OUTER HOUSE, COURT OF SESSION

[2023] CSOH 37

P249/23

OPINION OF LORD LAKE

in the Petition of

XY

Petitioner

for Judicial Review of

(FIRST) THE DECISION TO REFUSE COMPASSIONATE RELEASE IN TERMS OF SECTION 3 OF THE PRISONERS AND CRIMINAL PROCEEDINGS (SCOTLAND) ACT 1993 ("THE FIRST DECISION")

by

THE SCOTTISH MINISTERS

First Respondents

and

(SECOND) A DECISION OF THE PAROLE BOARD FOR SCOTLAND ON 2 MARCH 2023 NOT TO RECOMMEND RELEASE ("THE SECOND DECISION")

by

THE PAROLE BOARD FOR SCOTLAND

Second Respondents

Petitioner: R Pugh KC; Drummond Miller, LLP
First Respondents: D Byrne, advocate; Scottish Government
Second Respondents: M Lindsay KC; Anderson Strathern LLP

7 June2023

[1] The petitioner is serving a sentence of imprisonment of 6 years running from 6 June 2019. It was imposed on 18 July 2019 in respect of a charge of repeated incidents of oral rape committed against the daughter of his partner over a period of over 2 years. Although there was evidence of earlier sexual conduct with the complainer, the charge related to a period starting when the complainer was 13.

[2] In terms of the Prisoners and Criminal Proceedings (Scotland) Act 1993, section 1(2A), the petitioner will be entitled to automatic release from prison on 5 December 2023. In November 2022, the petitioner made an application for early release on compassionate grounds in terms of the 1993 Act, section 3. This enables the Scottish Ministers to release a prisoner on licence if they are satisfied that there are compassionate grounds. It is agreed between the parties that the decision-making function in this regard has been delegated to the Risk Management Team (RMT) of the prison in which the person is held. If they are minded to release the prisoner, they must consult the Parole Board. The petitioner's application was considered by the RMT on 2 February 2023 and they decided that it should not be progressed. Separately, the petitioner's case came before the second respondents, the Parole Board, to determine whether he should be released in terms of section 1 of the 1993 Act. On 2 March 2023, the Board decided not to recommend release. Both decisions are challenged in this application for judicial review.

[3] The background circumstances apparent from the documents relied on in making the decisions and the submissions of parties may be summarised as follows

(a) The petitioner has incurable metastatic pancreatic cancer.

(b) In February 2023, the consultant oncologist responsible for his treatment gave a prognosis that his life expectancy should be measured in "weeks or short months".

Both the consultant and the NHS General Practitioner treating the petitioner support release on compassionate grounds.

(c) The petitioner's condition is deteriorating and will progressively worsen until he dies. His ability to function is already limited.

(d) If the petitioner were to remain in the UK following his release on licence, conditions would be imposed on him with a view to management of the risk he presents.

(e) The petitioner is a Dutch national and when he is released, he will be deported to the Netherlands. The Home Office have already served a deportation order upon him.

(f) The petitioner has expressed the intention that after being deported he will live in a hostel in the Netherlands. The local police and the mayor for the locality in which he stays would be notified of his presence.

(g) No compulsory measures of control or supervision can be put in place in respect of the petitioner once he has left the United Kingdom.

(h) Having been deported, it would be possible for the petitioner to re-enter the United Kingdom.

(i) The petitioner is subject to and will remain subject to the notification requirements of the Sexual Offences Act 2003 ("the sex offenders register") if he returns to the United Kingdom.

[4] The parties were agreed that the test that was to be applied by both the first and second respondents was the same and is: "whether [the panel] is satisfied that the risk posed by the petitioner can be managed safely in the community." For these purposes, "the community" means wherever he resides and would include the Netherlands.

The petitioner's submissions

[5] The decision of the RMT was challenged on the basis that it was unreasonable or irrational and also that there was a procedural impropriety in not seeking further information about the petitioner's health. At the hearing it was made clear that the petition[er] no longer sought to place reliance on ECHR, Article 3, and did not insist on an argument that the decision was vitiated by an error of fact.

[6] In considering whether either decision was unreasonable the petitioner submitted that it was appropriate to apply the "nuanced" approach in *R (on the application of Wells)* v *Parole Board* [2019] EWHC 2710 (Admin) at [29] to [34] (as applied by the Inner House *Brown* v *Parole Board for Scotland* 2021 S.L.T. 687 at [36]). This required that the decision be tested against the evidence and for the question to be asked as to whether it can be safely justified on that evidence.

[7] It was argued that it was appropriate that there should be "anxious scrutiny" or, as it was more helpfully expressed in *DD* v *Parole Board* [2023] CSOH 24, a "relatively intense degree of scrutiny". This was on the basis that although the petitioner is not a prisoner who has served the tariff part of his sentence, there are other factors which indicate a greater degree of scrutiny is required. Reliance was placed on the fact that he is detained, that his health is deteriorating and that it is likely he will die prior to his automatic date of release on 5 December. If he is not to die in custody, it was submitted that action is required as he will not be in a position to apply again in several months' time. There is a short time only in which to respect the purposes of compassionate release.

[8] There were three distinct strands to the irrationality challenge. The first was that the RMT had failed to recognise that the petitioner's condition was deteriorating and that a

point would come when he no longer poses a risk sufficient to justify his detention. In this regard it was submitted also that the RMT had taken the wrong approach by looking for a situation in which there would be no risk rather than considering whether the risk is such to outweigh the hardship of keeping the petitioner in custody. It was submitted that the risk would decrease with time and a point would come where the risk could safely be managed in the community and would not justify keeping him in custody.

[9] Secondly, it was claimed that the RMT were incorrect to proceed on the basis that the petitioner might leave his hostel accommodation in the Netherlands. It was said that continuing to live in the hostel in the Netherlands would be a pre-condition to him receiving free medical care in the Dutch health system. It was unrealistic and irrational to suppose that someone with a terminal illness requiring palliative medical care would act in such a way as to lose entitlement to free treatment. It was submitted also that the RMT were wrong to proceed on the basis that the petitioner might return to the UK if he was deported and that would present a risk. It was said that this situation could be addressed by licence conditions that would be enforceable if he returned.

[10] The issue concerning the procedural fairness of the decision was that if the RMT had wanted more information about his health, it was incumbent on it to raise the issue before reaching a decision.

[11] In relation to the decision of the Parole Board, it was submitted that it had relied substantially on the reasoning of the RMT in the earlier decision and that it was therefore vitiated for the same reasons. In addition, it was noted that by the time of the Parole Board making its decision, more information was available regarding the petitioner's medical condition including material which indicates that his condition was deteriorating and that he only had "weeks to short months" left to live. Before the RMT, the point had been raised

that it was not known whether the petitioner's new partner had children but by the time of the decision of the Parole Board, it had been clarified she did not. At the time of the decision of the RMT, the prison based social worker was not in favour of release but this had changed by the time the matter was considered by the Parole Board. This was said to be on the basis of a further report from the consultant oncologist.

[12] It was submitted that the Board had not taken into account that there was only a short period between its decision as to whether to recommend release and the date on which the petitioner would be released as a matter of course and that the Board had made the same error as the RMT in assessing whether they could say that there was *no* risk rather than a *manageable* risk. The petitioner had not taken part in offence-focussed work as he did not admit his guilt and he was therefore in an impossible situation if the lack of such work means that the assessment of risk was not informed and on that basis he could not be released. It was again submitted that the Board should have sought more information on the medical position.

The first respondent's submissions

[13] It was contended that the RMT had taken into account the medical evidence. Despite the petitioner's worsening health conditions, they were required to make a decision as to the risk that was present at the time of taking their decision. The evidence was that the risk remained at the time the decision was taken. This had to be considered alongside the fact that it would not be possible to impose any compulsory measures to control that risk once the petitioner had been deported. While there was no dispute as to what might happen when the petitioner returned to the Netherlands, what was of importance was that there would be no compulsory measure of control.

[14] It was submitted that the second respondents did not seek to identify a situation where there was no risk. They had to consider whether risk could be managed in the community but, in assessing this, they were bound to have regard to the fact that there were no compulsory measures that could be imposed on the petitioner while he was in the Netherlands and that means that there were no means of controlling or mitigating that risk. At the time of the decision, the evidence was not that he would be unable to offend. When that was taken with the fact that he denied his guilt and had not engaged in any activities to control his behaviour while in prison it meant that he presented a risk.

[15] It was recognised that the petitioner was already in a condition which meant that he would not be able to commit an offence involving a period of grooming in the same way as the one that had led to his conviction. Here too, however, the fact that he had not engaged in work while in prison was relevant. It meant that the first respondent did not have insight into future patterns of likely offending behaviour and there remained a possibility that the petitioner would offend against children in a different way or ways. It could not be assumed that any offending would follow the same pattern as the offence for which he had been convicted. This meant that while a point might arise in future when he did not present a risk that could not satisfactorily be managed, that was not the position at the date the decision was taken. In relation to the submission that he would not leave his hostel in the Netherlands it was noted that as he was still able to offend, he could do so from the Netherlands. It was agreed that the risk that the petitioner might pose in the Netherlands was something that the respondents were obliged to take into account.

[16] As to the degree of scrutiny that the Court should exercise I was referred to *R* v *Ministry of Defence, ex p Smith* [1996] QB 517 at page 556, *Carlisle v Secretary of State* [2014] UKSC 60; [2015] C 945 and *R (D)* v *Parole Board* [2019] QB 285 to the effect that policy

decisions or those involving specialist knowledge or specialist tribunals are ones to which the Courts should show deference and in respect of which they should be slow to intervene.

[17] In light of these considerations, it was submitted that the decision not to progress the application to release was entirely rational.

[18] In relation to the submission made that the respondents should have obtained further information about the petitioner's medical condition if it was relevant to their decision, it was accepted that what was known as a *Tameside* duty might arise but it was said that the circumstances in this case were not such that it arose. I was referred to the judgment of Underhill LJ in *R (Balajigari)* v *Secretary of State for the Home Department*, [2019] 1 WLR 4647, paragraph 70, and it was submitted that this was not a situation in which no reasonable authority could have been satisfied that it had the necessary information. The decision had been taken with the benefit of the NHS GP treating the petitioner while in prison. They took into account the medical opinions that had been provided to them.

Submissions for the second respondents

[19] Counsel submitted that in terms of the degrees of scrutiny of the decision which the Court might undertake, the present situation falls at the lower end of the spectrum. He noted that although the right to liberty is one that the courts would protect, as a convicted prisoner serving a sentence the petitioner did not have that right.

[20] Counsel submitted that in relation to the issue of whether the risk presented by the petitioner was manageable, that was a matter where the skills and experience lay with the Parole Board and the Court should be slow to intervene. The Board had to decide whether or not the risk could be managed safely. He submitted that the correct approach had been taken by the Board. He said that in relation to the assessment of risk, there were three

elements; the seriousness of the risk, the likelihood of the risk and what safeguards can be put in place to mitigate or manage the risk. He submitted that in view of the seriousness of the risk in this instance, the likelihood must be low if the risk is to be acceptable. The risk here could not accurately be assessed because of the lack of offence focussed work on the part of the petitioner. The Parole Board was not content to proceed on the basis that there was no risk simply because the petitioner was not unable by reason of his health to offend in the same manner he had before. Taking all matters into account, there was more than enough information to mean that the Board could reach a decision that he presented a risk that could not be managed

[21] It was submitted that as at the date the matter was considered by the Board, the evidence was that the petitioner remained capable of offending. The evidence came from the social workers who had dealt with the petitioner and were aware of his offending and that there was no medical evidence to contradict it. That being so, there was no need for the panel to defer the decision to get further information.

Decision

[22] The conclusion of the decision of the RMT was as follows:

> "Taking into consideration all of the information available and provided during the course of the meeting, the RMT were of the opinion that they would not support early release for [the petitioner] on compassionate grounds at this time, as his assessed risk on release is too great without license conditions in place to mitigate this. The RMT were empathetic to [his] situation, but ultimately were of the view that they would not recommend early release into the community in Scotland without license conditions (if, at all) and that this same rationale should be applied when considering his release in another country."

[23] It is apparent that the RMT considered that in the absence of enforceable conditions, the risk was too great. I do not consider that this RMT have sought a "no risk" situation. It

is significant that the risk is said to be "too great". This is inconsistent with the submission for the petitioner that the RMT were requiring that there be no risk. It appears that the RMT had evaluated the risk that exists and made a qualitative assessment of it. They have not disregarded the evidence as to his decline. They have evaluated the risk based on his condition at the time of the decision. As the application was for release at once rather than at some point in the future, it seems that the proper application of the agreed test required them to do exactly that. To do so is not inconsistent with or contrary to the evidence that the petitioner's condition is deteriorating and that sometime in the future he will be physically unable to offend. The RMT has quite properly been considering whether the present risk that was identified can be managed and taken into account that the normal means of management – licence conditions – will not be available and have concluded that it cannot. It is not their responsibility to determine at what point in the future the stage where he no longer presents an unmanageable risk will be reached. As this issue would depend on matters of deterioration in medical conditions which cannot be predicted with any certainty, it is not apparent that this is a task which could be undertaken. I reject the petitioner's contention that this is an issue which should have been reasoned in the decision.

[24] It was noted that the risk could be managed by means of licence conditions if the petitioner was to remain in Scotland but that nothing could be put in place for the Netherlands. The effect of the inability to impose enforceable conditions is that the only factor that could control the risk that he presented is his capacity to offend as a result of his illness. In relation to that capacity the RMT had evidence from the Prison GP who advised that "in a matter of months … [the petitioner's] risk will be non-existent". This entails the logical position that the risk remained at the time of the position. The GP referred to a letter from the consultant oncologist which said he had only a few months to live although the GP

noted that the petitioner's death was not imminent. The Head of Psychology advised that the risk remained.

[25] The ultimate test of whether the risk can be managed safely in the community is one which requires an evaluation of the degree of risk and effectiveness of measures which are matters which are issues that the RMT is particularly well placed to address. In respect of these risks it is appropriate to accord deference to the specialist nature of the tribunal that took the decision. However, having regard to the evidence as to risk and the absence of any compulsory measures that could mitigate it, I do not consider that the conclusion could be said to be irrational. Applying the test of whether there was evidence capable of supporting the conclusion, I consider that there clearly was. There was evidence that the petitioner presented a risk and that his health had not declined to such a state as to remove that risk. There was also evidence that there would be no controls on the petitioner when in the Netherlands which might be effective to manage the risk. Even applying the more rigorous test derived from *Wells* advocated by the petitioner, I do not consider that the threshold for review is met.

[26] The second respondents relied in their decision on the fact that no offence focused work had been undertaken to identify the motivation and triggers for the petitioner's conduct. They noted that he was still physically capable of offending and considered that this, taken with the lack of insight into the triggers for this offending, the nature of his original offending means that his release could not be supported.

[27] In so far as the Parole Board proceeded on the basis of the contents of the minute of the RMT meeting, as that decision is not vitiated for the reasons set out above, it does not compromise the second respondents' decision. While there was additional information available, this was not inconsistent with their finding that the petitioner still presented a risk

so there is no issue of that evidence having been ignored or put aside. The Board expressly recognised that prison-based and community-based social workers supported release but noted also that the social workers were clear that the petitioner was not incapable of offending. They had proceeded on the basis that the petitioner's life expectancy was such that he could not offend in the same way he had in the past as there would not be the time for an extended period of grooming. Having recognised this, the Board considered that the absence of offence focussed work to consider what motivated the petitioner to offend meant that it did not indicate that he would not re-offend. The additional medical information did not indicate that the petitioner would be unable to offend.

[28] Although it was said that the Board had not taken into account the short period between their decision and the date of automatic release, I do not consider that this undermines the decision. The automatic date of release is fixed by statute. Release prior to that requires an assessment of the ability to manage risk. If the view is formed that the risk cannot be adequately managed, I do not consider that the risk will only exist for a relatively short period before automatic release changes the outcome.

[29] In the basis of the considerations noted in *Balajigari*, paragraph 70, I do not consider that it can be said that no reasonable authority in the position of the first or second respondents should have sought further information. They were required to assess risk at the time of their decision. They had information as to the physical capacity of the petitioner to offend and the extent to which this might be managed or the extent to which there could be an insight into the petitioner's motivations which would assist in assessment of the risk. I do not consider that they were bound to see if they could find further information which would suggest that the risk could be managed.

Conclusion

[30] On the basis of the above considerations, I sustain the first plea in law for the first respondents and the fourth plea for the second respondents, repel the second to seventh pleas in law for the petitioner and refuse the petition.