the Parole Board
working with others to protect the public

Judicial Reviews and Private Law Claims

September 2023 v2.0

Document History

Document version	Date of Issue	Revision description
1.0	14.02.2020	This guidance was created as part of the Parole Board's project to launch fully revised and updated member guidance.
2.0	September 2023	Guidance updated including expansion of section on Private Law Claims and addition of section on Challenges

Contents

Introduction

1.1 Legal challenges to the Parole Board can be made in a number of ways:

1) An application for a final parole decision to be set aside;
2) A challenge to a final parole decision or an administrative action of the Parole Board by way of judicial review; and
3) A private law claim for compensation in the civil courts.

1.2 This guidance explains the nature of judicial review applications and private law claims and outlines the legal procedures that are involved as well as the Parole Board's actions. There is separate guidance on set aside applications.

1.3 Only occasionally are panellists personally and directly involved in the Board's handling of legal challenges, although they may be asked to comment on aspects of a case where a panel decision or process has been challenged.

Judicial Review

2.1 Judicial review is the procedure by which an individual, company or organisation can challenge the lawfulness of a decision or other conduct of a person or body whose powers are governed by public law (i.e. a public body). This is governed by the Civil Procedure Rules (CPR) 1998 Part 54. The process for judicial review is set out in Part 54 and Practice Direction 54A (Judicial Review).

2.2 There is no right of appeal against a final decision of the Parole Board. The point at which a decision becomes final is set out in the Parole Board Rules 2019 (as amended). It is the point at which the decision is issued to the parties.

2.3 Either party (prisoner or Secretary of State) who wishes to challenge a final decision of the Parole Board can do so by making an application for judicial review to the High Court.

Components of Judicial Review

2.4 Any decision by a public body may be challenged by way of judicial review. This means that, as well as final parole decisions in individual cases, applications for judicial review can be made against Parole Board policies and procedures, or to make points about the status and independence of the Board.

2.5 Judicial review is the remedy of last resort. It can only be used when there are no other ways to resolve a dispute. This means that it will be premature and inappropriate to apply for judicial review if the Claimant has other means available to resolve the complaint – such as making submissions to the panel or asking for directions to be made.

2.6 This also means that applications for judicial review can only be made once final decisions have been reached in parole reviews. If a decision is still provisional (because it is subject to an application for consideration at an oral hearing or reconsideration) then an application for judicial review will be premature and inappropriate.

2.7 An application for judicial review will need to be made within three months from the date the decision under challenge was made. The Court has the power to extend this deadline (upon application by parties to the proceedings) but will only do so for a very good reason.

2.8 An application can be made on a limited number of grounds, that:

(a) **The decision is unlawful**

Such an argument will contend that the Parole Board did not have the power to make the decision, or that the decision, or the way it was made, contravened the law. Examples of this is where a public body such as the Parole Board has applied the wrong test for release, has acted outside its statutory powers, has taken into account irrelevant matters or failed to consider relevant ones).

(b) **The decision is irrational**

That the decision is so unreasonable as to be unsustainable (no reasonable decision maker would make the same decision) or where there has been an abuse of power. This is a very high bar. It does not mean that a different decision could have been made, it means that the decision was one that no reasonable decision maker would have made.

(c) **The decision is procedurally unfair**

This ground focuses on the process by which the decision was made, rather than the content of the decision. It means the decision-making process contained an obvious unfairness to either party.

Pre-action Correspondence (PAP)

2.9 Before an application for judicial review is made, the High Court will expect that pre-action correspondence is exchanged. The process is set out in the Pre-action Protocol for Judicial Review[1]. While the Protocol is not a legal requirement, the courts will normally expect it to be followed, and there may be cost consequences if it is not.

2.10 The claimant will send a Letter Before Action, which should be in a standard format. The Board will treat any letter which seeks to challenge a decision of the Board as a letter sent under the Protocol, regardless of how it is framed. However, service is only effective if the pre-action letter is served by post to the Parole Board office (see paragraph 5.1 below for the correct postal address) or via the email inbox Litigation@paroleboard.gov.uk. The Letter Before Action should set out the date and details of the decision, exactly what is being challenged and a clear summary of the facts and the grounds of the prospective claim as well as any information the Claimant is seeking. It should also set out what it is asking the Parole Board to do.

2.11 The Parole Board usually has 14 days to respond (unless the case is complex and an extension is required in which case an interim reply will be sent with a proposed date for a full response). The Board will do so by sending a Letter of Reply, which also has a standard format. This pre-action correspondence is

[1] Pre-Action Protocol for Judicial Review - Civil Procedure Rules (justice.gov.uk)

handled by the Litigation Team and in most cases, the Board will maintain a neutral stance and a response will be provided in line with our Legal Position Statement 2021. If the Litigation team requires further information, they may contact panel members for their comments on the proposed application. On the basis of that information, a decision will be made on how the Board will respond to the proposed claim.

The Parole Board's Stance on Judicial Review

2.12 If the Litigation Team considers there is a good argument that the decision is unlawful, irrational, or procedurally unfair, it will assess the merits of the proposed claim and take a view as to what the next steps should be to avoid any unnecessary litigation.

2.13 Under its Legal Position Statement 2021, the Parole Board generally does not defend cases where the challenge is against a judicial decision of the Board. As well as a final parole determination, this includes decisions about making directions and using case management powers.

2.14 The Board remains neutral because it is a court-like body which makes judicial decisions. The general rule in law is that a junior court or a tribunal does not actively defend its decisions when they are considered on appeal by a senior court or tribunal. The junior court or tribunal has made its judgment, and given its reasons, and the judgment and reasons will stand or fall on their own merits. The junior court or tribunal may assist the senior court or tribunal by providing information about the case or their own procedures, but it does not actively defend its decisions. This is known as taking a 'neutral stance'.

2.15 This is why the parole decision is so important, because it is its own justification. If the reasons for the decision are clear and focus on the identification and assessment of risk, accurately summarise the key elements that influenced the decision and the weight given to particular pieces of evidence, set out and apply the correct tests, then the High Court will be very reluctant to interfere. If an application for reconsideration was made and refused, a copy of that decision will be considered by the Court as well.

2.16 The Parole Board will usually take an active part in judicial reviews which are brought against its wider policies and procedures. These are not challenges to judicial decisions and so it is more appropriate for the Board to defend them.

The Judicial Review Process

2.17 Applications for judicial review which have been made to the High Court follow the process set out in Part 54 of the Civil Procedure Rules.

2.18 There is a two-stage process for an application for judicial review:

(1) An applicant must first get the Court's permission to bring an application to challenge a particular decision. The claim is served upon all parties who will have an opportunity to respond to the claim. Only when an application has received permission to proceed will the substance of the application be considered. The test for granting permission is whether

there is an arguable case that the Parole Board's decision was unlawful, irrational, or procedurally unfair.

(2) If permission is granted, the Court will list the application to be heard at a substantive hearing. This means the full application will be heard and a decision will be made as to whether the decision challenged should be upheld or quashed.

2.19 The sealed claim form must be served on the Parole Board within seven days to the designated email address Litigation@paroleboard.gov.uk (we also accept service via post to our London based office as set out on page 14). At this point, the Parole Board may take the view that instructions will be sent to the Government Legal Department (GLD) to act on its behalf.

2.20 The Parole Board will have 14 days to file an Acknowledgement of Service. This will generally notify the Court that the Parole Board is a court-like body and has taken a neutral stance in accordance with the case law. However, if there is additional information which the Parole Board feels may help the court (such as an explanation of Parole Board Rules, policies or procedures, or missing papers), it will be filed alongside the Acknowledgement of Service.

2.21 In the rare cases where the Parole Board takes an active role in the proceedings, the Acknowledgement of Service will be accompanied by Summary Grounds of Defence, which explain the Parole Board's position.

2.22 The Acknowledgement of Service can also be accompanied by a witness statement, explaining the Board's procedures and rebutting the grounds where appropriate. This will usually be made by the Board's Legal Advisor or a senior member of its Secretariat. Very rarely, it might be made by a member of the panel that considered the case.

2.23 The Court will read the claim form and papers submitted by the applicant, and the Board's Acknowledgement of Service. It will decide on the papers whether there is an arguable case and make a decision as to whether permission should be granted.

2.24 If permission is refused, the applicant can request that the case be considered again at an oral hearing. To do this, a renewal notice must be served by the applicant on the Court and the parties. If the applicant does not renew the application for permission, or the Court still refuses to grant permission following the permission hearing, proceedings come to an end and the matter will be closed.

2.25 If the Court grants permission, a date will be fixed for a substantive hearing. At the substantive hearing, the applicant will make their case. Sometimes, to save time, the Court 'rolls up' the permission and substantive stages into one hearing.

2.26 The Court has the power to grant interim relief. This could take the form of an order expediting the claim, or an order that a decision does not take effect until after the proceedings have concluded. The Court will only grant interim relief when it is satisfied that it is in the interests of justice.

2.27 Where the Parole Board is taking an active part in the proceedings, it will be represented by Counsel, but otherwise will not be present. The Court will then deliver its judgment on the basis of the documents and oral submissions.

The Judgment

2.28 If the application for judicial review succeeds, the Court may quash the Board's decision, and may make directions about how the case should proceed (for example, that it should be reconsidered as soon as possible). If the application is not successful, the decision under challenge will stand, and the process comes to an end.

2.29 On those rare occasions when the Court does rule against the Parole Board, it is important to remember that an adverse Court judgment is not a criticism of the panel members who made that decision, and it does not mean that the end result will necessarily be any different.

2.30 If there are judgments that lead to any change in Parole Board procedure, members will be alerted by way of a member notification and amendments made to member guidance.

Private Law Claims

3.1 A private law claim is a compensation claim made by a prisoner to the Parole Board about possible delays which may have occurred during their parole review. It will be alleged that such a delay breaches Article 5(4) of the European Convention of Human Rights, which requires that the lawfulness of any person's detention "shall be decided speedily by a court". What a 'speedy' review is can vary from prisoner to prisoner and will largely depend upon the facts of the case. Any such claim will be made via the County Court.

3.2 A legal representative or litigant in person will normally send a letter before action (pre-action letter) to the Parole Board setting out their claim and possibly an amount of compensation which they feel is appropriate to settle their claim. Such a letter must be served upon the Parole Board via post at its offices (see paragraph 5.1 for postal address) or via email to Litigation@paroleboard.gov.uk.

Eligibility

3.3 Article 5(4) does not apply in the case of a determinate sentence prisoner as confirmed by the Court of Appeal in the case of *Youngsam* [2018] EWCA Civ 229. This is because the sentencing court has authorised detention at all points until the end of the sentence and so Article 5(4) does not apply. Therefore, only prisoners who are serving a life or indeterminate sentence are eligible to make a claim for compensation. Claims from determinate sentence prisoners will be rejected for this reason.

3.4 The basis for their claim is set out in section 7 of the Human Rights Act 1998. All such claims must be brought within one year of the Parole Board's decision. If a prisoner wants to bring a claim later than that, they will need permission from the court to do so. So, any prisoner who brings a claim outside of this timeframe will have it rejected as it is out of time.

Calculation of Compensation

3.5 The leading case law that sets out the level of compensation that can be awarded are the cases of R (*Faulkner)* v SSJ Anor and R (*Sturnham*) v Parole Board [2013] UKSC 23. The amount of compensation that is to be assessed depends on whether the case falls within the 'Faulkner' or 'Sturnham' parameters.

Faulkner

3.6 Compensation awarded under the principles set out in the case of *Faulkner* only apply to release decisions. If the claimant can demonstrate on the balance of probabilities that they would have been released sooner had the Parole Board concluded their review sooner, then they are entitled to compensation for the resultant loss of liberty.

3.7 Following an assessment of the length of delay by the Board's Litigation Team, an award of £650 per month for loss of liberty can be awarded.

3.8 The key considerations in assessing Faulkner claims are:

- Whether, on the balance of probabilities, release would have been directed had the hearing occurred earlier;
- Listing delays and the reasons for these;
- The assessment of risk by report writers, primarily the community offender manager (COM) and the prison offender manager (POM);
- The risk management plan and work undertaken to reduce risk factors and the impact of this or planned ROTLs; and
- Judicial Directions – Hearing deferrals and adjournments which may have delayed the review.

Sturnham

3.9 Compensation awarded under the principles set out in the case of *Sturnham* only apply to decisions not to release, which may or may not be accompanied by a recommendation for a move to open conditions. If the claimant's review is delayed for more than 3 months then they may be entitled to compensation to reflect the frustration and anxiety of waiting for a decision.

3.10 Following an assessment of the length of delay by the Board's Litigation Team, an award of £50 per month for frustration and anxiety can be awarded.

3.11 The key considerations in assessing Sturnham claims are:

- Whether the decision would, on the balance of probabilities, have been made earlier had the hearing occurred earlier;
- Listing delays and the reasons for these; and
- Judicial Direction - Hearing deferrals and adjournments which may have caused some delay.

3.12 Prisoners will be entitled to damages in such cases where a breach is found whether or not they were released when they make their claim.

3.13 The vast majority of private law claims brought against the Parole Board are made in respect of unlawful delay during parole proceedings.

3.14 Cases which are being actively case managed, or where delays are being caused by another/third parties providing information, will not contain unlawful delay. However, cases which are not being actively managed (that are stuck and just waiting for events to move forward) are likely to contain unlawful delay. Active case management reduces the legal risk to the Board.

3.15 Parole Board Litigation case managers will go through an eligibility checklist to assess whether Article 5(4) is engaged. This assessment will cover the following points:

1. The sentence type - Article 5(4) is engaged in cases where the prisoner is serving an indeterminate sentence. Article 5(4) is not engaged in cases where the prisoner is serving a determinate sentence. This is because the sentencing court would have set the legality of detention for an indeterminate sentence through the tariff period set. Article 5(4) remains satisfied until the expiry of that tariff period. Article 5(4) will only be engaged in cases where the prisoner is serving an Extended Sentence (ESP) if the purported delay occurred in the extended part of their sentence (as this would be when the Parole Board would consider if release can be directed).

2. Time limit - Section 7(1) (5) of the Human Rights Act 1998 requires that claims for human rights breaches must be brought within one year beginning with the date on which the act complained of took place (i.e. the date the decision was sent to all parties).

3. Tariff Expiry Dates - Article 5(4) is not engaged until after tariff expiry date, so no damages would be awarded for any delay before tariff expiry.

4. Stage of Review - If the review is yet to be concluded, the length of the delay will be difficult to assess, and the Board cannot determine the level of compensation. Therefore, any claim for compensation before a review has ended would be premature and any such claim will be rejected.

3.16 If Article 5(4) is engaged, a case manager will review the case management system (PPUD) to identify any periods of delay and assess whether damages are payable. The case manager will identify whether the periods of delay fall under *Faulkner* or *Sturnham* damages. A chronology of events will be provided that contains all relevant information from the start of the review period to the final decision.

3.17 When assessing claims for compensation, the Litigation Team will use the original target date for listing and add a month to it when starting to calculate any period of breach. So, for example, if the original target date is 30 January 2023, we would calculate breach from 30 February 2023. This is to allow time for a hearing to be listed and the original target date is normally calculated as 3 months after the dossier is referred to the Parole Board.

Judicial Directions

3.18 Directions issued by Parole Board members are judicial directions. These act to stay any breach of Article 5(4) because they show that the case is being actively managed. Generally, this means that any periods of delay following a direction can be defended. However, if time for compliance has passed and there is no further case management, or if the hearing is listed outside of the target date, this period will usually not be defendable.

3.19 It is the responsibility of the prisoner, Secretary of State and any relevant third parties to ensure that directions set are complied with. Any delays that are a result of non-compliance with directions is the responsibility of the Secretary of State or the third party.

Deferrals and Adjournments

3.20 Deferrals and adjournments are forms of judicial directions. When calculating delay post-deferral/adjournment, the relevant date for the start of delay is the first day of the fourth month after the date of deferral/adjournment, as with MCA direction to oral hearing. For example, if a case is deferred on 4 October 2022, article 5(4) delay is calculated from 5 January 2023. The exception to this is if the panel chair or a duty member directs the case be expedited or prioritised. If a case is expedited, the target date for the next hearing is two months, if it is prioritised the target date is the first day of the following month.

3.21 If a hearing is listed outside of the target date due to a pure (a sole) listing delay or due to panel chair availability, the Parole Board generally accept breach as these are administrative delays.

Reconsideration/Set Aside

3.22 The reconsideration period should be entirely defensible as the Parole Board is not liable for a period in which we are actively considering an active challenge to a decision which is not yet final. Time spent considering a set aside application should also be defensible on the same basis.

Special Damages

3.23 Delays to release under article 5(4) are administrative delays. Article 5(1) is not engaged and therefore it is not a tort of false imprisonment. As such, the claimant cannot recover special damages from the Parole Board. If any individual seeks special damages, such as recovering monies paid to victims while they were in prison (victim levy), they will need to contact the respective body these funds were paid to.

3.24 The judgment in the case of *Faulkner* mentioned above provides the following:

> *86. For the reasons which I have explained at paragraph 16, the submission that Mr Faulkner was the victim of false imprisonment under English law must be rejected. So too, for the reasons explained at paragraph 23, must the submission that he was detained in violation of article 5(1). The problems which resulted in delay in Mr Faulkner's case,*

according to the findings of the Court of Appeal, appear to have been the result of errors by administrative staff, of a kind which occur from time to time in any system which is vulnerable to human error. It was extremely unfortunate that the errors occurred and resulted in the prolongation of Mr Faulkner's detention, but they were not of such a character, and the delay was not of such a degree, as in my view to warrant the conclusion that there was a violation of article 5(1).

Pecuniary Loss

3.25 Pecuniary losses cover loss of earnings. Loss of earnings caused by the prolongation of detention may also be compensated in full. The claimant will need to provide evidence of what the earnings are and why they were lost.

Covid-19

3.26 Although Covid-19 restrictions have been lifted, there have been claims relating to parole reviews that include some delays as a result of the Covid-19 pandemic. The periods of listing delays or adjournment/deferral delays relating to Covid-19 are sometimes defensible as this was an unforeseen global pandemic.

3.27 When assessing whether the impact of Covid-19 affected the listing of a hearing case managers will consider:

- panel chair directions and duty member decisions,
- correspondence regarding listing and any mention of Covid-19 restrictions.

Any information relevant to the delay and Covid-19 should be included in the chronology.

Challenges

4.1 Details about pre-action conduct under the relevant Practice Direction can be found here PRACTICE DIRECTION – PRE-ACTION CONDUCT AND PROTOCOLS – Civil Procedure Rules (justice.gov.uk)

4.2 If the litigation team believe that there has been a delay in the Claimant's case, costs will be assessed against the above framework and an offer to settle the claim at the pre-action stage will be made to avoid a claim being made to the County Court. Under the pre-action protocol, Claimants can challenge the Parole Board's assessment of compensation twice. After a challenge is received, case managers will conduct a fresh assessment of the claim and respond accordingly. If a claimant still does not agree with the pre-action response, they can then issue proceedings in the County Court.

Pre-action Response

4.3 At the pre-action stage, the Parole Board will send a letter of response within 21 days. 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.

4.4 In the event that liability is admitted, the Parole Board will also make a "without prejudice" offer to settle the claim. The Parole Board will not pay any legal costs incurred at a pre-action stage.

4.5 The vast majority of claims against the Parole Board are settled by pre-action correspondence, which is handled by the Parole Board's Litigation Team.

County Court claims

4.6 If the claimant files a claim in the County Court, the claim form and papers will need to be sent to court to be sealed. As with judicial review, copies of the sealed claim form and papers need to be served upon all parties within seven days from the date the claim form is sealed. The Parole Board will generally instruct the GLD to act for them from this point.

4.7 The Parole Board will assess the claim and provide detailed instruction to the GLD who will proceed to file an Acknowledgement of Service within 21 days of receiving the sealed claim, either neutral, defend all or admitting all parts of the claim. When all or part of the claim is defended, the Parole Board will usually file a Defence within 28 days after filing the Acknowledgement of Service.

4.8 Where it is appropriate to do so, the Board will attempt to settle the claim by agreement out of court. This may involve accepting liability for legal costs as well as compensation. But if it is not possible to do so, the Board will defend the claim at a hearing where it will be represented by a solicitor or counsel.

Pre-action Offer Made

4.9 If an offer was made at the pre-action stage, at the very minimum that offer would be maintained if proceedings have been issued at the County Court.

Issued Claim with No Pre-action Offer Made

4.10 If no offer was made at the pre-action stage, the Parole Board will review the original assessment of the claim to identify why and ascertain whether they agree with this decision.

4.11 If settlement cannot be agreed a claim can proceed to trial. There are three "case management tracks" to which the claim may be allocated by the court – the small claims track, the fast track and the multi-track. CPR 26.6 gives information on each one and to which the case is likely to be allocated.

Costs

4.12 Legal fees are payable once a claim has been issued and are assessed once a claim has been settled in full and damages received by the other side.

Service

5.1 The Parole Board is neither a servant nor an agent of the Crown. This means that rule 6.10 of the Civil Procedure Rules (service on the Crown) does not apply, and so papers cannot be served on the Parole Board via the Government Legal Department (unless they have already been instructed in a case). The

Parole Board therefore 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