Some reflections on the John Worboys case

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Introduction

The decision of a panel of the Parole Board to direct the release on licence of the taxi driver and serial sex offender Mr John Worboys must have seemed, to most members of the public unfamiliar with the legal framework within which the Parole Board is required to work, to have been incomprehensible and a serious blunder. That impression can only have been strengthened by (a) the media coverage given to public utterances made by some of Mr Worboys' victims and their lawyers, (b) the quashing of the panel's decision by the High Court on the basis that it should have sought to obtain information about the offences of which Mr Worboys had been accused but never convicted and (c) the forced resignation of the Board's chairman in consequence of the judgment. A friend of mine has commented that the Parole Board must have taken leave of its senses, and I have heard similar remarks made by others.

In this article I am not seeking to question the decision of the High Court: judicial discipline requires me, as a member of the Parole Board, to assume that that decision was correct. What I am seeking to do, however, is to demonstrate that the panel's mistake (as the High Court found it to be) was certainly not of the magnitude which must have appeared to the public: it was largely due to the extreme difficulties faced by the Parole Board, in a case like Mr Worboys', when it comes to applying the legal principles which govern its performance of its role in the criminal justice system. I shall also aim to show that the issues with which the High Court was faced were themselves complex and difficult, and that the approach which the court concluded the panel should have followed is not without its own difficulties.

I should make it clear that I am writing this article in my capacity as an academic

commentator on legal issues and not on behalf of or at the request of the Parole Board (though of course my membership of the Board gives me a special interest in this topic and, I hope, some knowledge of the legal issues involved).

The Parole Board's place in the system and the legal constraints under which it operates

To correct some of the misunderstandings generated by the Worboys case it is necessary to start by explaining the Parole Board's role in the system and the legal framework within which it operates. It is now (though it was not always) a part of the independent judiciary of England and Wales. It was not always so. When it was set up 50 years ago it was a purely advisory body, advising the Home Secretary (then the relevant member of the executive) on parole matters. By two stages (in 1991 and 2003) Parliament changed the law so as to transfer from the executive to the Parole Board the responsibility for deciding whether a prisoner serving an indeterminate sentence (life imprisonment or imprisonment for public protection) should be released on licence or remain in custody.

These changes came about as a result of Parliament's deference to decisions of the European Court of Human Rights in Strasbourg, which had held that the UK parole system in its original form was incompatible with the European Convention on Human Rights. Article 5(4) of that Convention requires the lawfulness of an individual's detention to be determined by “a court”. The Strasbourg judges accepted that the Article applies whenever an indeterminate sentence prisoner's “tariff” (the minimum term fixed in his case) has expired. From that point on any decision as to whether he should be released on licence should therefore be made by “a court” and not by a politician who would (with the best will in the world) inevitably be under pressure to make the decision which would go down best with the voting public.

The Strasbourg judges accepted that the Parole Board, if given the responsibility of making decisions about parole, might qualify as “a court” but only if (a) it was independent of the executive and the parties and (b) it had an appropriate set of judicial procedures to ensure fairness, which of course involves fairness to both parties. There are only two parties in parole proceedings: one is the prisoner and the other is the Secretary of State who represents the public and the victims. Since 2007 the relevant Secretary of State has been the Secretary of State for Justice.

As a result of those decisions the status of the Parole Board had to be, and was, transformed into that of a judicial tribunal, and its procedures were adapted so as to be consistent with those of any other court. They did not have to be identical: for example the Board's hearings may be conducted in private if (as is generally the case) that is necessary in the interests of confidentiality. But when it comes to the decision-making process the requirement of fairness is paramount.

Hearsay evidence is admissible in parole proceedings, and indeed Rule 23 (6) of the Parole Board Rules states that “An oral panel may produce or receive in evidence any document or information whether or not it would be admissible in a court of law”. This is, of course, subject to the overall requirement of fairness. Since the Criminal Justice Act 2003 came into force hearsay evidence has also been admissible in criminal courts, again subject to the same overall requirement.

In criminal court cases the European Court of Human Rights and the higher courts in the UK have been much exercised by how the requirement of fairness is to be applied to hearsay evidence of criminal conduct. The present state of the law is that fairness requires that a finding of guilt should not be made if it is based solely or decisively on a statement made otherwise than in oral evidence unless there are in place - to set against the obvious disadvantage to the defendant of not being able to test the reliability of that statement by cross-examination - sufficient counterbalancing factors to enable a fair assessment of the allegation to be made.

It is clear that if our parole system is to be compliant with Article 5(4) a similar approach to hearsay evidence must be taken in parole proceedings. In the nature of things it would be very difficult to say that the current parole system provides sufficient counterbalancing factors to set against the disadvantage to the prisoner of not being able to test by cross-examination, for example, a statement alleging that the maker had been the victim of a sexual offence committed by him. In a criminal court counterbalancing factors in such a case include (a) the prosecution's duty to disclose anything which undermines its case (b) the opportunity to scrutinise the circumstances in which the complaint was first made and (c) the opportunity to scrutinise exactly what the complainant said when interviewed by the police. In the nature of things the parole system does not provide those safeguards. The officials in the Public Protection Casework Section of the Ministry of Justice (“PPCS”) who

are responsible for preparing the case and presenting the evidence to the Board do not have the same disclosure obligations as the prosecution in a criminal case.

Panels of the Board do sometimes have to make findings of fact for the purpose of their risk assessments. By virtue of the requirement of fairness (and the likelihood that any breach of it would result in an application by the prisoner for judicial review) it is very rare for a panel to use hearsay evidence as a basis for finding that the prisoner committed an offence of which he has not been convicted. The proper place for a criminal allegation to be tested is in a criminal court, with all its checks and balances; and, necessarily, the Board normally relies on the findings of criminal courts to provide the starting point for its risk assessments. If the prisoner was convicted of an offence the Board will proceed on the basis that he committed that offence: it has neither the authority nor the resources to go behind the conviction. Similarly if the prisoner was acquitted of an offence the Board will proceed on the basis that he did not commit it - though evidence of the circumstances surrounding the incident in question may be relevant to the Board's assessment of risk.

Particular difficulty arises where the prisoner was neither convicted nor acquitted of an offence of which he was accused, because there was no trial of that allegation. The Board is not equipped to conduct a trial of the allegation in the same way as a criminal court (with all the safeguards built into such a trial and with the key witnesses brought to the prison and examined and cross-examined in the presence of the prisoner, which in any event would be quite inappropriate); and any attempt to use hearsay evidence to establish his guilt would be likely to result in the panel's decision (if adverse to the prisoner) being quashed by the High Court or found by the European Court of Human Rights to have been unlawful.

The Worboys case

The Worboys case was, as the High Court recognised, exceptional. He had been prosecuted for offences against only 14 of the much larger number of women who had made complaints to the police about him. This was because of the rule of practice in the criminal courts that an indictment to be tried by a jury should not be overloaded by including too many counts for them to disentangle and consider separately. In the result he was convicted of offences against 12 of the 14 and acquitted in relation to the other two.

It is not unreasonable to suppose that the prosecution had chosen what they perceived to

be their strongest cases to put on the indictment. The acquittals demonstrate that the safeguards provided by the system (including not only the opportunity to test the complainants' evidence by cross-examination but also the other factors to which I have referred) operated effectively. They also demonstrate that the jury heeded the judge's warning (equally applicable to parole proceedings) that it is impermissible to lump all the allegations together and it is necessary to examine each allegation separately. This is particularly so in sexual cases, where the issue of consent usually has to be considered.

The fact that the indictment was limited to a relatively small proportion of the allegations against Mr Worboys created real difficulties for the sentencing judge when fixing the appropriate sentence and in due course for the Parole Board in assessing risk. The situation was a highly unusual one: in a case of this kind there are normally sufficient counts on the indictment to give an adequate overall picture of the defendant's offending.

The panel's approach and the High Court decision

The High Court did not accept the submission made on behalf of the claimants that, on the evidence considered by the panel, its direction for release was “irrational”. It did however, not without anxious consideration and an acknowledgement that the submissions made on behalf of the Parole Board and Mr Worboys were powerful, accept the claimants' submission that the panel should have sought further information about the offences of which Mr Worboys had been accused but not convicted.

There are a number of reasons which, I suggest, cumulatively demonstrate that the mistake which the High Court found the panel to have made was a readily understandable and excusable one.

(1) All of the information which the High Court believed the panel should have sought to obtain amounts to hearsay (in some cases double or triple hearsay). As explained above, the legal framework within which the Parole Board is required to act creates real difficulties for a panel (and the risk of a successful judicial review challenge by the prisoner) if it relies on hearsay evidence to prove that an offender committed offences of which he has not been convicted.

(2) In taking the approach which it did (not seeking to obtain additional information as

now suggested by the High Court) the panel was acting in line with the Board's normal and reasonable approach to hearsay evidence. Mr Worboys' case was unusual in that there were so many allegations against him in addition to those on which he had been convicted, but the general principle applies whatever the number of allegations. [It is possible that the judgement of Mr Justice Green in civil actions brought against Mr Worboys falls into a rather different category from the other pieces of hearsay and that his findings could safely be relied on in the same way as a verdict returned by a jury.]

(3) Not only was the panel's approach in line with the Board's normal approach. It was also in line with the approach of the experienced officials in the PPCS who put together the dossier for the Board. Based on the same reasoning as above, they clearly did not think it appropriate to obtain the hearsay evidence and put it into into the dossier for the panel to consider. For the reasons set out in this paper, their approach - like the panel's - was entirely understandable.

(4) Furthermore the experienced "Secretary of State's representative" who (at the request of the panel in view of the importance and sensitivity of the case) represented him at the parole hearing did not suggest on his behalf (either in written submissions before the hearing or orally at the hearing) that the panel should seek to obtain evidence to establish Mr Worboys' guilt of other offences (adjourning the hearing if necessary).

(5) It is clear from the High Court judgement that there were powerful arguments on both sides on the question whether the panel should have sought further information about the other alleged offences. Whilst the court ultimately preferred the arguments for the claimants, the fact that it acknowledged the strength of the arguments the other way is clear evidence that the panel's mistake was an entirely understandable one.

(6) Importantly, the High Court accepted that the hearsay evidence could not be used as a basis for a finding that Mr Worboys had committed other offences. It stated that, whilst that was the case, "the evidence or material could have been used as a means of probing and testing the honesty and veracity of Mr Radford's [Mr Worboys' new name] account."

(7) Most people, I think, (whether lawyers or not) would find that distinction intellectually difficult to understand and apply: it is difficult to see how you could use the material to test Mr Worboys' account without at some stage deciding whether you believe it or not. Certainly it is hardly surprising that it did not occur to the panel that that intellectually sophisticated exercise was one on which it should be embarking.

(8) It is known that the Secretary of State sought legal advice as to whether there were grounds for him (as a party to the proceedings) to challenge the release decision by way of judicial review. I do not of course know precisely what advice he received but it was clearly to the effect that there were insufficient grounds for him to mount a challenge. It follows that his legal advisers were not of the view that the panel should have sought and considered evidence of wider offending than that of which Mr Worboys had been convicted. If that was their understanding, it is hardly surprising that the panel shared it.

I am aware that my former colleague Mr John Samuels has suggested in a letter to the Times that, if the panel had been chaired by a serving or retired judge, it would have sought evidence of other offending, as the High Court decided it should have done. I am afraid that as a retired judge myself I do not share Mr Samuels's confidence about that. Indeed I would have expected a judge or retired judge to have been particularly anxious to follow the principles set out in the Strasbourg and UK decisions about the use of hearsay evidence to prove criminal conduct. I doubt whether any of them would have anticipated the sophisticated intellectual exercise suggested by the High Court. My understanding is that the Worboys panel was chaired by one of the Board's highly skilled and experienced independent panel chairs.

Of course, as the High Court judgement pointed out, it would be surprising as a matter of common sense if, out of all the accusations made against Mr Worboys, the only true ones were the ones of which he was convicted. However, if reliance is to be placed on other offences, they need to be established by proper processes and procedures, and it is important that those procedures and processes should be adhered to (as the panel clearly tried to do). Hard cases make bad law, and to ignore or circumvent the proper procedures and processes in a high profile case in order to achieve the result which the public might like to see would be a serious error.

In an earlier article, published on the British Academy blog on 30 March 2018, I made a suggestion (use of the "two-stage trial" procedure introduced by the Domestic Violence, Crime and Victims Act 2004) as to how the various difficulties encountered both by the panel and by the High Court might be avoided in future cases. I hope that the Crown Prosecution Service may consider that suggestion to have merit. It would enable verdicts to be obtained on all of the allegations against Mr Worboys (some from the jury and some for the judge) which would in turn provide a reliable basis both for sentencing and, in due course, for the Board's risk assessment. It would also benefit those who could be proved to have been victims of the defendant's offending but whose complaints could not be included in a conventional indictment tried by a jury alone.

HH Jeremy Roberts QC

His Honour Jeremy Roberts QC was formerly a judge at the Central Criminal Court. He is a member of the Parole Board and a Master of the Bench at the Honourable Society of Inner Temple. He discussed the Worboys case's ramifications for judicial independence at the British Academy conference on 'Challenges to Judicial Independence in Times of Crisis' (8-9 May 2018), which was co-convened by BiE's director Dr Dimitrios Giannoulopoulos (with Dr Yvonne Mc-Dermott Rees, an Associate Prof at the Hillary Rodham Clinton School of Law).