OUTER HOUSE, COURT OF SESSION

[2021] CSOH 34

P690/20

OPINION OF LORD CLARK

In the cause

PAUL HUTTON

Petitioner

against

THE PAROLE BOARD FOR SCOTLAND AND OTHERS

Respondents

Petitioner: McLean; Balfour + Manson LLP
Respondent: Lindsay QC; Anderson Strathern LLP
Interested Party: Jajdelski; Scottish Government Legal Directorate
Additional Party: Welsh; Harper Macleod LLP

25 March 2021

Introduction

[1] The petitioner is currently in prison, having been sentenced to an Order for Lifelong Restriction ("OLR") in September 2008. In this petition, he seeks judicial review of a decision of an OLR Sentence Prisoner Tribunal of the Parole Board for Scotland, dated 28 May 2020, in which the Tribunal refused to grant his release.

[2] The grounds upon which review is sought are, firstly, that the Parole Board ought not to be regarded as a "court" in terms of Article 5(4) of the European Convention on

Human Rights ("ECHR") when it deals with the cases of prisoners subject to an OLR, and accordingly that it was not a "court" when it decided his case; and, secondly, that the decision on 28 May 2020 was reached in circumstances that were procedurally unfair, because the reasons given for the decision were inadequate.

[3] The respondent is the Parole Board. The Lord Advocate lodged answers as an interested party. The Risk Management Authority ("RMA"), on its unopposed motion, was granted leave to enter the process as an additional party.

Background

Imposition of the OLR

Statutory provisions

[4] The introduction of an OLR as an available sentence was suggested in the Report of the Committee on Serious Violent and Sexual Offenders, dated June 2000, chaired by Lord MacLean ("the MacLean Committee"). The report recommended creation of the RMA and that it be responsible for policy, standard setting, and operations. The principal changes to legislation to implement the report arose from the Criminal Justice (Scotland) Act 2003, in section 1, dealing with risk assessment and introducing the OLR form of sentence, and section 3-10, which deal with the establishment and role of the RMA and the duties of the lead authority. The main statutory provisions on these matters are set out by Lord Braid in *O'Leary* v *Scottish Ministers* [2020] CSOH 81 (at paras [6]-[12]) and I respectfully agree with his explanation of them. For present purposes, I now summarise the central points that arise from the statutory framework and the Parole Board rules, insofar as they relate to this petition.

[5] Section 1 of the 2003 Act made certain amendments to the Criminal Procedure (Scotland) Act 1995, including the introduction of sections 210B-210H. In terms of section 210B(1), where the High Court is to impose a sentence for certain types of offence, including a sexual offence, a violent offence or an offence which endangers life, the court, at its own instance or (provided that the prosecutor has given the person notice of his intention in that regard) on the motion of the prosecutor, if it considers that the risk criteria may be met, shall make a "risk assessment order" (unless the court makes an interim compulsion order or the person is already subject to an OLR). This orders the preparation of a risk assessment report, which is "a report as to what risk his being at liberty presents to the safety of the public at large" (section 210B(3)(a)). In terms of section 210F(1), the High Court, at its own instance or on the motion of the prosecutor, if it is satisfied, having regard to, *inter alia* any risk assessment report submitted under section 210C(4) or (5) of the Act that, on a balance of probabilities, the risk criteria are met, shall (where the person is not one in respect of whom a compulsion order could be made) make an order for lifelong restriction in respect of the person. The risk criteria are set out in section 210E:

> "that the nature of, or the circumstances of the commission of, the offence of which the convicted person has been found guilty either in themselves or as part of a pattern of behaviour are such as to demonstrate that there is a likelihood that he, if at liberty, will seriously endanger the lives, or physical or psychological well-being, of members of the public at large".

Section 210F(2) states that an order for lifelong restriction constitutes a sentence of imprisonment, or as the case may be detention, for an indeterminate period. The judge, when imposing the sentence, also has to fix a punishment part, which is the time to be served for retribution and deterrence, calculated in accordance with section 2A of the Prisoners and Criminal Proceedings (Scotland) Act 1993 ("the 1993 Act"). Following upon the expiry of the punishment part, the prisoner may continue to be detained because of the

risk he presents to the community. After expiry of the punishment part of an OLR prisoner's sentence, the Scottish Ministers are required, if directed to do so by the Parole Board, to release an OLR prisoner on licence (section 2(4) of the 1993 Act). The Parole Board cannot direct the Scottish Ministers to release an OLR prisoner on licence unless the Parole Board is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined (section 2(5)(b) of the 1993 Act).

[6] Viewing the statistics broadly, it is unlikely that immediately after the expiry of the punishment part the required reduction in risk will have been met. In *Ferguson* v *HM Advocate* 2014 SCCR 244 (at para [135]), Lord Drummond Young observed:

> "if the risk criteria were indeed met when the sentence was imposed it is quite likely that the risk to the public would still exist in every case after seven or eight years"

Lord Drummond Young also noted that punishment parts had expired in a substantial number of cases and emphasised the need for regular review of those cases to ensure that continued detention is necessary to meet the objectives of the sentencing regime which he said "is clearly contemplated by the terms and structure of the governing legislation". Nonetheless, it remains the case that a very small number of persons sentenced to an OLR have been released. I was advised that the RMA's Annual Report for 2020 states that around 205 OLRs have been imposed, of which 193 are active.

The petitioner's sentence

[7] The petitioner is aged 45. The majority of his convictions as an adult have been for offences relating to theft and fraud, but he has also committed offences of a sexual nature. On 10 July 2007, in the Sheriff Court, the petitioner pled guilty to two charges of offences against two former partners. The Sheriff took the view that an OLR may be appropriate in

respect of the second offence. The case was remitted to the High Court for sentence. On 24 September 2007, the High Court made a risk assessment order. A risk assessment report was prepared and objections were lodged. Following upon a hearing in September 2008, the judge imposed upon the petitioner a determinate sentence in respect of the first charge and an OLR in respect of the other charge, fixing a punishment part of 18 months. He ordered the OLR to run consecutively to the other sentence of imprisonment. The end date of the determinate sentence was 10 June 2008 and so the punishment part for the OLR started on that date, with the result that the petitioner became eligible for consideration by the Parole Board of release on parole on 10 December 2009. I was advised that the petitioner has always been detained in closed conditions.

Role of the lead authority and the RMA

Statutory provisions

[8] As the existence of risk forms the basis of an OLR, the risk posed by an OLR prisoner requires to be managed in order to allow a Tribunal of the Parole Board, in due course, to make a determination under section 2(5)(b) of the 1993 Act. Section 3(1) of the 2003 Act established the RMA, whose functions are to be exercised for the purpose of ensuring the effective assessment and minimisation of risk. "Risk" means "the risk the person's being at liberty presents to the safety of the public at large" (section 3(2)). Under section 4, in or in relation to the assessment and minimisation of risk the RMA is to compile and keep under review information about the provision of services in Scotland and research and development, promote effective practice and give such advice and make such recommendations to the Scottish Ministers as it considers appropriate. In terms of section 5(1), the RMA has to (a) prepare and issue guidelines as to the assessment and

minimisation of risk; and (b) set and publish standards according to which measures taken in respect of the assessment and minimisation of risk are to be judged. In accordance with section 5, the RMA has prepared and issued its "Standards & Guidelines for Risk Management 2016".

[9] Any person having functions in relation to the assessment and minimisation of risk is to have regard to such guidelines and standards in the exercise of those functions (section 5(2)). Section 6(1) provides that a risk management plan must be prepared in respect of any offender who is subject to an OLR. The risk management plan must: (a) set out an assessment of risk; (b) set out the measures to be taken for the minimisation of risk, and how such measures are to be co-ordinated; and (c) be in such form as is specified (section 6(3)). The risk management plan may provide for any person who may reasonably be expected to assist in the minimisation of risk to have functions in relation to the implementation of the plan (section 6(4)). In terms of section 6(6), the RMA may issue guidance (either generally or in a particular case) as to the preparation, implementation or review of any risk management plan. Section 7(1) provides that where the offender is serving a sentence of imprisonment in a prison or detention the risk management plan is to be prepared by the Scottish Ministers. Under section 7(3), where the risk management plan does not require to be prepared by the Scottish Ministers (or the managers of a hospital under subsections) the plan is to be prepared by the local authority in whose area the offender resides. Whoever is required by virtue of this section to prepare the risk management plan is referred to as the "lead authority" (section 7(5)). For present purposes, as the petitioner remains in prison, the lead authority is the Scottish Ministers.

[10] Section 8(1) states that preparation of the risk management plan is to be completed no later than nine months after the offender is sentenced, subject to a longer period where

there is an appeal. Section 8(4) states that the lead authority is to submit the risk management plan to the RMA and the RMA is to (a) approve it; or (b) where it considers that a plan does not comply with section 6(3) or that the lead authority has, in preparing the plan, disregarded any guideline or standard under section 5 or any guidance under section 6(6), reject it. Where any plan is rejected, the lead authority is to prepare a revised plan and submit it to the RMA by such time as the RMA may reasonably require (section 8(5)). Where the RMA (a) ejects a revised plan; and (b) considers that, unless it exercises its power under this subsection to give directions, subsection (1) would not be complied with, the RMA may give directions to the lead authority and any other person having functions under the plan as to the preparation of a revised plan; and the lead authority and such other person must, subject to a right to appeal to the sheriff, comply with any such direction. Section 9(4) states the lead authority is to report annually to the RMA as to the implementation of the plan. Under section 9(5), where there has been, or there is likely to be, a significant change in the circumstances of the offender, the lead authority is to review the plan.

Effect of these provisions

[11] As is clear from the statutory provisions, the RMA plays a very significant role in the risk management process, setting the standards and guidelines, requiring the lead authority's risk management plan or revised plan to be approved, and managing and supervising the process, including receiving a report from the lead authority annually on the implementation of the plan. Accordingly, in respect of an OLR prisoner, the existing statutory regime ensures that: (i) the assessment of risk and the proportionate mitigation measures are considered by the lead authority with access to all of the relevant information;

and (ii) the lead authority's risk management plan is subject to approval or rejection by the RMA as a body specialised in best practice as to risk management.

The Parole Board

Role and powers

[12] As Lord Braid explained in *O'Leary* v *Scottish Ministers* (para [16]), the Parole Board is a Tribunal non-departmental public body which exists under the provisions of the Prisons (Scotland) Act 1989, the 1993 Act, the Convention Rights (Compliance) (Scotland) Act 2001 and the 2003 Act. As the petitioner was subject to an OLR, the panel of the Parole Board which considered his referral was a Tribunal for the purposes of Part IV of the Parole Board (Scotland) Rules 2001, as amended ("the 2001 Rules"). It has been held to be a judicial body which is independent of the Scottish Ministers and impartial in its duties: *Brown* v *Parole Board of Scotland* 2018 SC (UKSC) 49 (*per* Lord Reed at para [61]). In deciding whether it is no longer necessary for the protection of the public that the prisoner should be confined, the Parole Board is required, by section 26B of the 1993 Act, to have regard to the risk management plan where one has been prepared.

[13] The 2001 Rules make provision with respect to the proceedings of the Parole Board. Further amendments occurred after the substantive hearing in the present case. These are of no direct relevance to the issues raised, but I comment very briefly upon those recent amendments at the end of this Opinion. Part II of the Rules make general provisions which apply to every case except where otherwise expressly provided. The key parts of Part II for present purposes are:

"Scottish Ministers' dossier

5.—(1) Subject to paragraph (2) and rule 6, not later than 2 weeks after the date of the reference of the case to the Board, the Scottish Ministers shall send to the Board and to the person concerned a dossier containing any information in writing or documents which they consider to be relevant to the case, including, wherever practicable, the information and documents specified in the Schedule to these Rules.

…

Representations

7.—(1) A person shall have the right to submit written representations with respect to his or her case together with any other information in writing or documents which he or she considers to be relevant to his or her case and wishes the Board to take into account, following receipt of the dossier under rule 5(1), any other information sent to him or her by the Scottish Ministers or the Board or any written notice under rule 6(2).

(2) Any such representations shall be sent to the Board and the Scottish Ministers within four weeks of the date on which the Scottish Ministers or, as the case may be, the Board sent to the person the dossier, information or written notice referred to above.

(3) In a case where the person has a right to submit written representations following receipt of a written notice, the representations may include any representations about the non disclosure of any damaging information

Matters to be taken into account by the Board

8. In dealing with a case of a person, the Board may take into account any matter which it considers to be relevant, including, but without prejudice to the foregoing generality, any of the following matters:–

(a) the nature and circumstances of any offence of which that person has been convicted or found guilty by a court;

(b) that person's conduct since the date of his or her current sentence or sentences;

(c) the risk of that person committing any offence or causing harm to any other person if he or she were to be released on licence, remain on licence or be re released on licence as the case may be; and

(d) what that person intends to do if he or she were to be released on licence, remain on licence or be re released on licence, as the case may be, and the likelihood of that person fulfilling those intentions."

Rule 9 deals with the confidentiality of information in proceedings before the Board, requiring non-disclosure except insofar as the chairman of the Board or, in a Part IV case, the chairman of the Tribunal, otherwise directs or in connection with any court proceedings. Part IV of the Rules applies to the case of any life prisoner, and any prisoner who falls to be treated as a life prisoner, and so includes a person sentenced to an OLR. Rule 19(i) provides that subject to the provisions of these Rules, a Tribunal may regulate its own procedure for dealing with a case. Rule 24 deals with citation of persons to attend a hearing to give evidence or to produce documents. It provides that the chairman of the Tribunal may at any time exercise the powers conferred on him to require any person to attend to give evidence or to produce any books or other documents on the application of a party, or where he is authorised by the Tribunal to do so on its own motion. Under Rule 27: parties can be heard either in person or through their representative; they are able to hear each other's evidence and put questions to each other and to any person called by the other party; they can call any person whom the Tribunal has authorised to give evidence or to produce any document and they can make submissions to the Tribunal, with any member of the Tribunal being entitled to put questions to any party or representative or any person giving evidence. Rule 28 states *inter alia* that the decision of the Tribunal shall be recorded in a document which shall contain a statement of the reasons for the decision.

Parole Board hearings regarding the petitioner

[14] The first hearing of a Tribunal of the Parole Board in the petitioner's case took place on 1 December 2009. That hearing was continued and the petitioner's case was considered again on 25 March 2010. Further hearings took place on 12 December 2011, 22 January 2014,

21 April 2015, 21 February 2018, 20 April 2018, 24 August 2018, 27 September 2018, 27 August 2019, and 17 March 2020. On occasions, hearings were adjourned in order for further information to be obtained. At some of the hearings the petitioner sought his release but in others he did not. In each decision, the Parole Board refused to release him. The hearing on 17 March 2020 was adjourned because the petitioner's solicitors were awaiting a report on behalf of the petitioner from an expert ("Dr L"), which had been prepared but not yet received.

[15] The petitioner's case was heard again on 28 May 2020. The Tribunal heard evidence from a psychology manager who had prepared the petitioner's risk management plan ("Ms P"), from the petitioner's community based social worker ("Mr W"), and from the petitioner. The Tribunal did not hear evidence from Dr L, but his report was considered. The Tribunal concluded that it was necessary for the protection of the public that the petitioner remained confined. The reasons given by the Tribunal are relevant to the second ground upon which judicial review is sought and I discuss these below when considering that ground. It suffices for present purposes to note that in the decision the Tribunal had regard to the evidence, including the report from Dr L. A further review was ordered to take place in 12 months' time.

The issues

Issue 1: is the Parole Board a court in terms of Article 5(4) ECHR when dealing with a prisoner subject to an OLR?

[16] Article 5 states:

> "Article 5 Right to liberty and security
>
> 1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (a) the lawful detention of a person after conviction by a competent court….
>
> 4. 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 …"

Submissions for the petitioner

[17] In short, the sentence imposed upon the petitioner was in danger of becoming an unjustified form of preventative detention because the Parole Board had been unable to take any meaningful steps to monitor his position or ensure that his continued detention is justified. The Parole Board ought not to be regarded as a "court" in terms of Article 5(4) of the ECHR when it deals with the cases of prisoners subject to an OLR, and that, accordingly, it was not a "court" when it decided his case on 28 May 2020. In relation to the background, reference was made to *Ferguson* v *HM Advocate* 2014 SCCR 244.

[18] On the petitioner's understanding, by 1 August 2018, only two prisoners who had been made subject to an OLR had ever been released from prison. One of the most insidious aspects of the OLR was that it, in effect, declares at the outset that there will, for the rest of the person's life, be a causal connection between the offence and the sentence. The purpose of Article 5(4) was to avoid arbitrary detention. Concerns have long been expressed about the powers of the Parole Board (or at least its equivalent in England and Wales) to deal with the cases of life prisoners. Reference was made to *Weeks* v *United Kingdom* (1987) 10 EHRR 293. Since the decision in that case certain changes had been made to the parole system in all parts of the United Kingdom, and steps have been taken to enhance the powers

of the Parole Board but it remained possible, as was decided in that case, that the Parole Board might be a "court" for some purposes and not others.

[19] The central issue was therefore whether the Parole Board has sufficient powers to deal with OLR prisoners, such as the petitioner. The essence of the OLR is risk. The level of risk posed by a prisoner changes over time and is a matter of professional judgment. The assessment of that risk depends not only on the information available but also on the way in which it is analysed. In order to be able to make proper decisions about an OLR prisoner, it was necessary for the reviewing body to take quite a pro-active role in obtaining and thereafter assessing the information. That was consistent with the court's observations in *Johnston* v *HM Advocate* 2012 JC 79 (at par [22]).

[20] OLR prisoners are often presented with very complicated backgrounds, in reality, often more complicated than is apparent from the risk assessment report. The powers of the Parole Board have to ensure that those persons have meaningful reviews of their sentences, and that their sentences do not become an unjustified form of preventive detention. It was not for the petitioner to identify any additional powers the Parole Board should have. It was accepted that there were numerous cases in which the Parole Board has been seen as a court for the purpose of Article 5(4), but there was no case which foreclosed the petitioner's argument in this case. The Parole Board was a body that generally operates as a court but in circumstances of OLR prisoners it did not fulfil those conditions. Its powers when looked at closely were more theoretical than real and it needed to be able to do much more than it was able to do in this case. It had to be able to do more to understand the inevitably difficult circumstances of the case leading up to the latest hearing and to say what ought to be done in the period between that hearing and the next hearing. Reference was made to paragraph 8.16 of the MacLean Committee's report.

[21] There were several problems with the Parole Board's approach in practice when it deals with the cases of OLR prisoners. In the first place, the test which it has to apply is vague. The Parole Board perceived its function to be to assess risk (*Petch* v *HM Advocate* 2011 JC 210, paragraph [38]), yet the word "risk" does not feature in its test. The Parole Board opposed applications for release of its reasons, which was a curious approach for a court in a liberal democracy, so it was impossible to assess the approach of individual tribunals. The process therefore lacked the transparency which ought to be present (and which the MacLean Committee anticipated), and was inconsistent with the principle of open justice (cf *R (on the application of DSD* v *Parole Board & Anor* [2019] QB 285). Transparency would be relevant as to how prisoners approach their tribunals and, for example, to instruction of an expert if a prisoner proposes, for example, to instruct his own psychological report.

[22] Secondly, the suggestion that the process is a co-ordinated procedure undertaken by the lead authority, the RMA and the Parole Board blurred what was intended by the MacLean Committee's Report. More importantly, the purpose of the Article 5(4) review was to guard against the risk of arbitrary detention. The court for that purpose must have sufficient powers itself to achieve that aim. Its powers cannot be supplemented by arms of the executive or by non-judicial bodies, such as the RMA.

[23] Thirdly, in any event, the role of the RMA in that "co-ordinated procedure" was such as to emasculate the Parole Board. In reaching its decisions about OLR prisoners, tribunals of the Parole Board are to "have regard to" the terms of the risk management report (section 26B of the 1993 Act). In its Standards & Guidelines for Risk Management (2016) the RMA summarised the role of the judicial body as being to "comply or explain." In other words, the judicial body must comply with the risk management plan or explain itself to the

executive and the non-judicial body. Decisions by the Parole Board suggested that it generally did comply with the view expressed on risk assessment.

[24] Fourthly, it was evident that tribunals considering the petitioner's case have been concerned by the lack of progress. There is no indication that those tribunals (or the chairs of those tribunals) have used their powers to try to deal with that matter or that they considered them to be of assistance. If they have, the powers were ineffective. The farcical circumstances of the release and re-detention of the petitioner in the case of *O'Leary* v *Scottish Ministers* suggested that the powers did not work in practice. That case was an example of a situation where powers available to the Parole Board evidently had not resulted in relevant information having been made available to it.

[25] For all those reasons, the Parole Board ought not to be regarded as a "court" in terms of Article 5(4) when it deals with the case of a prisoner subject to an OLR. In *Johnston* v *HM Advocate*, the court said that OLRs are the Scottish equivalent of the indeterminate sentence for public protection. The problems with indeterminate sentences for public protection which occurred in England and Wales were at risk of being repeated in Scotland in the context of OLR sentences. It was time to take steps to ensure that the OLR does not become an unjustified form of preventive detention.

Submissions for the Parole Board

[26] The role of the Parole Board, in terms of the statutory framework, was clear. Reference was made to *O'Leary* v *Scottish Ministers* and to *Brown* v *Parole Board of Scotland*. The Parole Board only grants release in cases where the level and nature of risk is deemed to be manageable. This decision is informed by the evaluation of the risk management plan. The recommendations and mitigations in a risk management plan were entirely a matter for

the risk management team at the lead authority, in this case the Scottish Ministers. The risk management plan is subject to statutory oversight by the RMA. Reference was made to the guidelines on the assessment and minimisation of risk, the relevant standards and the procedures set out in the 2003 Act. The Parole Board had no statutory authority to order the basis on which the risk management plan is to be prepared. Rather, the Parole Board was required to have regard to the risk management plan where one has been prepared but was not bound to follow the risk management plan. It was a co-ordinated procedure undertaken by the lead authority, the RMA and the Parole Board. This meant that the procedure must be viewed as a whole when determining the issues raised by the petitioner.

[27] The Parole Board's Tribunal, when dealing with prisoners subject to an OLR, is a court for the purposes of Article 5(4). This point had been authoritatively decided by the courts: *Varey* v *Scottish Ministers* 2001 SC 162 *per* Lady Paton at paragraphs [36]-[37]; *O'Neill* v *HM Advocate* 1999 SLT 958 *per* Lord Justice General at page 961H; *Osborn* v *Parole Board* [2014] AC 1115 *per* Lord Reed at paragraph [90]; *R (James)* v *Secretary of State for Justice (Parole Board intervening)* [2010] 1 AC 553, *per* Lord Judge CJ at paragraph [134]; *Brown* v *Parole Board for Scotland* [2013] CSOH 200 *per* Lady Wise at paragraphs [21] and [34]; *Brown* v *Parole Board for Scotland* 2016 SC 19; *per* Lady Clark of Calton at paragraphs [35] to [48]; *Brown* v *Parole Board for Scotland*; *R (Gourlay)* v *The Parole Board* [2017] 1 WLR 4107 *per* Hickinbottom LJ at paragraphs [19] to [22]; *R (D)* v *Parole Board & others* [2019] QB 285 *per* Leveson P at paragraph [171]. There was nothing to distinguish the circumstances of the petitioner from the circumstances in those cases.

[28] The Parole Board's powers, when dealing with OLR prisoners, were effective and sufficient to ensure full compliance with Article 5(4). The Tribunal was able to take a pro-active role in examining all the available evidence and the submissions advanced by the

parties in making its determination whether to release an OLR prisoner. To identify a breach of Article 5(4), it was incumbent on the petitioner to identify what power is lacking (*Weeks* v *United Kingdom*). In relation to paragraph 8.16 of the MacLean Committee's Report, that was in effect what the Tribunal had done here: it had set a new date for 12 months' time and set out what it expects to have happened, progressing towards more open conditions and further treatment. The Tribunal was able to evaluate the material placed before it and reach its own objective judicial decision with no predisposition to favour the official version of events, or the official risk assessment, over the case advanced by the prisoner. It was not necessary for the Tribunal to have prison management and sentence management powers in order to comply with the obligations imposed by Article 5(4). The petitioner was protected by the existing statutory regime. The petitioner seeks to place in the hands of the Parole Board the responsibility for conducting the assessment as well as determining what should happen in light of it. That would be a significant reduction in the independence of the regime that is currently in place.

[29] The statutory test was a clear statement of general principles. The fact that the word "risk" did not appear was irrelevant. The necessity of protection of the public meant that risk is an inherent part of the assessment. The point about open justice was something of a red herring. This case concerned the decision about the petitioner. It was not a wider challenge as to whether decisions of the Parole Board should be publicised. In any event, there were good reasons why publication did not occur, including identification of prisoners and whether health care professionals could speak freely and frankly. The discussion of publication to assist victims was a different matter. There is a statutory power which could be exercised to permit publication of decisions of the Parole Board (rule 9 of the 2001 Rules). Each of the three bodies which carry out functions and work together do exactly what the

MacLean Committee Report recommended. The suggestion that the Parole Board's role was emasculated was incorrect. There was nothing to suggest that the Tribunal is bound by the conclusions of the risk management plan. *O'Leary v Scottish Ministers* was actually an example of the procedure working: when additional information became available the Tribunal was able to make a rapid decision when necessary.

Submissions for the Lord Advocate

[30] Counsel referred to the provisions in the 1995 Act and the 2003 Act in relation to an OLR. The risk management procedure in respect of an OLR prisoner such as the petitioner was not a procedure undertaken on its own by a single authority. The role and responsibilities of the lead authority, the RMA and the Parole Board were clear from the legislation. The Parole Board's Tribunal, when dealing with a prisoner subject to an OLR, was a "court" for the purposes of Article 5(4). It is a court which decides, in determining whether or not to direct the Scottish Ministers to release an OLR prisoner on licence, the lawfulness of the continued detention of an OLR prisoner after the expiry of the punishment part of his sentence. Reference was made to the same authorities as referred to by senior counsel on behalf of the Parole Board.

[31] The petitioner's position had changed in its emphasis. It was originally framed as the Tribunal not having sufficient powers, but it was now also argued that perhaps there are available powers but in reality these were not being used. However, it was very difficult to see how an alleged failure to use the powers that are available could make the Tribunal, structurally, not a court. There was no complaint of a specific failure to use a power it had available. On the first of the four points raised by the petitioner, that the criterion is vague, this was clearly a test that had been applied over a number of decades. The test is set out in

statutory language and judicial comments regarding the application of the test provided guidance. On the second point, a distinction fell to be drawn between risk management procedure on the one hand, in which the three bodies take part and have distinct contributions to make and, on the other hand, the review of the legality of detention for the purposes of Article 5(4). It was the latter that is solely the function of the Parole Board, operating within the framework and with input from the lead authority and the RMA. As to the suggestion of emasculation, the fact that the Tribunal is directed to have regard to certain matters did not prevent it from being a court. It clearly did not prevent the Tribunal from dealing with other evidence including evidence for the prisoner. The dossier of material to which the Tribunal must have regard contains a lot more than the risk management plan. It was perfectly consistent that in most cases the Tribunal, acting independently, did not consider it had good reason to depart from conclusions in the risk management plan. On the fourth point, there was no clear articulation of what powers are missing. It was not said what would make them effective, apart from releasing more OLR prisoners.

[32] The requirement, in terms of *Weeks* v *United Kingdom,* relates to the scope or breadth of the review undertaken by the "court" within the meaning of Article 5(4), not to any specific powers which the reviewing body must be equipped with in order to be a "court" for Article 5(4) purposes. Reference was made to *Doherty* v *United Kingdom*, no 76874/11, 18 February 2016 (para 98), *MH* v *United Kingdom*, no 11577/06, 22 October 2013, (2014) 58 EHRR 35 (para 75), and *Shtukaturov* v *Russia*, no 44009/05, 27 March 2008, (2012) 54 EHRR 27 (para 123).

[33] In any event, this court would not be in a position to hold that the Parole Board's alleged lack of powers to deal adequately with OLR prisoners prevents it from being a

"court" under Article 5(4) without a precise identification of those missing powers. There was no relevant case supporting the petitioner's proposition, but there was English case law supporting the view that a lack of particular powers on the part of the Parole Board did not prevent it from being a court for the purposes of Article 5(4): *R (Morales)* v *Parole Board and Ors* [2011] EWHC 28 (Admin) [2011] 1 WLR 1095 (para [83]); *R (Flinders)* v *The Director of High Security* [2011] EWHC 1630 (Admin), paras [114]-[118]). If a Tribunal of the Parole Board were to have powers to regulate an OLR prisoner's sentence management, rehabilitation and progression to less secure conditions, or powers to direct how a risk management plan is prepared and what it contains, or powers to require particular documents to be generated or particular evidence to be given, it would detract from its independence under the statutory framework for managing the risk posed by OLR prisoners.

[34] The power which has been held to be critical to the body which reviews the legality of detention being a "court" for Article 5(4) purposes is the power to order release of the person detained if the detention is found to be unlawful (*Weeks* v *United Kingdom* (para 61); *Stafford* v *United Kingdom*, no 46295/99, (2002) 35 EHRR 32 (paras 88-90); *Öcalan* v *Turkey*, no 46221/99, First Section, 12 March 2003 (para 75); *Öcalan* v *Turkey*, no 46221/99, Grand Chamber, 12 May 2005, (2005) 41 EHRR 45 (para 71). A Tribunal of the Parole Board met that test.

[35] The powers of the Tribunal do not include powers (i) to commission reports (*AE* v *Parole Board for Scotland*, Note by Lady Carmichael to interlocutor refusing permission, 25 September 2020 (para [9])), (ii) to make any coercive orders in relation to the manner and timing of preparation and the content of any risk management plan to be prepared by the Scottish Ministers in respect of an OLR prisoner under section 6 of the 2003 Act, or (iii) to

require particular steps to be taken in relation to sentence management, prisoner rehabilitation or progression to less secure conditions. Sections 20(4) and 20(4A) of the 1993 Act did not enable the Scottish Ministers to confer such powers on the Parole Board.

Submissions for the RMA

[36] The petition proceeded upon a misunderstanding of the statutory framework. Under that framework, different public bodies have their own duties and responsibilities in relation to the assessment and management of risk when considering the release of an OLR prisoner: *O'Leary* v *Scottish Ministers* (at para [81]). Reference was made to the provisions of the 2003 Act regarding the RMA, to standard 1 in the Standards & Guidelines and to the considerations to be borne in mind by the RMA when determining whether a risk management plan meets that required standard. It was therefore clear that the identification of the risks posed by any particular individual is a matter which requires detailed consideration and analysis of information. That information is available to the lead authority's risk management team in the creation of the risk management plan. The lead authority's use of that information is then considered by the RMA in its review of the risk management plan. In analysing the risks posed by any particular offender, the lead authority will develop an evidenced based assessment of the risk of serious harm and then must set out the measures to be taken for the minimisation of those identified risks and how such measures are to be coordinated. It was an essential element of a risk management plan that the proposed mitigation measures are proportionate to the identified risk.

[37] In relation to the petitioner, the risk management plan concluded that he poses a risk which is not manageable if the petitioner were to be released into the community but which would be manageable within custody. The petitioner did not seek in these proceedings to

challenge those findings. It would not be acceptable under the standards and guidelines for a risk management plan to identify that a risk was unmanageable in the community whilst also setting out measures in the community to manage the risk. The plan was considered and approved by the RMA as being in accordance with the requirements of section 6(3) and the Standards & Guidelines.

[38] The Parole Board did not have any power to compel a lead authority to produce a risk management plan on any basis other than that which the lead authority deemed to be appropriate. It was simply not the role of the Parole Board, as the decision-maker, to become involved with the preparation of the materials on which that decision will be based. Such involvement would risk undermining the Parole Board's independence. At the very least, the implementation of the risk management plan is reviewed annually as a safeguard to ensure that work is ongoing but it is also reviewed where there has been, or there is likely to be, a significant change in the circumstances of the offender.

[39] The phrase "have regard to" used in section 26B of the 1993 Act meant a greater degree of consideration than an obligation simply to "consult", but it did not mean "follow" or "slavishly obey", although where a decision maker decides to depart from the plan, clear reasons must be given for choosing to do so: *R (Governing Body of the London Oratory School)* v *Secretary of State for Education* [2015] EWHC 1012 (Admin) (at paras [50]-[61] and [58]). This was recently upheld in *O'Leary* v *Scottish Minister* (at para [55]). In that case, further information became available after the official release. Further, the case was an example of the Parole Board not following the risk management plan, which said that the prisoner could not be managed in the community, but nonetheless the Parole Board released him. It would be entirely inappropriate for the Parole Board, as the petitioner appeared to imply, to take charge of deciding the mitigation measures to be applied for a prisoner and then to

determine whether its own mitigation measures have been successful so as to permit the release of the prisoner. It was not the role of the Parole Board to create a path for the prisoner to follow.

[40] In relation to Article 5(4), reference was made to *Mooren* v *Germany* (2010) 50 EHRR 23 (at para [106]), *Khlaifa* v *Italy* (16483/12), *R (Brooke)* v *Parole Board* [2008] 1 WLR 1950. Once the legal justification for detention ceases, the prisoner must be released without undue delay: cf *Quinn* v *France* (1996) 21 EHRR 529 (at paras [39]-[43]); *Reid* v *United Kingdom* (2003) 37 EHRR 9 (at paras [69]-[74]). The Strasbourg authorities were clear that there is a justifiable difference between mandatory life sentence prisoners and discretionary life sentence prisoners and for the latter, once the punitive element of the sentence is completed, the justification for continued detention is continuing risk or dangerousness, which is subject to change, and therefore requires reviews by a court-like body at regular intervals: *Thynne* v *United Kingdom* (1991) 13 EHRR 666.

Reply for the petitioner

[41] The petitioner maintained his positon that there were policy considerations in respect of the powers to be given to the Parole Board and it was not for the petitioner to identify missing powers. However, paragraph 8.16 in the MacLean Committee's Report identified some of the required powers. The Tribunal had previously also raised concerns about the petitioner's case. The existing powers were not sufficient to enable tribunals to deal with those concerns and that was a gap. In relation to *O'Leary* v *Scottish Ministers* it was correct that the information about the person became available after release, but the point being made here was whether, with the power the Tribunal supposedly has, that information should have been available when it made its decision.

Decision and reasons on issue 1

[42] The decision about whether to release a prisoner subject to an OLR is of major importance for the prisoner, the public and the Parole Board. On occasion, based on the evidence, reaching a decision may possibly be reasonably straightforward, but at times it may also be strikingly complex and difficult. The reason for an OLR being imposed in the first place is that the risk criteria were met. Therefore, reaching the critical stage of it being no longer necessary for the protection of the public that the prisoner should be confined can take some time and must involve thorough and detailed consideration of risk. While OLR prisoners might express concerns about the process, the issue before me is the specific contention that the Parole Board is not a court for the purposes of Article 5(4) when it deals with such prisoners.

[43] For a reviewing body to be a court under Article 5(4), the review it makes should be wide enough to bear on those conditions which are essential for the lawful detention of a person according to Article 5(1). Once the punishment part of a discretionary life sentence is completed, the justification for continued detention is continuing risk or dangerousness. The level of risk may change and therefore requires to be reviewed, at regular intervals, by a court-like body: *Thynne* v *United Kingdom*. The reviewing "court" must not have merely advisory functions but must have the competence to decide the lawfulness of the detention and to order release if the detention is unlawful: *MH* v *United Kingdom* (para 74); *Doherty* v *United Kingdom* (para 98) and *Shtukaturov* v *Russia* (para 123). In *R (Gourlay)* v *Parole Board* it was explained that in *Weeks* v *United Kingdom*

> "20. The Court therefore identified three characteristics of a "court" for these purposes, namely (i) independence from the executive, (ii) appropriate guaranteed

> judicial procedures and (iii) a decision-making, as opposed to merely advisory, function…

[44] Numerous authorities were cited by the parties as examples of decisions by the judiciary that the Parole Board is a court for the purposes of Article 5(4) (see paragraph [27] above) and I need not rehearse those judgments here. It is true that the specific points raised in this petition are not addressed in those cases. But if some aspect of the test under Article 5(4) is argued not to be met on the basis of an absence of power, it is in my view incumbent upon the petitioner to identify with sufficient clarity what power is alleged to be lacking and as a result which aspect of the test is not met. That is illustrated in *Weeks* v *United Kingdom*, where the powers of the Parole Board in England at that time to recommend release were held to be merely advisory and hence it lacked the power of decision required by Article 5(4). The petitioner in this case did not specify any particular powers the Parole Board does not, but should, have in order to meet the test of being a court for the purposes of Article 5(4). Of itself, that negates any force in the petitioner's argument.

[45] However, there is also authority in England supporting the view that a lack of particular powers on the part of the Parole Board does not prevent it from being a court for the purposes of Article 5(4). In *R (Morales)* v *Parole Board and Ors* the court held that the Parole Board in England does constitute a court within the meaning of Article 5(4) even though it cannot require the production of documents. It had the power to make independent decisions of the kind specified in the authorities, including to determine the lawfulness of the detention of an individual. While it did not have jurisdiction to deal with that procedural issue about documents, it was not unknown for a court not to have all powers to enforce its orders but to have to rely on another court to enforce them. This approach was cited with approval and adopted in *R (Flinders)* v *The Director of High Security*

(at paras [114]-[118]) where the court held that the fact that the Parole Board had no enforcement powers in relation to its case management directions did not mean that Article 5(4) was infringed. The petitioner has not identified with clarity any specific power which is lacking but these cases show that the mere absence of powers would not be enough unless that absence resulted in the criteria under Article 5(4) not being met. The petitioner fails to show that there was an absence of power resulting in the criteria not being met.

[46] The general problems identified by counsel for the petitioner were that the Parole Board had been unable to take any meaningful steps to monitor the petitioner's position or ensure that his continued detention is justified. It was said that the reviewing body had to take quite a pro-active role in obtaining and thereafter assessing the information on risk. There was claimed to be a lack of power on the part of the Tribunal and that its powers could not be supplemented by arms of the executive or by non-judicial bodies, such as the RMA. The Parole Board's powers, when looked at closely, were said to be more theoretical than real.

[47] The central problem with these contentions is that they do not take proper account of the true nature of the Parole Board's role in the context of the overall scheme. The context, from the statutory framework set out earlier and as explained by Lord Braid in *O'Leary* v *Scottish Ministers* (at para [81]), is what could be described as a co-ordinated procedure, but undertaken by three independent bodies with distinct statutory duties and roles: the lead authority, the RMA and the Parole Board. The lead authority prepares the risk management plan, in line with the guidance published by the RMA. The RMA reviews and requires to approve or reject that risk management plan. On behalf of the RMA, it was explained that, in order to ensure its ongoing effectiveness, a risk management plan is kept under review and at the very least the implementation of the risk management plan is reviewed annually

as a safeguard to ensure that work is ongoing. Further, as noted above there is also a requirement for the lead authority to review the risk management plan where there has been or there is likely to be a significant change in the circumstances of the offender.

[48] The Parole Board has its own specific duty: it cannot direct the Scottish Ministers to release an OLR prisoner on licence unless the Parole Board is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined (section 2(5)(b) of the 1993 Act). In reaching its decision, it must have regard to the risk management plan and decide what weight to give to it. Thus, the Parole Board's decision of whether the level and nature of risk is deemed to be manageable on release on licence involves consideration of the risk management plan. However, the determination of how, if at all, identified risks can be mitigated and where such mitigation should take place is entirely a matter for the risk management team at the lead authority, in this case the Scottish Ministers, having regard to the guidance from the RMA. In the present case, the plan was considered and approved by the RMA as being in accordance with the requirements of section 6(3) of the 2003 Act and the Standards & Guidelines. Risk management in respect of an OLR prisoner such as the petitioner is not monitored by the Parole Board, but plainly, by having regard to all of the evidence put before it, the Tribunal is taking meaningful steps to monitor the position on whether the prisoner's continued detention is justified. The roles of the lead authority and the RMA ensure the independence of the Parole Board in making the crucial decision it requires to reach. The checks and balances, and the respective roles of the three bodies within the system, are very clear.

[49] The result is that the Parole Board itself has no statutory authority to order the basis on which the risk management plan is to be prepared. Rather, the Parole Board is required to have regard to the risk management plan prepared by the lead authority, but is not bound

to follow that risk management plan. I accept the submissions on behalf of the RMA that the phrase "have regard to" used in section 26B of the 1993 Act involves a greater degree of consideration than an obligation simply to "consult" and that it does not mean "follow" or "slavishly obey". If it does not follow the risk management plan, the Parole Board is required to provide reasons for not doing so (Rule 28 of the 2001 Rules). There is no basis for the Parole Board to have a more "pro-active role" which involves widening its remit to embrace matters relating to risk assessment that currently fall within the roles of the lead authority and the RMA. As is self-evident from the 2001 rules, as amended (quoted above), the Parole Board's powers allow it to examine all of the available evidence and the submissions advanced by the parties in making its decision about whether to release an OLR prisoner. Accordingly, the Tribunal is able to evaluate the material placed before it and reach its own objective judicial decision with no predisposition to favour the official version of events, or the official risk assessment, over the case advanced by the prisoner: *Osborn* v *Parole Board per* Lord Reed at [90]. If the petitioner is suggesting that the Parole Board, as the decision-maker, should become involved in preparing material on which its decision will, in part, be based that would risk compromising the Parole Board's objectivity and independence.

[50] The closest the petitioner reached in identifying powers said to be missing was an alleged failure to follow the recommendation in paragraph 8.16 of the MacLean Committee Report, that the Tribunal should be:

> "able to determine a future release date, linked to levels of progress relevant to the case under review, together with determining any requirements for levels of control, supervision and support in the community".

As noted, the Tribunal does not prepare, or influence the contents of, the risk management plan, but must have regard to it. The plan may include management in the community and

if release is permitted those aspects of the plan, if the Tribunal accepts it, will require to be implemented. In relation to future release and levels of progress, in the present case the Tribunal set out what it expects to happen in progressing towards more open conditions and further treatment. It would be quite wrong to view the recommendation of the MacLean Committee as meaning that a date should be fixed for release notwithstanding the risk at that time, regardless of whether or not any progress has been made. There is nothing in the recommendation in paragraph 8.16 that is inconsistent with the statutory framework enacted or the Parole Board rules or what the Tribunal actually did in the petitioner's individual circumstances. The three bodies which carry out the functions described above are fulfilling what the MacLean Committee's Report recommended. It may be the case (as occurred here) that at times the Tribunal expresses some concern about a lack of progress, but that does not imply any lack of power on its part. As I understand it, the petitioner is not contending that the Tribunal had failed to use a specific power it had available. In any event, it would be very difficult to see how an alleged failure to use the powers in a specific case could result in the Tribunal not being a court for the purposes of Article 5(4).

[51] I do not accept that the other individual points raised by the petitioner are well-founded. The fact that the word "risk" does not appear in the statutory test to be applied by the Parole Board is of no relevance, because the fundamental concept of protection of the public means that risk must be an inherent factor in the Tribunal's assessment. While counsel for the petitioner criticised the Parole Board's failure to publish its decisions about OLR prisoners, this did not form any specific part of the challenge to the lawfulness of the decision dated 28 May 2020. In particular, the petitioner made no challenge in relation to rule 9 of the 2001 Rules, making no averments or seeking remedies in respect of that rule. Plainly, many sensitive matters may be raised before the Tribunal and there may be good

reasons why publication is inappropriate or undesirable, under the rules as they applied in the present case. Nonetheless, rule 9 permits publication and that is a matter for the Parole Board to decide upon. As noted at the end of this Opinion, the rules on publication have now changed. On the point that the Parole Board's position was "emasculated" by the role of the other bodies, that fails to take on board that the Tribunal is not bound by the conclusions of the risk management plan (as occurred, for example, in the decision to release in *O'Leary* v *Scottish Ministers*). Merely because the Tribunal is required to have regard to the risk management plan does not prevent it from being a court. As occurred here, other evidence (including evidence for the prisoner) will normally be available to the Tribunal. The facts in *O'Leary* also illustrate the ability of the Parole Board quickly to review its decision in the light of fresh information becoming available.

[52] I therefore conclude that the powers and function of the Parole Board in respect of OLR prisoners meet the requirements of being a "court" for the purposes of Article 5(4). The petitioner's submission that the powers of the Parole Board are more theoretical than real does not bear scrutiny. If there are any legitimate concerns on the part of the petitioner about the process involved in the review of the need for detention of an OLR prisoner, those do not relate to the powers and function of the Parole Board as a "court" for the purposes of Article 5(4). Of course, if there is any ground for contending that the Parole Board has in a particular case misdirected itself or acted irrationally, the availability of an application to the supervisory jurisdiction of this court ensures that there is a mechanism for that to be challenged.

Issue 2: did the Tribunal provide adequate reasons for its decision?

Submissions for the petitioner

[53] The decision of 28 May 2020 was reached in circumstances that were procedurally unfair, because the reasons given for the decision were inadequate. One of the important purposes of providing reasons is to enable the person who is affected by the decision to be able to understand why it was reached: *Wordie Property Co Ltd* v *Secretary of State for Scotland* 1984 SLT 345 and *R* v *Northamptonshire County Council, Ex p W* [1998] ELR 291. Provided that standard is met, there is no requirement to deal with every argument advanced (cf *English* v *Emery Reimbold & Strick Ltd* [2002] 1 WLR 2409 (para [17]).

[54] Where a decision-maker is presented with expert evidence, and it wishes to reject that evidence, then it is under a duty to provide reasons in the form of a "coherent rebuttal" (cf *Flannery & Anor* v *Halifax Estate Agencies Ltd (t/a Colley's Professional Services* [2000] 1 WLR 377 applying *Eckersley* v *Binnie* (1988) 18 Con LR 1). It is not sufficient merely to prefer another witness or to prefer one expert to another (cf *Maynard* v *West Midlands Regional Health Authority* [1984] 1 WLR 634). The same point has been made in the context of Parole Board decisions (see *R (on the application of Wells)* v *Parole Board* [2019] EWH 2710 (Admin)).

[55] In its reasons for decision, the Tribunal summarised Dr L's opinion. The summary was not wholly accurate, although it was not intended to be comprehensive. But the Tribunal did not expressly recognise that Dr L's opinion provided evidence (albeit heavily caveated evidence) suggesting that the statutory test was met. The Tribunal stated (in paragraph 50) that "there was very little evidence on which to base a decision to release [the petitioner]". It's finding that it did not consider that Dr L's opinion on the management of the petitioner's risk in the community was "clear or persuasive" was an unfair

characterisation. It was wrong to say his opinion was not clear merely because it was, of necessity, heavily caveated.

[56] The panel went on to say that Dr L "does not appear to have gone so far as to say that [the petitioner] should be released" but it was not surprising that Dr L did not go that far. He did not have the necessary information to reach that conclusion. But, more importantly, it would probably have been inappropriate for him to have done so because the decision about release was one for the Tribunal to make. Dr L's role was to provide assistance to it in reaching its decision. In particular, his role was to provide the Tribunal with information about the risk presented by the petitioner, and to express a view about how that risk could be managed. Accordingly, it could not be sufficient to dismiss Dr L's report by saying that he did not recommend release. It was doubtful whether Dr L would disagree with Mr W's assessment that there are factors in the petitioner's case that make it difficult to formulate a risk management plan, but at least Dr L tried to formulate one.

[57] When the Tribunal said it agreed with Mr W's assessment, in effect it also agreed with Dr L's assessment. What it failed to do was to say why it rejected Dr L's evidence that it was possible to devise a plan to deal with risk in the community. That would, perhaps, have been an opportunity to deploy its extensive powers, had they been effective. But it appeared that the Tribunal simply "preferred" Mr W's evidence, which is inappropriate, even more so when it is a preference for an apparent non-expert over an expert. Although the Tribunal set out Ms P's evidence, it did not appear to have relied on her evidence for the purposes of rejecting Dr L's evidence and there was some concern on the petitioner's part about the qualifications of Ms P, which were not made clear. For those reasons, the panel's determination contained no reasoned rebuttal of Dr L's conclusions and the reasons were therefore inadequate. The reason for rejecting Dr L's report might have assisted the

petitioner in a next discussion. If the reason for rejecting his conclusions was the lack of specific risk management measures, that would have been an easy thing to say.

Submissions for the Parole Board

[58] In relation to the standard to be met in giving reasons, reference was made to *Laidlaw* v *Parole Board for Scotland* 2008 SCLR 51 (at paras [32]-[34]). Also, if things were agreed in the material before the decision maker, little needed to be said about them. In the present case, there was a lot in common in what was said in evidence and in Mr L's report. The Tribunal provided adequate and comprehensible reasons which fully explained its decision not to direct the release of the petitioner because it was not satisfied that it was no longer necessary for the protection of the public that the petitioner be confined. In particular, the Tribunal provided adequate and comprehensible reasons which fully explained why it did not accept Dr L's evidence that it would be possible to implement effective external risk management measures. On considering the evidence, the Tribunal was satisfied that it was necessary for the protection of the public that the petitioner should be confined. Having regard to the evidence which was before it, this was a conclusion which was reasonably open to the Tribunal.

[59] In making its decision, the Tribunal had regard *inter alia* to evidence from Mr W, the petitioner's supervising officer, who did not recommend release. The Tribunal agreed with Mr W's assessment. It also accepted the evidence of Ms P that it was still necessary for the protection of the public that the petitioner remained confined. The Tribunal noted, correctly, that there was very little evidence on which to base a decision to release the petitioner. Rather, there was significant evidence that he still required to integrate the skills learned on programmes, improve his behaviour and develop better emotional regulation

and self-management. The Tribunal noted that in his evidence the petitioner struggled to articulate what he had learned on programmes. The Tribunal concluded that this added weight to Ms P's evidence that he has not yet engaged meaningfully in programme work. The Tribunal provided detailed reasons explaining that it considered the petitioner's evidence demonstrated a lack of insight into the challenges which awaited him in the community after a lengthy period of imprisonment. Having regard to all of this evidence, the Tribunal explained that it was of the view that the petitioner required to spend a period of time in less secure conditions before release; as this would provide him with the opportunity to develop the skills he will need to stay safe in the community in a supported environment and to demonstrate in increasing freedoms that he is able to manage himself successfully to the Board.

[60] The Tribunal considered that, at present, there remained significant concerns about a number of matters including the petitioner's lack of insight into his risk and a likelihood and imminence of him reoffending if released. It therefore considered that there was insufficient evidence that he had the skills he needed to remain offence free in the community and it did not direct release. The Tribunal considered that a 12 month review should provide sufficient time to allow the petitioner to undertake the abovementioned assessments and progress to less secure conditions.

[61] Having regard to the detailed reasons provided by the Tribunal in its decision, the Tribunal duly fulfilled the duty to provide adequate and comprehensible reasons for its decision. The Tribunal's decision did not leave the informed reader or the court in any real and substantial doubt as to what the reasons for it were and what were the material considerations which were taken into account in reaching it. This met the relevant test.

Decision and reasons on Issue 2

[62] In *R* v *Northamptonshire County Council, Ex p W*, Hutchinson LJ said (at para [3]):

> "[t]he purpose of reasons is to inform the parties why they have won or lost and enable them to assess whether they have any ground for challenging the adverse decision."

In *Wordie Property Co Ltd* v *Secretary of State for Scotland* the Lord President (Emslie) said (at p348):

> "The decision must, in short, leave the informed reader and the court in no real and substantial doubt as to what the reasons for it were and what were the material considerations which were taken into account in reaching it".

Counsel for the petitioner correctly noted that provided the standards expressed in these cases are met, there is no requirement to deal with every argument advanced (cf *English* v *Emery Reimbold & Strick Ltd* (para [17]). As was explained in *Laidlaw* v *Parole Board for Scotland*, the reasons should be readily understandable to the prisoner and his advisers and ideally should be short, simple and easy to follow.

[63] In setting out its decision, the Tribunal stated that it had taken into account:

> "a) the circumstances of the index offence and any offending history;
>
> b) the assessed high level of risk and needs, high risk of sexual reoffending and imminence of serious harm if Mr Hutton reoffends;
>
> c) conduct since sentence, and intentions if released;
>
> d) all relevant information in the dossier; and
>
> e) the evidence heard at the hearing."

Regard was therefore had to all of the relevant material. The key points made by Dr L in his report, some of these being similar or consistent with Mr W's evidence, were expressly noted. Specifically, the Tribunal recorded that:

> "… it does not consider that Dr [L]'s opinion on the management of Mr Hutton's risk in the community is clear or persuasive. It does not appear that he has gone so far as

> to say that Mr Hutton should be released, merely that if he was released before all the necessary work was completed, it 'should be possible to implement a series of external risk management measures that are effective.'"

[64] The Tribunal noted that it does not have jurisdiction to interfere with how offenders are managed by the Scottish Prison Service and said that in making its decision it had regard to "convincing evidence" from Mr W who "said it is not possible to implement adequate risk management measures, either during lockdown or later, until Mr Hutton demonstrates sufficient change in his behaviour in custody". The evidence of Mr W is then summarised. The Tribunal agreed with his assessment and explained that there was very little evidence on which to base a decision to release the petitioner and indeed that there was "significant evidence that he still requires to integrate the skills learned in programmes, improve his behaviour and develop better emotional regulation and self-management". The petitioner has "struggled to articulate what he had learned on programmes, lending weight to Ms [P]'s evidence that he has not yet engaged meaningfully in programme work". The Tribunal found that in his evidence the petitioner "demonstrated lack of insight into the challenges which await him in the community after such a significant period in custody." It concluded:

> "52. Given all of the above, the Tribunal was of the view that Mr Hutton requires to spend a period of time in less secure conditions before release. This will provide him with the opportunity to develop the skills he will need to stay safe in the community in a supported environment and to demonstrate in increasing freedoms that he is able to manage himself successfully to the Board. The Tribunal considered that, at present, there remain significant concerns about a number of matters including Mr Hutton's lack of insight into his risk and a likelihood and imminence of him reoffending if released now. It therefore considered that there is insufficient evidence that he has the skills he needs to remain offence free in the community and it did not direct his release."

[65] In my opinion, the Tribunal's reasoning clearly meets the test articulated in the authorities. The Tribunal's comment that Dr L's views on the management of the petitioner's risk in the community were not "clear or persuasive" has to be considered in the

context of its reasoning as a whole. That reasoning makes it plain that Dr L's views were not accepted because the other evidence was more convincing. The other evidence was not merely "preferred"; rather, it was considered and scrutinised and found to have more persuasive foundations. Specific factors which caused that conclusion to be reached are identified, as noted above. While the Tribunal did observe that Dr L did not go as far as to say that the petitioner should be released, that was not, of itself, the basis for the decision it reached. The Tribunal took into account his view that it "should be possible to implement a series of external risk management measures that are effective" but identified solid evidential grounds for disagreeing with that view. In short, the Tribunal explained why it did not accept his position. The petitioner's concerns in relation to Ms P were not developed in submissions and I was given no basis for considering that the Tribunal's reliance on that evidence in relation to the rejection of Dr L's opinion, albeit more limited than its reliance on Mr W's evidence, was improper.

[66] I therefore conclude that the second ground of review must also fail.

New Parole Board Rules

[67] While the case was at *avizandum*, the Scottish Ministers laid before the Scottish Parliament the Parole Board (Scotland) Amendment Rules 2021 ("the 2021 Rules"), to amend the 2001 Rules. These came into force on 1 March 2021. Among other things, the new rules introduce rule 28A into the 2001 Rules, which provides that where the Tribunal's decision under rule 28 is a decision to direct that a prisoner is released, the Tribunal must publish, in such manner as it may determine, a summary of the reasons for that decision and that, where a different decision is made, the Tribunal may publish, in such manner as it may determine, a summary of the reasons for that decision. Such a summary must not include

information which identifies, or could be used to identify, any person concerned in the proceedings. Accordingly, these new provisions supplement the existing discretionary power under rule 9 of the 2001 Rules and allow for disclosure of certain information in the new cases to which the 2021 Rules will apply. The new rules do not have retrospective effect and do not apply to the Parole Board's decision challenged in this case and therefore I need say no more about them.

Disposal

[68] For the reasons given I shall refuse the petition, reserving in the meantime all questions of expenses.