**OFFICIAL SENSITIVE**

the Parole Board
working with others to protect the public

# PAROLE BOARD FOR ENGLAND & WALES

# LEGAL CHALLENGES: POSITION STATEMENT

## 1. OVERVIEW

The Parole Board is constituted as a corporate public body, created and empowered by statute[1]. Its rules of procedure are set out in the Parole Board Rules 2019 ('the Rules')[2].

The Parole Board is a court like body whose members make judicial decisions. It is not an agent or servant of the government. It is publicly funded and accountable to the Ministry of Justice for its expenditure. The Board's wider accountability is to Parliament.

It is possible in some Parole Board reviews to make an application for reconsideration of a provisional decision, before the decision becomes final. In others, the decision is final when made. Once a final decision has been made, there is no appeal against a final decision of the Parole Board, but as a public body its decisions are open to challenge in the High Court by judicial review, and private law actions for damages can be brought in respect of its decisions.

As a public body the Parole Board is also liable to civil law challenges in respect of its non-judicial functions.

Many Parole Board reviews[3] engage Article 5(4) of the European Convention on Human Rights. Article 5(4) states:

> "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."

The Rules set give the Board the ability to specify an electronic address for service[4]. The Parole Board accepts service to the postal and electronic addresses set out in this document.

[1] Currently, section 239 of the Criminal Justice Act 2003.
[2] SI 2019/1038
[3] Apart from determinate sentences where the sentencing court has authorised detention
[4] Rule 11(1)(a)

## 2. APPLICATIONS FOR RECONSIDERATION

Certain decisions of the Parole Board can be the subject of an application for reconsideration under rule 28 of the Rules.

Applications can be made in respect of decisions:

(a) to direct release, or not to direct release;
(b) in a case where a prisoner is serving an eligible sentence; and
(c) within 21 days of the decision being issued to the parties (unless an in time request for extension has been granted).

Eligible sentences are defined in rule 28(1) as being an indeterminate sentence (including life and IPP), an extended sentence, or a determinate sentence subject to initial release by the Board under Chapter 6 of Part 12 of the Criminal Justice 2003.

An application which is made out of time, which is made in respect of a non eligible sentence, or which is made against a non-release decision (such as a recommendation about transfer to open conditions or a decision to grant or refuse an oral haring) will be rejected by the secretariat.

Guidance on eligibility to make an application for reconsideration can be found here.

Only the parties to the proceedings (the prisoner and the Secretary of State) may make an application for reconsideration. Victims must apply to the Secretary of State to make an application on their behalf. An application will only be granted if the applicant can demonstrate that the provisional decision was irrational and/or procedurally flawed.

Applications should be made in writing on the CPD2 form. The Parole Board will accept applications made in writing without using this form in exceptional circumstances.

The Parole Board accepts service of applications by email to Reconsideration@paroleboard.gov.uk, or by post to the following address:

Reconsideration Team
**The Parole Board for England and Wales**
3rd Floor
10 South Colonnade
London E14 4PU

Parole Board decisions on reconsideration applications are published here.

## 3. LITIGATION AGAINST THE PAROLE BOARD

Litigation against the Parole Board generally takes the following forms –

(a) Applications for judicial review. These can be against:
  (i) a judicial decision made by the Parole Board; and
  (ii) decisions made by the Parole Board which are not judicial decisions (such as challenges to the policies and procedures of the Parole Board).
(b) Private law claims for compensation.

Examples of judicial decisions include:

- Whether or not to direct release;
- Whether or not to recommend transfer to open prison;
- Whether or not to grant an application for reconsideration;
- Setting licence conditions;
- Making directions;
- Case management decisions;
- Directions about listing and expedition; and
- Decisions on whether to grant an oral hearing.

## 4. STATEMENT OF GENERAL PURPOSE

The Parole Board exercises a judicial decision-making function. The Court of Appeal in Gourlay[5] stated (at paragraph 64):

> "Therefore, in respect of decisions concerning the release of prisoners, the Board is an independent and impartial "court" for article 5(4) purposes and is also, clearly, acting as a court or tribunal for the purposes of Davies. The principles of Davies thus apply to challenges of such decisions."

The Court of Appeal confirmed (at paragraph 66) that this analysis equally applied to decisions of the Parole Board in respect of recommendations about transfers to open conditions.

It is an established principle of common law that the role of judicial decision making bodies as defendants in judicial review proceedings is not, save in exceptional cases, to contest the proceedings. The Court of Appeal set out the history in the case of Davies[6]. The role of the court is simply to provide the reviewing court with relevant information where necessary[7]. This can include:

(a) explaining matters relating to its jurisdiction, practice or procedure; and
(b) providing factual information about a case.

Unless the court or tribunal plays an adversarial role in proceedings, it should not to be liable for costs. The Court of Appeal in Davies stated (at paragraph 47(iii)) that:

[5] R (Gourlay) v Parole Board [2017] 1 WLR 4107, upheld by the Supreme Court in R (Gourlay) v Parole Board [2020] UKSC 50

[6] R (Davies) v HM Deputy Coroner for Birmingham (Costs) [2004] 3 All ER 543

[7] R (Stokes) v Gwent Magistrates' Court [2001] EWHC Admin 569

> "If, however, an inferior court or tribunal appeared in the proceedings in order to assist the court neutrally on questions of jurisdiction, procedure, specialist case-law and such like, the established practice of the courts was to treat it as a neutral party, so that it would not make an order for costs in its favour or an order for costs against it whatever the outcome of the application."

The Parole Board will decide on a case by case basis whether it should defend its decisions. It has adopted the following statement of general purpose:

- In any form of litigation, the Parole Board will first consider whether it wishes to concede.
- Where it has decided not to concede the case, and the decision is a judicial decision, the Parole Board will normally not seek to settle or defend the position but will instead take the neutral stance envisaged by the case law.
- Where it has decided not to concede the case, and the decision is not a judicial decision, the Parole Board will defend its position.

## 5. JUDICIAL REVIEW

The procedures for judicial review are governed by the CPR Part 54 and the Pre-action Protocol for Judicial Review.

While the Protocol is not a legal requirement, the courts will normally expect it to be followed. This is because, as set out in the Protocol at paragraph 8:

> "The parties should consider whether some form of alternative dispute resolution procedure would be more suitable than litigation, and if so, endeavour to agree which form to adopt. Both the Claimant and Defendant may be required by the Court to provide evidence that alternative means of resolving their dispute were considered. The Courts take the view that litigation should be a last resort, and that claims should not be issued prematurely when a settlement is still actively being explored. Parties are warned that if the protocol is not followed (including this paragraph) then the Court must have regard to such conduct when determining costs. However, parties should also note that a claim for judicial review 'must be filed promptly and in any event not later than 3 months after the grounds to make the claim first arose'."

The recommended format for a pre-action letter is at Annex A of the Protocol; however the Board will treat any letter which seeks to challenge a decision of the Board (apart from an application for reconsideration) as a letter sent under the Protocol. A Claimant should always include:

(a) the date and details of the decision, exactly what is being challenged and a clear summary of the facts on which the claim is based;
(b) details of any relevant information that the claimant is seeking and an explanation of why this is considered relevant; and
(c) the action that the claimant expects the Parole Board to take.

Individuals can communicate directly with the Parole Board, but since the content of pre action correspondence may affect a subsequent judicial review, it is strongly advised that they seek legal advice first.

The Protocol requires that a full response will normally be made within 14 days. The Parole Board will seek to respond within 10 working days, to take account of public holidays. Responses will be drafted in the format set out at Annex B of the Protocol and in line with the statement of general purpose above.

The Secretary of State for Justice should be an Interested Party to judicial review proceedings against the Board[8].

If judicial review proceedings are served the Parole Board will file an Acknowledgement of Service under Part 54 and in line with the statement of general purpose above.

Where the Board has decided to take a neutral stance, it will neither defend nor concede the case. The Board may choose to assist the court by setting out relevant facts, supplying relevant documents, or stating its understanding of the position at law.

In the exceptional cases where the Board decides to concede after service, for example after receipt of a strong indication from the Court, it will seek to settle the matter by way of a Consent Order.

## 6. PRIVATE LAW CLAIMS

Private law claims against the Parole Board are almost exclusively brought for damages under Article 5 of the European Convention of Human Rights, although there is no bar to a claimant from bringing an action for damages on a different basis in the rare cases where this will be appropriate. Section 7(5) of the Human Rights Act 1998 states that proceedings for breach of Convention rights must be brought within the period of one year beginning with the date on which the act complained of took place (unless the court is prepared to grant an extension).

Where a claimant seeks only damages; or a declaration that his rights under Article 5(4) have been breached, then the claim should normally be brought in the County Court, not the Administrative Court, depending on the complexity and value of the claim[9].

Private law claims are governed by the Practice Direction for Pre-Action Conduct. The principle that the parties should attempt wherever possible to reach an agreement without recourse to the courts also applies to private law claims against the Parole Board, as is made clear in paragraph 3 of the Practice Direction, which states:

[8] R (Davenport) v Parole Board [2018] EWHC 410 (Admin)
[9] Roche v Parole Board [2011] EWHC 2535 (Admin)

"Before commencing proceedings, the court will expect the parties to have exchanged sufficient information to—
(a) understand each other's position;
(b) make decisions about how to proceed;
(c) try to settle the issues without proceedings;
(d) consider a form of Alternative Dispute Resolution (ADR) to assist with settlement;
(e) support the efficient management of those proceedings; and
(f) reduce the costs of resolving the dispute."

Paragraph 6 establishes that where there is no specific pre-action protocol, the Claimant should send a letter before claim setting out "the basis on which the claim is made, a summary of the facts, what the claimant wants from the defendant, and if money, how the amount is calculated."

The Practice Direction also states that a letter of response should be sent within 14 days. The Parole Board will accordingly seek to respond in full within 10 working days of receipt, to take account of public holidays. That response will either admit that there has been a breach of Article 5(4) and confirm the length of the breach; or provide a full written response denying liability. In the event that liability is admitted, the Parole Board will also make a without prejudice offer to settle the claimant's claim.

The Civil Procedure Rules do not require the Parole Board to pay any of the claimant's legal costs in respect of a settlement agreed at pre-action stage, and the Parole Board will accordingly not pay pre-action costs.

In the event that the matter cannot be settled at a pre action stage, and proceedings are issued in the County Court, the Parole Board will file:

(a) within 14 days of service of the Particulars of Claim, an Acknowledgement of Service containing either an admission or an intention to defend the claim; and
(b) 28 days after filing an Acknowledgement of Service stating the intention to defend the claim, a Defence.

Where the Board decides to concede after service, it will seek to settle the matter by way of a Consent Order.

## 7. SERVICE

The details for service of reconsideration applications are given above.

The Parole Board accepts service of pre action letters, civil proceedings, or applications for judicial review either by email to Litigation@Paroleboard.gov.uk, or by post to the following address:

Litigation Team
**The Parole Board for England and Wales**
3rd Floor
10 South Colonnade
London E14 4PU

Rule 6.10 of the Civil Procedure Rules, which states that service of a claim against a government department should be made on the Treasury Solicitor, does not apply to any litigation brought against the Parole Board. The Parole Board is neither a servant nor an agent of the Crown (per schedule 19(1) of the Criminal Justice Act 2003). The Parole Board accordingly does not accept service where letters and proceedings are served via the Government Legal Department, unless they have already been instructed in a matter.

The Parole Board may instruct the Government Legal Department after proceedings have been served and the claimant will be informed in writing that this is the case. All further correspondence should thereafter be addressed to the Government Legal Department.

## 6. TRANSITIONAL ARRANGEMENTS

This Statement came into effect on 1st June 2021 and applies to:

- any application for reconsideration;
- any application for judicial review;
- any private law claim; and
- any letter before action (whether in respect of a proposed application for judicial review or a private law claim);

received by the Parole Board on or after that date.

Applications for reconsideration, applications for judicial review, private law claims and letters before action in either case which are received prior to 1st June 2021 will be dealt with in accordance with the Parole Board's Litigation Strategy dated August 2019.