Neutral Citation Number: [2022] EWHC 2125 (Admin)

Case No: CO/2724/2022

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

The Civil Justice Centre Manchester

Date: 9 August 2022

Before :

HIS HONOUR JUDGE BIRD SITTING AS A JUDGE OF THIS COURT

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Between :

The Queen on the application of Adrian Bailey	**Claimant**
- and -	
The Secretary of State for Justice	**Defendant**
- and -	
The Parole Board of England and Wales	**Interested Party**

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- -

Mr Rule (instructed by **Instalaw Solicitors**) for the Claimant
Mr Seifert (instructed by **Government Legal Department**) for the Defendant

Hearing dates: 8 August 2022

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Approved Judgment

His Honour Judge Bird :

1. The Claimant, Mr Adrian John Bailey, was born on 25 November 1975. The Claimant was convicted on 26 January 2006 of the offence of murder and sentenced to a life sentence with a minimum term of 8 years to serve before consideration for parole. This is his application for interim relief to prevent new Parole Board rules and connected guidance to report makers from applying at his parole hearing which is due to take place on 10 August 2022.

The facts

2. The claimant's tariff expired on 25 January 2014. He is a category D prisoner at an open prison (HMP Haverigg) and is eligible for release at the direction of the Parole Board (see section 28 of the Crime (Sentences) Act 1997 referred to below). His case was referred to the Board on 10 November 2020. The Board directed an oral hearing now listed to take place on 10 August 2022.

3. On 14 June 2022, the panel chair (His Honour Judge Geoffrey Kamil) directed that updated reports from the claimant's community offender manager ("COM") and prison offender manager ("POM") be prepared and served by 29 July 2022. The directions reflected the content of the Parole Board Rules then in force (Paragraphs 4 and 5 of the part B of the schedule to the 2019 rules – see below) so that each was to contain a recommendation about release. The POM and COM will attend the hearing to give evidence.

The relevant statutory framework

4. By section 28 of the Crime (Sentences) Act 1997 the Secretary of State has a duty to release a life prisoner in the position of the claimant once he has served the relevant part of his sentence and the Parole Board has directed his release. By section 28(6) the Board may only give such a direction when it is " satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined."

5. By section 239(4) of the Criminal Justice Act 2003, before giving any such direction, the Board must consider "all evidence as may be adduced before it".

6. Section 239(5) of the 2003 Act contains a power for the Secretary of State (without prejudice to subsections (3) and (4)) to make rules "with respect to the proceedings of the Board, including proceedings authorising cases to be dealt with by a prescribed number of its members or requiring cases to be dealt with at prescribed times."

7. Article 5 of the European Convention on Human Rights 1950 ("ECHR") materially provides as follows:

> Right to liberty and security
> Article 5
> 1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
> (a) the lawful detention of a person after conviction by a competent court;
> …

> 4. Everyone who is deprived of his liberty by arrest or detention shall be entitled 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.
> 5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

8. The Secretary of State is under a duty not to contravene Article 5 (see section 6(1) of the Human Rights Act 1998).

9. Art.5(4) provides a guarantee to all prisoners of a fair and independent judicial process to determine if they should be released. That guarantee is honoured in practice through the operation of the Parole Board.

The new Parole Board Rules

10. The schedule to the Probation Rules of 2019 sets out (see rule 16) what information the Secretary of State is to provide to the Board and the prisoner. Part A of the schedule deals with general information, part B deals with the content of reports.

11. Part B comprises 8 paragraphs. Paragraph 4 requires that "current reports on prisoner's risk factors, reduction in risk and performance and behaviour in prison, including views on suitability for release on licence as well as compliance with any sentence plan" be provided. Paragraph 5 requires the provision of "a current risk management report prepared for the Board by an officer of the National Probation Service……, including information on the following where relevant……(l) a view on the suitability for release".

12. The 2019 rules were amended (insofar as is relevant to this application) on 21 July 2022 by the Parole Board (Amendment) Rules 2022 made by the Secretary of State in exercise of the powers conferred on him by section 239(5) of the 2003 Act. Rule 16 is unchanged. In so far as relevant, the amendments are as follows:

    a. Before paragraph 1 of part B of the schedule the following words are to be inserted as a new paragraph 1Z:

        "(1) Reports relating to the prisoner should present all relevant information and a factual assessment pertaining to risk, as set out in the paragraphs of Part B of this Schedule, but the report writer must not present a view or recommendation as to the prisoner's suitability for release…...
        (2) Where considered appropriate, the Secretary of State will present a single view on the prisoner's suitability for release."

    b. In paragraph 4 the words " , including views on suitability for release on licence as well as compliance with any sentence plan" are to be removed, and

    c. In paragraph 5, sub-paragraph (l) is to be removed

The reasons for the changes

13. The genesis of the change was the Government's "root and branch review of the parole system" published without consultation in March 2022 and conducted as a result of a manifesto commitment published in 2019. The changes are designed to prevent any view or

recommendation about the prisoner's suitability for release being expressed or made in any report.

14. Paragraphs 44 to 48 explain the position in respect of reports as it was in March 2022. In particular it notes that reports set out recommendations and that the authors of those reports are often called to give evidence and "*will explain their assessments to the panel and their reasons for why they support or do not support the release of the prisoner. In the majority of cases the Board will follow the evidence and recommendations of the professional report writers*." At paragraphs 94 to 98 there is some further explanation of the position as it was in March 2022. In particular it is noted that the Secretary of State's representative at the hearing "*do not currently offer a view on whether the prisoner should be released ….. Instead, the Representative urges caution on the Parole Board panel, drawing their attention to aspects of the prisoner's risk where assurance is needed that the public would not be exposed to undue risk if the prisoner were released. The representative makes a submission to the oral hearing and attends it, to answer questions from panel members*." The Secretary of State appears to have been concerned that reports might express different views about the suitability of a prisoner for release. This was the thrust of the Secretary of State's response to a question put to him in Parliament on 5 July 2022 by the Member of Parliament for Stretford and Urmston. He said: "*when the vital question of risk is assessed there is a risk that separate reports…may give conflicting recommendations. [In serious cases] there will be one overarching Ministry of Justice view so that the Parole Board has a very clear steer".* This response mirrors paragraph 98 of the review which notes that a model is being developed in which *"there will be one Secretary of State view presented to the panel*" which would reflect the assessment made by those who write the reports.

Guidance issued by HM Prison and Probation Service

15. A 20 page guidance document was issued by HM Prison and Probation Service to all staff "involved in writing parole and recall review reports, or who are attending oral hearings, about recent significant changes to the parole and recall process."

16. In addition to providing necessary guidance about the impact of the amended rules, the guidance sets out the following: "From 21 July HMPPS witnesses in oral hearings must no longer provide a view or recommendation about suitability for release or a move to open conditions, unless they have submitted a report with a recommendation before 14 July." Under the heading "Language guidance for reports and attendance at oral hearings" the guidance sets out what an HMPSS employee should do if asked at a Parole Board hearing taking place after 21 July (if they have not provided a report before 14 July) to express a view or recommendation as to the prisoner's suitability for release. The guidance directs that one of four possible responses be used.

    • 'It is not my role to provide a view on the suitability of [prisoner name] release or open conditions, but I am able to answer any questions you may have otherwise'
    • I / the Probation Service / Prison Service cannot provide a view/recommendation on whether or not to release / a move to open conditions
    • Where appropriate and relevant: A single view has been provided by the Secretary of State in this case and I refer you to it
    • I cannot provide a view / recommendation on that I'm afraid, but I can provide my assessment of risk and my plan to manage that risk should release be directed

17. The guidance is expressed in mandatory terms ("you should respond") and amounts to a clear direction that a question put by the panel, or a legal representative should not be answered:

    a. Under the heading "what do you need to do now?" in respect of "staff attending an oral hearing on or after 21 July" the guidance is unequivocal: "Do not provide a view or recommendation about suitability for release or a move to open conditions in the oral hearing…… Review the language guidance below to help you prepare." (emphasis added)

    b. In the "frequently asked questions" section of the guidance the answer to the question: "What if a Parole Board panel member or solicitor / barrister asks me for my view on suitability for release during the oral hearing?" the response is: "The Parole Board is aware of these changes. It is very likely that Panel Members and the prisoner's legal representative will ask you whether you assess the risk to be manageable in the community, whether your risk management plan is considered sufficient to protect the public, whether the prisoner is safe to be released or is suitable for transfer to open conditions. You cannot answer as it would constitute a view on suitability for release/open and instead should politely tell the Panel Members and/or the prisoner's legal representative that your role is not to provide the Panel with a recommendation but rather your assessment of the prisoner's risks. If this does happen, you may wish to speak to your line manager following the hearing." (emphasis added).

The connection between the Guidance and the new rules

18. The Secretary of State accepts that the amended rules do not expressly cover the oral evidence of the maker of a report (an employee of HMPSS) and so do not prevent a report maker from answering a question posed by the panel. The Secretary of State did however submit that the amended rules must be read so that they cover such questions.

The impact of the new rules and guidance on the claimant

19. The reports were prepared after the new rules came into force. By operation of the rules the reports do not express a view on release. It follows that the reports do not comply with the directions given by the Board on 14 June 2022.

20. If the HMPSS guidance is applied by the COM and POM at the hearing they will refuse to provide a view or recommendation about suitability for release or a move to open conditions even if directly questioned by the Panel.

The grounds for Judicial Review

21. The grounds are as follows:

    i. The decision and/or action of the Defendant to deny the Claimant the benefit of recommendations expressed by his report writers constitutes an unlawful interference in the judicial process of the independent Parole Board in breach of the common law and/or Article 5(4) ECHR;

    ii. The new Parole Board Rules as implemented by rule 2(22) of the Parole Board (Amendment) Rules 2022 (in force 21 July 2022) are unlawful as they violate Article 5(4) ECHR and/or the inherent guarantees of Article 5 ECHR

and/or are ultra vires;

iii. The breach of legitimate expectation of the process to be followed under the Rules that have applied since the commencement of the Claimant's parole review process – this is a substantive change that directly impacts upon the decision-making rather than merely procedural matter;

iv. The Defendant's instructions to probation and psychology staff, and/or other report writers, not to provide oral recommendations and not to answer judicial questions that ask for their recommendations are ultra vires and/or unlawful.

v. Failure to consult where the common law would impose an obligation to do so, before making changes to a system in which the right to liberty of the individual is governed and in which an independent judicial body is a stakeholder and/or other persons would have legitimate interests in being consulted (including professionals involved in the system or otherwise).

vi. The decision (and step taken) to remove recommendations from report writers is Wednesbury unreasonable at it removes relevant evidence that concerns both liberty and/or public safety and protection from the judicial body that determines whether or not to release convicted offenders.

The relief sought

22. The claimant seeks an order that: the relevant parts of the Parole Board Amendment Rules 2022 set out above "do not apply to the Claimant's ongoing parole review" and an order that the COM and POM "may and should answer any question or volunteer any appropriate evidence concerning his or her recommendation as to the suitability of the Claimant for release and may comment upon whether the risk management plan would protect the public, and/or whether risk is manageable in the community."

23. The claimant therefore seeks to disapply the 2022 rules in so far as they impact his parole hearing and an order that the COM and POM (and any other witness to who the guidance applies) should give their evidence without being fettered by the guidance.

The test for interim relief

24. The parties agree that the appropriate test is set out at paragraph 9 of the judgment of Swift J in *R (on the application of Hussain) v The Secretary of State for Health and Social Care* [2020] EWHC 1392 (Admin):

> *"There is no dispute as to the principles to apply when deciding this application for interim relief. In this case, the Claimant must first show a real prospect that at trial he will succeed in obtaining a permanent injunction, taking account of the fact that any decision to grant such relief would include consideration of the public interest. If the required real prospect exists, the next issue is whether or not the balance of convenience favours the grant of relief. As is ordinarily the case, the balance of convenience requires me to assess the prejudice that would arise if interim relief were wrongly granted, and weigh that against the prejudice that would arise were interim relief wrongly to be refused. At this stage too, the public interest is a relevant consideration: see generally Smith v Inner London Education Authority [1978]1 All*

> *ER 411 and R (Medical Justice) v Secretary of State for the Home Department [2010] EWHC 1425 (Admin.) In this case the relevant public interest is that of the Secretary of State continuing to operate effective measures to safeguard public health in response to the risk presented by the COVID-19 pandemic. I also accept the submission made by the Secretary of State that since the relief sought would prevent operation of part of the 2020 Regulations, no question of granting interim relief would arise unless I am satisfied, to adopt the words of Goff LJ in R v Secretary of State for Transport, ex parte Factortame No. 2 [1991] 1 AC 603 , that the "challenge is so firmly based as to justify" such a cause of action (see the speech of Goff LJ at page 674D). Thus, this application for interim relief will not succeed on the first American Cyanamid requirement unless the prospect that the substantive case will succeed is particularly strong."*

25. I was also referred to the Administrative Court Guide. Paragraph 16.6.2 sets out the following:

> *"The strength of the public interest in permitting a public authority's decision to remain in force will depend on all the circumstances. Where interim relief is sought to prevent the enforcement of primary legislation, there is a strong public interest in allowing the public authority to continue to enforce an apparently authentic law pending the determination of the challenge. Where subordinate legislation or policy is challenged, the public interest weighing against interim relief may also be strong, albeit less so than where the target is primary legislation"*

<u>The application of the test to the present facts</u>

<u>The application to disapply the 2022 rules</u>

<u>Prospects</u>

26. Grounds (i) (ii) (iii) (v) and (vi) concern the 2022 rules. In my view grounds (i) (ii) and (iii) are arguable.

27. The amendment rules are expressly made in exercise of the powers set out at section 239(5) of the 2003 Act. That power is limited and arises (in so far as is relevant to the claimant who is seeking a direction from the Board) "without prejudice" to the Board's duty to consider all evidence that is adduced before it. It is therefore arguable that the power to make rules does not extend to a power to exclude evidence so that the relevant parts of the rules are (as set out in ground (ii)) ultra vires.

28. Ground (iii) is in my judgment arguable at least for those whose cases have been referred to the Board. The new rules have no transitional arrangements and so apply to all Parole Board proceedings. The claimant and those in his position have an argument that they have started an important process with an expectation that the Board will receive reports containing

recommendations and are arguably entitled to conclude the process under the same regime. One practical consequence of a late change in the rules is that a prisoner whose case is at an advanced stage (like the claimant) will have no opportunity to obtain his own independent report on the risk he poses to the public if released. Such a report is not covered by the new rules and so might well express a view on risk.

29. Ground (i) appears to stand or fall with ground (ii).

30. I regard grounds (v) and (vi) as more difficult to make out. In my view those grounds add little if anything.

31. In my view at least ground (ii), the vires ground, passes the "real prospect" test. I am therefore persuaded for the purposes of this application that the strength of the claimant's case is such that I should go on to consider the balance of convenience.

Balance of convenience

32. In my view the public interest strongly favours keeping the amended rules in place until a final decision can be made. The Secretary of State's decision to amend the rules follows a manifesto commitment to review and, where necessary, make changes to the parole system. In my view there is a strong public interest in allowing the "apparently authentic" new procedures to stand pending the determination of the present proceedings. The Secretary of State's view that it is beneficial to avoid conflicting recommendations is in my view sufficient to establish for the purposes of this application a real public interest in the changes. Although there is a real prospect of success, I do not regard the prospects of success as being "particularly strong".

33. If I refuse to grant relief the claimant will continue to have the benefit (subject only to the restriction on the content of the reports) of a judicial process before a panel whose statutory duty to consider if its satisfied that "it is no longer necessary for the protection of the public that the prisoner should be confined" remains unchanged.

34. If I grant relief, there is a risk not only that the claimant's hearing would need to be postponed but that other hearings may be delayed because other prisoners would wish to be in the same position (having a hearing under the old rules) as the claimant. There is a risk, as counsel for the Secretary of State puts it, that parole board hearings would "essentially cease before the resolution of the substantive judicial review".

35. In my view the balance of convenience therefore comes down strongly in favour of refusing interim relief in respect of the application of the amended rules

The guidance

Prospects

36. In my view ground (iv) is strongly arguable. The guidance issued to HMPSS staff may well go far beyond the rule change. In my view it is strongly arguable that a procedural rule which limits the form of evidence that can be received by a judicial tribunal should be read narrowly. If the Secretary of State had intended to allow a witness to refuse to answer a question (or in effect prohibit a panel from raising certain matters), assuming he had the power to do so, it might be expected that he would say so clearly.

37. It is strongly arguable that the guidance represents a blatant interference with the Board's ability to govern its own process and act independently of the Secretary of State. At the very least the guidance creates a potentially irreconcilable tension between a witness who is an HMPSS employee bound by the guidance and the panel.

38. The guidance, if upheld, gives one party to a judicial process (the Secretary of State) control over parts of the evidence its own witnesses can give to the panel. Such control might be seen as entirely inconsistent with an independent judicial process. There is a very strong argument that such control renders the process unfair.

39. Even if it were right that a panel could not take account of a view expressed by the Secretary of State's witnesses on the issue of release it is strongly arguable that is going too far to say that the view (which has been freely expressed and taken account of for many years) cannot now be expressed.

40. I am persuaded that in respect of the guidance there is a real prospect that the court will order that it be quashed.

Balance of convenience

41. The guidance does not arise as part of a manifesto pledge and so cannot obviously be seen as having a democratic mandate. The rationale for it is in my view not clear. It does not appear in the root and branch and review and for the reason I have given it appears to go beyond the scope of the amended rules.

42. If I refuse relief, I would be permitting the Secretary of State to have independent control over the evidence given to the panel at the claimant's hearing. There is a strong risk that I would therefore be allowing an interference with the judicial processes of the Board and an interference with its statutory duty to consider all evidence that might be adduced before it.

43. If I grant interim relief, I would be allowing the Panel to deal with matters as it thinks appropriate and entrusting the Panel with the right to decide on its own procedure, to ask questions it wishes to ask and thereby to receive evidence it might consider relevant. It will then be in a position to deal with the evidence in accordance with the law and the rules as it interprets them.

44. Bearing in mind that the guidance is not primary or secondary legislation, does not support the amended rules and appears to interfere with the judicial functions of the Board and bearing in mind the claimant's right to a fair and impartial hearing pursuant to Art.5(4) the balance of convenience in my view comes down strongly in favour of granting the relief sought.

Conclusion

45. I will therefore refuse relief in respect of the amended rules but grant relief in respect of the guidance.

Changes to the Guidance

46. During the hearing, the Secretary of State presented an amended iteration of the guidance. I understand that the amendments are not finalised and are offered in effect as a compromise in the hope that they will answer the criticisms raised by the claimant.

47. The proposed amendments change the "language guidance for reports and attendance at oral hearings" but do not remove or alter any of the points I have set out above. The changes do not alter my conclusion.

The hearing and this judgment

48. I am grateful to both counsel for their submissions. This judgment has been drafted overnight so that a written decision is available in the event that an appeal is pursued. I have not set out all of the arguments which I heard but have taken full account of the written arguments and the oral submissions.

49. The parties should use their best endeavours to agree an order.

50. I have found that grounds (i) to (iv) are at least arguable and expressed a view that grounds (v) and (vi) add little. As the test of arguability is a low one I would grant permission to proceed on all grounds. A direction has been made that the issue of permission should be dealt with by a High Court Judge. In my view it is sensible that I deal with permission now. I raised the issue with both parties and neither objected to my dealing with the point.