

Prison Law Team Legal Bulletin

November 2009



Parole Board Delay and Indeterminate Sentence Prisoners – The Current State of the Law

The widespread problems for prisoners serving indeterminate sentences of delays in Parole Board hearings and a failure to provide coursework required to provide evidence to those hearings are well known to all involved. There has been much recent litigation challenging whether these delays and lack of provision give rise to claims under Article 5 of the European Convention of Human Rights as amounting to a breach of the right to liberty of those affected.

This bulletin seeks to draw out some common threads from the recent case law and provide much needed guidance to prisoners and their legal advisers on how to progress. What is clear is that this unhappy chapter of prison human rights law is still being written, and it seems that substantial progress will now only be made via the Court of Human Rights in Strasbourg. A common feature of the approach of the Secretary of State (SSJ) and the Parole Board (PB) in the recent litigation is to present the problems as being unexpected and transitional, with all efforts being made to rectify the position. The truth is that this country has more indeterminate prisoners than all the other EU countries put together, and the number continues to rise inexorably. The additional resources made available, does not. Despite ingenious efforts to divert courses from determinate sentence prisoners to indeterminates, and to restrict the right to oral hearings, the position will only get worse until either substantially more resources are made available, or the number of such prisoners is significantly reduced.

Currently, such prisoners fall into two distinct categories for the purposes of litigation:

1 Prisoners serving indeterminate sentences who are not able to progress to release due to the lack of availability of relevant coursework

The recent House of Lords decision in; *R (James) (Lee) (Wells)* [2009] 2 WLR 1149 explored whether a failure by the SSJ to provide coursework for indeterminate prisoners to evidence their lack of dangerousness led to a breach of their Article 5(1) (lawful detention) and Article 5(4) (speedy determination of the lawfulness of detention) rights.

It is difficult to extract a consensus from the opinions, but the following is clear:

- a) Their Lordships found that a failure by the SSJ to provide coursework does not lead to the detention of the prisoner being unlawful for the purposes of Article 5(1) because the causal link between ongoing detention and the original sentence is not broken; the prisoner is still presumed to be dangerous until the PB are satisfied that he is not.
- b) Neither is there a breach of Article 5(4) when a lack of evidence renders the PB review ineffective, or a delay in the review is caused by the necessary reports not being ready *unless* the delay has continued for so long that detention has become arbitrary.

Given the judgments in *James* regarding Art 5(1) and 5(4), it is difficult to progress claims when there has been a failure to provide coursework. Mr James has lodged an application before the European Court of Human Rights. However, it may be possible still to take claims on the narrower public law basis set out in [R \(Cawser\) v SSHD \[2003\] EWCA Civ 1522](#); that the failure to provide a particular course is irrational if it is *required* to be done before the prisoner can be released. Furthermore, if the shortcomings in the system persist or deteriorate it will be possible to once again seek declaratory relief for breach of public law duty to provide a reasonable system as *required* by the legislation.

2 Pure delay cases

Where a post-tariff hearing is delayed due to a failure by the SSJ or PB, for example caused by a lack of resources or personnel or even an error or omission, there is a potential breach of Article 5(4); *Noorkoiv v SSHD* [2002] 1 WLR 3284, a case considered with approval in *James*. The principled distinction with the first category is not easy to see, but it seems that pure delay occurs where the executive fails to operate a statutory system, whilst delay caused by failure to provide course work relates to resource allocation which is within the political rather than judicial arena.

The Administrative Court has received a large number of pure delay claims, with prisoners seeking mandatory orders that they be given a speedy hearing and/or damages, including; [R\(on the application of Faulkner\) v Secretary of State for Justice and another](#) [2009] EWHC 1507 (Admin), 5th June 2009, [R\(on the application of Betteridge\) v Parole Board](#) [2009] EWHC 1638 (Admin), 23rd June 2009 and [R\(on the application of Pennington v Parole Board\)](#) [2009] EWHC 2296 (Admin), 14th September 2009. The PB and SSJ have been using *Faulkner* and *Betteridge* to sidestep further cases, suggesting

(again) that the problems are historic and they are getting to grips with them.

The key case is *Betteridge* which provides a good analysis of the requirements of *Art 5(4)* in such circumstances, although its conclusion on the scope for further challenges is disappointingly narrow. The PB (but not the SSJ) conceded a breach of *Art 5(4)*, and Collins J upheld that breach but gave no relief as it was apparent that the Claimant did not have a good argument that he would have been released but for the delay. The judgment makes clear that such claims survive the decision in *James*, and that each case will depend upon its own facts; there is no absolute period beyond which a breach of *Art 5(4)* will be found.

However, Collins J concluded that it was not appropriate for a future claimant to bring proceedings in such cases alleging a breach of Article 5(4) 'unless there are very special circumstances'. This conclusion was reached in the context of the particular Claimant's position, and assertions by the PB and the SSJ that they are trying to improve the situation. The reasoning of the Court is one of policy rather than principle; there is no sense in giving one prisoner a mandatory order for a speedy hearing with the effect that it displaces another prisoner down the queue and thereby creating the same problem for him or her.

Despite Collins J pragmatic policy conclusion, it should not be considered that he has created a very narrow category of exceptional or unusual claims for the pursuance of breaches of Article 5(4). It is clear from the post-judgment discussion that the *special circumstances* envisaged would include a Claimant who simply had a good case for release (at [73]).

So who should proceed with an Article 5(4) challenge at the moment?

The following questions should be considered in all such cases;

- a) What is the cause of the delay? Is it 'pure delay' caused by an omission of the SSJ to refer the case to the PB or a failure to provide a dossier, or has the PB claimed a shortage of available members for a panel? A failure to provide coursework will not be sufficient to establish a breach of Article 5(4) unless the delay is so long that detention is arbitrary, or the course is a pre-requisite for release.
- b) Are there *special circumstances* which mean that the claimant should be granted damages or have an expedited hearing? Examples could be a prisoner who has a strong case for release, or a prisoner with serious health problems which have not been taken into account.

Prisoners and their advisors should not be put off by the robust positions taken by the SSJ and PB, and *special circumstances* should not be given too narrow a construction. If Judicial Review proceedings fail, consideration should be given to applications to the Court of Human Rights.

It remains to be seen whether the assertions that the SSJ and the PB have made to the House of Lords and to the lower courts, that the system is now working and that the remaining problems are currently being dealt with, are correct. Their track record to date is lamentable, and there seems little current prospect of the required resources being made available.

Sarah Daley and Pete Weatherby,
Garden Court North Chambers
16th November 2009

Garden Court North Chambers

5-day prison law course (30 Nov - 4 Dec 09)

Overview

A 5-day course aimed at practitioners both new to this area of work and those with experience. The course is practical and informative and concentrates on key areas of prison law practice but also provides a general knowledge of the whole subject. It aims to give delegates a solid and comprehensive foundation for best practice when representing prisoners and to provide the training through which practitioners can build or develop a thriving prison law practice.

Speakers

Course facilitator [Pete Weatherby](#).

Members of Garden Court North Chambers prison law team will lead parts of the course. Other guest speakers will cover Risk / Treatment of Sexual Offenders (Dr Ruth Mann, Senior Prison Service Psychologist), lifers (Elkan Abrahamson, Jackson & Canter), types of prisoner and different treatment (Louise Curtis, Equality and Human Rights Commission) and funding for Prison law (Mike Pemberton, Stepnsons).

Fee

£750.00 (+ VAT) per delegate for the 5 day course including lunch and refreshments.

CPD Accreditation

30 CPD hours. Garden Court North Chambers are accredited by the Solicitors Regulation Authority as authorised CPD providers of Prison Law. All delegates completing the course will receive a Certificate of Completion.

Booking information

Please contact [Paula Morris](#) on 0161 236 1840 to request a detailed course outline and a booking form.

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