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Greetings

Parole and the 'powers that be': a discussion on the powers and functions of the Correctional Supervision and Parole Board

Clare Ballard and Suraj Chauhan

Introduction

In the recent judgment of *Gwebu v Minister of Correctional Services and Others*[1], Acting Judge Ebersohn considered the 'non-action' of the Correctional Supervision and Parole Board (CSPB) in determining whether the applicant should be released on parole. Although the judgement is rather thin on the factual details of the applicant's case, it appears that the CSPB refused to grant the applicant parole on the grounds that he should fulfil a 'restorative justice' component of his sentence, although neither the sentence nor the sentence plan stipulated such a requirement. The Court stated the following in respect of the CSPB's response:

"…the Parole Board apparently relied on the so-called "restorative justice" aspect to delay the matter. This so-called "restorative justice" concept is a fabrication of a process whereby it is required from a prisoner to make peace with the family of the victim, in this case people outside the borders of our country. The whole process is an illegal concoction undermining the rights of prisoners to be released on parole when they legally qualify for it."[2]

Similarly, in the case of *Botha v Minister of Correctional Services and Others*,[3] the Court noted that the CSPB had erred by "unilaterally, and at the stage the applicant, on the face of it, was entitled to parole, insisting on a process of "restorative justice."[4] The Court also questioned, firstly, why, at the hearing stage, "restorative justice was pulled out of the hat like a rabbit" and second, why the prison authorities had not implemented the process sooner…"[5]

In both cases the CSPB refused to release the offender on parole, despite the fact that, on the face of it, the offender had, by all accounts, complied with the prescripts of his sentence plan and had been recommended for release by the Case Management Committee (CMC). In addition, in both

instances the CSPB had recommended that the offender undergo a 'restorative justice' programme whilst serving the remainder of his sentence. Although the CSPB referred to the offenders' attendance of a restorative justice programme as a 'strong recommendation,' the Court, particularly in the *Botha* matter, described the CSPB as having 'insist[ed] on a process of restorative justice.'[6] It appears, therefore, that the Court treated the 'recommendation' as an additional condition that had been unilaterally imposed on the offender. This interpretation makes sense. For if the institutional body tasked with deciding whether to release an offender refuses release and recommends that the offender undergo certain treatment or engage in various programmes, it is certainly plausible that the offender would perceive such recommendation to be an instruction that must be completed should he or she hope to be released.

These cases therefore raise the issue of the scope of the CSPB's authority to impose conditions concerning the remainder of an offender's sentence. Certainly, the CSPB has clear legislative authority to attach conditions to an offender's serving of parole. It is less clear, however, whether any authority exists for the CSPB to attach conditions to the remainder of an offender's sentence where parole is refused. Of course, where an offender has quite clearly failed to comply with her sentence plan, the CSPB's refusal to release an offender on parole coupled with a recommendation to undergo additional programmes or treatment is unlikely to be controversial.[7] This newsletter will thus be based on the 'hard cases,' i.e. where an offender has complied with his sentence plan, but is refused parole and 'ordered' by the CSPB to undertake additional programmes or treatment.

This newsletter will also explore the nature of parole determinations and the powers of Parole Boards in England and Wales. England and Wales offer an interesting contrast when it comes to the powers and functions of parole boards, particularly since much of South African administrative law is based on English doctrine. Although the parole scheme in England and Wales is markedly different from the South African system in respect of the process for eligibility, the power and functions of the respective agencies are, nevertheless, similar.

The structure of this newsletter is as follows:

1. applicable legislation and directives concerning the South African CSPB;
2. the nature of parole determinations;
3. discussion and conclusion.

Applicable legislation and directives

The Correctional Services Act 111 of 1998 (the Act) came into effect on 1 October 2004, with the exception of only a few provisions. The so-called 'transitional provisions' of the Act[8] stipulate that offenders sentenced prior to 1 October 2004 must have their parole determined according to the provisions and policies in force immediately prior to the coming into effect of the Act, i.e. in accordance with the Correctional Services Act of 1959 (the old Act). Importantly, for the purposes of a discussion regarding the scope of the CSPB's power, there are no material differences between the two Acts. The same is true in relation to the different policies applicable before and after 1 October 2004. Thus, the discussion will focus on the provisions of the current legislation and policy.

In order to understand more fully the powers of the CSPB, it is helpful to set out the relevant

legislative provisions regarding the administration of prison sentences. It is worth noting at this juncture that the Correctional Services Amendment Act 32 of 2001 removed the posts on the CSPB reserved for correctional officials. This means that CSPB boards are now staffed almost exclusively by civilians, with the only correctional official post being that of the secretary to the CSPB. Uncontroversially, officials are better trained in the provisions of the Act. This means that a wealth of knowledge on the parole provisions in the Act may have been 'removed' with the coming into effect of these amendments.

All newly-admitted offenders "must be assessed" by the Case Management Committee (CMC) in terms of the following:[9]

1. security classification for purposes of safe custody;
2. health needs;
3. educational needs;
4. social and psychological needs;
5. religious needs;
6. specific development programme needs;
7. work allocation;
8. allocation to a specific correctional centre;
9. needs regarding reintegration into the community;
10. restorative justice requirements; and
11. vulnerability to sexual violence and exploitation.

The CMC is then required to compile a "sentence plan" for all offenders sentenced to a term of imprisonment exceeding 24 months that addresses "each of the needs" described above.[10] The sentence plan must: (1) propose intervention strategies aimed at addressing the risks and needs of the sentenced offender; (2) determine what services and programmes are required to target offending behaviour and to help the offender develop skills to handle the socio-economic conditions that led to criminality; (3) determine the services and programmes needed to enhance the sentenced offender's social functioning; and (4) set time frames and specify responsibilities to ensure that the intended services and programmes are offered to the sentenced offender. The Act also requires that the CMC interview, at regular intervals, offenders subject to sentence plans for the purpose of reviewing the suitability of such a plan, and, if necessary, amend the sentence plan.[11]

When an offender becomes eligible for parole, the CMC must compile a report for the CSPB containing the following information:[12]

1. the offence or offences for which the sentenced offender is serving a term of incarceration together with the judgment on the merits and any remarks made by the court;
2. the previous criminal record of the offender;
3. the conduct, disciplinary record, adaptation, training, aptitude, industry, physical and mental state of the offender;
4. the likelihood of a relapse into crime, the risk posed to the community and the manner in which this risk can be reduced;
5. the assessment results and the progress with regard to the correctional sentence plan; and

6. the possible placement of the offender on parole.

It is based on this report that the CSPB will base its decision on whether the offender can be released on parole or not.

The nature of parole determinations

The CSPB, when determining whether an offender should be released on parole, must consider the CMC's report, and, where relevant, any representations from a complainant or offender.[13] The CSPB is then authorised by the Act to do the following:[14]

1. place an offender under correctional supervision, day parole, parole, or medical parole and determine the conditions that will attach to these respective placements; and
2. in respect of a sentenced offender serving a sentence of life incarceration, make recommendations to the Minister on the granting of day parole, parole or medical parole and the nature of the conditions that should be imposed.

There are a wide range of conditions which the CSPB may attach to an offender's parole.[15] Importantly, however, the Act and its regulations are silent on whether the CSPB, when refusing to place an offender on parole or recommend his or her release to the Minister, has the power to make recommendations regarding or impose additional conditions which should attach to the remainder of the offender's sentence. The Standing Orders of the Department of Correctional Services: B-Orders (B-Orders), a set of policy directives issued by the Commissioner of Correctional Services, offer a limited amount of guidance on the CSPB's actual powers in relation to the scope of its powers. In the section headed 'Functions and Duties' the B- Orders, much like the Act, only go as far to state that the CSPB has the power to 'grant, deny or revoke parole', 'recommend placement for prisoners sentenced to life imprisonment'[16] as well as 'determine the period for and the conditions on which the prisoner shall be placed [parole]'.[17] The objective of the CSPB is described in the B-Orders as the following:

'The responsible consideration of and approval/disapproval of the placement of prisoners under correctional supervision/on day parole/parole and in specific cases the release of prisoners upon their sentence expiry dates. This consideration/approval function is performed throughout with due consideration to the interests of the individual, but especially the protection of the community. On the other hand the community's responsibility and involvement in terms of the reintegration of the prisoner into the community is accomplished as far as possible.'[18]

In addition, the B-Orders state:

'[a] low risk level for the community is not the only consideration. The CSPB must also consider whether the prisoner obtained the maximum benefit in terms of positive development from his/her imprisonment and whether his/her placement under/conversion to correctional supervision/placement on day parole/parole will lead to his/her further improvement/development.'[19]

Under the heading 'Policy,' however, the B-Orders provide that the '[CSPB] shall adopt rules, regulations and policies necessary to perform its function as dictated by the [Act] or Minister."[20] The scope of the CSPB's policy-making powers are curbed by the Constitutional Court's finding in

AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another.[21] In that matter the Court held that where a statute is silent on whether a particular body is vested with a particular power, such authority can be presumed if, in order to carry out its objectives, that power is "reasonably necessary".[22] Put differently, and in the words of Langa CJ, a power is "reasonably necessary" if effect cannot be given to the statute as it stands unless the provision sought to be implied is read into the statute."[23] It is thus necessary to determine whether the power of the CSPB to make recommendations concerning the manner in which an offender should serve the remainder of his sentence is reasonably necessary to carry out the CSPB's objectives.

There are, arguably, convincing reasons justifying both positions. These are set out below.

As mentioned previously, it is clear that there is no explicit authority in the legislation or policy for the CSPB to make recommendations concerning the manner in which an offender should serve the remainder of his sentence. In certain respects, this makes sense, for it is the CMC that is tasked with assessing the offender and overseeing her progress in carrying out the various programmes or tasks attached to the sentence. The CMC has thus enjoyed the obvious benefit of firstly, understanding an offender's specific needs, and, second, continuously monitoring whether such needs are being met by the assigned programmes in the sentence plan. The CMC also has the authority to amend the sentence plan if it is apparent that it is lacking in some way. Moreover, the CMC's report is, in part, based on and includes various other reports, "including judicial comments and psychological and/or psychiatric evaluation." It has thus had the additional benefit of having reviewed such documents, if any. The CSPB's understanding of the offender and her needs is limited to the information provided to it in the report and recommendations of the CMC. It is therefore only able to determine the extent to which an offender has complied with the conditions of his sentence plan, thus rendering it significantly disadvantaged in its determination of how an offender could best be rehabilitated during the latter portion of her sentence. A rule authorising the imposition of additional conditions to be completed during the offender's period of imprisonment may result in outcomes similar to those that occurred in the *Gwebu* and *Botha* decisions: the imposition of an additional programme or task that has little value in relation to the circumstances of the offender, thus rendering the refusal of parole by the CSPB deeply unfair.

On the other hand, there are good reasons why the CSPB should have the type of powers necessary to enable it to have some sort of say regarding how an offender should serve the remainder of his sentence. The CSPB must perform a rather delicate balancing act: the assessment of whether an offender is rehabilitated to the extent that he or she is no longer a threat to the safety of the public. It must also determine whether parole will contribute to an offender's personal development.[24] These tasks involve the weighing up of the interests of the individual offender against those of the public.[25] Although the CSPB does not have the benefit of having monitored the offender's progress in the same way that the CMC does, there are nevertheless instances in which the CSPB may have insight into an offender's potential readiness for release. This may happen when the CSPB receives information additional to that contained in the CMC's report, either from the offender herself, or from the victim or relatives of the victim.[26] It could also happen simply because there are very good reasons justifying a departure from the CMC's recommendation. (Such reasons would need to be recorded in writing, however.) Given the possibility that the CSPB may, based on additional information it may have received, come to a different conclusion to that of the CMC, it follows that it should be able to explain how and why the offender could overcome the obstacle preventing his or her eligibility for release. Whether such 'explanation' should be in the

form of a recommendation or a directive must be determined against what would be required or permitted by the 'dictates of the Act.'[27] The Act describes the objectives of "community corrections," which includes parole, as the following:[28]

1. to afford sentenced offenders an opportunity to serve their sentences in a non-custodial manner;
2. to enable persons subject to community corrections to lead a socially responsible and crime-free life during the period of their sentence and in future;
3. to enable persons subject to community corrections to be rehabilitated in a manner that best keeps them as an integral part of society; and
4. to enable persons subject to community corrections to be fully integrated into society when they have completed their sentences.

The "immediate aim" of the implementation of community corrections as required by the Act, is "to ensure that persons subject to community corrections abide by the conditions imposed upon them in order to protect the community from offences which such persons may commit."[29]

In essence, the factors listed above, describe the effective rehabilitation of an offender and his or her adherence to conditions. Given that the Act specifically authorises the CSPB to impose conditions on parole, it is only the rehabilitative aspect of the objectives that may or may not have a bearing on the authority of the CSPB.

As discussed above, the CSPB is simply not in a position to have the level of insight necessary to be able to determine how an offender should best serve the remainder of her sentence. Rather, it is the CMC that is best equipped to determine the nature of the 'needs' of the offender. Moreover, such 'needs' are those typically associated with an offender's successful reintegration, such as educational, health and developmental needs.[30] But, given the (albeit) narrow range of instances in which the CSPB may be privy to additional information, it should be able to have some sort of say regarding how an offender should be eligible in the future for release on parole. Such authorisation should not, however, extend to the giving of orders or directives. Authorisation should be limited to recommendations only; and only in circumstances where the CSPB has been given information additional to what it was provided by the CMC. Moreover, it should state, in writing, that such recommendations are not binding and subject to improvement or correction by the CMC. The *Botha* and *Gwebu* matters serve as excellent examples of how the CSPB's powers, when extended beyond its mandate, make unnecessary incursions into an offenders right to liberty. Given the Constitution's robust protection of this right, such incursions should be avoided at all costs.

Discussion and conclusion

Legislative silence on whether the CSPB has the power to order or recommend that an offender undergo or complete certain training or programmes during the remainder of her sentence, has led to confusion and, regrettably, unjustified incursions into the right to liberty. The same is not true for England and Wales, or, at least, this has not been revealed through case law. This is significant, given the similarities of the two jurisdictions' respective parole processes. Much like the position in South Africa, the powers and function of the Parole Boards in England and Wales focus almost exclusively on the determination of whether an offender should be released and the number and type of conditions that would accompany release, if so permitted.[31] In England and Wales, for

example, immediately after the imposition of a custodial sentence, adult offenders sentenced to a term exceeding 12 months undergo an assessment for the purpose of generating a specific "sentence plan."[32] Once a case has been referred to the Parole Board it is provided with a dossier containing information almost identical to that of the South African example.[33] The Parole Board essentially has the power to direct either release, a transfer to "open conditions" or that the offender remain in custody.[34] Before ordering the release of an offender the Parole Board must be "satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined."[35] In addition, the Parole Board is thus required to take into account a number of factors, which, again, are essentially similar to those outlined in the Act and the B-Orders.[36]

Unlike the South African examples described above, the English Parole Board appears to adhere to the comprehensive and expressly defined powers through which it is mandated only to assess offenders in order to determine which offenders may be released safely. While the extensive range of provisions allow the Parole Board to control, conduct and modify the parole process according to the requirements and circumstances of each case, its powers are limited. It retains no explicit authority to impose or recommend additional requirements that the offender must fulfil in order to be released. Moreover, it has not assumed, as has the CSPB, that such a power has been impliedly authorised. Although, as we argue, there may be a limited number of circumstances in which the CSPB should be able to issue recommendations regarding the remainder of an offender's sentence, this should never culminate in the *de facto* ordering of the fulfilment of certain conditions prior to release. This amounts to an unlawful extension of its mandate. It is unclear why the CSPB has previously assumed that such a power was reasonably necessary to fulfil its purpose. Perhaps it is the result of inadequate training on the part of the CSPB members. Certainly, the legislation or Commissioner's directives could be amended to reflect the correct position in law. Although this would serve only to clarify the correct position in law, it would nevertheless have the added benefit of reducing the number of cases going to court on review, which, in turn, would lessen the amount of time potential parolees would spend in prison waiting for their matters to be heard. The vigour with which the right to liberty has been protected by our courts in the past may indeed indicate that legislative amendment is the correct course of action.

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[1] 26 June 2013, North Gauteng High Court, as yet unreported.

[2] Id at para 5.

[3] 10 March 2009, High Court, Transvaal Provincial Division, unreported. Interestingly, seven days later, in the same court, the matter of *Derby Lewis v Minister of Correctional Services and Others* 2009 (6) SA 205 (GNP) was handed down. In that matter the Court dismissed the applicant's request to be placed on parole. Although the judgment does not deal exclusively with the role of restorative justice in parole determinations, it nevertheless delivered a thorough and well-considered finding that the victims of the applicant's crime had a right to be heard pending the CSPB's decision on whether to release the offender. Thus, despite the fact that the applicant had completed a number of "rehabilitative programmes" and had a record of good behaviour in prison, the Court noted that, given the interest of the victim in making submissions to the CSPB on the applicant's proposed release, such submissions must be heard prior to the CSPB's determination.

[4] Id at para 27.

[5] Id.

[6] Id at para 27.

[7] See for example *Van Gund v Minister of Correctional Services* 2011 (1) SACR 16 (GNP.

[8] Section 136 of the Correctional Services Act 111 of 1998.

[9] Section 38(1) of the Correctional Services Act 111 of 1998.

[10] Section 38(1A) of the Correctional Services Act 111 of 1998. Importantly, offenders sentenced to a period of imprisonment less than 24 months are not given a sentence plan. This seems somewhat disingenuous given that all offenders are assessed. It also raises the question of whether such short sentences are appropriate given that such offenders will not be partaking in any sentence plan 'activities.' In addition, the release on parole of offenders sentenced to less than 24 months in prison is determined by the Commissioner of Correctional Services.

[11] Section 42(1)(b) of the Correctional Services Act 111 of 1998.

[12] Section 42(1)(d) of the Correctional Services Act 111 of 1998.

[13] An offender is entitled to make representations to the CSPB when he or she is serving a sentence of life imprisonment. In such circumstances it is the Minister of Correctional Services, based on the recommendation of the CSPB, that has the final say on whether such an offender should be released on parole. The Act states that an offender sentenced to life imprisonment is entitled to make representations to the Minister regarding the recommendation by the CSPB to the Minister (section 75(1)(c) of the Correctional Services Act 111 of 1998. A victim of the offender is entitled to make representations to the SCPB on an offender's proposed release in terms of section 75(4) of the Correctional Services Act 111 of 1998. See also *Derby-Lewis v Minister of Correctional Services and Others* 2009 (2) SACR 522 (GNP).

[14] Section 75(1)(a) of the Correctional Services Act 111 of 1998.

[15] Section 52 of the Correctional Services Act 111 of 1998 states that the CSPB may order the offender:

a. is placed under house detention;
b. does community service in order to facilitate restoration of the relationship between the sentenced offenders and the community;
c. seeks employment;
d. where possible takes up and remains in employment;
e. pays compensation or damages to victims;
f. takes part in treatment, development and support programmes;
g. participates in mediation between victim and offender or in family group conferencing;
h. contributes financially towards the cost of the community corrections to which he or she has been subjected;

i. is restricted to one or more magisterial districts;
j. lives at a fixed address;
k. refrains from using alcohol or illegal drugs;
l. refrains from committing a criminal offence;
m. refrains from visiting a particular place;
n. refrains from making contact with a particular person or persons;
o. refrains from threatening a particular person or persons by word or action;
p. is subject to monitoring;
q. in the case of a child, is subject to the additional conditions as contained in section 69; or
r. is subject to such other conditions as may be appropriate in the circumstances.

[16] Standing Orders of the Department of Correctional Services: B-Orders, Chapter 26, para 2.0.

[17] Standing Orders of the Department of Correctional Services: B-Orders, Chapter 26, para 7.9.

[18] Standing Orders of the Department of Correctional Services: B-Orders, Chapter 26, para 7.1.

[19] Standing Orders of the Department of Correctional Services: B-Orders, Chapter 26, para 7.16

[20] Standing Orders of the Department of Correctional Services: B-Orders, Chapter 26, para 5.0.

[21] 2007 (1) SA 343 (CC).

[22] Id at para 82.

[23] Id.

[24] Standing Orders of the Department of Correctional Services: B-Orders, Chapter 26, para 7.16.

[25] In the past courts have set aside the CSPB's refusal of parole where it has determined that the "seriousness of the offence" justifies the refusal of parole. Courts have made it clear that consideration of the nature of the offence is not something which falls within the mandate of the CSPB. See for example *Combrinck and Another v Minister of Correctional Services and Another* 2001 (3) SA 338.

[26] See sections 75(4) and 75(4A) of the Correctional Services Act 111 of 1998.

[27] Standing Orders of the Department of Correctional Services: B-Orders, Chapter 26, para 5.0.

[28] Section 50(1)(a) of the Correctional Services Act 111 of 1998.

[29] Section 50(2) of the Correctional Services Act 111 of 1998.

[30] Section 38 of the Correctional Services Act 111 of 1998.

[31] See generally Criminal Justice Act 2003, Section 239; The Parole Board Rules 2011; Secretary of State's Directions to the Parole Board: May 2004 (http://www.justice.gov.uk/offenders/parole-

board/sos-directions/may2004; Crime (Sentences) Act 1997.

[32] The report is reviewed annually and similarly, is reviewed every 16 weeks until expiry of the licence period.

[33] The Parole Board Rules 2011, Schedule 1.

[34] For those sentenced to extended sentences, this period will continue until expiration of the extended period. IPP must remain on licence for a minimum period of 10 years before they can apply to be discharged (Crime (Sentences) Act 1997, Section 31A), while life sentence prisoners remain on licence until death (Crime (Sentences) Act 1997, Section 31(1)); Crime (Sentences) Act 1997, Section 28(7).

[35] Crime (Sentences) Act 1997, Section 28(6). In *R (on the application of Sturnham) v Parole Board* [2013] UKSC 47, the Supreme Court confirmed the applicability of this test to the now defunct IPP sentence.

[36] These factors are set out in the Secretary of State's Directions to the Parole Board (May 2004):

- Whether the safety of the public would be placed unacceptably at risk. This requires consideration of:
    - The nature and circumstances of the index offence (including the impact on the victim or victim's family);
    - The offenders background (including previous offending behaviour);
    - Whether the offender has demonstrated through his attitude and behaviour, a willingness to address his offending behaviour and whether he has made positive effort and progress in this regard;
    - Behaviour during temporary release or other outside activities;
    - The risk posed to the victim and the victim's family and friends;
    - Medical, psychiatric or psychological factors related to risk;
- The content of the resettlement plan.
- Whether the provision of supervision following release is likely to reduce the risk of reoffending.
- Whether the offender is likely to comply with licence conditions and the requirements of supervision.
- The suitability of home circumstances.
- The relationship with supervising probation officer.
- Representations made by the victim or victim's family regarding the licence conditions.