to what is the minimum in question. [68] … The fact that information is withheld from a prisoner does not mean that there is automatically such fundamental breach of the prisoner's rights either under article 5(4) or under domestic law. [76] The Board when confronted with a situation where a SAA may have to be appointed must balance carefully the conflicting interests involved. If it does not do so in a way which in the end protects a prisoner's rights to be treated fairly, then the Administrative Court can quash its decision. In this was the rule of law applies. [82]

Both Lord Roger and Lord Carswell, in dismissing the appeal, reached much the same conclusion as Lord Wolf. In a case of historic irony, Lord Carswell relied on the decision of Sir Thomas Bingham MR in *R v Parole Board, Ex parte Watson* (supra) quoted above; ironic since the learned Master of the Roll in *Watson* became the dissenting Lord Bingham in the instant appeal.

The case is significant at all levels, not least in demonstrating how the intrusion of the *European Convention on Human Rights* and the decisions of the European Court have intruded into what was once the exclusive domain of the common law of England. Given recent events, it is perhaps not unreasonable that the protection of innocent members of the public against significant risk of serious risk of injury should overtrump all other considerations of human rights.

The implication of *Roberts* for Australia are all too obvious. In September 2005, an American peace activist, Scott Parkin, in Australia on a six-month visa, was summarily arrested, kept in solitary confinement for five days, and then deported for allegedly posing a risk to security. Parkin has no known history of violence, albeit holding strong views about the war in Iraq. Parkin is appealing his deportation to the Immigration Review Tribunal.

As in *Roberts*, Attorney-General Ruddock has stated publicly that Parkin's appeal will be conducted 'in confidence', and any material relied on by ASIO in support of Parkin's deportation will be withheld from him and his counsel, thus depriving his counsel of promoting the rule of law in our adversary system.

The fates of Roberts and Parkin sound eerily like that of Joseph K in Kafka's The Trial, all victims of anonymous governing forces beyond their control.