OUTER HOUSE, COURT OF SESSION

[2020] CSOH 45

P665/19

OPINION OF LORD TYRE

in the petition of

LEE BROWN

Petitioner

for Judicial Review of a decision by the Scottish Ministers to refuse to recommend that the petitioner be transferred to less secure conditions

Petitioner: Leighton; Drummond Miller LLP
Respondents (Scottish Ministers): P Reid; Scottish Government Legal Directorate

19 May 2020

Introduction

[1] The petitioner is a prisoner in HMP Glenochil who is serving a number of sentences including an extended sentence. The custodial part of his sentences is 19 years, 8 months and 125 days; the extension period is 2 years. Unless previously released, he will remain in prison until 13 September 2024. In 2008 he escaped from custody and spent three days unlawfully at large. On 13 July 2016, he was released on non-parole licence but was recalled to prison on 17 January 2017 for breach of licence conditions.

[2] The petitioner is considered for release at least annually by the Parole Board. In order to have a realistic chance of release, he requires first to progress to less secure prison conditions. On 26 April 2019, a Risk Management Team ("RMT") met and considered his

management. The RMT decided not to recommend his transfer to less secure conditions. In this petition the petitioner seeks reduction of that decision. Permission to proceed with the petition was granted on one ground only, namely that fairness had required that he be permitted to attend the meeting of the RMT at which the decision concerning his progression was taken.

Risk management and progression of prisoners within the Scottish prison system

[3] Section 10(1) of the Prisons (Scotland) Act 1989 states that a prisoner may lawfully be confined in any prison. Section 10(2) provides that prisoners shall be committed to such prisons as the Scottish Ministers may from time to time direct, and may be moved from any prison to any other prison. Decisions as to where a prisoner is to be confined, and whether or not he or she is to be transferred from one prison to another, accordingly fall within the management functions exercised by the Scottish Prison Service ("SPS") on behalf of the Scottish Ministers.

[4] The SPS policy in relation to Risk Management, Progression and Temporary Release is set out in some detail in a guidance document published in August 2018. An application by a prisoner for progression to less secure conditions is referred in the first instance to the RMT, described in the guidance document as

> "…a multi-disciplinary team of professionals representing a range of agencies involved in the management of offenders. Its primary purpose is to consider the assessment, intervention and management needs of those offenders referred via the ICM [ie integrated case management] process or where local management have a particular concern about an offender's behaviour or on-going management that requires immediate intervention. It is also the decision making body that considers offenders for progression to less secure conditions and/or community access…"

The RMT is chaired by the Deputy Governor or, in his or her absence, the Governor in Charge. The guidance provides that the Chair must ensure that the membership of a RMT

meeting contains an appropriate range of disciplines to reflect the specific risk and need of the offender. In addition, the Chair should consider the benefits, on a case by case basis, of a prisoner making his or her own representation by attending the meeting.

[5] An offender seeking progression to less secure conditions is required to complete an application form providing *inter alia* the following information: the reason for the application; confirmation that they meet certain standard criteria for progression; details of what they have achieved in order to merit consideration for a move to less secure conditions, including evidence of a reduction in risk; reasons why they should be considered by the RMT for progression; and any other supporting factors which should be taken into consideration by the RMT. The person responsible for the co-ordination of the RMT must then carry out a review of all available information pertinent to the offender, identify and request any necessary further investigations in specialist areas, and liaise with the Chair as to whether the offender should be invited to attend the meeting. The co-ordinator must then produce a risk assessment for circulation to RMT members in advance of the meeting, addressing a variety of matters listed in the guidance.

[6] Section 14.3 of the guidance deals specifically with progression of previous absconders and escapees. There is a presumption against any offender progressing to less secure conditions where there has been a previous abscond or escape, unless it is in the public interest. If the RMT recommends that it is in the public interest for the offender to be allowed to be tested in less secure conditions, it should ensure that the case is forwarded to the Prisoner Monitoring and Assurance Group ("PMAG"). Under the heading "The case to be made", the guidance states:

> "Where the RMT makes a recommendation for progression of a previous escapee/absconder, the Chair of the RMT should, no later than 2 weeks following the RMT, complete Section 10 of the RMT documentation and forward it to the Head of

> Operations and Public Protection. The establishment's case for progression must clearly, and in detail, identify the specific circumstances that were considered to be exceptional or of such criticality to justify progression, given the 'presumption against'. It is also necessary in all cases to identify that progression is in the public interest. If no such case is, or can be made, progression should not be approved."

[7] As regards "the public interest test" for previous absconders and escapees, the guidance states:

> "The decision to be reached based on the evidence available is whether in a particular case it serves the interests of the public better to permit the offender, with a previous escape or abscond, to access less secure conditions than it would be to deny that access. The public interest might be served by allowing access to test risk and evidence suitability for release. Withholding access to less secure conditions when it is a necessary step for the offender to demonstrate suitability for release would not normally be in the public interest as the offender would be held longer than is necessary in closed conditions."

[8] The RMT has produced a guidance leaflet for prisoners, explaining *inter alia* its purposes and membership. The leaflet notes that one of the RMT's purposes is to consider progression to less secure conditions. Under the heading "What do I need to do?" the leaflet states:

> "When the referral form is raised, and if you are being considered for progression, you will be required to make your own representation. This is your chance to put your case to the RMT and inform them of the offending behaviour work, personal circumstances, your achievements and your goals for the future. This is your own representation during this process and it is important that you give as much information that you can at this stage.
>
> Support with writing your representation can come via a friend, your personal Officer or the learning centre staff."

No mention is made in the leaflet of the presumption against progression of previous absconders and escapees, although there is reference to copies of the "Risk Management & Progression Guidance" manual being available in the prison library.

The petitioner's application for progression

[9] The petitioner applied for transfer to less secure conditions at the Open Estate. He completed an application form with the assistance of his personal officer. At that time he was unaware of the existence of either the guidance or the leaflet, and in particular was unaware that there was a policy applicable specifically to previous absconders and escapees. His application was considered at a RMT meeting on 26 April 2019. The meeting was chaired by the Deputy Governor. Among those present were prison based social workers, a psychologist, and a cognitive behavioural therapist who had been working with the petitioner. The petitioner was not in attendance. There is nothing in the documentation to indicate what consideration, if any, was given to inviting him to attend.

[10] The RMT decided to refuse the application. It is unnecessary for me to narrate in full the RMT's reasons for refusal, but it should be noted that it is stated that the RMT members "considered all paperwork in relation to this case including Mr Brown's self representations". The decision concluded:

> "The RMT members noted that Mr Brown's case did not merit [sic] the criteria of an application to PMAG, as it was deemed that the circumstances that were considered today were not exceptional nor were they critical to justify progression.
>
> …In view of the above information, the RMT is satisfied that it is in the public interest that Mr Brown should not spend a period in the Open Estate, given the risk factors and the previous escape from lawful custody…"

[11] On being informed of the RMT's decision, the petitioner submitted a complaint to the prison's internal complaints committee. Again it is unnecessary to go into the detail, but the substance of his complaint was that he was unable to discern from the RMT's decision what, if anything, he could ever do in order to be considered for progression. The committee agreed that the RMT's minute could be improved to provide the petitioner with clearer

expectations for his future management, and recommended that his case for progression be considered by the RMT at least annually. At a meeting on 29 August 2019, the Parole Board unanimously decided not to direct the petitioner's release, but respectfully suggested that "some creativity be employed, in terms of testing Mr Brown in a less secure environment".

The law

[12] The petitioner's argument is founded upon the decision of the Supreme Court in *R (Osborn)* v *Parole Board* [2014] AC 1115. That case concerned three appellants, one of whom (Osborn) was a determinate sentence prisoner who had been released on licence but then recalled to custody. His case was listed for hearing by the Parole Board to assess whether he could be released. His case was considered by a "paper panel" consisting of a single anonymous member of the board, who decided not to recommend his release. He then requested an oral hearing, which request was refused by another anonymous single member panel. He sought judicial review of the refusal of an oral hearing.

[13] Delivering a judgment with which the other members of the Court agreed, Lord Reed made certain observations of a general nature in relation to procedural fairness, and certain others that were more specific to the circumstances of the three appeals. Lord Reed's general observations, at paragraphs 64-72, included the following:

(i) When considering whether a fair procedure was followed by a decision-making body such as the board, the role of the court was not merely to review the reasonableness of the decision-maker's judgment of what fairness required, but rather to determine for itself whether a fair procedure was followed.

(ii) The purpose of procedural fairness was not limited to achieving better decisions by ensuring that the decision maker received all relevant information and

that it was properly tested. At least two other important values were engaged. The first was the avoidance of the sense of injustice that the person who was the subject of the decision might otherwise feel, where his or her rights were not adequately respected. The second was the rule of law, promoting congruence between the actions of the decision-makers and the law which should govern their actions.

(iii) If cost were regarded as a factor in deciding whether to allow oral hearings, it should be borne in mind that inaccurate risk assessments could lead to greater cost if an offender were wrongly released or detained unnecessarily.

[14] In relation to the particular question of the circumstances in which the Parole Board was required to hold an oral hearing, Lord Reed's first conclusion (paragraph 2) was that in order to comply with common law standards of procedural fairness, the board should hold an oral hearing before determining an application for release, or for transfer to open conditions, whenever fairness to the prisoner required such a hearing in the light of the facts of the case and the importance of what was at stake. Although it was impossible to define exhaustively the circumstances in which an oral hearing would be necessary, these would include (a) where important facts were in dispute; (b) where the board could not otherwise properly make an independent assessment of risk; (c) where a face to face encounter was necessary to enable the prisoner or his representatives to put their case effectively; and (d) where, having regard to the consequences, it would be unfair for a "paper" decision by a single board member to become final without an oral hearing. Lord Reed also noted at paragraph 88 that the question whether a prisoner's right to a fair hearing required the holding of an oral hearing did not depend on his establishing that his application stood any particular chance of success: such an approach involved circular reasoning.

[15] The Supreme Court's decision in *Osborn* was distinguished by the Court of Appeal in *R (Hassett)* v *Secretary of State for Justice* [2017] 1 WLR 4750. This case concerned the standard of procedural fairness required to be observed by a review team ("CART") responsible for deciding whether to maintain a prisoner's security classification in prison as Category A (ie as a prisoner whose escape would be highly dangerous). The applicant sought judicial review of the CART's refusal to allow him an oral hearing before the decision was made. The Court of Appeal refused the application. Delivering a judgment with which the other members of the court agreed, Sales LJ identified what he regarded as material distinctions between the Parole Board on the one hand and the CART on the other, in relation to the requirements of procedural fairness. Having referred at some length to Lord Reed's judgment in *Osborn*, Sales LJ at paragraph 59 contrasted the respective tasks of the Parole Board and the CART: the former had to make its own independent assessment of risk, and be seen to do so, rather than acting as part of an overall consideration by the Secretary of State; the Parole Board had to carry out a broader assessment of possible management measures after release, to which a prisoner might make a useful contribution at an oral hearing; in the context of prisoner management decision-making it was less likely that the prisoner would be directly engaged; and it was less likely that a prisoner would be able to make a useful contribution at the stage of consideration by the CART because of the question being addressed and the nature of the process leading up to that consideration. Sales LJ concluded (paragraph 60):

> "Lord Reed JSC was considering the standards to be expected of the Parole Board as an independent judicial body. Therefore he did not address other reasons why, in striking a fair balance in terms of procedural standards between the public interest and individual interests in the context of decision-making by the CART/director, it is legitimate to bear in mind that the director and other officials engaged in the process are not judges required to dedicate their full time and attention to categorisation decision-making, but have wider management responsibilities in running prisons.

> Lord Reed JSC observes that the Parole Board should guard against any temptation to refuse oral hearings as a means of saving time, trouble and expense. However, whilst it is no doubt the case that the CART/director could not lawfully refuse an oral hearing on these grounds if fairness required one, it is a relevant consideration in assessing whether it does that the courts should be careful not to impose unduly stringent standards liable to judicialise what remains in essence a prison management function. That would lead to inappropriate diversion of excessive resources to the categorisation review function, away from other management functions."

Sales LJ did accept that fairness would sometimes require an oral hearing by the CART, albeit only in comparatively rare cases.

Argument for the petitioner

[16] On behalf of the petitioner it was submitted that the circumstances of the present case were analogous to those in *Osborn*. The Parole Board member in *Osborn* was in effect carrying out the same function as the RMT in the petitioner's case, and making the same character of decision. *Hassett* was an unwarranted gloss on *Osborn* and should not be followed. In any event it was concerned with categorisation and not progression.

[17] In the present case, the RMT's decision-making process could only have benefited from having the petitioner present. He had been justifiably ignorant of the test of exceptionality and criticality, and had not therefore addressed it in his application. It was not obvious from the minute of the RMT's decision that they had made much of his written submissions. His arguments, for example in relation to being drug-free, were best presented personally. It was not submitted that fairness would require all previous absconder/escapee applicants to be permitted personal attendance. The distinguishing features in the petitioner's case were his ignorance of the test to be applied, his desire to be present, the absence of any practical difficulty in allowing him to be present, and the importance of the

decision to him, having regard to the time that he had spent in prison and the fact that he was being detained solely for public protection.

Argument for the respondent

[18] On behalf of the respondent it was submitted that fairness had not, in all the circumstances, required the RMT to allow the petitioner to attend its meeting and make representations. The question was not whether allowing attendance would have been better or more fair; it was whether the procedure was actually unfair: *R* v *Home Secretary, ex p Doody* [1994] 1 AC 531, Lord Mustill at 560-1. The true parallel with the present case was *Hassett*, not *Osborn*. The RMT was taking an internal prison management decision. The test had been set out in published guidance. The participants knew the petitioner and were fully informed of his circumstances. The petitioner had failed to identify any way in which his personal attendance could have made a difference. There were no facts in dispute and no additional information that might affect the RMT's assessment of risk. The petitioner's situation was not distinguishable from that of any other previous absconder/escapee applying for progression.

Decision

[19] In my opinion the circumstances of the present case are distinguishable from those of the applicant in *Osborn*. It is unnecessary for me to analyse the differences or similarities between the role of the Parole Board in England and Wales on the one hand and the role of the RMT in Scotland on the other. I agree with the submission by counsel for the petitioner that what matters is the nature of the decision that is being made, rather than the identity of

the body tasked with making the decision. If in all the circumstances of a case procedural fairness requires personal attendance by an applicant, then provision must be made for it.

[20] The reasons why I consider that personal attendance was not necessary in the present case in order to achieve procedural fairness are as follows:

- The participants at the RMT meeting included the individuals most closely familiar with the petitioner, including the prison-based social worker and cognitive behavioural therapist responsible for managing him and assessing his progress. The issue that the RMT had to determine, namely whether there were exceptional circumstances justifying a recommendation that the petitioner progress to less secure conditions, was one that fell to be resolved by specialist assessment. In contrast to the task of the decision-maker in *Osborn*, that assessment was being made by persons who knew the petitioner well and who were in regular direct contact with him.
- There were no disputed issues of fact for the RMT to consider. It is difficult to see what the petitioner could have contributed to the meeting other than an assurance, from his personal perspective, that he was ready for progression. Such an assurance would not have added anything to the information provided by the petitioner in the application form which he had completed and which was before the RMT at its meeting.
- The petitioner founded upon what was said to be his excusable ignorance of the criteria applicable under the guidance to previous absconders/escapees such as himself. I am not entirely persuaded that his ignorance of the test should be regarded as wholly excusable: the application form that he completed included a reference to the leaflet which, in turn, referred to the

> guidance which was available had he sought it. But, more importantly, it did not seem to me that counsel was able to identify any particular matter that the petitioner would or might have put forward as an additional argument to address the "presumption against" progression, had he been in attendance at the meeting. Nor, for my part, can I see any reason why his awareness of the test in the guidance could have made any difference to the presentation of his case to the RMT.

[21] As regards comparison of the petitioner's circumstances with those of the applicant in *Hassett*, it does seem to me that there is more in common than there is with those of the applicant *Osborn*. I agree with the submission by counsel for the respondent that there is no conflict between *Osborn* and *Hassett*, and that the difference in outcome results from the significant differences between the role, in England and Wales, of the Parole Board on the one hand and the CART on the other. Like the CART, it seems to me that the RMT was performing what is in essence a prison management function. It was, of course, a decision which carried significant personal consequences for the petitioner and I accept, as the Court of Appeal recognised in *Hassett*, that there could be circumstances in which fairness would require an opportunity to be given to attend the meeting of the decision-making body. For the reasons already given, I do not consider that this was such a case.

[22] Finally, although I have not placed any weight on it in reaching my decision, it is worth noting that the petitioner's grievance immediately following intimation of the RMT's decision was not that he would have wished to attend the meeting in person, but rather that the reasons that he was given for the decision left him without a clear indication of how, if at all, he might be able to achieve progression in the future. It appears that that complaint was regarded by the internal complaints committee as having some merit. The petitioner can

also derive some encouragement from the Parole Board's suggestion that creativity be employed in testing him in a less secure environment. But there is nothing in the post-decision material to support the contention that in arriving at its decision without the petitioner's personal attendance, the RMT acted unfairly.

Disposal

[23] For these reasons, the petition is refused. Questions of expenses are reserved.