

Listing Backlog – requests for prioritisation or expedition  
on grounds of exceptional circumstances

Guidance to members

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# **1 Recent judgments regarding article 5(4) and Parole Board listing**

## **1.1 Betteridge**

The 23 June 2009 judgment in the case of *Betteridge* explored the current listing situation for oral hearings before the Parole Board, the available resources in terms of panel members and panel chairmen, what both the Board and the Secretary of State's plans were to address the situation and how and when the powers of the court in judicial reviews should be used in this context.

## **1.2 Breach of article 5(4)**

So far as what constitutes a breach of article 5(4) there is a distinction to be drawn in cases like *Betteridge* (i.e. a pure listing delay) from the James or Faulkner scenario (i.e. the Board having a complete dossier, but the delay to hearing being caused by gathering further information/evidence to better enable the prisoner to demonstrate his risk is reduced or enabling the prisoner to work towards reducing his risk prior to his review).

The essential point is that article 5(4) concerns the procedural requirements to allow a prisoner access to the Board; it does not involve the substance of the information before it (beyond the requirement that there must be sufficient information to enable an assessment of risk, i.e. provide a meaningful review). **Put simply, article 5(4) requires that a prisoner has access to the Board for a speedy determination of the lawfulness of his continued detention; it does not require that the State has enabled him to reduce his risk.** The latter requirement falls under Public Law duties alone.

In cases of pure listing delay, there will generally be a breach of article 5(4). Whether or not the breach is such to require compensation in the form of damages when a prisoner is released at the completion of his parole review will depend on the individual circumstances of each case.

In cases where there is a delay beyond the original due date for review, but where that delay is solely caused by the Board's requirements for further information which leads to assessment of the prisoner's risk, there will not generally be a breach of article 5(4).

### **1.3 Summary of the findings of the *Betteridge* judgment**

Article 5(4) requires speedy determination of a case. In the case of *Betteridge*, it may have been likely that the Board would not have released at tariff expiry but that is not a reason to delay such a hearing.

Evidence was accepted that steps are now being taken to seek further judicial and other manpower in order to properly meet the requirements of article 5(4) and that it would take time for the position to be improved.

Mr Justice Collins indicated he was glad to see that one of the measures put in place was a more flexible approach to listing and prioritising in the form of the listing framework.

He also found that it was not appropriate for the court to make a mandatory order that a case be heard by a particular date, because it was not fair for one prisoner to "jump the queue" over another and discouraged other prisoners in the same situation as *Betteridge* from making applications for judicial review where the only possible relief was declaratory.

### **1.4 The effect of the *Betteridge* judgment**

The avenue of applying for judicial review in cases where there is ongoing delay in obtaining a hearing date has effectively been closed to prisoners while it is accepted that the Board is prioritising those in the queue to ensure the shortest possible waiting time for each prisoner whose article 5(4) rights are engaged.

Mr Justice Collins found that it would be inappropriate for the court to order the Board to list cases sooner than it was currently doing according to the listing prioritisation framework, as the effect any such order would have would be to push another prisoner, who would have been waiting longer than the Claimant, further down the queue.

However, this judgment also suggested that expedition might be appropriate where the prisoner was "a real candidate for immediate release". The judgment, in this area, was carefully worded and referred to situations where there had been a previous parole review at which the Board made clear that a particular prisoner was already a real candidate for immediate release, but not able to be released at that previous review. The example given was the Board making this assessment at a pre tariff review.

Mr Justice Collins stated as follows:

30. It is obvious that the measures put in place to alleviate the problem will not have immediate effect. The evidence before me, from a number of solicitors who have experience in dealing with these cases, makes it clear that the delays continue and

the backlog has not improved, and indeed that latter point is made clear by evidence produced by the Secretary of State and by the Parole Board. But, as I say, one has to recognise that the changes can not be expected to take place overnight. I do not doubt that the authorities will now appreciate the need to get on top of this problem and to ensure that the hearings that are required are provided, and that the requirements of Article 5(4) are met. While, as I say, in the circumstances of this case, it does not particularly avail the claimant because he will not have achieved release, there may well be cases where that is not the case, and I am glad to see that one of the measures put in place is a more flexible approach by the Board to consideration of cases which do need priority. Obviously, if it has been made clear, perhaps in a pre-tariff hearing, that a particular prisoner, once he has served his tariff, is a real candidate for immediate release, then the sooner that particular individual has a hearing the better.

31. In the light of what is being done, it is not now appropriate for any prisoner to take proceedings against the Parole Board alleging breaches of Article 5(4) unless there are very special circumstances, something has gone badly wrong despite the new arrangements in that prisoner's particular case. It will not be helpful, either to the prisoner or to the court, if claims are brought which in reality, because of the existing situation, are not likely to achieve any sensible redress and merely add to costs. Of course, one has sympathy with those who may stay in prison longer than they perhaps, on one view, ought to. That is a thoroughly unsatisfactory state of affairs. But, equally, the court cannot do the impossible. We cannot make orders which are only going to create difficulties for others and are not in any way desirable, because, as I have already said, it is not helpful that prisoner A gets relief which may advance him in the queue but which inevitably means that prisoner B has a longer wait. As I repeat, absent special circumstances, claims of this nature should now be discouraged. But, this has at least brought home to the court, and enabled the court to make the point, that the situation that existed was unsatisfactory, potentially contrary to law, and the court welcomes the steps that are clearly being taken now to ensure that that situation does not continue.

### **1.5 *Alcock*: whether recommendations of report writer is sufficient to constitute exceptional circumstances**

The case of *Alcock* was heard on 3 September 2009. This was a challenge to the Board's refusal to prioritise the Claimant. The Claimant's grounds for requesting prioritisation were that, because there were positive recommendations from report writers, he was a likely candidate for progression, and as such his circumstances were exceptional. The Claimant had requested that his case be given higher priority for listing than it would otherwise be given (i.e. that it should be moved up the queue and be listed sooner than other older cases before it).

The court found that the existing ICM procedures was a sufficient assessment of the prospect of progression and that we were right not to accept that the recommendations of report writers alone were sufficient grounds to constitute exceptional circumstances

## **2 Exceptional circumstances and expedition or assigning high priority for listing**

Where, prior to the *Betteridge* judgment, requests for expedition or higher priority were generally only being made on grounds of

particularly special circumstances, for example where there was a diagnosis of mental illness where continued incarceration was evidentially causing a deterioration to a prisoner's condition, the Board is now receiving a number of requests for prioritisation where the prisoner believes he is a real candidate for immediate release and other factors will be affected if a review is not held soon.

There can be no precise guidelines for what constitutes "exceptional circumstances" as by their nature, they will be unusual and atypical. The following guidelines are instead an indication for ICM members on how to identify if a request for expedition or prioritisation can be described as special and if a case is accepted as having "exceptional circumstances", what consideration should be given to listing?

The Board itself can identify cases that should be expedited or given high prioritisation. This is generally done at the ICM stage, but Case Managers may also identify situations where there may be a case for consideration of further prioritisation, and when identified put cases before a duty ICM member for consideration. Both members and staff should make themselves aware of these guidelines.

## **2.1 The effect of assigning "high priority" to a case**

When considering a request for prioritisation, members should be aware of the affect that agreeing to prioritisation outside of the normal listing prioritisation framework will have.

All cases awaiting an oral hearing date are currently prioritised according to the date their review was originally due (see the listing prioritisation framework for details). If a request to prioritise a case due to exceptional circumstances outside of the framework is granted, this is effectively an instruction to the listing manager to make every effort to list that case in the next listing exercise. This will mean that, no matter what the original due date was for this case, it will move to the top of the queue of cases awaiting hearing.

## **2.2 The effect of directing expedition**

If a member directs that a case is so exceptional and the matter is of such urgency that the case be expedited, this is a direction to the listing manager to make every effort to list this case **as soon as possible**. This will involve attempting to arrange an entirely new panel at short notice, or seeing if any panel already listed for that prison can take an additional case at short notice.

## **3 "A real candidate for immediate release"**

### **3.1 Board's own identification at ICM stage**

Following Mr Justice Collins's comments at paragraph 30 of the *Betteridge* judgment, ICM members are advised to make a point of examining any previous panel decisions included in dossiers when making their initial assessment.

If a previous Parole decision indicates that a prisoner was a real candidate for immediate release at their last review **and** if the reports in the current dossier reflect this assessment, then ICM members should note that the case should be given high priority when listing the case. This note should be made clearly at the top of ICM directions in red font as follows:

"Due to previous panel decision and positive recommendations from report writers, there is a likely prospect of release in this case and it should accordingly be given high priority within the listing framework."

It is recognised that in reality, this will be relatively unusual as panels should not be tying the hands of future panels when making their decisions. Thus, such situations will be by their nature "exceptional".

### **3.2 Request for high prioritisation in cases of "a real candidate for immediate release"**

**When Case Managers receive a request for prioritisation due to the prisoner asserting he is "a real candidate for immediate release" they should pass the letter and file to their Team Manager.**

Team Managers will assess the submissions and decide whether or not sufficient reasons have been given to pass the matter to the duty ICM member for consideration of the request.

Requests where the prisoner asserts that there was an indication at a previous review that he was a real candidate for release and that current reports make recommendations for release, should be passed to the duty ICM member for consideration for prioritisation.

The mere fact that report writers support (even unanimously) release will not in general be sufficient to render a case exceptional. The purpose of an assessment by the Board at a hearing or otherwise is to scrutinise the all the evidence as to suitability of release, and to question the cogency of the evidence given by report writers. There will often be cases where the Board does not recommend release, even where report writers have supported this. Indeed, there are many prisoners awaiting hearing dates where there are positive recommendations from report writers and these cases cannot be said to be exceptional, so as to warrant expedition. Thus in general, Team Managers will respond informing prisoners that such circumstances cannot be regarded as "exceptional".

Similarly requests for prioritisation in cases where there are recommendations for a move to open conditions will not be considered by an ICM member, unless there are additional factors which may bring the case into the "exceptional circumstances" category.

The assessment of prospects of release or progression is one that is made at the ICM stage in every case in any event. Matters which were considered after 1 April 2009 will only progress to oral hearing where there is an arguable case for release or progression, or where an oral hearing is required in order to ascertain the position. As such, all cases awaiting hearing where article 5(4) is engaged are already prioritised according to the date the hearing was originally due to have taken place.

Requests where the prisoner submits that positive recommendations from report writers mean that he is a real candidate for immediate release or for progression to open conditions **and** where there are additional submissions that suggest the case may be one of "exceptional circumstances" which mean it should be prioritised outside the listing framework are explored below.

#### **4 Requests for high prioritisation where exceptional circumstances are cited**

It is not possible to set out an exhaustive list of situations which may constitute "exceptional circumstances". The following is simply a guide to the type of situation where consideration should be given by an ICM member to requests for prioritisation.

##### **4.1 Likelihood of release**

The majority of requests will generally fall into 3 main categories (but are not limited to these and as such this provides a non exhaustive guide):

a) Where continued delay affects the life, welfare or human rights of a third party:

A prisoner with caring responsibilities where the dependant's situation will deteriorate or be adversely affected due to the ongoing delay in the Parole Board's decision. For example, a prisoner who is the sole carer for an elderly or disabled relative, where the prisoner has a realistic prospect of release and the relative's health is deteriorating and requires full time care from the prisoner;

A female prisoner who is pregnant and who will be unable to live with and care for their child once it is born while she remains incarcerated, where the prisoner has a realistic prospect of release

(in such instances, ICM member's should consider the needs of the child);

b) Where continued delay will mean that circumstances will change or opportunities to contribute to society will be missed or irretrievably removed:

For example, a prisoner with a realistic prospect of release who will lose the opportunity of work or education if no release decision is made within a specified time. Caution should be exercised here, as there will be a fair number of prisoners in such a situation, so the decision maker must be sure that the individual circumstances are sufficiently special to mean that case "jumps the queue".

c) Where continued delay is causing deterioration to a diagnosed mental illness or condition.

#### **4.2 Likelihood of progression to open conditions or advice cases**

Cases where there is a realistic prospect of progression to open conditions should rarely be given priority beyond the due date of hearing, as such prioritisation will generally mean that the case will be heard sooner than a case where there is a likelihood of release.

This does not mean that due consideration should not be given to requests in this category.

While the Board has a duty to provide the Secretary of State with advice when it is so required, in the case of pre tariff advice cases it must be borne in mind that the prisoner's article 5(4) rights will not yet be engaged. There may, however, be situations where the circumstances are so unusual that the case should be prioritised for listing in any event. An example of exceptional circumstances would be where something has gone badly wrong; perhaps the case has been referred to the Board an inordinately long time ago and since been lost in the system with no case management or it has taken an extremely long time to obtain an expert report.

Such circumstances should, of course, be covered by the practice of listing according to the date such a review was due. It is therefore always worth ensuring, when receiving requests of this nature, that the correct due date has been assigned to the case for listing. If an error in the recorded due date is noted on receipt of such a request, team managers may be able to correct that error and accordingly inform the prisoner that his request for prioritisation is no longer necessary as he currently takes highest priority due to the original due date of his review and will receive the next available hearing date.

### **5 Requests for Expedition**

There may alternatively be requests for expedition, rather than prioritisation. When expedition is directed, this means that the Board must make efforts to either secure an additional panel quickly to deal with a particular case, or decide to defer a case already listed in order to make way for an emergency case.

Due to the current listing situation, it is sometimes impossible for the Board to comply with its own direction to expedite a case. This should not prevent a member from making that direction of course; the direction must be considered solely on the merits of the case.

Expedition should only be directed in cases of emergency and as such will only be granted rarely.

An example of an emergency situation would be cases where the prisoner is being held in a secure psychiatric unit, but has been discharged by a Mental Health Tribunal and his continued incarceration is evidentially causing deterioration to his mental health. Such cases already receive the highest level of prioritisation within the listing framework; requests for expedition can also be considered where something has gone badly wrong (perhaps in previous listing exercises, or where there has been a delay in the referral of the case following the MHT decision).