RECONSIDERATION OF PAROLE BOARD DECISIONS
THE DECISION OF THE HIGH COURT IN
R (ON THE APPLICATION OF HUXTABLE) v THE SECRETARY OF STATE FOR JUSTICE

The High Court has handed down judgment in *Huxtable,* an important claim challenging the legality of the "*reconsideration"* procedure introduced by the Secretary of State for Justice in the Parole Board Rules 2019. Mr Huxtable was represented by Andrew Sperling from SL5 Legal / Tuckers solicitors and Jude Bunting from Doughty Street Chambers.

BACKGROUND

Prior to 22nd July 2019, the Parole Board had the power to make a binding direction for a prisoner's immediate release. The "*reconsideration"* procedure removed this power, so as to enable the release decision to be challenged. The result is that any direction for release is now "*provisional"* for a period of at least 21 days while the Secretary of State decides whether to apply for the decision to be reconsidered.

The cases in which the procedure applies are cases where the prisoner has already served the punishment term of their sentence and is only being detained 'preventatively'. These include IPP prisoners and extended sentence prisoners as well as those serving traditional life sentences.

The Parole Board is regarded as a court which makes decisions about the liberty of prisoners.

The Claimant is an IPP prisoner who had served several years longer than the sentencing judge had set as his minimum term. The Parole Board directed his release last August. He was detained for over three weeks despite the fact that he had a release address to go to within two days of the Parole Board's decision.

His situation was not unusual. The Court was provided with eight witness statements from other prisoners. In each of those cases, a prisoner's release (after long-term detention) was delayed, even though their immediate release had been risk assessed by an independent Court, the Parole Board. Those prisoners described this additional period of detention as distressing and difficult.

The new reconsideration power has led to delayed release for several hundreds of prisoners whom the Parole Board has found could safely be released. Prisoners who have release plans in place and addresses to go to immediately have been waiting in custody for over three weeks (and sometimes significantly longer) simply because the Secretary of State might challenge the decision. In the overwhelming majority of cases there is no prospect of the decision being challenged.

The evidence at the hearing showed that between the introduction of the 2019 Rules on 22 July 2019 and 13 May 2020, the reconsideration procedure had been applied to **3,113** prisoners and of those cases, the Secretary of State had applied for reconsideration in **16** cases. Only **2** of those requests followed requests from victims. Of those 16 applications for reconsideration,

only 2 of the the Secretary of State's applications for reconsideration led to orders for reconsideration from the Parole Board.

THE GROUNDS CHALLENGING THE RECONSIDERATION PROCEDURE

The claim argued that the reconsideration procedure is unlawful for two reasons.

- First, the Secretary of State did not have the power to introduce the "*reconsideration"* procedure because he used powers permitting the making of procedural rules to make substantive amendments to the powers of the Parole Board. In particular, he had removed the Parole Board's power to order a prisoner's immediate release where this is justified in terms of risk;

- Second, the rules are in breach of article 5 of the Human Rights Act 1998. They permit the detention of a prisoner even in circumstances in which an independent Court has decided that their detention is no longer justified on the grounds of risk. This is a break of the 'causal connection' between the sentence and the ongoing detention. It leads to a delay in release for reasons unrelated to the risk actually posed by an individual prisoner. It also adds in delay to a prisoner's release that is unjustified by the facts and circumstances of their case.

THE COURT'S DECISION

The Court found that the reconsideration procedure was lawful and rejected the claim. The judgment can be found here.

The Claimant will be seeking permission to appeal.

THE POWER TO REDUCE THE RECONSIDERATION PERIOD (RULE 9 APPLICATIONS)

Although the claim was unsuccessful, it has significantly improved the position of prisoners who are detained following a Parole Board direction for their release. This is because the Court has found that it *is* possible for a prisoner to apply to reduce the 21-day period for reconsideration. At the time the claim was issued, it was understood that the 21-day period was fixed. This was reflected by the fact that every Parole Board decision referred to the fact that the decision would be suspended for the 21-day reconsideration period.

This power to reduce the 21-day time period was not mentioned in any of the guidance issued when the reconsideration procedure was introduced, which in fact suggested that a prisoner could not be released during this period. The first time it was mentioned publicly in any way was a reference buried in a lengthy Policy Framework relating to Parole Board proceedings which was issued in January 2020. This suggested that in exceptional

circumstances, the Secretary of State would apply to reduce the reconsideration period.

We have asked the Parole Board to use this power to reduce the reconsideration period in other, later cases. These applications were refused. The Parole Board members in those cases indicated that it would frustrate the purpose of the reconsideration mechanism if the period were reduced. In one of these cases, the prisoner was seriously ill and had had two heart attacks during the reconsideration period.

In a letter provided by the Secretary of State's legal representatives in May 2020, it was confirmed that *no prisoners at all had been released during the reconsideration period* since it had been introduced.

The Court's judgment makes it clear that the Parole Board does have a power to alter the 21-day period for the Reconsideration Mechanism and that it had not acted lawfully in refusing these other applications.

The Court relied upon this power as crucial to its decision that the reconsideration procedure did not breach Article 5.

The Court also emphasised that the right to liberty was fundamental and refuted the Secretary of State's suggestion that the period did not matter because it only affected a small number of prisoners for a comparatively short period of time:

> *"The right to liberty is a fundamental and important one. It is enshrined now in the Human Rights Act, but was prized at common law for many centuries before that.*
>
> *…The Defendant submitted that it was only in a small number of cases that delay would be caused, and any delay would be minimal. This comes close to a purely utilitarian type argument, along the lines that the interests of the majority are generally satisfied and if there are difficulties or delays, they only affect a few prisoners. This is not the correct approach to adopt to such a fundamental right as liberty."*

The Court also suggested that there is no requirement for exceptional circumstances before a prisoner can apply to have the reconsideration period reduced:

> *"So far as the difficulty of meeting the threshold, it is clear from the rules that exceptional circumstances are required for the Defendant to make such an application, but there is no such stricture upon prisoners. The wording of Rule 9 requires that consideration is given to that "where it is necessary to do so for the effective management of the case, [or] in the interests of justice". The decision is made by the Parole Board, an independent court. I do not see that an imposing an impossibly high threshold."*

The Court expressly indicated that where a prisoner can be released within the 21 days there is nothing to prevent this from happening if the Parole Board direct it:

> *The risk of delayed release may, as accepted in the Defendant's evidence, sometimes potentially occur in a specific individual case, and the obvious scenario would be where the work required towards the release plan and satisfaction of conditions was going to be completed in less than 21 days. However, the answer to that is itself contained in the*

2019 Rules, namely to use the mechanism to apply to the Parole Board for a reduction in the period.

The final paragraph of the judgment returns to this theme:

> *There is one point to which I wish to return, and it concerns the ability to have the period of 21 days reduced upon application to the Parole Board under Rule 9. Such an application can be made either by the Defendant, or by the prisoner. As has been explained above, that provision is an important one in terms of how the 2019 Rules are intended to work. The 2019 Rules are relatively new, and it may be that this provision to shorten the period, expressly accepted by the Defendant in these proceedings as applying to the 21 days for operation of the Reconsideration Mechanism, has not been widely known. Certainly, as the letter of 29 June 2020 at [**Error! Reference source not found.**] makes clear, there are only very few cases in which this has occurred in the first 11 months of operation of the 2019 Rules. The decision on any application to reduce the period is made by the Parole Board. Whether the number of such applications now increase remains to be seen.*

POST-SCRIPT

During the last month (prior to receiving the judgment in this case), we made two applications to reduce the reconsideration period, both involving mentally ill prisoners who had been detained for very long period of time. We are pleased that, in one of these, the Parole Board reduced the reconsideration period from 21 days to 7 days. In the other, the Member who considered the application noted:

"[The Rule 9] power should be exercised with caution, particularly where it restricts the right of either party to seek to prevent the finalisation of a decision by the Board to release. Rule 28 was specifically introduced to allow some consideration of 'final' decisions of the Board prior to formal finalisation.

…The only appreciable way in which he can be significantly disadvantaged is if the Secretary of State exercises his appropriate right under the Parole Board rules, and considers the decision itself to be worthy of reconsideration. It would be somewhat self-defeating of the purpose of the rule if that was sufficient to allow an abridgement in the interests of justice."

It is hoped that this kind of approach will change once the Parole Board has had the opportunity to digest the judgment in this case and recognises that, as an independent court, it can freely make its own decisions.

Andrew Sperling of SL5 Legal/Tuckers, acting for the Claimant said:

"We are proud of pursuing this case. We regard liberty as fundamental. We do not believe that the unfortunate circumstances of one high profile prisoner should have led to the system being changed for the many thousands of prisoners who could be released once the Parole Board has directed that they no longer need to be in prison.

We do not object to an appeal procedure but we do have grave concerns about a system which suggests that every release decision of the Parole Board should be suspended on the off-chance that it might be challengeable. The existing law allowed for the Secretary of State or a victim to challenge a Parole Board decision without unnecessarily detaining the many thousands of others for whom there is no prospect of anyone challenging their release decision.

We are very pleased that this case has, at least, created a framework for prisoners to apply to reduce the reconsideration period. Prisoners who can be released very soon after receiving their parole decision will now have a chance to ask the Parole Board to ensure that this happens.

We hope that we will be granted permission to appeal and that this will eventually lead to a review process which is fair and does not unnecessarily deprive people of their liberty."