Barnard v Minister of Justice: the minister's verdict

Deciding on parole for offenders serving life sentences

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Granting parole to offenders serving life sentences has raised questions in public and political discourse. This contribution evaluates the discretion of the minister to decline parole under Section 78(2) of the Correctional Services Amendment Act 25 of 2008 (CSAA). It examines the drafting history of Section 78(2) of the CSAA, evaluates the full extent of the ministerial powers, and reviews its recent application in Barnard v Minister of Justice, Constitutional Development & Correctional Services and Another. It argues that ministerial discretion to refuse parole needs to be re-examined in the wake of that decision, and recommends elements for inclusion in the minister's decision to refuse parole.

According to Section 78(2) of the Correctional Services Amendment Act 25 of 2008 (CSAA), the Minister of Justice and Correctional Services may deny parole to an offender serving life imprisonment. This role was performed by the Minister of the Department of Correctional Services even before the department was merged with the Department of Justice and Constitutional Development.[1] In 2015, Ferdi Barnard applied to the court for a review of the minister's decision denying him parole. The court declined to review the decision because it found it to be reasonable. The applicant only discovered the reasons that informed the minister's decision in the course of hearing his review application. The minister's failure to give the applicant information regarding the outcome of his parole, and the reasons for his decision before Barnard applied for review, are problematic. This contribution analyses the minister's refusal in light of the drafting history of the section and its application in *Barnard v Minister of Justice, Constitutional Development and Correctional Services and Another* (*Barnard*).[2] It is argued that an offender should know the decision and the reasons that informed it, at the time the decision is passed. The terms applicant, offender and prisoner are used interchangeably to refer to the offender under Section 78 of the CSAA.

Bounds of the minister's discretion to deny parole

After the National Council (NC) has considered the record of proceedings and recommendations

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of the Correctional Supervision and Parole Board (CSPB), it may recommend to the minister that an offender is placed on parole.[3] If the minister refuses to grant parole, he recommends the treatment, care, development and support that the offender should undergo to improve his chances of placement on parole.[4] The NC may advise the minister to reconsider granting parole to an offender within a period of two years from the date of the earlier decision.[5]

Consideration for parole under Section 78 of the CSAA requires that three steps be followed. Firstly, the CSPB considers the merits and the conditions that the offender should follow before he or she is granted parole, and that it makes recommendations to the NC for further scrutiny.[6] The purpose of scrutinising the recommendations of the CSPB is to establish if the offender, when released on parole, will be able to adhere to the conditions for his release.[7] Secondly, the NC scrutinises the recommendations of the CSPB with regard to parole of an offender.[8] The involvement of the NC only occurs in applications for parole under the aforesaid action. Thirdly, the minister makes a decision to grant or deny parole.[9]

Section 78(2) of the CSAA gives the minister the discretion to decline to place an offender on parole, and to make recommendations that relate to the treatment, care, development and support of the offender. These recommendations are aimed at improving the offender's likelihood of being placed on parole. They should be sufficiently stated to enable the offender to make informed decisions. This section, however, does not provide for a review of the minister's decision. The offender has to resort to the Promotion of Administrative Justice Act (PAJA) to review the minister's administrative decision.

Section 6(2) of the PAJA provides for various grounds for a judicial review of an administrative decision. These include lack of authority and unlawful delegation, bias, failure to comply with the mandatory procedure, procedural fairness, error of law, review of the decision-making process, rationality and reasonability.[10] The offender may plead any of these grounds as evidence in his or her application. The PAJA does not provide for any other kind of procedure that the offender may follow, other than possible reconsideration and recommendation by the NC to the minister within a period of two years. If the minister does not reconsider his decision, the offender may apply for a review of the minister's administrative decision.[11]

Drafting history of Section 78 of the Correctional Services Amendment Act

The object of the amendment to the Correctional Services Act in 2008 was to bring the act in line with the White Paper on Correctional Services of 2005.[12] The initial bill included Clause 62 [now Section 78], which sought to leave it to the minister to decide which offenders would get parole. The Parliamentary Portfolio Committee on Correctional Services expressed concern that certain parts of the bill gave the minister various powers relating to parole.[13] The committee required the amendment to embrace the broader role of parole, namely that of rehabilitating the offender.[14] Committee members felt that if the minister had powers to grant or deny parole, the offenders, and persons who were affected by the offender's acts, would commence unnecessary litigation.[15] The two reasons that informed the committee's concern were that firstly, this litigation was perceived to be based on the executive nature of the minister's power, and secondly, that the regulatory powers of the minister under Section 82 were sufficient.[16]

The Constitution of the Republic of South Africa and PAJA were enacted to give effect to the principle of administrative justice in a coherent, well-managed, just, uniform and equitable system.[17] However, scholars such as Julia Sloth-Nielsen held the view that the current parole system fell short of these principles, and argued

that the decision to let the minister decide parole terms contravened the rule of law.[18] The South African Human Rights Commission was of the opinion that to give the minister the power to decide on parole in cases of life imprisonment would be problematic, as it was a judicial role.[19] The committee nevertheless adopted the amendment, which gave the minister the discretion to decide parole terms under Section 78 of the CSAA.

The concerns of the committee prior to the adoption of the amendment related to whether the proposed acts of the minister were administrative or executive actions.[20] In *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*, an administrative action was defined as the action or function to be done, other than the functionary or the person who carried out the action.[21] However, it did not reflect the peculiar nature of the executive function under Section 78(2) of the CSAA. In *Abel Zanele Mbonani v Minister of Correctional Services and Others* (*Mbonani*), the court stated that organs of state should treat people with dignity, honesty and fairness.[22] This position created a fusion of the functionary and the function and, therefore, the administrative act could not be severed from the minister's position as a member of the executive. In essence, the minister's decision affected the offender's right to freedom and security of a person.

Application in *Barnard*

In *Barnard*, the applicant sought to review the minister's refusal to place him on parole. At the time of his application, he had previous convictions on two counts of murder, one count of attempted murder and another count of theft. He applied for parole in 2013 after he had served 16 years and 8 months in prison. At this time the NC recommended that he should not be placed on parole and that it would reconsider his profile after 12 months.[23] The parties agreed that the NC should submit a recommendation to the minister by 19 December 2014 and that the minister would make a decision by 31 January 2015.[24] The NC recommended parole for Barnard from 1 June 2015, upon completion of the pre-release programme.[25] He had to be monitored electronically, and adhere to the normal parole conditions of the DSC.[26]

The minister declined to place Barnard on parole until after 12 months and required that the CSRB aid Barnard to perform six conditions.[27] At this point in the parole process, the minister had on two occasions given his approval that Barnard's profile be re-examined after 12 months. Barnard based his review application on various grounds, including the fact that the decision was unreasonable.[28] These grounds provided evidence that there had been a violation of Barnard's right to a just and fair administrative decision. There is no need to repeat how the court dealt with the statutory and policy framework governing parole, because it is out of the scope of this contribution. The minister stated that despite the decision document being headed 'Reasons for decision', it did not contain the reasons for his refusal to grant Barnard parole.[29] He claimed that the 'Reasons for decision' simply listed the steps that the department would be required to take in assisting Barnard in the period between the refusal and the fresh consideration of his profile.[30]

The minister's reply indicates that firstly, the CSPB did not communicate to Barnard the reasons for its recommendations to the NC, to be taken further to the minister. Secondly, the minister did not communicate the reasons for the refusal of parole to the offender.[31] The drafters of Section 78(2) did not envisage these two scenarios. The minister stated that, firstly, he considered positive factors such as the applicant's behaviour and adjustment during incarceration.[32] Secondly, he also considered

negative factors such as the applicant's criminal history.[33] The minister noted that that the applicant was still a danger to the community.[34]

Only in court was the applicant alerted to the factors that the minister had considered before making the decision. The decision given to the applicant on 25 February 2015 indicated that the applicant had not been placed on parole and that the minister's recommendations had to be followed by the department before reconsidering his parole after 12 months. However, the reasons that led to the minister's decision were lacking, which the applicant did not know prior to submitting his application for review.

The court did not fault the minister for not giving the applicant all the information regarding his parole before the application for review. This was firstly an indication that the minister may deny an offender parole, and make recommendations for a future successful parole application. Secondly, the minister's reasons need not form part of the recommendations communicated to the offender on the day of the decision. In *Barnard*, the court used the reasonableness test in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others,* to evaluate the minister's decision.[35] The court looked at the nature of the decision, the identity and expertise of the decision-maker, and the range of factors relevant to the decision.[36] Other factors include the reasons for the decision, the nature of competing interests, and the impact of the decision on the lives and wellbeing of those affected.[37] With regard to the reasons for the decision, these were not communicated to Barnard before the application for review. The court established that the minister's decision was reasonable, but did not deal with his failure to communicate the reasons that informed his decision before Barnard applied for review. Whether the substantive reasons for the denial of parole should be communicated, and whether these reasons should be given to the offender at the same time that the decision is communicated to the CSPB, remain unresolved.

A working framework

Parole is an executive function that requires the minister to exercise reasonableness in granting or declining it. With regard to declining parole, a clear framework is key to upholding the roles of the executive, legislature and judiciary in this administrative process. While Parliament may prescribe harsh sentences to show that the country is tough on crime, an unforgiving attitude, contrary to the ubuntu concept of national understanding and forgiveness, should be avoided.[38] Parole serves the interests of offenders, victims and government through the encouragement of the use of ubuntu for reconciliation.[39] While there is no express policy on the use of ubuntu for parole, reconciliation embraces ubuntu as a tool for punishment.[40] A working framework that revisits the content and context of the minister's decision under Section 78(2) of the CSAA is important.[41] Ubuntu serves as a transformative tool that creates cohesion in the demographic, cultural and legal diversity of South Africa.[42] It provides a transition from South Africa's apartheid era to the democratic dispensation. Since respect for human rights is a cornerstone of this democratic dispensation, ubuntu underpins the restoration of relations between offenders and the community, which goes against parliamentary policy decisions to punish offenders.[43] Given that ubuntu balances punishment for a crime with restorative measures such as parole, the decision to deny parole should always take cognisance of administrative justice.[44]

Engaging with the definition of administrative law is important in creating this framework. Administrative law applies to public authorities or a branch of law that regulates the activities of bodies that exercise public powers or perform public functions, irrespective of whether those bodies are public authorities in a strict

sense.[45] Secondly, administrative law is the area of public law that regulates the exercise of public power and the performance of public functions by natural and juristic persons and the organs of state.[46] Thirdly, administrative law emphasises the effective control of public administration and administrative activities to ensure that the exercise of public powers does not adversely affect the rights of individuals.[47] It is clear that administrative law effectively regulates what the administration may or may not do, and what remedies are available in the case of maladministration.[48] The actions of some private institutions or bodies may also qualify as administrative actions, even though these bodies and institutions are not strictly speaking part of the broader public administration domain.[49]

These reflections do not envisage the exercise of a quasi-judicial role in the minister's refusal to grant parole, which affects an offender's right to liberty. This is because the decision is made by the minister in an administrative sense rather than a judicial one.[50] In *Derby-Lewis v Minister of Justice and Correctional Services* and *S v Makwanyane*, the courts stated that the minister needs to uphold the concept of ubuntu and embrace an individual's inherent human dignity.[51] According to *Van Vuuren v Minister of Correctional Services and Others,* this course of action enables the minister to use parole as a tool of restorative justice between the offender and his community.[52]

The content of the decision

The decision should include three aspects: the refusal to grant an offender parole, the reasons that inform this decision and the recommendations that follow. Firstly, it is only fair that these three aspects form part of the communication in order to enable an affected party to make an informed decision on the next course of action.[53] Secondly, it minimises perceptions of unreasonableness and administrative bias on the part of the minister.[54] The importance of these three aspects is underscored by the problematic nature of the minister's decision, which hinges on criminal justice in as far as it determines the liberty of an individual. The non-communication of the reasons for the refusal of parole to an offender exhibits a lack of transparency. A decision communicated with these three aspects enables an offender to make an informed decision, and prepare an informed application for review. An offender who does not apply for review may follow the minister's recommendations based on the reasons that informed his refusal. These three aspects enhance the accountability of the minister to the offender, the victims and the public.[55]

The offender has a right to be considered for placement on parole.[56] According to Mujuzi, parole is a legitimate expectation of an offender to be considered and placed thereon upon the fulfillment of all required conditions.[57] This is an indication that placement on parole is a privilege and not a right. However, the Constitutional Court implied the existence of the right to be placed on parole in *Agole Abdi Jimmale and Another v S* (*Jimmale*) when it stated that a non-parole order should be made only in exceptional circumstances.[58] The court stated that since the non-parole order was a determination in the present for the future behaviour of the offender, there was a possibility of issuing the order based on inadequate information about the offender.[59] Although the court did not expressly provide for placement on parole as a right, it implied as much. Since the court implied the granting of parole as a right in *Jimmale*, the minister's finding should therefore include the decision, the reasons that inform it and the recommendations. This conduct upholds the equitable maxim that justice should not only be done but also manifestly be seen to be done.[60]

The context of the decision

The context of the decision to decline parole refers to that time when the three aspects that

form the content of the decision should be communicated. It is based on the requirement of natural justice that a person should know the reasons for a decision passed against him or her, to aid the next course of action.[61] The three aspects of the content of the decision declining parole should inform the communication to the offender on the date that the decision is passed. In *Barnard*, for instance, the decision denying parole, the recommendations and the reasons for the refusal should have been communicated on the same day, before Barnard applied to the court for an administrative review. It may be that an affected party will not seek legal redress if the three aspects of the decision are communicated at once and simultaneously.

Conclusion

These recommendations may be instructive to a minister's decision to allow or deny the placing of an offender on parole. A finding under Section 78(2) of the CSAA should include the decision to refuse parole, the reasons that inform this decision, and the recommendations that should be followed by the offender. A failure to do this should launch a review application on grounds of unreasonableness under the PAJA.[62] In his decision to decline parole, the minister may make a material departure from the reasons and recommendations of the NC. He ought to give a full explanation why he departed from the reasons and recommendations of the NC. The offender is then able to make an informed decision when deciding on a course of action. This enhances the accountability, transparency and consistency of the decisions made by the minister.

The courts should interpret Section 78(2) of the CSAA in a manner that promotes dignity, equality and freedom.[63] The minister's decision should enable the offender to make an informed decision before seeking administrative review of the finding. It is recommended that further research is carried out on how the courts should do this in light of the past interpretation of Section 78(2). In the interim, the current literal interpretation of the section by the courts, requiring only that the decision and recommendations are communicated to the offender, may be solved by the aforementioned approach. Although the court dealt with the issues of *Barnard* decisively, it is probable that its position would be different if it had considered the information Barnard needed to have at a particular point in the parole process before lodging his application for review.

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Notes

1 N Manyathi-Jele, New justice ministry announced, *De Rebus*, 128, July 2014, http://www.saflii.org/za/journals/DEREBUS/2014/128.pdf (accessed 22 February 2017).

2 *Barnard v Minister of Justice, Constitutional Development and Correctional Services and Another 2016* (1) SACR 179 (GP).

3 Correctional Services Amendment Act 25 of 2008 (CSAA), Section 78(1).

4 Ibid., Section 78(2). For all gender pronouns, 'he' may refer to 'she'.

5 Ibid., Section 78 (4).

6 Correctional Services Act 111 of 1998, Section 75(1) c.

7 Ibid., sections 78(1), (3), (4) and 84 (5).

8 Ibid., Section 73(1).

9 Ibid., Section 78(2).

10 Ibid., Section 6(2) (a) (i) and (ii), (b), (c), (d), (e) (i)-(iv), (f) and (h).

11 The Promotion of Administrative Justice Act 3 of 2000 (PAJA).

12 Parliamentary Monitoring Group (PMG), Correctional Services Amendment Bill [B31-2007]: briefing, 24 August 2007, https://pmg.org.za/committee-meeting/8228/ (accessed 5 September 2016).

13 PMG, Correctional Services Amendment Bill [B31-2007]: deliberations, 31 August 2007, https://pmg.org.za/committee-meeting/8259/ (accessed 5 September 2016).

14 Ibid.

15 Ibid.

16 Ibid.

17 *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC) para 45–48 deals with the interpretation of 'unreasonableness' in an administrative decision. See also *Minister of Defence and Military Veterans v Motau and Others* [2014] ZACC 18 para 33–35 on the nature of an administrative decision.

18 See Prof. Julia Sloth-Nielsen's remarks in PMG, Submission to the Parliamentary Portfolio Committee on Correctional Services relating to parole and the proposed amendments concerning parole in the Correctional Services Amendment Bill, 31 August 2007, para 13, http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/2007/070905sloth-nielsen.htm (accessed 13 March 2017). For other views on reasonability as a ground for review of an administrative decision, see C Hoexter and R Lyster, *The new constitutional and administrative law,* Vol. 2, Cape Town: Juta, 2002, 187.

19 PMG, Correctional Services Amendment Bill [B31-2007]: public hearings, 4 September 2008, https://pmg.org.za/committee-meeting/8274/ (accessed 5 September 2016).

20 *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 (10) BCLR 1059 para 141.

21 Ibid., 141.

22 *Abel Zanele Mbonani v Minister of Correctional Services and Others,* Unreported High Court Application 15991/2011 (judgement delivered 5 October 2011) para 12. See C Hoexter, *Administrative law in South Africa*, Cape Town: Juta, 2012, 325, note 485.

23 *Barnard v Minister of Justice, Constitutional Development and Correctional Services and Another,* para 10.

24 Ibid., para 12.

25 Ibid., para 14.1.

26 Ibid., para 14.2–14.3.

27 Ibid., para 15, 17. The conditions included, first, to aid restorative justice between the offender and the family of the second victim and, second, to obtain a positive address. Third, the department was required to assist the offender to strengthen his relationship with his son and, fourth, to participate in self-development programmes. Fifth, the offender had to receive further supportive therapy, and sixth, the department had to advise on security threats that might exist if the offender were placed on parole.

28 Ibid., para 32.1–32.7.

29 Ibid., para 34.

30 Ibid., para 34.

31 The author was unable to establish which scenario was evident in Barnard's case.

32 Ibid., para 35.1. For other positive factors, see para 35.2–35.4.

33 Ibid., para 36.2. For other positive factors, see para 36.3–36.7.

34 Ibid., para 36.7.

35 *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC); *Barnard v Minister of Justice, Constitutional Development and Correctional Services and Another,* para 81.

36 *Barnard v Minister of Justice, Constitutional Development and Correctional Services and Another*, para 81.1–81.3.

37 Ibid., para 81.4–81.5.

38 F Hannes, Curb the vengeance: Laws on minimum sentencing and parole spell worsening prison conditions, *South African Crime Quarterly,* 10, 2004, 1–5, 4; L Wolf, Pre and post-trial equality in criminal justice in the context of separation of powers, *Potchefstroom Electronic Law Journal*, 14(5), 2011, 155.

39 Hannes, Curb the vengeance, 4.

40 DW Nabudere, Ubuntu philosophy: memory and reconciliation, *Texas Scholar Works*, 2005, 1–20, 6;

41 Wolf, Pre and post-trial equality in criminal justice, 155.

42 C Himonga, M Taylor and A Pope, Reflections on judicial views of ubuntu, *Potchefstroom Electronic Law Journal,* 16:5, 2013, 372–429, 372.

43 Constitution of the Republic of South Africa, 1996, Section 7(1); H Keep and R Midgley, The emerging role of ubuntu-botho in developing a consensual South African legal culture, in F Bruinsma and D Nelken (eds), *Recht der werkelijkheid,* Gravenhage: Reed Business BV, 2007, 29–56, 30.

44 *S v Makwanyane* 1995(3) SA 391.

45 GE Devenish, K Govender and D Hulme, *Administrative law and justice in South Africa,* Durban: Butterworths, 2001; L Kotze, The application of just administrative action in the South African environmental governance sphere: an analysis of some contemporary thoughts and recent jurisprudence, *Potchefstroom Electronic Law Journal,* 7:2, 2004, 58–94, 1.

46 Y Burns, *Administrative law under the 1996 constitution* (2nd ed), Durban: LexisNexis, 2003, 7. This category falls within the constitutional right to a just administrative action. See Constitution, Section 33; PAJA, Section 1(i) (a) and (b).

47 Hoexter and Lyster, *The new constitutional and administrative law*, 2-4; Kotze, The application of just administrative action in the South African environmental governance sphere, 1.

48 Kotze, The application of just administrative action in the South African environmental governance sphere, 1; CRM Dlamini, The right to administrative justice in South Africa: creating an open and accountable democracy (part 2), *Journal of South African Law,* 2000, 53–71, 53.

49 Hoexter and Lyster, *The new constitutional and administrative law.*

50 For an extensive discussion on review of decisions of the Commission for Conciliation, Mediation and Arbitration, see DJ van Graan, The grounds for review of CCMA awards, unpublished LLM thesis, University of Pretoria, 2014, 38.

51 *Derby-Lewis v Minister of Justice and Correctional Services* 2015 (2) SACR 412, para 55; *S v Makwanyane* 1995(3) SA 391, para 307–308.

52 *Van Vuuren v Minister of Correctional Services and Others* 2012 (1) SACR 103 (CC), para 51.

53 This is in line with the requirement to give a person reasons for an administrative decision under Section 33(2) of the Constitution 1996 and Section 3(2)(b)(iii) of PAJA.

54 E Nwauche, Administrative bias in South Africa, *Potchefstroom Electronic Law Journal,* 8:1, 2005, 36–74, 54.

55 Wolf, Pre and post-trial equality in criminal justice in the context of separation of powers, 155.

56 For a general discussion on the bounds of the right to be considered for parole, see JD Mujuzi, Unpacking the law relating to parole in South Africa, *Potchefstroom Electronic Law Journal,* 14:5, 2011, 205–228.

57 Ibid., 209.

58 *Agole Abdi Jimmale and Another* 2016 (2) SACR 691 (CC), para 13. See also *Strydom v S* [2015] ZASCA 29 at para 16.

59 Ibid., para 13.

60 *R v Sussex Justices ex parte McCarthy* [1923] All ER 233; Nwauche, Administrative bias in South Africa, 53.

61 *R. v. Northumberland Compensation Appeal Tribunal, ex parte Shaw* [1952] 1 K.B. 338, C.A.

62 PAJA, Section 6(2).

63 The interpretation should be in line with Section 39(1) (a) of the Constitution.