



R (Bailey and Morris) v Secretary of State for Justice

PRESS SUMMARY: For release at 0930 on 15 March 2023

This summary does not form part of the judgment. It is provided by the Court for the assistance of the public and press.

Result

- 1 The High Court (Lady Justice Macur and Mr Justice Chamberlain) today upheld a claim for judicial review challenging decisions by the Secretary of State for Justice to amend the Parole Board Rules and to issue guidance about the effect of the amendments.**

The Parole Board

- 2 The Parole Board (“the Board”), although funded by the Ministry of Justice (“MOJ”), is an arms-length body with important judicial functions. These include deciding whether prisoners with indeterminate sentences who have completed their minimum terms, or who have been released and recalled to prison, should be released into the community. The Secretary of State has power to make rules about proceedings before the Board.

The decisions initially challenged

- 3 On 28 June 2022, the Secretary of State exercised this power to make the Parole Board (Amendment) Rules. Rule 2(22) prohibited staff employed or engaged by HM Prison and Probation Service (“HMPPS staff”) from including in their reports a view or recommendation on the question whether a prisoner is suitable for release or transfer to open conditions (“the ultimate issue”). It also provided that, where considered appropriate, the Secretary of State would present a “single view” on the prisoner’s suitability for release.
- 4 In July 2022, the Secretary of State issued guidance (“the July Guidance”) about the rule change to HMPPS staff. This was used as the basis for staff training.

The claim

- 5 The claimants were prisoners serving indeterminate sentences and awaiting hearings before the Board. They challenged the decision to make rule 2(22) on the grounds that it: amounted to an unlawful interference with in the independent judicial determination of the legality of detention, contrary to common law and/or Article 5(4) of the European Convention on Human Rights (“ECHR”) (**ground 1**); was *ultra vires* the enabling power,

construed in accordance with Article 5(1) and (4) ECHR (**ground 2**); frustrated the claimants' legitimate expectation that the rules would remain as they were when their cases were first referred (**ground 3**); was made without prior consultation and therefore unlawful (**ground 5**); and was irrational (**ground 6**). They also challenged the July Guidance as unlawful (**ground 4**).

The early stages of the litigation

- 6 The first claimant obtained an interim declaration that the July Guidance was of no effect in his case. The Secretary of State gave an undertaking to similar effect in the second claimant's case. In the light of the points made in the claim and the judgment granting interim relief, the Secretary of State produced a new version of the guidance ("the October Guidance"). The claimants were permitted to amend their claim to include a challenge to this.

The High Court's reasoning

- 7 In a judgment handed down today, the High Court decided as follows:
- (a) Rule 2(22) applies only to those reports forming part of the dossier which the Secretary of State is required to serve when referring a case to the Parole Board. It does not prevent the Board from using its case management powers to direct a witness to provide a further report containing a view about the ultimate issue; nor does it affect the witness's legal obligation to comply with such a direction. Equally, it does not prevent the Board from asking the witness for a view on the ultimate issue during the oral hearing; nor does it affect the witness's legal obligation to answer such a question.
 - (b) On its true, narrow construction, the result achieved by rule 2(22) was within the power conferred by s. 239 of the 2003 Act, read compatibly with Articles 5(1) and (4) ECHR.
 - (c) However, the decision to make rule 2(22) was nonetheless unlawful for two reasons:
 - (i) One of the Secretary of State's principal purposes in making it was to suppress or enable the suppression of relevant opinion evidence which differed from his own view in cases where he expressed one. That purpose was improper. The decision to make the rule was an attempt by a party to judicial proceedings to influence to his own advantage the substance of the evidence given by witnesses employed or engaged by him and an impermissible interference with a judicial process. The fact that the attempt failed because the drafters did not achieve his purpose does not save the decision from being unlawful.
 - (ii) There is no evidence that the Secretary of State ever considered whether a prohibition on the expression of views on the ultimate issue was justified if its application was limited to the reports sent with the referral. The reasons

currently advanced for it do not provide a rational justification for rule 2(22) on its correct, narrow construction.

- (d) Even on the footing that rule 2(22) had been lawfully made, the decision to promulgate the July Guidance was unlawful. It instructed HMPPS witnesses that they must not include any view on the ultimate issue in their written reports, without distinguishing between the reports to which the prohibition applied and those to which it did not. It also instructed those witnesses to refuse to answer questions about their views on the ultimate issue. There was no legal basis for these instructions. The July Guidance was therefore unlawful.
- (e) Although the July Guidance was “revoked” and replaced by the October Guidance, HMPPS staff were never told that the former misstated the law or that they should disregard the training they had recently received based on it. On the contrary, they were given the impression that it was simply being reissued in a more concise form. No further training was offered. In any event, even taken alone, the October Guidance would be understood by HMPPS staff as instructing or encouraging them not to offer views on the ultimate issue even when (i) they have such views and (ii) they have been directed to provide them in reports or asked for them in oral hearings. In these respects, the October Guidance continued to misstate the law and to induce staff to breach their legal obligations. The decision to promulgate it was therefore also unlawful.
- (f) The July Guidance and October Guidance were bound to, and did, cause report writers to breach their legal obligations in large numbers of cases. It is not possible to say with certainty what effects this guidance has had in the cases determined while it was in force. But its promulgation may well have resulted in prisoners being released who would not otherwise have been released and in prisoners not being released who would otherwise have been released.
- (g) The Secretary of State did not consult outside the MOJ before making rule 2(22). If he had done so, he might have avoided the unedifying confusion which appears to have prevailed within the MOJ and HMPPS about the effect and consequences of rule 2(22). However, there was no statutory obligation to consult and no promise or sufficiently consistent practice or doing so. The failure to consult was therefore not unlawful.

Directions for a further hearing

- 8 The High Court gave directions for a further hearing to determine what orders it should grant in the light of its conclusions. At that hearing it will also hear further argument on the questions (1) whether a witness who declined to provide their view on the ultimate issue when directed or asked by the Board to do so would commit contempt of court and (2) if so by what procedure that could be addressed. Although the legality of the two challenged decisions did not turn on those questions, there was a public interest in determining them.

Ends