

Parole Board Decision-making: Two Key Challenges for the Parole Board of England and Wales

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1. Introduction

*R. (on the application of DSD) v Parole Board of England and Wales (Worboys)*³ has focussed public and professional attention upon the Parole Board. While much of the media commentary has been critical of the Board, it has highlighted the difficult task confronting the Board. Making risk assessments is a complex undertaking at the best of times.⁴ Some will argue that that the Board's work has not been made any easier by *Worboys*. It is not our intention in this article to discuss the decision in detail⁵ but rather to highlight the need for clear direction from appellate courts. The Board functions in a complex legal environment and faces many challenges; internally to secure the information and assistance it needs to make decisions, and externally in explaining its decisions to an increasingly critical public. To make its life easier it is vital that the guidance given by the High Court (and above) as to how the Board should carry out its duties is clear and consistent.

This article explores the complex environment within which the Board operates, and discusses recent judgments relating to the test for release which reveal an inconsistent approach by the Courts. We first identify the challenges arising when a tribunal like the Parole Board exercises an inquisitorial function while operating within an adversarial system of justice. This issue has received insufficient attention from scholars. We then discuss the test for release in light of recent judgments. Greater clarity is required, from several perspectives. Litigants need a clear understanding of the tests and the Board's methodology in arriving at decisions to release. Victims (and the wider public) need to understand the role of the Board as a court as well as the constraints upon the Board's ability to explain its decisions.⁶ The legislature may believe it has set out a clear and consistent test, but that test has ignored decisions of the Courts. More clarity and consistency is needed from the higher courts as to which test for release applies (and when). Finally, it is important that the test is fair and complies with the requirements of the European Convention on Human Rights (ECHR).

2. Decision-making by the Board: has it a duty to act as an inquisitor?

It is important to understand the hybrid nature of the Board's role as a court. Unlike a criminal court (in this jurisdiction) the Board is not purely adversarial; it has inquisitorial functions. As the Board's publications note, 'In reality, most reviews and hearings contain elements of both adversarial and inquisitorial practices.'⁷ Yet any inquisitorial tribunal requires resources and powers, and the Board has insufficient of either to investigate matters thoroughly if the parties

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³ [2018] EWHC 694 (Admin); [2018] H.R.L.R. 12.

⁴ See special issue of the Federal Sentencing Reporter, Vol. 27, Number 4, 2015; Starr, S. 'Evidence-based Sentencing and the Scientific Rationalisation of Discrimination.' Stanford Law Rev. 66, 803-872, 2014.

⁵ See Jeremy Roberts, "The Parole Board and the Warboys Case" [2018] (10) Crim L. R. 808.

⁶ These constraints will likely be relaxed following the Government's review, the consultation period for which closed in July 2018 - Ministry of Justice, *Review of the Law, Policy and Procedure relating to Parole Board Decisions* (April 2018, CM 9611).

⁷ Parole Board Oral Hearings Guide. 3.1. (Updated 2014).

themselves have not pursued a relevant line of inquiry. While it is the obligation of the Secretary of State for Justice to provide the Board with material relating to a prisoner's offending, behaviour and rehabilitation,⁸ the Court in *Worboys* decided that it is for the Board to ensure that any gaps in the material supplied relevant to future risk are fully investigated. The Divisional Court considered that the Board had that obligation as part of its inquisitorial function.⁹ Does it have that function because it was intended to have it, or has it acquired it by necessity as a result of failures in an adversarial procedure? Either way, the Board is placed in a difficult position if the necessary resources and powers to carry out an inquisitorial function are insufficient or unavailable.

Procedures in parole hearings can be adversarial. Kennedy LJ speaks in one of the leading cases of an 'adversarial procedure'.¹⁰ The judge made that observation while commenting on whether a panel chair should direct the attendance of a witness which had not been sought by either of the parties.¹¹ The Secretary of State is a party to every case and provides most of the material on which the panel bases its decision. He is entitled to attend and argue his case; cross-examine the prisoner and any of the prisoner's witnesses; call evidence and make submissions.¹² The Secretary of State has the responsibility to represent the interests of the public in ensuring that offenders who still represent a danger to the public remain in custody.

3. The Worboys Hearing

The Court in *Worboys* found that the decision to release was not irrational and did not quash the decision on that ground. Nor was the decision quashed because the panel had failed to take into account a material consideration, namely evidence of wider offending beyond his convictions, as that ground could only succeed if evidence of wider offending was always material to the decision whether to release. The Court held that it was not. The decision was quashed because the Court found it was irrational for the panel not to seek further information about the alleged wider offending in order to properly test the evidence of the prisoner and the psychologists. The decision left unclear how one of the central conclusions¹³ reached in the case can be reflected in practice. The Court accepted the submission of the Parole Board that it was beyond its role to determine whether a prisoner had committed offences of which he had not been convicted but went on to say that the Board was not precluded from considering evidence of unprosecuted offending when determining the issue of risk. The Court explained that 'this evidence or material could have been used as a means of probing and testing the honesty and veracity of Mr. Radford's (Worboy's) account'.¹⁴

The *Worboys* parole hearing was adversarial. The Secretary of State's representative questioned Worboys and his witnesses and made submissions to the panel that Worboys should not be released. What the representative did not do but should have done, according to the *Worboys*' decision, was adduce evidence of Worboys' wider offending. Further, on the finding of the Divisional Court, she failed to sufficiently test Worboys' credibility. Nor did she test the

⁸ The Parole Board Rules 2016, sch.1.

⁹ R. (*on the application of DSD*) v Parole Board of England and Wales [2018] EWHC 694 (Admin); [2018] H.R.L.R. 12 at [149].

¹⁰ R. (*Brooks*) v The Parole Board for England and Wales [2004] EWCA Civ 80 at [33].

¹¹ R. (*Brooks*) v The Parole Board for England and Wales [2004] EWCA Civ 80 at [32]-[37].

¹² The Parole Board Rules 2016, Rule 23(3).

¹³ R. (*on the application of DSD*) v Parole Board of England and Wales [2018] EWHC 694 (Admin); [2018] H.R.L.R. 12 at [155].

¹⁴ R. (*on the application of DSD*) v Parole Board of England and Wales [2018] EWHC 694 (Admin); [2018] H.R.L.R. 12 at [155].

evidence of the psychologists called to support Worboys' release to suggest that they had reached their conclusions on a premature or false basis. The Divisional Court decided that if the Secretary of State, had failed to take those steps, it was irrational of the panel not to do so.¹⁵ Had the Secretary of State's representative arguing the case against release taken this step, intervention by the Parole Board panel would have been unnecessary. Worboys was also represented. His lawyer cross-examined witnesses and made submissions in support of his client's release. How far in a hearing where both parties were represented and were arguing their respective cases, was the panel entitled to rely on them to adduce all the relevant evidence? Not very far is the answer of the Divisional Court.

Some may find it difficult to understand how evidence of wider offending can be used to test a prisoner's credibility without making an express (or implied) finding that he did or did not commit other offences. The Worboys' case itself provides a good illustration of this difficulty. DSD, who was one of the claimants in the Divisional Court, had not been a complainant in the criminal trial. She had alleged in a witness statement to the police that she had been sexually assaulted by Worboys in his cab in 2003. Worboys was never tried for that offence. He told the psychologists that he started offending in 2006 after a trigger in late 2005 or 2006. If DSD was correct in her allegation, then his offending pre-dated the alleged trigger. That could have been relevant to the psychologists' opinions and whether Worboys had been honest in his accounts to the panel and the psychologists. The Divisional Court knew that Worboys denied any other offending outside his convictions. How could the relevance of DSD's allegation to the decision whether to release have been determined without reaching some conclusion as to its veracity? We will have to wait and see how this critical part of the judgment will be interpreted in practice, but further judicial reviews will undoubtedly follow. It is arguable that this part of the judgment is inconsistent with the decision of the Court of Appeal in *Brooks*.¹⁶ In *Brooks* the panel considered an allegation that the prisoner had raped his wife and it seems clear that the panel decided on the balance of probabilities that he had. The Court of Appeal held that the panel had been entitled to reach that conclusion on the basis of hearsay evidence without hearing direct evidence from the complainant.

The primary duty for ensuring that all evidence and arguments relevant to risk are put before the panel must lie on the Secretary of State¹⁷ who has the power to summons witnesses and produce reports. He runs the prison service and supervises those responsible for the rehabilitation of the offender. The Board can only secure evidence by making requests of the Secretary of State. Over the years, no doubt mainly for reasons of cost, the Secretary of State has not been represented, nor exercised the right to make written representations in most cases. While the Secretary of State always has the right to be represented, it is often only at the instigation of the Panel that there is representation, and this was the case in the *Worboys* hearing. Even when the Panel asks the Secretary of State to be represented due to some difficulty with the case, that invitation may be declined.

¹⁵ *R. (on the application of DSD) v Parole Board of England and Wales* [2018] EWHC 694 (Admin); [2018] H.R.L.R. 12 at [201].

¹⁶ *R. (Brooks) v The Parole Board for England and Wales* [2004] EWCA Civ 80.

¹⁷ Criticism of the Board is fuelled by a failure to fully appreciate the role of the Secretary of State. The public likely assume that the Board has sole responsibility to collect all relevant information in order to reach a decision on release. In other words, the public probably assumes that the Board is a wholly inquisitorial tribunal taking making releasing decisions without submissions from adversarial parties.

Indeed, in most cases, it has been left to the panel to ask most of the questions based on the information contained in the dossier supplied by the Secretary of State and any expert reports provided. Allowing the panel to pose the questions has the advantage that the oral evidence can focus on the matters that concern the panel. As a result, the role of the Board has come to be regarded as partly inquisitorial. If the Secretary of State had continued to take the responsibility for putting all relevant evidence before the Board and making recommendations, there would be no need for the Parole Board to function as an inquisitorial court. That does not mean that the panel would not probe witnesses. Any court will ask some questions. Jurors can ask questions, but that does not mean criminal courts are inquisitorial. The judgment recognises that a sentencing court exercises 'considerable latitude as to the range of the information to be considered...this 'same principle applies to the Parole Board'.¹⁸ Yet the adversarial nature of criminal trials inevitably constrains a court's (and the Board's) search for information. Neither can be expected to actively pursue lines of inquiry and to fill important gaps in the submissions by the parties. The hybrid nature of the Board may itself create some ambiguity which could impair effective investigation. The Secretary of State may expect the Board to undertake particular (and further) inquiries while the panel may assume that the parties carry principal responsibility for adducing evidence. The judgment may now change these expectations and assumptions, as well as the conduct of the panels.

4. Practical Limitations on the Board

There are also significant material constraints upon the Board's inquiries. The Parole Board lacks the powers an inquisitorial body might be expected to exercise. For example, it has no resources to conduct its own investigations. It can (and does) issue directions to the parties for the submission of information, reports or evidence.¹⁹ Members of the Board regularly encounter difficulties in achieving compliance with directions by the Secretary of State. Yet the Board has no sanctions which it can impose to ensure compliance. There can be lengthy delays in obtaining relevant information, and the Panel may have to defer the hearing, sometimes more than once. Such delays can be unfair to the prisoner and may in an extreme case constitute a breach of Article 5(4) of the ECHR.²⁰ The Board can direct the attendance of a witness under the 2016 Parole Board rules,²¹ but it has no power to issue a witness summons. This can only be done by the Secretary of State (or the prisoner) on application to the High Court or the county court.²² Importantly, the Parole Board has no power to compel a witness to answer questions and it has no power to commit a reluctant witness for contempt. In short, the Board lacks both the necessary advocacy in order to satisfy the requirements of adversarialism and the investigative powers to satisfy inquisitorial requirements.

Finally, the complaint against the Panel that considered *Worboys*, which the Divisional Court decided was justified, was that it failed to order material to be put before it about aspects of the case which were not the subject of enquiry by either of the parties. In an adversarial context it is unlikely that an appeal would be upheld against either a criminal or civil court

¹⁸ R. (*on the application of DSD*) v Parole Board of England and Wales [2018] EWHC 694 (Admin); [2018] H.R.L.R. 12 at [151].

¹⁹ The Parole Board Rules 2016, rule 10.

²⁰ Article 5(4) provides that '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'.

²¹ Parole Board Rules 2016, rule 10(2)(d).

²² Civil Procedure Rules, part 34, Rule 34.4 <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part34#34.3>

because it failed to investigate elements of the case which were not being pursued by any party to the case. In *Worboys*, the Divisional Court could only do so because of its conclusion that the proceedings before the panel were ‘in part inquisitorial’²³. It is unclear what that expression means in practice but, if it is correct, it can only be based, it is suggested, on the gradual withdrawal from the proceedings of the Secretary of State. The way the Parole Board operates is as a court and courts in this country are normally adversarial. The appearance of a court as fair is best maintained if the tribunal is able to remain ‘out of the arena’ and certainly not indulge in searching cross examination.

5. The Test for Release: is there a burden of proof and a standard of proof and if so what are they?

One of the key attributes of an adversarial proceeding is that a burden of proof is placed on one or other of the parties to prove their case to a required standard. It is then for the party bearing the burden to prove his case to the required standard and it is for the opposing party to test that case. What is the position with parole hearings?

The Courts have said that the appropriate ‘standard of proof’ for deciding factual issues which contribute to the decision by the Parole Board whether or not to release is on the balance of probabilities.²⁴ Once the panel has decided what facts have been proved, it then has to decide whether or not to release in light of those findings. In almost all cases the test is that the Board should only release a prisoner if satisfied that it is no longer necessary for the protection of the public that he or she remain in prison. That test appears to place a burden of proof on the prisoner. The nature of the test for release and the burden of proof for establishing facts seem designed for an adversarial system. ‘Satisfy’ is the same word that judges use when directing juries on the burden of proof in criminal trials. It describes a burden being on the prosecution to satisfy the jury that the ingredients of the offence have been made out. The standard of proof in a criminal trial is that the jury have to be sure.

What is absent from the test to be applied by the Parole Board in deciding on release is the standard of proof that is to be required. The Board has to be satisfied that it is no longer necessary for the safety of the public that the prisoner remains confined (in prison). To what standard does the Board have to be satisfied? A requirement that the Board should be satisfied on the balance of probabilities may be a very different test from being satisfied so that the Board is sure that it is safe to release the prisoner.

Despite the terms of the test for release which has appeared regularly in statutes and most recently in Legal Aid, Sentencing and Punishment of Offenders Act 2012 (hereafter LASPO),²⁵ the House of Lords has held that it is not appropriate to talk of their being a burden of proof on the prisoner to justify his release.²⁶ Instead, it was said by Lord Bingham in *Lichniak* (and repeated in other cases), that it was more appropriate to talk of the Parole Board forming a judgment rather than there being a burden of proof on the prisoner to satisfy the board that he is safe to release.²⁷ *Lichniak* did not concern a decision of the Parole Board; it was concerned with

²³ *R. (on the application of DSD) v Parole Board of England and Wales* [2018] EWHC 694 (Admin); [2018] H.R.L.R. 12 at [117].

²⁴ *Re D* [2008] UKHL 33; [2008] 1 W.L.R. 1499.

²⁵ LASPO 2012 sch.17.

²⁶ *R. v Lichniak* [2002] UKHL 47; [2003] 1 A.C. 903.

²⁷ *R. v Lichniak* [2002] UKHL 47; [2003] 1 A.C. 903 [16].

the legality of life sentences. Lord Bingham's comment in *Lichniak* is not expressed in strong terms²⁸ and the Courts have been far from consistent in the way they have dealt with this issue.²⁹

When the wording of the test for release is considered and the various cases which comment on it are taken into account, it is difficult to disagree with the view expressed by Professor Padfield that 'the statutory test suggests that the prisoner bears a very real burden: he or she has to satisfy the Parole Board that it is no longer necessary for the protection of the public that he should be confined before the Board may direct his or her release'.³⁰

The issue of whether or not there was a burden of proof on the prisoner had to be confronted head on in the House of Lords decision in *Re McLean*.³¹ That case concerned the release of a prisoner under the terms of the "Good Friday" agreement. Under that agreement, the Sentence Review Commissioners had to release a prisoner if four conditions were satisfied. Mr. McLean had been released but following a further incident the Secretary of State applied to revoke his release on the grounds that one of the four conditions was no longer met -- namely that if the prisoner was released immediately he would not be a danger to the public. This is a very similar test to that which the Parole Board has to apply.

Mr. McClean's release was revoked and he applied for judicial review. In the Judicial Review proceedings, one of the Commissioners swore an affidavit stating that the test which had been applied was that it was for the Secretary of State to satisfy the Commissioners on the balance of probabilities of the facts on which he relied and for the prisoner to satisfy the Commissioners on the balance of probabilities that, if released immediately, he would not be a danger to the public. Mr. McClean's application for judicial review was dismissed but he succeeded on appeal. The Northern Ireland Court of Appeal allowed the appeal on the basis that the Commissioners were wrong to place a burden of proof on the prisoner.³² The House of Lords allowed the appeal of the Commissioners and the Secretary of State and supported the Commissioners' approach. Lord Bingham, while not saying that there was a burden of proof on the prisoner, said that:

"[A]ny reasonable doubt which the Commissioners properly entertain whether, if released immediately, a prisoner would be a danger to the public must be resolved against the prisoner".³³

While the issue in the case was whether there was a burden of proof on the prisoner the standard of proof suggested by Lord Bingham was a higher one than the Commissioners had imposed in that it reflects the criminal burden of proof³⁴ and not the civil one.

Lord Carswell was also in favour of allowing the appeal and reversing the decision of the Court of Appeal. His Lordship, agreeing with Lord Bingham, did not favour imposing a burden of proof on either party but considered that the Commissioners had to consider all the evidence

²⁸ *R. v Lichniak* [2002] UKHL 47; [2003] 1 A.C. 903 [16] "I doubt whether there is in truth a burden on the prisoner to persuade the Parole Board that it is safe to recommend release, since this is an administrative process requiring the board to consider all the available material and form a judgment".

²⁹ For discussion see John Jackson, "Evidence and proof in parole hearings: meeting a triangulation of interests" [2007] (Jun) Crim. L.R. 417, 421 – 429.

³⁰ Nicola Padfield, "Justifying Indefinite Detention – on what grounds" [2016] (11) Crim L. R. 797.

³¹ [2005] UKHL 46; [2005] N.I. 490.

³² *Re McClean (No. 2)* [2004] NICA 13; [2005] N.I. 21.

³³ *Re McClean (No. 2)* [2005] UKHL 46; [2005] N.I. 49 at [29].

³⁴ Proof 'beyond reasonable doubt'.

and decide whether the fourth condition was still met.³⁵ Lord Brown seemed to accept that a burden of proof might arise in a case where the tribunal was genuinely unsure whether a prisoner could be safely released. He said at paragraph 103 that:

“If a mandatory life prisoner having already served the tariff period of his sentence must positively satisfy the Board that he can be safely released, the benefit of any doubt being given to the public, so surely must a life sentence prisoner whose only claim to be entitled to early release within the tariff period depends upon his satisfying a series of statutory conditions”

Again, this would appear to apply the criminal standard of proof with the burden placed firmly on the prisoner. Bearing in mind the uncertainties which inevitably surround risk assessments, this puts an impossibly high burden on prisoners and it is arguable that it does not meet the standard of fairness required under Article 5(4).

It is suggested that it makes no difference whether you describe the process as making a judgment or applying a burden and standard of proof; it amounts to the same thing. The Government in its Green Paper *Breaking the Cycle* published in 2010 accepted that it was for the prisoner to satisfy the Parole Board that he could be safely managed in the community.³⁶

The case of Sim and recalls during an extended licence period.

In reaching his conclusion that there could be a burden of proof in parole cases,³⁷ Lord Brown relied on the judgment in the case of *R. (on the application of Sim) v Parole Board for England and Wales*.³⁸ An appeal against the first instance decision in *Sim* was rejected by the Court of Appeal.³⁹

Sim was serving an extended sentence imposed under s.58 of the Crime and Disorder Act 1998 which was subsumed in s. 85 of the Powers of Criminal Courts (Sentencing) Act 2000. S.58 enabled the courts to pass an extended sentence for a sexual or violent offence if it concluded that the normal period of licence would not be long enough to prevent the commission by the prisoner of further offences and secure his rehabilitation. The effect of an extended sentence was to extend the licence period beyond its normal length. *Sim* was recalled during the extension period of the licence. The Board applied the public protection test, namely were they satisfied that it was no longer necessary for the protection of the public that *Sim* remained confined. This test will be referred to as the ‘standard public protection test’. The Board applied this test and concluded that it was not so satisfied and parole was refused. The issue on appeal was whether they were right to apply the standard public protection test. It is not surprising that the Panel used the standard public protection test. In doing so they applied s. 44A(4) of the Criminal Justice Act 1991 that prescribed that test. Nevertheless, both the High Court and the Court of Appeal ruled that they were wrong to do so.

The first issue that the Court had to consider in *Sim* was whether Article 5(4) applied to parole hearings for prisoners recalled during the extension period of an extended sentence. The Courts have had considerable difficulty in reaching consistent conclusions as to when Article

³⁵ *Re McClean (No. 2)* [2005] UKHL 46; [2005] N.I. 49 at [78].

³⁶ Ministry of Justice, *Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders* (2010, Cmnd 7972) para 185.

³⁷ *Re McClean (No. 2)* [2005] UKHL 46; [2005] N.I. 49 at [96]-[108].

³⁸ [2003] EWHC 152 (Admin); [2003] 2 W.L.R. 1374; and [2003] EWCA Civ 1845; [2004] Q.B. 1288.

³⁹ [2003] EWCA Civ 1845 [2004] Q.B. 1288.

5(4) applies.⁴⁰ Elias LJ giving the first judgment in *R(Whiston) v Secretary of State for Justice*,⁴¹ which concerned revocation of a prisoner's licence during a home detention curfew, said, at para 1, that:

“This is one of a growing number of cases which have bedevilled the appellate courts on the question whether and when decisions affecting prison detention engage that article. Problems arise because of the combination of general and imprecise Strasbourg principles and the complexity of English sentencing practices.”

Turner J in *Youngsam*, having considered the different decisions that the appeal courts had reached on the application of Article 5, concluded that Article 5(4) was not engaged when a prisoner was recalled during the licence period of a determinate sentence and the Board had to decide whether to release him.⁴² In doing so he had to choose between the obiter dicta of Lord Neuberger, who was at the time the President of the Supreme Court,⁴³ and conflicting obiter dicta of Lady Hale, his successor.⁴⁴ Lord Neuberger was of the opinion that Article 5(4) did not apply, Lady Hale was of the opinion that it did. An appeal against the first instance decision in *Youngsam* is due to be considered by the Court of Appeal.

The Court in *Sim* both at first instance and in the Court of Appeal decided that Article 5(4) was engaged as no court had authorised the confinement of Sim during the extension period of his sentence. Elias J concluded that:

“The decision to continue to detain a prisoner who has been subject to recall during an extended licence period is a decision that attracts the safeguard of Article 5; accordingly, the detention must be consistent with the aims and objects of the original sentence and must be subject to regular supervision by reviews which are compliant with Article 5(4)’.

The decision that Article 5(4) applies to recalls during the extended licence period of an extended sentence has recently been confirmed by the Supreme Court in *Brown v Parole Board for Scotland*.⁴⁵

Having found that Article 5 applied to detention during the extension period of an extended sentence, the Court went on to say that it would contravene Article 5(4) to have a presumption in favour of detention as in the standard public protection test. Elias J at first instance used the word presumption instead of burden of proof as he considered it more appropriate, but it is difficult to see the difference in practice. He ruled that the presumption should be for release, as detention has to be positively justified. Accordingly Elias J ruled at first instance that s.44A(4) should be read down to conform with a presumption in favour of release⁴⁶ namely that the Parole Board must release the prisoner unless satisfied that it is necessary for the protection of the public that he remains confined.

On the basis of this ruling in *Sim*, the Board has to consider whether the presumption in favour of release has been displaced by the evidence in the case of a prisoner recalled during the

⁴⁰ See the judgment of Turner J in *R. (Youngsam) -v- the Parole Board* [2017] EWHC 729 (Admin); [2017] 1 W.L.R. 2848.

⁴¹ [2012] EWCA Civ 1374; [2014] Q.B. 306.

⁴² *R. (Youngsam) v Parole Board* [2017] EWHC 729 (Admin); [2017] 1 W.L.R. 2848.

⁴³ *R. (Whiston) v Secretary of State for Justice* [2014] UKSC 39; [2015] A.C. 176 at [45]–[48].

⁴⁴ *R. (Whiston) v Secretary of State for Justice* [2014] UKSC 39; [2015] A.C. 176 at [58]–[59].

⁴⁵ [2017] UKSC 69; [2018] A.C. 1.

⁴⁶ In accordance with the provisions of s. 3 of the Human Rights Act 1998.

extension period of an extended sentence or whether the presumption in favour of detention has been displaced by the evidence in all other cases. Elias J considered that if the Board was in doubt whether the presumption had been displaced then the decision whether to release should be in accordance with the presumption.

The ruling made by Elias J was upheld by the Court of Appeal. In affirming the presumption in favour of release in cases of recall, the Court of Appeal relied on *Reid v United Kingdom* as requiring the party arguing for detention to make it out.⁴⁷ The decision in *Sim* has what might be considered the curious result that, when the Parole Board considers whether to re-release a prisoner who has been recalled during the normal licence period of his sentence there is a presumption against release, but when considering the re-release of a prisoner who has been recalled during the extended period of his licence, there is a presumption in favour of release. There does not seem to be any good reason to suppose that a prisoner is less likely to be safe to re-release during the ordinary period of licence than an extended period.

While the ruling that Article 5(4) applies to the recall of prisoners during the extension period of the licence would seem to be correct, as it has been affirmed by the Supreme Court, there may be some doubt that the effect of the application of Article 5(4) is to raise a presumption in favour of release. Those doubts arise both from the original decision in *Sim* and whether, if it was correct at that time, it has survived the amendments to the Criminal Justice Act 2003 introduced by LASPO. It was argued by the unsuccessful respondents in *Sim* that there should be no presumption in favour of release just as there was no such presumption in the case of a prisoner convicted of murder and recalled to prison following release after the expiry of the minimum period.⁴⁸ The point of comparison had been decided by the European Commission of Human Rights in 1997.⁴⁹ It was also the view taken in *Lichniak* where Lord Bingham ruled that the fact that, at the end of the minimum term of a mandatory life sentence the prisoner had to show it was safe to release him, did not make the sentence unlawful⁵⁰.

Keene LJ in *Sim* distinguished *Lichniak* because it concerned a mandatory life sentence where the objectives of the sentencing court may well have been to ensure that a person who has committed such a serious crime is not to be released unless and until it can be shown that he no longer represents a danger to the public. He contrasted that with the object of an extended sentence which -

“is not to subject the prisoner to detention for the extended licence period...The aim is to manage the risk in the community rather than in prison...The offender is not on licence as an alternative to prison; rather he is on licence as an alternative to liberty.”⁵¹

To some, this may seem an arbitrary distinction. In both cases the prisoner has served his punishment as reflected in the tariff and it is necessary for any further custody to be decided by a court applying the normal principles of fairness in accordance with Article 5(4). Why then does the same rule not apply for prisoners serving a mandatory life sentence for murder as to those serving an extended sentence? It is unrealistic to think that the Judge sentencing a defendant for murder forms any view whether there is a presumption in favour of or against release at the end of the minimum period. What Keene LJ did not deal with is what the correct release test is for a

⁴⁷ (2003) 37 EHRR 9.

⁴⁸ R. (*Sim*) v Parole Board [2003] EWCA Civ 1845 [2004] Q.B. 1288 at [44]-[56].

⁴⁹ *Comerford v United Kingdom* (Application No.29193/95; 9 April 1997).

⁵⁰ Para 16.

⁵¹ See the judgment of Elias J at first instance which was adopted by Keene LJ.

prisoner recalled during the licence period of a discretionary life sentence. Is it for the state to establish that the prisoner is still dangerous when he has served his tariff or is it for the prisoner to establish that he is no longer dangerous? Surely as a matter of fairness, the burden should fall on the state.

Sim was considered by Lord Brown in *Re McClean*⁵² as set out above. Lord Brown distinguished the situation in *McClean* from a prisoner serving an extended sentence. Lord Brown said, at para 103, that: “Sim is the only decision that I am aware of which holds that where after hearing all the evidence the Board remains genuinely unsure whether the prisoner needs to be detained or not, the benefit of that doubt must be given to the prisoner.” His Lordship held that in the circumstances of his case *McLean* was not entitled to the same benefit but did not doubt the correctness of the decision in *Sim*.

Do the LASPO amendments to the Criminal Justice Act 2003 affect the decision in Sim?

The Lord Chancellor at the time, Chris Grayling, in a written statement in July 2013 announcing that he was withdrawing all directions to the Parole Board relating to releasing prisoners said that LASPO

“contains a clear and consistent statutory release test that the board must apply in making those decisions...The LASPO Act applies this ‘public protection’ test to all cases which come before the board and also provides a power for the Secretary of State to amend the test by order”.⁵³

The then Lord Chancellor was referring to the standard public protection test, but was he correct to say that the standard public protection test applied in all cases?

The amendments to the parole test introduced by LASPO were considered in *R. (King) v Parole Board for England and Wales*, but unfortunately *Sim* was neither referred to nor considered.⁵⁴

In *King*, both the Divisional Court⁵⁵ and the Court of Appeal⁵⁶ had to consider whether the Parole Board was correct to apply the standard public protection test when considering whether to release a determinate sentence prisoner who was recalled during a normal, not extended licence period. Both the Divisional Court and the Court of Appeal decided that the Parole Board was correct. The Courts were not dealing with the question of the test to be applied when the Board is considering the release of a prisoner serving an extended determinate sentence recalled during the period of the extension, but the Court’s reasoning is relevant to that issue. In reaching their decision both Courts, and particularly the Divisional Court, extensively reviewed the relevant statutes and cases.

The test to be applied by the Parole Board in deciding the release test for prisoners recalled during their sentence is not set out in statute but the tests that the Secretary of State has to apply when considering release prior to any consideration by the Parole Board are. They are to be found in s.255B and s.225C of the Criminal Justice Act 2003 as amended by LASPO 2012. Those sections provide that in cases of all determinate sentences including extended determinate sentences the test to be applied for release following recall is the standard public protection test.

⁵² [2003] UKHL 46; [2005] N.I. 490.

⁵³ Hansard HC column 45WS (11 July 2013).

⁵⁴ [2016] EWCA Civ 51; [2016] 1 W.L.R. 1947.

⁵⁵ *R. (King) v Parole Board for England and Wales* [2014] EWHC 564 (Admin); [2014] A.C.D. 103.

⁵⁶ *R. (King) v Parole Board for England and Wales* [2016] EWCA Civ 51; [2016] 1 W.L.R. 1947.

S255B sets out the test for those serving an ordinary (i.e. non-extended) determinate sentence who are suitable for automatic release at the end of 28 days. S. 255C sets out the test to be applied by the Sec of State when considering release of ordinary determinate sentence recalls who are not suitable for automatic release and for the release of extended determinate sentence recalls. While the Act is silent as to the test to be used by the Board when the Sec of State refers the case to the Board, the Court in *King* decided that Parliament clearly had it in mind that the same test should be applied by the Parole Board as was applied by the Sec of State.

The decision in *Sims* means that the test for release by the Parole Board will be different for those recalled during the extended period of licence from all other determinate sentence recalls. As set out above, in the case of a prisoner serving an extended sentence who is recalled during the extension period, Article 5(4) is engaged whereas for all others covered by s.255C it is not⁵⁷. The consequence of that is that the test set out in s.255C (3) when applied by the Parole Board will have to be written down to reflect the presumption in favour of release in accordance with s. 3 of the Human Rights Act 1998. If the presumption in favour of release applies when the Parole Board is making the decision for re-release of prisoners recalled during the extended licence period then the same must apply to the Secretary of State when he is deciding on release by parity of reasoning.

To summarise, applying the decision in *Sim*, far from there being one universal test for release (as suggested by the Lord Chancellor), the picture is far more complex.

6. Different forms of Extended Sentence

Is there some other way of distinguishing the decision in *Sim* following LASPO? The meaning of an extended sentence in s. 255 of the Criminal Justice Act 2003 includes those ‘serving an extended sentence under s. 85 of the Sentencing Act’ which is the sentence that *Sim* was serving. When the Parole Board is dealing with a prisoner serving an extended sentence imposed under s. 85 it has to apply the presumption in favour of release, and it is suggested the Secretary of State would have to apply the same test.

In *R. (Coney) v Parole Board for England and Wales*,⁵⁸ Burnett J did exactly that and applied the presumption in favour of release as set out in *Sim*. That case concerned a man serving an extended sentence imposed under s.85 who was recalled during the extended period of his licence. It is not surprising that Burnett J applied that test as it was conceded to be the correct test by Counsel acting for the Parole Board. While the Judge was deciding a renewed application for leave and leave was refused, the case was a rolled-up hearing and the Judge gave a full judgment, so it does have weight as an authority.

Would the same presumption in favour of release apply to an extended sentence passed under the Criminal Justice Act 2003 before it was amended by LASPO and/or a determinate extended sentence passed after LASPO amended the Criminal Justice Act? There is a difference between pre-2003 and post-2003 extended sentences. For the imposition of an extended sentence passed under the 2003 Act both before and after the amendments introduced by LASPO, a Judge had to be satisfied that a Defendant was ‘dangerous’. A Defendant is ‘dangerous’ if he has committed a specified offence and the Judge decides there is a significant risk to members of the public of serious harm occasioned by the commission by the Defendant

⁵⁷ See Youngsam above

⁵⁸ [2009] EWHC 2698 (Admin).

of further specified offences.⁵⁹ The provisions of s.58 of the Crime and Disorder Act 1998 under which Sim was sentenced were different. Under s.58, a court could impose an extended sentence where it imposed a custodial sentence for a sexual or violent offence and considered that the normal period for which the offender would be on licence was not adequate for the purpose of preventing the commission by him of further offences and securing his rehabilitation. In the light of those differences, it might be arguable that for post 2003 extended sentences the same release test should apply as for prisoners who are recalled while they are serving a discretionary indeterminate sentence. It might be that it could be argued that it could properly be inferred that Parliament had not intended a ‘dangerous’ offender to be released unless the Parole Board was satisfied that it was safe to release him.⁶⁰

However, none of this is made clear in the authorities or the legislation. The same reasoning on which the decision in *Sim* was based applies to extended sentences passed both before and after the Criminal Justice Act 2003. No court has authorised detention during the extended part of the licence and it is for the party seeking detention to justify it.

If pre-2003 and post-2003 extended sentences are to be treated differently, it means that s.255C as interpreted in *King* may have a different meaning when the Secretary of State or Parole Board is considering release for a prisoner sentenced to an extended sentence passed under s.85 to a prisoner sentenced to an extended determinate sentence post LASPO. It is suggested that this cannot be the proper interpretation of s. 255C

Since the changes made by LASPO, *Sim* has been considered by the High Court in *R. (Brownne) v Parole Board of England and Wales*, but that decision does not resolve any of these problems.⁶¹ Indeed it is suggested that the reasoning in that case must be wrong as it decides that the Board should apply the presumption in favour of release when considering the case of a prisoner recalled during the normal licence period. This is contrary to the decision of the Court of Appeal in *King* which said that the standard public protection test applied in those cases.

We suggest that the Secretary of State was wrong when he said that there was a clear and consistent test that the Parole Board had to apply post LASPO. Rather, there is a different test which has to be applied when dealing with the recall of a prisoner during the extended period of licence of an extended to any other test.

Does it make any difference to the decision about release whether the presumption is in favour of release or the presumption against release is used?

The High Court in *Sim* did not quash the decision to refuse parole as the Judge concluded that even if the correct test had been used, the result would have been the same.⁶² Elias J took the view that applying the different test could, in certain circumstances, change the result⁶³ and the Court of Appeal agreed.⁶⁴ The Court of Appeal said it would be limited to cases where the Panel was unable to reach any conclusion on whether the prisoner was safe to be released.⁶⁵ Moses J, in *R. (Hirst) v Parole Board for England and Wales*, thought there wouldn’t be a difference in practice

⁵⁹ Criminal Justice Act 2003 s.226A.

⁶⁰ As was accepted in *R. v Lichniak* [2002] UKHL 47; [2003] 1 A.C. 903.

⁶¹ [2016] EWHC 2178 (Admin).

⁶² *R. (Sim) v Parole Board* [2003] EWHC 152 (Admin); [2003] 2 W.L.R. 1374 at [65]-[66].

⁶³ *R. (Sim) v Parole Board* [2003] EWHC 152 (Admin); [2003] 2 W.L.R. 1374 at [50]

⁶⁴ *R. (on the application of King) v Parole Board for England and Wales* [2016] EWCA Civ 51; [2016] 1 W.L.R. 1947 at [43].

⁶⁵ *R. (on the application of King) v Parole Board for England and Wales* [2016] EWCA Civ 51; [2016] 1 W.L.R. 1947 at [50].

although it was unnecessary for him to decide that issue.⁶⁶ Lord Brown in *Re McClean* appears to have preferred the view of Elias J but did not expect there to be any difference in all but a very few cases. A parole panel would be expected to be able to reach a decision as to whether it was safe for a prisoner to be released and not simply to be left in doubt.

Assuming that there is very little difference between the tests (and it is confusing to have two tests), it is preferable to have a single one. If that is correct should that test reflect a presumption in favour or against release? Once a prisoner has served the punitive part of his sentence, why should he or she remain in custody any longer unless it is demonstrated that it is unsafe to release him or her? While in the present state of concern about parole, such a change would no doubt cause an outcry, it should be borne in mind that it will only make a difference in very few cases.

There was (and is) considerable concern among informed commentators at the fact that prisoners sentenced to IPP had to remain in prison until the standard public protection test was satisfied.⁶⁷ The result was that for some relatively minor offences a prisoner could remain in prison for a very long time, greatly in excess of his 'just deserts' and some are still in prison. The previous Lord Chancellor was considering introducing the presumption in favour of release for all prisoners serving IPPs. Interestingly, that would have included Mr. Worboys. That has all been submerged and, one fears buried, in the furore arising out of *Worboys*. Once the debate over that particular decision has cooled and knees have stopped jerking, it is to be hoped that we can return to sensible discussions about our penal system and this issue in particular.

The Appellate Courts have made clear their preference for describing the function of the Parole Board as reaching a judgment on the evidence rather than deciding whether a burden of proof has been satisfied by one side or the other. If greater emphasis is placed on the inquisitorial role of the Board, reaching a judgment may be the more appropriate description. Whether it is for the Board to reach a judgment or decide whether a burden of proof has been satisfied may not make a great deal of difference in practice but whether or not there is a standard of proof and, if so what it is, may matter a great deal. The Court in *Sim* described the test for release as creating a presumption which can be displaced by the evidence. The criminal law provides examples of similar presumptions. Where the prosecution relies on evidence that the Defendant has committed a criminal offence, his conviction for that offence creates a presumption that he has committed it.⁶⁸ The presumption can be rebutted by the Defendant if he satisfies the jury on the balance of probabilities that he did not commit the offence. In the case of *Sim*, Elias J said that the presumption in favour of continued detention or release would not be overcome if the Board remained in doubt after considering the evidence. In the case of a prisoner recalled during the extension period of an extended sentence this means that the Board should release even if in doubt whether it is safe to do so. Such an approach would undermine public confidence in the work that the Board does. Equally, it would seem unfair and unreasonable only to release when there is no doubt that the prisoner is safe to release when the presumption is to keep in custody. It can seldom be the situation that no doubt remains where the decision is concerned with risk assessment.

⁶⁶ [2002] EWHC 1592 (Admin).

⁶⁷ For more detailed comment on the IPP, see Sir John Saunders, "The extended determinate sentence: is it a just and fair sentence?" [2017] (12) Crim. L.R. 940; Elaine Freer, "IPP: how long is too long?" [2017] (3) Arch. Rev. 4-7.

⁶⁸ S.74(3) Police and Criminal Evidence Act 1984

Bearing in mind that decisions as to fact are made by the Board on the balance of probabilities, why does the same not apply to the decision as to whether it is satisfied that it is safe to release the prisoner? There appears no good reason why it should not, and it provides a fairer test whether the presumption is in favour of release or detention.

7. Conclusions

This article has addressed two key challenges for the Board. First, in gathering and evaluating while constrained by the adversarial model; and second, in applying inconsistent tests for release which the material put before the Board is supposed to satisfy. If the Courts are going to impose on the Parole Board a duty to act inquisitorially then the Board needs the necessary powers to enable it to do that effectively. Currently, it does not have those powers. The Courts should recognise that the primary responsibility for acquiring all relevant evidence relating to risk lies on the Secretary of State. In this respect, it is also hoped that the Secretary of State will draw some lessons from the judicial review of the *Worboys* decision. It also needs to be clear what is meant by the role of the Board being partly inquisitorial. What is the extent of its duty to acquire evidence of wider offending and what conclusions can properly be drawn from that material.

There needs to be clarity from the courts as to the question which has to be asked by the Board when deciding whether to release. Does it have to resolve any doubt as to the safety of release against the prisoner or should it decide whether it is safe to release on the balance of probabilities? If the question is best expressed as a presumption, is the presumption in favour or against release? The work of the Parole Board is complicated by inconsistent decisions of the Courts which generate ambiguity in the law surrounding parole. The decision in *Worboys* will likely result in more appeals to the High Court while panels work out how to implement the principles which the decision established and lawyers test its ambit. It is to be greatly hoped that the Courts dealing with those challenges provide consistent and practical answers to the questions raised.

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