SECOND DIVISION, INNER HOUSE, COURT OF SESSION

[2023] CSIH 26
P1025/22

Lord Justice Clerk
Lord Turnbull
Lord Matthews

OPINION OF THE COURT

delivered by LORD TURNBULL

in the Reclaiming Motion

in the Petition by

DAVID DOLAN

Petitioner & Respondent

for

Judicial Review of a Decision of the Parole Board for Scotland dated 6 September 2022

against

THE PAROLE BOARD FOR SCOTLAND

Respondents & Reclaimers

Petitioner & Respondent; Pirie KC, Crabb; Drummond Miller LLP (for McGreevy & Co., Glasgow)
Respondents and Reclaimers: Dean of Faculty; Anderson Strathern

_____

30 June 2023

[1] In this reclaiming motion the Parole Board for Scotland seeks to challenge the decision of the Lord Ordinary in the judicial review brought by the prisoner petitioner David Dolan. In June 1996, when aged 16, he was convicted of murder and sentenced to

detention without limit of time. The punishment part of that sentence imposed in terms of section 2(2) of the Prisoners and Criminal Proceedings (Scotland) Act 1993 was subsequently fixed at a period of 10 years, to date from 4 March 1996. The murder took place on 3 March 1996 whilst the petitioner was on bail granted to him in June of 1995. In May of 1995 he was convicted in the High Court of an offence of assault and robbery carried out at a newsagent's shop by presenting a meat cleaver. On that occasion the sentencing judge imposed a probation order with a requirement to perform community service. The petitioner breached both of these orders prior to the commission of the murder.

[2] On 6 September 2022 a Tribunal of the Board refused to direct the petitioner's release and ordered that a further review of his suitability for release on licence should take place in 12 months. By his decision dated 21 April 2023 the Lord Ordinary held that the Tribunal had acted unfairly and unlawfully in reaching its decision. He therefore ordered that the decision be reduced and directed that a differently constituted Tribunal of the Board should reconsider the petitioner's application for release.

The background

[3] The petitioner has a lengthy history of being released and returned to custody. He was first released in March 2010 but quickly breached his licence conditions and was returned to custody only a few weeks later. He was next released on 26 April 2019 but similarly returned to custody a short time later on 10 June, again having breached licence conditions, including breach of his electronic monitoring condition, association with known drug users and using illicit drugs. He was next released on 8 October 2019 and returned to custody the following month on 23 November, having disclosed to his supervising officer that he was misusing street Valium and cannabis. This was against a background of having

attended for various meetings apparently under the influence of drugs and as a consequence of concerns which his behaviour had caused to the staff supervising his accommodation arrangements.

The Tribunal's decision

[4] At the hearing on 6 September 2022 the Tribunal had available to it all of the documentation in the petitioner's dossier and up-to-date reports from Mr Smith, his prison-based social worker and Ms O'Hara his community-based social worker. Both also gave oral evidence to the Tribunal. Further evidence was given by Ms Lennox from a support agency known as Hope Connections and by the petitioner himself. The information before the Tribunal disclosed that he had been bullied and assaulted over the years whilst in prison and had latterly been kept in the prison's protection hall for vulnerable prisoners. He had been diagnosed as having general anxiety disorder including situational anxiety and ruminative worry and as having difficulties suggestive of complex post-traumatic stress disorder. He had not committed any acts of violence nor manifested any tendency towards violence since being imprisoned. The psychological assessments which he had undergone had not suggested that his mental health condition represented a risk to others.

[5] The Tribunal accepted that the petitioner presented a high level of risks and needs using the LS/CMI (Level of Service / Case Management Inventory) assessment tool. His identified risk factors included employment/education, companions and alcohol/drug problems. The Tribunal accepted that he was assessed as presenting a low risk of serious harm with this risk not currently considered imminent but accepted the community-based social worker's assessment that his risk of causing serious harm increased to medium on release.

[6] The Tribunal accepted Ms O'Hara's evidence that the petitioner's lack of proper engagement with the supervision process increased his risk of reoffending. It also accepted her assessment that his risk of using violence could not be discounted given the circumstances of the index offence and his previous violent offence involving a weapon. The Tribunal accepted that a return to substance misuse was not necessarily indicative of a risk of violence in his case but it considered that the degree to which he was misusing substances in the community made it impossible for him to engage with supervision to allow his risks to be monitored and assessed.

The Lord Ordinary's decision

[7] In reaching his decision the Lord Ordinary noted that the petitioner had committed no act of violence in the past 26 years, whether in custody or during his several months at liberty and engaging in drug misuse. He observed that this might be thought to be a powerful indication of the absence of material risk to the public to which the Tribunal might have been expected to accord rather greater weight than it apparently did. However, having regard to the need to accord due deference to the Tribunal's assessment of the evidence before it, he accepted that the Tribunal had concluded that the petitioner's release would pose a material risk of harm to the public and that it was justified in coming to that view on the basis of the evidence before it.

[8] In the view of the Lord Ordinary these findings were insufficient to entitle the Tribunal to refuse to direct his release. The statutory test which the Tribunal was bound to apply was set out in section 2 of the Prisoners and Criminal Proceedings (Scotland) Act 1993 and prohibited the Tribunal from directing the petitioner's release on licence unless it was satisfied that it was no longer necessary for the protection of the public that he should be

confined. The Lord Ordinary held that before the Tribunal could decide whether this test was met it required to address itself to "the question of whether whatever potential risk might be posed by the release of the petitioner was proportionate with his continued detention" (para [20] of his opinion).

[9] In the Lord Ordinary's opinion, this exercise required the Tribunal to form a view on what the nature of any such risk was and, at least in general terms, on the likelihood of its eventuation. In his view, the Tribunal had proceeded on the incorrect assumption that any material risk of violence of whatever kind justified the continued detention of the petitioner. He concluded that the Tribunal's determination failed to disclose any appreciation of the correct test which fell to be applied along with any consideration of the matters which thereby required to be assessed. For these reasons the Lord Ordinary concluded that the Tribunal had proceeded upon an error of law, or had at least failed to express the nature of its reasoning at a standard acceptable in public law.

Submissions for the Parole Board

[10] The Dean of Faculty submitted that the twin findings set out by the Lord Ordinary exhausted the statutory test provided for by section 2(5)(b) of the 1993 Act. Having acknowledged that the Tribunal's determination was that the petitioner's release would pose a material risk of harm to the public, and that it was justified in coming to that view, the Lord Ordinary should have appreciated that the Tribunal was then directed to the only outcome available, namely that it remained necessary for the protection of the public that he should be confined.

[11] The Lord Ordinary erred in concluding that the Tribunal had applied the wrong test or had failed to appreciate the correct test. The degree of risk which would justify continued

detention long after the expiry of the punishment part was a substantial risk of serious harm to the public, sometimes known as the "life and limb" test. It was obvious that this was the test which the Tribunal had in mind given the petitioner's background history of violent conduct. The evidence accepted by the Tribunal led it to conclude that it was impossible to assess and monitor the petitioner's risk in the community. If the risk which he posed could not be managed in the community it was impossible for the Tribunal to be satisfied that it was no longer necessary for the protection of the public that he should be confined. The decision reached had been correct and ought not to have been interfered with.

[12] The Lord Ordinary was also wrong to hold that a proportionality test of the sort which he described required to be applied by the Tribunal. An awareness of the consequences of continued detention for the petitioner was part of the overall assessment, or balancing exercise, which the Tribunal required to perform in coming to a decision as to whether the statutory test was met. It was not a separate consideration which fell to be weighed after the assessment of the overall level of risk posed had been made. The Dean of Faculty submitted that the approach which he contended for was supported by the analysis set out by this court in the case of *Ryan* v *Parole Board for Scotland* 2022 SLT 1319 and by the United Kingdom Supreme Court in *R(Pearce)* v *Parole Board* [2023] 2 WLR 839.

[13] Furthermore, the reasoning which had led the Tribunal to its decision had been stated entirely adequately. The informed reader would have no difficulty in understanding the reasons for the decision or the material considerations taken into account in reaching it. When it was understood that the Tribunal had concluded that the petitioner was currently incapable of engaging in supervision in the community, and that it was therefore impossible for his risk to be monitored, it would be obvious that this made it impossible to grant his release. Given what the Lord Ordinary went on to say at paragraph [21] of his opinion, to

the effect that the release of the petitioner in his current circumstances would likely lead to a rapid revocation of his licence and recall to prison, it was obvious to the Lord Ordinary himself what the Tribunal's reasons had been.

Submissions for the respondent

[14] Mr Pirie KC submitted that the correct approach to determining whether the statutory test for release was met is described in the case of *Ryan* at paragraphs [14] to [17]. That approach included applying the following propositions, as outlined at paragraph [14] of the decision:

(i) "the court must adopt anxious scrutiny of the decision;

(ii) it can interfere if the reasoning falls below an acceptable standard in public law;

(iii) the duty to give reasons is heightened if expert evidence is being rejected;

(iv) the longer the prisoner serves beyond the tariff "the clearer should be the Parole Board's perception of public risk to justify the continued deprivation of liberty involved";

(v) while a cautious approach is appropriate when public protection is an issue, as time passes it is not only legitimate but necessary for there to be appropriate appreciation of the impact of confinement well beyond tariff and;

(vi) the decision maker should ensure that it is apparent that this approach has been adopted and its reasoning should provide clarity as to why confinement remains necessary in the public interest."

[15] The decision in the case of *R(Pearce)* had emphasised that the consequences for a prisoner remaining in custody after serving the punishment part of his sentence are relevant and necessary components of the evaluation which the Tribunal is mandated to make. It would therefore be a failure to take account of a relevant consideration for the Tribunal not to give due consideration to the adverse consequences of a decision not to direct release – paragraphs 42, 69-70 and 87.

[16] In arriving at its decision the Tribunal had only taken account of the risk that it considered the petitioner posed. It had failed to take account of the consequences for him of continued detention. This could be seen from the fact that there was no consideration in the decision Minute of these consequences. At paragraph 110 of the Minute the Tribunal listed the matters which it took into account without mentioning the consequences for the petitioner. The decision of the Tribunal had not complied with the requirements of paragraph [14] sub-paragraphs (v) and (vi) of the decision in *Ryan*.

[17] Had the Tribunal followed the approach set out in these subparagraphs it would have taken account of the prejudice to the petitioner of remaining in custody and weighed that against the assessment of risk posed before deciding whether or not to grant release. The decision of the Supreme Court in *R(Pearce)* supported the proposition that this was a necessary step. In the petitioner's case that prejudice included the failure to progress the psychological treatment designed to address his complex difficulties. Dr Kreis, Principal Clinical Psychologist, who had given evidence at an earlier Tribunal hearing, had explained

that the trauma processing phase of his treatment could only be provided outwith the prison environment.

[18] The second line of argument advanced was that the Lord Ordinary had in any event been correct to conclude that the Tribunal's decision had not been lawfully made. There was a logical gap between the conclusions which it arrived at on the evidence before it and the decision that it remained necessary for the protection of the public for the petitioner to be confined. At paragraph 111 of the Minute the Tribunal set out its findings on the risk of harm being caused. It accepted the evidence of Ms O'Hara that the petitioner's risk of using violence could not be discounted. That was an inadequate basis upon which to conclude that he posed a substantial risk of serious harm. There was no assessment of the type of conduct which he might engage in or the likelihood of him doing so.

[19] The final submission, as set out in the written Note of Argument which was adopted, was that the reasoning of the Tribunal was inadequate. The reasons given were comparable to those which were found to be inadequate in the case of *Crawford* v *Parole Board for Scotland* 2021 SLT 822.

Decision and reasons

[20] The Parole Board for Scotland is the statutory body whose functions include directing the release on licence of prisoners subject to an order for indefinite detention. A Tribunal of the Board acts as an independent and impartial judicial body and can only properly direct the release on licence of a prisoner subject to indefinite detention if it is satisfied that it is no longer necessary for the protection of the public that the prisoner in question should be confined. This is the statutory test contained within section 2(5)(b) of the 1993 Act which the Tribunal must apply.

[21] In directing itself to its function the Parole Board operates as a specialist Tribunal and the weight which it gives to the evidence available to it is a matter for it alone. The task with which it is entrusted is a sensitive one (per the Lord Justice Clerk in delivering the opinion of the court in *Ryan* at paragraph [15]) and judging whether it is necessary for the protection of the public that a prisoner be confined is often no easy matter; it is not a black and white test (per Lord Phillips of Worth Matravers delivering the judgment of the court in *R(Brooke)* v *Parole Board* [2008] 1 WLR 1950 at para 53). For an individual serving an indefinite sentence that sentence "lasts until it is safe to release the prisoner" (per Lords Hodge and Hughes in delivering the judgement of the Supreme Court in *R(Pearce)* at para 9).

[22] In approaching its task the Parole Board will often have a voluminous quantity of material available to it, comprising all of the various reports prepared in relation to the prisoner, from the original trial judge's report and pre-sentence social enquiry report onwards, through the various reports prepared by prison staff and by the prison-based and community-based social workers entrusted with reporting on the prisoner's background, circumstances and progress. As in the present case, medical reports and reports from clinical psychologists and psychiatrists are also often available. Various of these reports may set out risk assessments conducted by the use of acknowledged risk assessment tools or by professional assessment.

[23] The particular Tribunal hearing an application for release of a prisoner will also have available to it the detailed Minutes setting out the reasons for any previous Tribunal decisions. These will include a summary of any relevant evidence heard by that Tribunal and its assessment of that evidence along with the Tribunal's view as to why it is no longer necessary for the prisoner to remain confined, or how he should progress towards release.

In the present case the Tribunal hearing the application on 6 September 2022 had the benefit of a very detailed Minute, running to over 200 paragraphs, concerning the previous hearing which took place over 8 December 2020 and 17 February 2021.

[24] In addition, it had available to it the reasons provided by the Tribunals which granted the petitioner's release on the three occasions mentioned and the reasons provided by the Tribunals on the other 13 occasions, from March 2006 onwards, on which release was refused. These documents provided a comprehensive history of the petitioner's progress within custody and whilst at liberty during the whole period of his sentence.

[25] The submission that the 6 September Tribunal failed to give consideration to the consequences of its decision for the prisoner falls to be assessed in the context of the whole information available to it in the dossier. The detailed decision-making set out in the Minute of the Tribunal which refused to direct the petitioner's release in February 2021 is of relevance and importance. In its decision Minute that Tribunal noted (at paragraph 116) that the petitioner's illicit substance abuse was a feature in both the index offence and the earlier assault and robbery. It also accepted that the general link between involvement in illicit substances and criminality including risk of violence is well documented and it was satisfied that the petitioner's high level of substance misuse was a significant factor in its assessment of risk. At paragraph 118 of its decision Minute that Tribunal noted that the evidence available to it was that the petitioner's complex posttraumatic stress disorder could have been a trigger to the index offence and could also remain a relevant and persistent risk factor. The lack of immediate treatment in the community to address that risk was therefore a matter of concern for that Tribunal. In light of all of the information available to it that Tribunal concluded that a review in 12 months would be appropriate to allow the petitioner to progress to the National Top End, to begin a gradual reintegration into the community

and to build relationships with his supervising officer and other supports in the community. By the time the hearing of 6 September 2022 took place that progression to the National Top End had not occurred and the petitioner's reintegration into the community had not commenced.

[26] The submission that the 6 September Tribunal failed to give consideration to the consequences for the petitioner of its decision has no force. Seen in the context of the many years over which various Tribunals of the Parole Board have been giving detailed consideration to the level of risk which he posed, and his inability to cope with what were deemed necessary management and monitoring conditions, it is obvious that the Tribunal must have been acutely aware of his history and the reasons for his continued detention. At paragraph 12 of its decision the Tribunal refers to the Minutes of the Board's previous consideration of the case being included within the dossier and at paragraph 110 it explains that it took account of all relevant information in that dossier. Both Mr Smith and Ms O'Hara continued to recommend that the petitioner should proceed to the National Top End in order to gain experience of gradual reintegration to the community. The Tribunal gave effect to this recommendation at paragraph 115 of its decision Minute and set a further review in 12 months. The statement made in this paragraph of itself reflects the Tribunal's awareness of the consequences of its decision for the petitioner.

[27] The consequences for any prisoner of remaining in custody, and the hardship of requiring him to do so many years after the expiry of the punishment part, are components of the whole picture which the Tribunal has to assess in determining whether or not the statutory test is met. Counsel for the petitioner argued that there should be a balancing exercise in which hardship was weighed against risk, with the potential that even where risk to the public was identified the hardship for the prisoner of continued incarceration might

direct the Tribunal towards his release. The foundation for this argument was the reference to the Parole Board carrying out a balancing exercise made by this court in the case of *Ryan* and by the Court of Appeal for England and Wales in the case of *R* v *Parole Board, Ex p Watson* [1996] 1 WLR 906. The submission advanced clashes head on with the statement made by Taylor LJ, with whom the other judges agreed, in the case of *R* v *Parole Board, Ex p Wilson* [1992] QB 740 at page 747 (referring to a passage in the decision in the earlier case of *R* v *Parole Board, Ex p Bradley* [1991] 1 WLR 134):

> "If that passage means only that the longer a prisoner has remained in custody the more anxiously the Parole Board should scrutinise whether the risk of releasing him is at the unacceptable level, then I would entirely agree with it. …. However, Mr Fitzgerald argued the passage meant that the longer a prisoner has been detained the greater would the risk to the public need to be in order to justify his continued detention. This would import a sliding scale whereby the protection of the public would diminish and taper off in proportion to the length of the prisoner's detention. In my judgment that cannot be right. The level of risk to the public which the Parole Board regards as unacceptable cannot properly be varied to accommodate the release of a prisoner even if he was jailed in his twenties and has been detained for many years."

[28] A statement to the same effect can be found in the judgement of Lord Dyson MR in the case of *R(King)* v *Parole Board* [2016] 1 WLR 1947 at paragraph 31:

> "… [A]s a matter of ordinary language, the words 'necessary for the protection of the public' do not entail a balancing exercise in which the risk to the public is to be weighed against the benefits of release to the prisoner or the public. The concept of 'protecting the public' does not involve any kind of balancing exercise. It simply involves safeguarding the public from the danger posed by the prisoner. …. If the board concludes that confinement is necessary because there will be a (more than minimal) risk of harm if the prisoner is released, then confinement of the prisoner will be required to avoid that risk."

[29] With the benefit of the focus which the submissions in the present case brought, the court agrees with the statement made at paragraph 69 of the decision in the case of *R(Pearce)* that it may not be helpful to describe the function of the Tribunal as a "balancing exercise". It is certainly not an exercise of the sort conducted as part of a proportionality assessment

when considering a European Convention based argument. Nor is it the sort of balancing exercise which may take place in determining how to exercise a discretionary power.

[30] Unless a Tribunal can be satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined, even if many years have passed since the expiry of his punishment part, then the statutory obligation is to refuse to release that prisoner on licence. This duty cannot be outweighed by the hardship caused to the prisoner by his continued incarceration. What is necessary is that there be an appropriate appreciation of the impact of confinement and that the decision maker's reasoning should provide clarity as to why confinement remains necessary in the public interest (*Brown* v *Parole Board for Scotland* 2021 SLT 687 Lord Malcolm delivering the opinion of the court at paragraph [37]). The approach to be taken by the Tribunal is perhaps better described as an holistic exercise in which the Tribunal evaluates all of the material before it in its assessment of risk (see *R(Pearce)* at paragraph 46), or as a 360° view taking account of all relevant factors (see *Ryan* at paragraph [15]).

[31] In the present case, at paragraph 108 and 109 of its decision Minute, the Tribunal identified that the petitioner presented a high level of risk and needs using the LS/CMI risk tool and a low risk of serious harm which was assessed by the community based social worker as increasing to medium on release. It is artificial to suggest that in these paragraphs the Tribunal is doing no more than mentioning the evidence led before it. This is the evidence which the Tribunal accepted.

[32] In so far as the Tribunal was invited to take account of the evidence previously given by Dr Kreis it is important to bear in mind that she stressed she had not conducted a risk assessment. Her report also made plain that when the petitioner had previously been released she had been unable to complete sessions of trauma focused work with him as

planned because of his lack of engagement and attending under the influence of substances (see decision Minute for the hearing of 22 November 2019 paragraph 11). Despite not having conducted a risk assessment, Dr Kreis expressed the view in her report of 2 August 2019 that the risk which the petitioner posed in the community was manageable but with the qualification that this would require "robust care, support and risk management".

[33] Although it is correct to note that the petitioner had not been involved in any violent conduct since being incarcerated, the murder offence was committed at a time when he had been drinking and was consuming cannabis daily and taking hallucinogenic drugs on a regular basis. He had never been able to explain why he acted as he did on that occasion. He claimed to have committed the assault and robbery in order to pay back a debt in the context of regular drug abuse. In his own evidence before the Tribunal the petitioner had said that he found it hard to explain what happened with his three recalls to custody and what he could change (decision Minute paragraph 90).

[34] In applying itself to the question of whether it was satisfied that it was no longer necessary for the protection of the public that the petitioner should be confined the Tribunal had in mind the level of risk which had been identified. The concern which it held was around the degree to which the petitioner had abused substances in the community. This was a quite different picture from the level of substance abuse which he had engaged in whilst in prison. He did not present as an uncontrollable figure within the prison environment, whereas in the community his substance abuse had made it impossible for him to engage with supervision to allow his risks to be monitored and assessed. This is the conclusion of the Tribunal as set out at paragraph 114 of the decision Minute. Because of the level of risk assessed and the impossibility of managing this within the community the Tribunal concluded that the statutory test was not met.

[35] We do not agree with the Lord Ordinary's view that the Tribunal failed to show any appreciation of the correct test to be applied. It referred directly to the statutory test at paragraph 2 of the decision Minute. Nor do we agree that the Tribunal was required to embark upon an assessment of the nature of the risk posed if, as Mr Pirie suggested, that meant identifying the type of conduct involved and the likelihood of it occurring. The level of risk required to justify continued detention post tariff has been described in different ways. The test described in *R* v *Parole Board, Ex p Bradley* was:

> "that the risk must indeed be 'substantial' … but this can mean no more than that it is not merely perceptible or minimal."

[36] As noted at paragraph [28] above, what was said to be necessary to justify continued detention in the case of *R(King)* was a more than minimal risk of harm. However, in the Supreme Court's decision in the case of *R(Sturnham)* v *Parole Board* [2013] UKSC 47 at paragraph 29 Lord Mance, with whom the other judges agreed, stated that it was preferable to concentrate on the statutory language and not to paraphrase. The same point was made by the Lord Justice Clerk in delivering the opinion in *Ryan* at paragraph [15] when she observed that:

> "Whilst the use of a shorthand, such as 'life and limb', may be useful this should not obscure or embellish the statutory test."

[37] That is the approach which the Tribunal adopted in the present case. It did not proceed upon the view that any material risk of violence justified continued detention. The Tribunal addressed itself to the question of whether it was satisfied that it was no longer necessary for the protection of the public that the petitioner should be confined. In the context of his posing a medium risk of causing serious harm if released, with risk factors including companions and alcohol/drug problems, it concluded that it could not be so satisfied because his risk could not be assessed and monitored in the community. Accepting

that the Tribunal had an appropriate appreciation of the ongoing impact of confinement on the petitioner, the reasoning set out in paragraph 114 of its decision Minute provides adequate clarity as to why confinement remains necessary in the public interest. There was no need for the Tribunal to approach the matter in any other fashion.

[38] It follows that the court rejects both of the principal submissions advanced on behalf of the petitioner. To the extent that the inadequate reasons point was maintained it has no substance. The informed reader would have no difficulty in understanding why the Board came to the decision that the statutory test was not met. The reasons given in the present case bear no valid comparison with the reasons which were found to be inadequate in the case of *Crawford* v *Parole Board for Scotland*.

[39] The decision of the court is therefore that the reclaiming motion will be allowed, the Lord Ordinary's interlocutor of 21 April 2023 will be recalled and the petition will be refused.

Post Script

[40] In his interlocutor of 27 April 2023 the Lord Ordinary, *ex proprio motu*, made an *interim* reporting restriction in terms of section 11 of the Contempt of Court Act 1981 and granted the petitioner anonymity, anonymising his name to "DD" on the basis "the petition raises and requires consideration of serious mental health issues affecting the petitioner, publication of the details of which in conjunction with his name would not be in the interests of justice". We are of the view that there is no basis for granting anonymity nor a contempt of court order, taking into account the importance of the principle of open justice in facilitating public confidence in the civil justice system (*MH* v *Mental Health Tribunal for Scotland* 2019 SC 432 and *Anwar* v *Secretary Of State For Business, Energy And Industrial*

Strategy 2020 SC 95). The court will also recall the Lord Ordinary's interlocutor dated 27 April 2023.