



OUTER HOUSE, COURT OF SESSION

[2021] CSOH 44

P965/20

OPINION OF LORD BRAID

In the cause

PATRICK CRAWFORD

Petitioner

for

Judicial Review of a decision of the Parole Board for Scotland dated 25 August 2020

Petitioner: Crabb; Drummond Miller LLP

Respondents: Lindsay QC, Anderson Strathern LLP

6 May 2021

Introduction

[1] The petitioner is a life prisoner more than 20 years past his tariff date. The short issue raised by this petition for judicial review is whether adequate reasons were given by the Parole Board for Scotland (“the Board”) for its decision of 25 August 2020 not to direct the petitioner’s release on licence from custody.

[2] The petitioner contends that the Board’s reasons were inadequate since they did not explain why the Board preferred one expert’s views over another (one social worker supporting his release on licence, and one not), nor did it explain why it was necessary for the protection of the public that the petitioner should continue to be confined. He seeks

reduction of the decision and an order that his case be reconsidered by the Board within a reasonable time.

Background

[3] The petitioner was convicted of murder and two charges of attempted murder in 1997. He was sentenced to life imprisonment in respect of the murder with a punishment part of 13 years, and a period of 10 years imprisonment in respect of the charges of attempted murder. In 2014 he was released on licence. Concerns arose that the petitioner was misusing illicit substances in the community. The petitioner's licence was revoked in 2017 and he was returned to prison. In January 2018 he was fined £500 in respect of a conviction of possession of diamorphine whilst in the community.

[4] The petitioner's case came before the Board on 3 August 2020 to consider his application for parole. Prior to the hearing, the petitioner's prison based social worker, Mr Murray, had produced a report supporting his release on licence. However, the community based social worker, Ms Cordiner, produced reports which did not support the petitioner's release.

[5] On 3 August 2020 the Board heard from Mr Murray. In its minute of that date, it recorded Mr Murray's evidence. It noted that he supported the petitioner's release on licence. He referred to two refusals by the petitioner to provide mandatory drug tests, which he ascribed to the petitioner's desire to make a point, rather than to hide drug use. The petitioner had been on licence in the community for almost 4 years before his return to custody in December 2017 although had been unlawfully at large (UAL) for 3½ months of that period. He had engaged well with community supervision, other than having received a warning letter for possession of two diazepam tablets. Mr Murray acknowledged that the

petitioner had resorted to heroin use in the months before his recall and had not been honest with his supervising officer about that. However he had not attended supervision meetings under the influence. Had substance misuse been a problem Mr Murray would have expected it to be visible in the prison environment but it was not. While the UAL was a concern, Mr Murray took the view that it was because the petitioner had not wanted to return to prison. What was significant in terms of risk was that there was nothing to suggest any aggressive or violent behaviour in that period. As noted above, the petitioner had accrued a conviction for possession of diamorphine in respect of which he had been fined £500. He had now been in custody in closed conditions for over 3 years following his recall. There was no evidence from his behaviour in prison that would give rise to concern that he would not engage with supervision in the community or that his risk could not be managed in the community. While he had strong opinions, these had been put forward in an appropriate way. The Board concluded its summary of Mr Murray's evidence in the following terms (paragraph 23 of the minute):

"However, in terms of risk, there was no evidence of any substance misuse, no evidence that he was attempting to conceal substance misuse, no concerns about his behaviour or his engagement otherwise in the prison regime and no evidence of any violence since the index offence. Looking overall at his response in the community, the circumstances of his recall, subsequent conviction and his response in custody thereafter Mr Murray could see no reason to justify [the petitioner]'s continued detention in closed conditions and he recommended and supported his release."

[6] The Board decided to adjourn the hearing, to obtain evidence from Ms Cordiner. In reaching that decision the Board accepted (at paragraph 65) that there was no suspicion or evidence of substance misuse, and that the refusal to take mandatory drug tests was to make what the petitioner considered to be a justified point. It then stated (paragraph 66):

"Having regard to that background, the fact that [the petitioner] has not been involved in violent behaviour since the index offence and his positive response and engagement in the community for 3½ years prior to the circumstances that led to his

recall, the Board wishes to explore with [Ms Cordiner] the extent to which his risk could be managed in the community with close supervision and additional licence conditions to include conditions relating to substance misuse, engagement with Psychological Services and work on decision making, problem solving and consequential thinking.”

To that extent, at that stage, the Board appeared to have accepted at least elements of Mr Murray’s evidence, and to have attached some weight to the absence of violent behaviour and to the petitioner’s previous positive engagement in the community.

[7] A further hearing took place on 25 August 2020 at which the evidence of Ms Cordiner was heard. She did not support release and considered that the petitioner required to demonstrate an ability to comply with licence conditions to allow his risk to be managed safely in the community. She attributed his heroin relapse to the impact of historical child abuse. The petitioner had not followed through with the psychological support he had received in the community and Ms Cordiner had a concern therefore about the extent to which those issues still had to be addressed. She believed it would present a significant difficulty for him in the community if they remained unaddressed. A licence condition to ensure that he had the support of psychological services, if required, would be appropriate. Ms Cordiner then referred to the petitioner’s having been UAL for over 3 months which she considered was a significant concern because he had been unscrutinised for that period. While she recognized that it was positive that there was no evidence of further offending during that period, given his level of compliance she did not consider that his risk could be managed. Her view was that progression to the Open Estate would be the best way forward for the petitioner. That would allow him to build up a relationship with his supervising officer, discuss any issues that he may have with substances, show that he could make wise choices about how he spent his time and with whom, and that he could adhere to temporary licence conditions. It would also help with his reintegration to the

community. At her meeting with the petitioner on 21 July 2020 he took issue with her recommendation that he should be tested in the Open Estate because he felt that he could be released. He considered that he was right and she was wrong. She considered that his attitude could present a problem in managing him, because he would have to be prepared to comply with her directions. His attitude would have to change to allow him to be managed in the community. It was a concern that the petitioner's house had been searched twice by police officers in connection with drugs (in May 2016 and August 2017) and that drugs were recovered on each occasion. She considered that 6 months testing at the Open Estate would allow Mr Crawford to have six periods of home leave to demonstrate compliance and to build a relationship with his supervising officer. She acknowledged that he had succeeded in the community for some time, that there had been no evidence of substance misuse in prison and that there had been no suggestion of violence in the community. She also accepted that his failure to comply with the prison regime related only to his failure to provide drug tests.

[8] After that hearing, the Board declined to direct the petitioner's release on licence.

Since the adequacy of the reasons given is at issue, they bear setting out in full:

“63. The Board, having considered the evidence, is satisfied that it is necessary for the protection of the public that [the petitioner] should be confined.

64. The Board has considered carefully [the petitioner]'s response and engagement in the community prior to the circumstances that led to his recall and his response in custody.

65. However, [the petitioner] was not open and honest with his supervising officer about his difficulties in coping with memories of childhood abuse and about his relapse to heroin use. At a time when he was in need of support, his superficial engagement led his supervising officer to believe that he was responding well and to reduce the frequency of his supervision appointments in June 2017.

66. In August 2017 his house was searched by police officers for the second time and a quantity of drugs and drug paraphernalia was recovered. The Board notes

that [the petitioner] subsequently pleaded guilty to simple possession of heroin, but the Board is entitled to look at all the circumstances and it did not find [the petitioner]'s evidence about the items recovered to be credible. It raised concern about the extent of his involvement in the drugs scene and the risks associated with such involvement.

67. While [the petitioner]'s engagement with the supervision process was superficial prior to his arrest in August 2017, the Board was satisfied on the evidence presented that he disengaged completely thereafter. He failed to inform his supervising officer of his arrest and his subsequent conviction, he failed to reside at his approved address, and he was UAL for over 3 months. The Board notes [the petitioner]'s position that he was unaware that his licence had been revoked, but even if that position was accepted, it does not explain his failure to attend his next supervision appointment in September 2017. Even if it is accepted that he only became aware that his licence had been revoked two weeks before he was returned to custody, he did not hand himself in at that stage. The Board did not find [the petitioner]'s explanation for his failure to have any contact with his supervising officer from August 2017 until his return to custody to be satisfactory. The Board considered that [the petitioner] was reluctant to take responsibility for and minimised his failures to comply with his licence. He stated that he had been recalled for a £200 drug fine and that demonstrated to the Board that he did not appreciate the significance of his lack of engagement and the need for full compliance with his life licence.

68. Following his recall, the entrenched position which [the petitioner] adopted with regard to the provision of MDTs and his reasons for doing so are set out in the Minute of 3 August 2020. However as stated therein his decision making in dealing with the issue by refusing to provide MDTs and failing to accept the advice of [Mr Murray] to do so, raised concern about his future compliance. His attitude in discussion with Ms Cordiner in July 2020 also raised concern about his willingness to accept an alternative view and his future compliance with the directions of his supervising officer.

69. Ms Cordiner does not support [the petitioner]'s release and the Board agrees with her assessment.

70. Licence conditions and open and honest engagement form a significant part of the risk management process in the community. [The petitioner]'s failure to comply with the conditions of his licence and lack of openness and honesty with his supervising officer are therefore matters of significant concern and the Board cannot be satisfied that his risk can be managed in the community without a period of testing in less secure conditions to show that he can remain drug free, avoid negative peers, make good decisions and comply with temporary licence conditions. It will also provide an opportunity for him to start to build a relationship with his supervising officer which the Board considers will be important for his future management.

71. The Board notes that [the petitioner] is willing to provide the drug tests necessary for progression and in the expectation that he will now progress quickly to the Open Estate, the Board considers that a review in 9 months is appropriate. That period should allow the progression process to be completed and for [the petitioner] to have a period of 6 months testing at the Open Estate.”

Submissions

Petitioner

[9] Counsel for the petitioner submitted that the decision reached was unreasonable because the reasons given were inadequate. While accepting that it was open to the Board to reject expert evidence, counsel focussed on the importance of giving adequate reasons where liberty is at stake, and the need for anxious scrutiny. The reasons given must reflect the issues at play. The Board ought to have explained which expert evidence it accepted and which it rejected, giving reasons. In the decision part of the Board’s minute it had not once referred to the evidence of Mr Murray. Given what was at stake for the petitioner and the nature of Mr Murray’s evidence, it was insufficient to say only that the Board agreed with Ms Cordiner. Whether or not the reasons given might have been adequate in another context, they were not adequate having regard to the need for anxious scrutiny where liberty was at stake. The petitioner had been prejudiced because he did not know whether the Board had properly addressed the issues. Counsel referred to the following cases: *R (on the application of H) v Ashworth Special Hospital Authority* [2003] 1 WLR 127, paragraph 76; *R (on the application of Wells) v Parole Board* [2019] EWHC 2710 (Admin), paragraph 38 to 41); *Brown v The Parole Board for Scotland* [2021] CSIH 20, [35] to [37].

The Board

[10] Senior counsel for the Board submitted that the reasons were adequate. The petitioner knew why the Board had decided not to direct his release, and knew what he had to do to secure release in the future. It was evident from the Board's reasoning (as set out above) that the Board had preferred the evidence of Ms Cordiner to that of Mr Murray. The Board did not require to state explicitly which expert it preferred, or why, where that was implicit from its reasoning, as here. It had dealt with all the issues which had been raised: the petitioner's criminal conviction; his relapse into drugs and discovery of drugs paraphernalia; his failure to engage with his supervising officer; his having been UAL; and his refusal to undertake mandatory drug tests. That was sufficient. The reasons given adequately explained why the decision had been reached. The issue as to whether the substantive reasons themselves might be impugned had not been raised in this petition. Senior counsel referred to the following cases: *Wordie Property Co Ltd v Secretary of State for Scotland* 1984 SLT 345 per Lord President Emslie at 348; *Hutton v Parole Board for Scotland* [2021] CSOH 34; *Laidlaw v Parole Board for Scotland* [2008] SCLR 51, [32] to [34]; *R (CPRE Kent) v Dover District Council* [2018] 1 WLR 108 per Lord Carnwath at [35]-[36] and [42]; and *General Medical Council v Awan* [2020] EWHC 1553 (Admin) per Mostyn J at [12].

Decision

[11] The law governing reasons in the context of decisions of the Board was recently summarised by Lord Clark in *Hutton v Parole Board for Scotland* [2021] CSOH 34 at para [62] as follows:

“In *R v Northamptonshire County Council, Ex p W*, Hutchinson LJ said (at para [3]): ‘[t]he purpose of reasons is to inform the parties why they have won or lost and enable them to assess whether they have any ground for challenging the adverse decision.’

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

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

... provided the standards expressed in these cases are met, there is no requirement to deal with every argument advanced As was explained in *Laidlaw v Parole Board for Scotland*, the reasons should be readily understandable to the prisoner and his advisers and ideally should be short, simple and easy to follow”.

[12] To this may be added that reasoned decisions need not be lengthy, provided they achieve the above standards: *R (on the application of H) v Ashworth Special Hospital Authority*, above, para [79]. The corollary of that should not be overlooked, namely, that a lengthy decision will not necessarily be an adequately reasoned one if the reasons are nonetheless not readily understandable, or otherwise fail to reach the requisite standard. Moreover, the adequacy of reasons must be judged by reference to what is demanded by the issues which call for decision: *Ashworth*, para [76].

[13] A further strand of authority is that discussed by the Inner House in *Brown v Parole Board for Scotland* [2021] CSIH 20 at paragraph 36:

“[36] The following can be taken from *R(Wells) v Parole Board* (cited above), where the prisoner remained in custody 12 years after the expiry of the tariff. To justify continued confinement the danger posed by the prisoner must involve a substantial risk of serious harm to the public, ie involving offences of serious violence. (From time to time reference has been made to a ‘life and limb’ test.) The longer the time in custody after expiry of the tariff the scrutiny should be ever more anxious as to whether the level of risk is unacceptable: see paragraphs 20/21 and 27. Under the modern context-specific approach to rationality and reasons challenges, in the area of detention and liberty the court must adopt an anxious scrutiny of the decision. The court can interfere if the board’s reasoning falls below an acceptable standard in public law. The duty to give reasons is heightened if expert evidence is being rejected: paragraphs 35, 38 and 40. It can be noted that the need for ever more anxious scrutiny as to whether the level of risk is unacceptable as time goes by is well

established in England and Wales: see *Osborn v Parole Board* [2014] AC 1115, Lord Reed at paragraph 83; *R(King) v Parole Board* [2016] 1 WLR 1947, Lord Dyson MR at paragraphs 37/39. In the latter decision his Lordship referred to earlier authority that 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'.

[37] ... While a cautious approach is appropriate when public protection is in 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. 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. Thus in the present case, given that every professional involved with the petitioner and who assisted the tribunal said that he posed no serious risk of significant harm to others, the petitioner can reasonably expect to be informed as to why those opinions were rejected."

[14] Before turning to consider the decision in this case, two further points fall to be made. First, whether reasons are adequate or not will depend on the circumstances of the particular case; each case is fact specific. Thus, while senior counsel for the Board sought to distinguish *Brown* on the basis that in that case, all the expert evidence favoured the petitioner whereas here there are two competing opinions, I do not consider that difference to be material: as counsel for the petitioner submitted, *Brown* (where the issue was merely whether permission ought to be granted) is significant for the principles it affirmed rather than for the application of those principles to the facts. Second, the two decisions in this case, those of 3 August 2020 and 25 August 2020, fall to be read together. Thus it is not entirely correct to say that the Board's decision does not mention Mr Murray's evidence at all, since it is narrated in the minute of 3 August 2020.

[15] None of the foregoing is controversial. The dispute between the parties is the application of these established principles to the facts of the petitioner's case. Superficially, and at first blush, there is some merit in the submissions of senior counsel for the Board. It does appear from the Board's own reasoning that it preferred the evidence of Ms Cordiner

to that of Mr Murray. In a nutshell, based upon the circumstances which led to his recall, and his refusal to undertake mandatory drug tests, the Board was concerned about the petitioner's future compliance if released. To that extent, the Board has explained why it reached the decision it did.

[16] However, although it may be clear that the Board did in fact prefer the evidence of Ms Cordiner, it has not explained *why* it did so, and I consider it was all the more incumbent upon the Board to give some explanation for that choice when from the minute of 3 August 2020 it appeared, as I have mentioned above, to have accepted Mr Murray's evidence at least to an extent. When one then adds in the fact that the petitioner is a life prisoner more than 20 years past his tariff date, resulting in a need for anxious scrutiny, and a greater onus to explain the Board's thinking, the decision does, in my view, fall short of the requisite standard, as explained in *Brown*. It is not possible, from the reasons given, to discern whether or not the Board did have regard, as *Brown* puts it, to the impact of confinement well beyond tariff, nor does the reasoning provide clarity, again in the words of *Brown*, as to why confinement of the petitioner remains necessary in the public interest. That was not specifically an issue spoken to by Ms Cordiner in her evidence, and therefore, in the particular circumstances of this case, it was insufficient for the Board to record merely that Ms Cordiner did not support the petitioner's release and that the Board agreed with her assessment. It is therefore simply not possible for the reader, and more importantly, the petitioner, to know whether or not the Board has properly addressed whether confinement of the petitioner continued to be necessary in the public interest. In that regard, the petitioner has been prejudiced, for the reasons submitted by his counsel.

[17] For these reasons, I find that the petitioner's criticisms of the Board's reasons are justified. Accordingly, I have sustained the petitioner's second and third pleas in law, and

repelled the Board's pleas in law. I will reduce the decision of 25 August 2020, and ordain the Board to convene within a reasonable time a differently constituted panel of the Board to properly and lawfully reconsider the petitioner's application for release from custody on licence.