OUTER HOUSE, COURT OF SESSION

[2023] CSOH 24

P1025/22

OPINION OF LORD SANDISON

in the petition of

DD

Petitioner

for

Judicial review of a decision of the Parole Board for Scotland dated 6 September 2022

Petitioner: Crabb; Drummond Miller LLP
Respondent (Parole Board for Scotland): Lindsay KC, Anderson Strathern

21 April 2023

Introduction

[1] DD is presently a prisoner in HMP Low Moss. In June 1996, he was convicted of murdering a young man previously unknown to him, by repeatedly stabbing him with a carving knife in a street in Renfrew. As he was then aged 16, he was sentenced in terms of section 205(2) of the Criminal Procedure (Scotland) Act 1995 to be detained without limit of time, with a punishment part of 10 years commencing on 4 March 1996.

[2] The Parole Board for Scotland is a statutory body existing and discharging functions under the Prisoners and Criminal Proceedings (Scotland) Act 1993 amongst other enactments. One of its functions is directing the release on licence of prisoners subject to an

order for indefinite detention. It performs that function through a Tribunal established by it in terms of Part IV of the Parole Board (Scotland) Rules 2001. The Tribunal is an independent and impartial judicial body. In terms of section 2(5)(b) of the 1993 Act, it can only properly direct the release on licence of a prisoner subject to indefinite detention if satisfied that it is no longer necessary for the protection of the public that the prisoner in question should be confined.

[3] By way of a decision dated 6 September 2022, a Tribunal of the Board declined to order DD's release from custody on licence. In this petition for judicial review, he seeks reduction of the decision not to direct his release on licence and an order requiring a differently-constituted Tribunal of the Board to reconsider his application for such release within a reasonable time, on the grounds that the decision complained of was unreasonable and unlawful.

Background

[4] Before being sentenced for the murder he committed, the petitioner had been made subject to a Home Supervision Order by the Children's Panel, and had further been convicted of the assault and robbery of a shopkeeper by presenting a meat cleaver at him and demanding money from his till. He was sentenced to probation with 240 hours of community service for this offence.

[5] After his conviction for murder, the petitioner was originally placed in a Young Offenders Institution, where he was bullied and assaulted. He has been attacked in prison on multiple occasions and has latterly been kept in the prison's protection hall for vulnerable prisoners. He has committed no act of violence, nor manifested any tendency towards violence at any point since the events leading to his murder conviction. He has been

diagnosed as having general anxiety disorder including situational anxiety and ruminative worry, and as having difficulties suggestive of complex post-traumatic stress disorder. Repeated psychological assessments have not suggested that his mental health condition represents a risk to others.

[6] The petitioner has previously been released on licence on three occasions. He was first released in 2010, but was returned to custody after about a month in respect of breach of his licence conditions. He was next released in 2019, again lasting only about a month in the community before his licence was revoked for breach of his electronic monitoring conditions, association with known drug users and using illicit drugs. A further release later in 2019 resulted in a return to custody within about six weeks because the petitioner disclosed that he was misusing street Valium and cannabis, and he had attended a meeting with a clinical psychologist under the influence of Valium. A further application for release on licence was refused by the Board's Tribunal in 2021.

Petitioner's submissions

[7] Counsel for the petitioner submitted that, in order to justify continued confinement after the expiry of the punishment part of his sentence, the Tribunal would have to be satisfied that his release would involve a substantial risk of serious violence posing danger to the public –*Brown* v *Parole Board for Scotland* [2021] CSIH 20, 2021 SLT 687 at [36]. The Tribunal did not have to be satisfied that there was no risk of re-offending, but rather had to be persuaded that the risk of re-offending was at a level that did not outweigh the hardship of keeping a prisoner detained after he had served the term commensurate with his fault – *R (Brooke)* v *Parole Board for England and Wales* [2008] EWCA Civ 29, [2008] 1 WLR 1950 per Lord Phillips CJ at [53]. In other words, what was required was an assessment of whether

any potential risk was proportionate with the petitioner's continued detention – *R (on the application of Wells)* v *Parole Board* [2019] EWHC 2710 (Admin) at [26].

[8] That was a question to which the Court required to apply "anxious scrutiny", increasingly so as the period beyond the punishment part of the sentence increased: R *(on the application of Osborn)* v *The Parole Board* [2013] UKSC 61, [2014] AC 1115 at [2(vi)] and [83]. The longer the prisoner had served beyond the expiry of the punishment part, the clearer should be the Tribunal's perception of public risk in order to justify the continued deprivation of liberty involved, given the need for there to be appropriate appreciation of the impact of confinement well beyond tariff. While the Tribunal was expert in its field and that required due deference to be given to its decisions, so that the Court could not simply substitute its own views for that of the Tribunal, the reasons given for the decision required an appropriate degree of scrutiny. The reasoning underpinning the decision should be examined against the appropriate acceptable standard in public law, with a view to ascertaining that all relevant circumstances had been taken into account, that the proper test had been applied and that a clear explanation had been given as to why confinement remained necessary in the public interest – *Ryan, Wiseman and Meehan* v *Parole Board for Scotland* [2022] CSIH 11, 2022 SLT 1319 at [13] and [15], per the Lord Justice Clerk, affirming *Brown* at [36] and [37]. The requisite degree of scrutiny could be intensified if the Tribunal was rejecting expert evidence before it, where the decision concerned a prisoner previously granted conditional freedom of which he had subsequently been deprived (*Osborn* at [2(vi)]), or where the Tribunal was departing from an earlier reasoned decision concerning the prisoner (*Wells* at [40]).

[9] In the present case, the petitioner remained in confinement 16 years after the expiry of the punishment part of his sentence. It had been 3 years since he had last been returned

to custody after release on licence. The Tribunal's decision did not explain the basis for any perceived risk of serious harm to the public in the event of his release. He had not committed a violent offence since 1996, had undertaken course work including a violence prevention programme in 2007, and was described as a model prisoner with no further programme needs in terms of violence reduction. No explanation had been given as to why other relevant factors (including his drug use and difficulties with supervision) or the overall position now were materially different from the position in 2019 when he had been deemed suitable for release. The decision complained of failed to give appropriate weight to his youth (and consequent likely immaturity) at the date of his offending and to the effect on his behaviour of the complex PTSD with which he had been diagnosed. The LS/CMI assessment of risk and needs carried out on the petitioner had resulted in a conclusion that his levels of need and risk were "high", but on closer examination it was clear that the high risk was of self-harm, not involving the public, and that his mental health issues, including his ability to address the reasons for his offending, could not be addressed further in a custodial setting. There was no psychological or psychiatric evidence that he presented any material risk to the public safety. Although concerns about his susceptibility to monitoring in the community might be well-founded, that did not justify a conclusion that he presented any risk of violence to the public, nor had any such risk manifested itself during his previous releases.

Respondent's submissions

[10] On behalf of the respondent, senior counsel submitted that the Tribunal was an independent specialist decision-maker which exercised its own expertise and judgment when applying the statutory test for release on licence set out in section 2(5)(b) of the 1993

Act. That expertise required to be taken into account by the Court when assessing the lawfulness and reasonableness of the Tribunal's decision. The petition was nothing more than an illegitimate attempt to reargue the merits of the petitioner's application for release on licence. All relevant and material considerations had been taken into account by the Tribunal, and it had carefully scrutinised the disputed evidence. The petition failed to identify any material error of law, any irrational exercise of a discretion or any procedural irregularity.

[11] In particular, the undisputed LS/CMI assessment of the petitioner concluded that he presented a high level of risk and needs. His identified risk factors include employment/education, companions and alcohol/drug problems. The community based social worker who had given evidence to the Tribunal had explained the difficulties encountered by the petitioner during his last period of supervision in the community, including a quick relapse into substance misuse, presenting as heavily under the influence at supervision appointments and refusing some supports offered to him to assist with his complex risks and needs. The Tribunal, entirely reasonably, accepted her evidence that the petitioner's lack of proper engagement with the supervision process increased his risk of reoffending. The Tribunal similarly accepted her assessment that the petitioner's risk of using violence could not be discounted given the circumstances of the index offence and previous violent offence involving a weapon. It had not rejected any expert evidence before it which clearly favoured release.

[12] There was no evidence available to the Tribunal, whether from the petitioner or anyone else, that he would be able to cope any differently on further release or engage with any additional support made available to him. The Tribunal concluded that the petitioner lacked internal risk management strategies and that it was clear from his last three failed

attempts in the community that despite the high level of external controls and supports put in place he was unable to engage in supervision at a level which would allow his risks to be assessed and monitored. The weight to be attached to these circumstances, when assessing the risk posed by the petitioner, was a matter for the Tribunal. The circumstances presented to the Tribunal in 2022 were different from those which had led to the decision to release in 2019; in particular, there had been another failed release since then, the social work evidence was not supportive of release in 2022 whereas it had been in 2019, and there had been further failures to engage with social workers.

[13] The Tribunal gave full and adequate reasons for its decision, which met the tests for validity gathered in *Crawford* v *Parole Board for Scotland* [2021] CSOH 44, 2021 SLT 822 at [11] and the subsequent paragraphs. The assessment of risk was one for the Tribunal alone, and not one in which it was obliged, or indeed entitled, to defer to anyone else. It could not be said that the Tribunal's decision was so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Accordingly, the decision was one that was reasonably open to the Tribunal, having regard to the evidence which was before it, and there were no grounds upon which the Court could reduce or otherwise interfere with the Tribunal's decision in the exercise of its supervisory jurisdiction.

Decision

Proper question for the Tribunal

[14] Section 2 of the Prisoners and Criminal Proceedings (Scotland) Act 1993 (headed "Duty to release discretionary life prisoners") contains the following provisions:

> "(4) Where this subsection applies, the Secretary of State shall, if directed to do so by the Parole Board, release a life prisoner on licence.
>
> (5) The Parole Board shall not give a direction under subsection (4) above unless—
>
> (a) the Secretary of State has referred the prisoner's case to the Board; and
>
> (b) the Board is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined."

Although the petitioner does not technically meet the definition of "life prisoner" set out in section 2 of the 1993 Act, having been sentenced to detention without limit of time in terms of section 205(2) of the Criminal Procedure (Scotland) Act rather than to life imprisonment in terms of section 205(1), it was common ground before me that section 2(5) of the 1993 Act applied to him. It was also common ground that, although section 2(5)(b) does not expressly place any duty on the Tribunal to direct a prisoner's release if satisfied that it is no longer necessary for the protection of the public that he should be confined, there is no discretion in the Tribunal to refuse to direct release even if satisfied of that matter, on account of some other weighty consideration as to where the public interest lies or, perhaps, in the interests of the prisoner's own wellbeing. Given the joint position adopted by parties on this question and, more pertinently, the fact that it is clear that that was the assumption underlying the Tribunal's deliberations in the present case, I proceed on the basis that that is indeed the position in law, without, however, myself endorsing the suggestion.

Function of the Court

[15] The Court's task, then, is to examine the Tribunal's determination with a view to deciding whether it has directed itself to the right question, namely whether the risk of re-offending in the case before it was at a level that made it proportionate to the hardship inherent in keeping a prisoner detained after the determinate part of his sentence to continue

that detention meantime; to check that all circumstances relevant to inform a conclusion on that matter have been taken into account; and to examine the reasons given for the decision so as to ensure that they represent a clear explanation as to why confinement remains necessary in the public interest.

[16] As to how diligently that examination ought to proceed, I have already expressed some doubt about the utility of the concept of "anxious scrutiny" in this context: *O'Leary* v *Parole Board for Scotland* [2022] CSOH 13, 2022 SLT 623 at [16], preferring instead on that occasion to deploy the idea of "meticulousness", both as to the examination of the material before the Court and as to sensitivity regarding the limits of the Court's powers of review in the particular circumstances before it. I now consider it more useful (and more accurate) simply to recognise in general terms that the degree of intensity of scrutiny which the Court will apply in any particular case challenging the decision of an inferior tribunal or other decision-making body subject to its review will occupy a place on a potentially wide spectrum, and that the location of the case on that spectrum will be fixed on a multi-factorial basis which at a high level will *inter alia* take into account the nature of the decision complained of, its effect on those complaining about it, and the specific grounds of complaint, and at a lower level is capable of being informed by all sorts of particular features of the individual case apt to pull it one way or the other along the spectrum, either in general or in relation to individual aspects of the review.

[17] In the present case, the decision complained of being one which affects the liberty of an individual who has served 16 years in detention beyond his punishment part, a relatively intense degree of scrutiny of the Tribunal's decision must be the starting point. The fact that the petitioner has previously been freed on three occasions and is thus now deprived of the (conditional) freedom previously afforded to him adds somewhat to the intensity of scrutiny

required. On the other hand, the Tribunal's decision followed the expert evidence led before it from the Community Based Social Worker. It did not decline to follow any clear expert evidence in front of it. The circumstances of the petitioner's application for release in 2022 were sufficiently dissimilar, for the reasons set out above, from those which pertained in 2019 as not to require any particular explanation for the different result. Those features of the case accordingly neither add nor subtract anything to or from the degree of scrutiny required. The expert nature of the Tribunal detracts to some degree from the intensity of scrutiny applicable to areas where that expertise has or may have been applied. In summary, the case requires a degree of scrutiny much more towards the intense than the relaxed end of the spectrum, with due deference being given to the apparent exercise of any specialist expertise of the Tribunal. I stress that I do not conceive myself to be applying any different approach to the Court's function than that often referred to as "anxious scrutiny", but merely to be expressing the matter in a more straightforward and comprehensible way.

The present case

[18] The salient part of the Tribunal's determination in the present case is contained in paragraphs 111 and 114, which are in the following terms:

> "111. Ms O'Hara, CBSW provided clear evidence at the Tribunal in which she explained the extent of the difficulties encountered within Mr D's last period of supervision in the community. He quickly relapsed into substance misuse, presenting as heavily under the influence at supervision appointments and refusing some supports offered to him to assist with his complex risks and needs. The Tribunal accepted Ms O'Hara's evidence that Mr D's lack of proper engagement with the supervision process increased his risk of reoffending. The Tribunal also accepted Ms O'Hara's assessment that Mr D's risk of using violence could not be discounted given the circumstances of the index offence and previous violent offence involving a weapon. The Tribunal's concerns about Mr D's ability to engage with supports were exacerbated by his decision not to meet with his CBSW in December 2021 and April 2022.

…

> 114. Although Mr D clearly has remorse for the index offence, he still cannot explain why he committed it. He appears to lack internal risk management strategies and it is clear from his last three failed attempts in the community that despite the high level of external controls and supports put in place he was unable to engage in supervision at a level which would allow his risks to be assessed and monitored. Although there is no evidence of violent conduct in custody, Mr D has only been in the community for 6 months in 26 years so there is little evidence that he can avoid resorting to violence in the community. Although the Tribunal accepts that a return to substance misuse is not necessarily indicative of a risk of violence in this case, it noted that the degree to which Mr D was misusing substances in the community made it impossible for him to engage with supervision to allow his risks to be monitored and assessed."

In other words, the Tribunal proceeded on the basis that the petitioner's inability to engage with supervision in the community on account of his drug misuse increased his risk of reoffending. It noted that those circumstances did not necessarily indicate a risk of violence on his part, but accepted the view of the community based social worker, Ms O'Hara, that given his past history the risk of his using violence could not be discounted.

[19] It might well be possible, given the degree of scrutiny appropriate to this case, to query whether the Tribunal actually did reach the view that the petitioner's release would pose any material risk of violence directed at the public. The evidence in support of any such view was exiguous. Although Ms O'Hara certainly gave evidence of a somewhat conjectural nature as to the existence of an increased risk of violence should the petitioner be released and relapse into drug misuse, she did not commit herself to any definite proposition about the risk of violence beyond stating that she could not say that there was no risk of harm. The LS/CMI assessment carried out on the petitioner, although assessing his level of risk and needs as high in general terms, was clear that while in custody the risk he posed of causing serious harm was low, and it appears from the dossier before the tribunal that any rise in that risk on release would pertain to self-harm rather than to harm

to members of the public. The indisputable fact 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 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 (cf *Wells* at [37]). However, having regard to the need to accord due deference to the Tribunal's assessment of the evidence before it, I am prepared to accept, perhaps rather benevolently, (a) that the Tribunal did consider that the petitioner's release would pose a material risk of harm to the public and (b) that it was justified in coming to that view in the basis of the evidence before it.

[20] That, however, is not the end of the matter. As already stated, the Tribunal required to address itself to, and answer, the question of whether whatever potential risk might be posed by the release of the petitioner was proportionate with his continued detention. In order to carry out such an assessment, it necessarily required 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. The Tribunal's determination appears to proceed, rather, on the incorrect assumption that any material risk of violence, of whatever kind, *ipso facto* justified the continued detention of the petitioner. At the very least, the determination fails to disclose any appreciation of the correct test which fell to be applied in law, any consideration of the matters which thereby required to be assessed, and any relative conclusion reached by the Tribunal. In these circumstances the determination proceeds upon an error of law or in any event fails to express the nature of the Tribunal's reasoning at a standard acceptable in public law and falls accordingly to be reduced.

[21] I observe finally that I have a good deal of sympathy with what appears to have been the underlying concern of the Tribunal, namely that the petitioner's current state of mind

and propensity to abuse drugs would, to put it mildly, not lead him to prosper in the community. One would have to be optimistic indeed to think that a release of the petitioner in his current circumstances would be likely to lead to any different outcome than that which transpired in respect of his last three releases, namely the rapid emergence of a situation in which the Scottish Ministers or the Board might rightly consider it "expedient in the public interest" (2003 Act, section 17) to revoke his licence and recall him to prison. In these circumstances it would appear that the role of the Tribunal in cases like that of the petitioner is not dissimilar to that of a commissionaire supervising a slowly revolving door into and out of prison, a position which one cannot suppose truly represents the legislative intention. Nevertheless, standing the joint position of the parties on the import of section 2(5) of the 1993 Act narrated above, it is difficult to see how that situation can be avoided.

Conclusion

[22] For the reasons stated, I shall sustain the petitioner's first and second pleas in law, repel the respondent's pleas, reduce the Tribunal's determination dated 6 September 2022, and direct that a differently-constituted Tribunal of the Board reconsider the petitioner's application for release on licence within a reasonable time.