



OUTER HOUSE, COURT OF SESSION

[2023] CSOH 3

P312/22

OPINION OF LORD ERICHT

in Petition of

ROBERT McPHEE

Petitioner

for

Judicial Review of a decision of the Parole Board for Scotland dated 10 February 2022

Respondent

Petitioner: Crabb; Drummond Miller LLP
Respondent: Lindsay KC; Anderson Strathern LLP

24 January 2023

Introduction

[1] Scottish Ministers referred the case of a prisoner to the Parole Board for a recommendation on release. The Board considered the case on the papers. It did not recommend release as the prisoner had an outstanding programme which he had not yet completed. The prisoner seeks reduction of the Board's decision on the ground that the Board should have held an oral hearing.

Factual background

[2] In March 2018 the petitioner was convicted, after trial, of assault to severe injury, permanent disfigurement, abduction, assault to severe injury and danger of life, assault to injury, abduction, assault to severe injury and permanent disfigurement, contravention of section 47(1)(A) of the Criminal Justice and Licensing (Scotland) Act 2010, abduction and assault to injury and contravention of section 4(1)(A) of the Human Trafficking and Exploitation (Scotland) Act 2015. The offences took place over a prolonged period of time between 1993 and 2016. He was given a 12-year extended sentence comprising a 10-year custodial term and an extension period of 2 years, backdated to 20 March 2017. He was made subject to a Trafficking and Exploitation Prevention Order order under section 4(1)(a) of the Human Trafficking and Exploitation (Scotland) Act 2015, for a period of 5 years on release. He was made subject to a confiscation order which totalled £11935.

The decision of the Parole Board

[3] In a unanimous decision dated 10 February 2022, the Board did not recommend release.

[4] By letter dated 8 February 2022 the petitioner's agent submitted written submissions dated 8 February 2022 for consideration at the hearing (the "Written Submissions"). The Written Submissions were in the following terms:

"I represent the interests of Robert McPhee. He is a 69 year old man currently a prisoner within HMP Shotts. Mr McPhee is seeking his immediate release.

Mr McPhee was sentenced to a total of 10 years with 2 years extended after trial at the High Court in Glasgow. Robert McPhee was convicted of charges spanning from 1993 to 2016. My client fully acknowledges the serious nature of the charges upon which he was convicted. Despite reference to denial in the dossier Mr McPhee advises he takes full responsibility for his actions and for the role which he played in the offences. Mr McPhee accepts the decision of the Jury.

Mr McPhee reports that he initially struggled with life in prison. The reality of his situation is not lost upon him. Mr McPhee has however used his time in a very constructive and positive manner. Mr McPhee is described as polite and courteous to staff and his peers alike. Mr McPhee has documented health difficulties however maintains his employment within the prison and completes his duties to a high standard. Mr McPhee has not incurred any guilty reports nor are there any reported issues in relation to substance misuse. There is no evidence to support drug or alcohol misuse in the community. Mr McPhee attends the gym regularly and through hard work and dedication has lost 5 stone in custody. There is clear evidence to support that fact that Mr McPhee is fully compliant with prison rules and regulations. Mr McPhee is described as a 'model prisoner' by those who work closest with him.

Mr McPhee was identified as meeting the criteria for the self change program in September 2019. To date he has yet to commence this course. Mr McPhee has from the outset been motivated to participate on this course. Mr McPhee has been extremely pro active in his efforts to commence this course. This appears to be noted in the dossier. However it is omitted from the dossier the delays he has faced or the fact that he was recently advised it is unlikely he will commence the course until at least August/September 2022, some 3 years after being identified as requiring to complete it by the SPS. This understandably so has been a cause of frustration for Mr McPhee. It is accepted that the board do not interfere with the management of prisoners by the SPS but they will no doubt be aware of the SPS's legal obligation to rehabilitate prisoners within a reasonable timeframe in order that they are in an advantageous position when presenting for parole. I have now been instructed in this matter and I am seeking counsel's opinion in to the prospects of success regarding possible judicial review.

It is interesting to note that the PBSW delved deeper with my client into his index offences and he responded positively to the discussions showing a level of insight into his behaviour and acknowledging his use of violence as an intimidation tactic and accepting he could often be impulsive and reactive in situations when verbalising his anger. Mr McPhee since his incarceration and despite any intervention work identified by the SPS has been making every effort to work on his areas of concern, there is no evidence to support aggressive behaviour, to the contrary actually, the incident in March 2019 when he walked away from a confrontation with his son which had the potential to escalate even after he was assaulted, did not as he chose to walk away. Mr McPhee maintains the view he has made progress in the areas of anger management and reactive behaviours whilst in custody and can provide the board with examples. It would appear from discussions between my client and social work that he has the necessary skills needed to resolve conflict in the right manner and implement when and where necessary.

In terms of risk, Mr McPhee has been assessed using LSCMI within the medium category of risk/needs. We understand a referral to MAPPA has been made but no decision is documented in the dossier. Is this outstanding? We note the report

was concluded in November 2021. It is also unclear as to whether an actual risk of serious harm assessment was carried out by the PBSW/SPS however it is noted at B12.15 that it is the author's 'professional opinion' was this the conclusion reached following the appropriate risk assessment or merely speculation? I would submit this requires clarification.

In relation to risk factors/areas of concern raised by social work around and in particular directly linked to anger management and conflict resolution, Mr McPhee indicates he would be more than willing to engage upon intervention work in the community. What are the availability of such courses if any in the community? It is noted that the CBSW propose a specific licence condition re offence focused work around areas of risk/needs. Given there is nothing to suggest that my client wouldn't comply it is submitted that this licence condition would mitigate any risk posed. It would also be worth exploring with social work why there is a requirement to do further work in the community after the completion of the prison based intervention work, which appears to be targeting the same treatment needs? Would his participation on intervention work with his supervising officer in the community in order to reduce his risk of re offending not suffice? It is submitted that a robust management plan would mitigate any risk posed by Mr McPhee in the community allowing for his safe management.

In terms of a release address, in discussions with Mr McPhee this morning he proposed his granddaughter's address. It was explained to him this would require to be assessed as suitable by CBSW. Mr McPhee understood this and advised he was happy to follow the instruction of his supervising officer in terms of an address. It is unclear as to what accommodation would be available to Mr McPhee should the board direct release and it is submitted this requires clarification from CBSW.

Given the aforementioned it is submitted that an oral hearing should be assigned in these particular circumstances. It is respectfully submitted that the board would not have sufficient information upon which to make a decision. It would also allow Mr McPhee an opportunity to make his case for release directly to the board and clarify his position in relation to the index offences. I would refer the board to the case of Osborn where it was held that an oral hearing should be held in circumstances where fairness demands it. It is in the interests of justice and fairness that an oral hearing should be assigned."

[5] The Decision sets out the Board's reasons for not recommending release:

"Conduct and progress

13. Mr McPhee is a compliant prisoner.
14. At Programmes Case Management Board (PCMB) on 11 September 2019, the frequency and severity of violence perpetrated by Mr McPhee was noted and it was concluded that Mr McPhee required to address his violence through the Self Change Programme (SCP). This need remains outstanding. Mr McPhee

has participated in the engagement phase for this programme and will begin the programme in the coming weeks. Upon completion of the programme a postprogramme report (PPR) will be presented to the PCMB so that any further treatment needs may be identified.

15. On 19 March 2019, Mr McPhee was charged with fighting but was found not guilty. The incident related to an argument between Mr McPhee and his son. He has had no other misconduct reports. He has returned three mandatory drug tests (MDTs) all of which are negative. There is no adverse intelligence.

Intentions on release

16. Mr McPhee has proposed the address of a static caravan..... The address is assessed as unsuitable.

Risk

17. Using LS/CMI, Mr McPhee is assessed as presenting a medium level of risk and needs.
18. Significant domains identified in the LS/CMI include anti-social pattern, procriminal attitude, criminal history, leisure and recreation and companions. In addition, Mr McPhee is noted to continue to deny and minimise matters relating to the index offences and his use of power, reputation and violence to target vulnerable individuals and intimidate them to achieve what he wanted.
19. Mr McPhee is assessed as presenting a high and imminent risk of serious harm. A referral has been made to the Multi Agency Public Protection Arrangements (MAPPA) for consideration.

Sufficiency of information

20. Having considered the dossier, the Board is satisfied that it has sufficient information upon which to reach a decision, and that no further enquiry is necessary.
21. The Board is in receipt of representations from Mr McPhee's solicitor dated 8 February 2022. The representations indicate that Mr McPhee seeks his immediate release.
22. The Board, in considering the above, is satisfied that the interests of justice do not require an oral hearing.

Reasons for decision

23. The Board, having considered the evidence, is not satisfied that such risk as Mr McPhee poses can be managed safely in the community.

24. Neither the prison based social worker (PBSW) nor the community based social worker (CBSW) recommends release. The PBSW makes reference to Mr McPhee's lengthy period of serious offending, his minimisation and denial with reference to the IO and his lack of transparency. While the PBSW commends Mr McPhee for his conduct within the prison environment, there is concern that he was aware of the vulnerability of those that he targeted. The PBSW concludes that Mr McPhee should engage with programmed intervention and reflect on his behaviour. The CBSW refers to the convictions relating to offences of a serious and violent nature spanning a lengthy period and that Mr McPhee fails to recognise the significant impact of his behaviour on his numerous victims. The CBSW is of the view that Mr McPhee requires to progress to conditions of lesser security so that he can practice and develop the skills he has learned on programmes within closed conditions and demonstrate that he has the ability to comply with licence conditions.
25. The Trial Judge Report (TJR) refers to Mr McPhee using violence against vulnerable people and causing them a great deal of harm and suffering noting that 'Much of the evidence was shocking in describing the level of violence you used.'
26. The Board is in agreement with the recommendations made by the PBSW and CBSW. The Board commends Mr McPhee for his conduct in custody. However, there are identified outstanding needs to address the risks that he presents. Engagement in the SCP will allow him to reflect on his offending and to identify strategies to reduce the risk that he presents. It is recorded in the dossier that Mr McPhee reports that he has always experienced difficulties with anger management and reactive behaviours. However, his conduct within the prison environment would suggest that he is capable of controlling impulsive and reactive behaviour and that his behaviour was targeted at vulnerable individuals. Following completion of the offence focused work, his case will be considered by PCMB to determine if he has outstanding needs. It may be that following completion of offence focussed work, his learning from such interventions will require to be tested in conditions of lesser security where he might be afforded access to his victim profile.
27. The Board notes the representations made by Mr McPhee's solicitor with regard to the fixing of an oral hearing. However, it did not consider that an oral hearing was fair or necessary at present because it is of the view that Mr McPhee requires, at the very least, to complete the identified interventions in custody before release given the seriousness of his index offence. The Board is in receipt of the Trial Judge Report and does not require to explore the circumstances of the index offences further in making this decision. The Board notes that Mr McPhee's solicitor advises that he has not been violent in custody, but this in in a very different regime to the circumstances he will face in the community. The nature of the predisposing, perpetuating and presenting risks Mr McPhee presents in the community will be informed by the

offence focused work he completes in prison and this and the post programme reports will, in turn, inform an adequately tailored community facing Risk Management Plan. In the circumstances, the Board did not consider that there were any valid reasons to fix an oral hearing at this stage.”

Submissions for the petitioner

[6] Counsel for the petitioner invited me to sustain pleas-in-law two (reduction) and three (ordain respondent to convene a differently constituted panel to reconsider the application for release on licence). The decision was unfair and the unfairness was material. The respondent was required to uphold the highest standards of procedural awareness (*Booth v The Parole Board* [2013] UKSC 61, *O’Leary v Parole Board for Scotland* [2022] SLT 623, *R (West) v Parole Board* [2005] UKHL 1, *Roberts (FC) v Parole Board* [2005] UKHL 45, The Parole Board (Scotland) Rules 2001 (“2001 Rules”) Rules 15A, 15G). There were material differences in procedural fairness in parole cases (*Hassett v Secretary of State for Justice* [2017] EWCA civ 331). The current case was similar to *Tarnowski v Parole Board* [2019] EWHC 2674 (Admin), where the High Court had found that the refusal of an oral hearing was unfair. The procedure was unfair for the following reasons. (i) There were significant facts in dispute. Unlike the social work reports, the solicitor’s submissions made clear that the petitioner acknowledged the serious nature of the charges and took full responsibility. There were factual differences relating to the index offence as recorded in the social work report: the respondent acted unfairly by stating that it did not need to explore the circumstances of the index events when there were significant matters in dispute. The petitioner had been in custody for a significant period of time and an independent assessment of risk required the respondent to assess by way of oral evidence how far he had developed. (ii) The representations raised issues which may in practice have a significant impact on a petitioner’s future management. The MAPPAs assessment will have

a significant impact on the petitioner's future management and should have been explored at an oral hearing. Further there was lack of clarity about the risk assessment. It was unclear whether an actual risk of serious harm assessment had been carried out or whether the risk of serious harm assessment was part of the LSCMI assessment: that matter could have been clarified at an oral hearing. Further, the petitioner sought to explore whether a robust management plan would mitigate his risks with programme work in the community. While neither social worker supported release this was not a case where the social work report stated that no licence conditions or management plans could be put in place. The respondent should have explored the licence conditions and management plan against the petitioner's view that he could be safely managed in the community. An oral hearing would have allowed for closer examination of the issue. The fight with his son was a matter which could have been explored and tested in oral evidence. The matter of a suitable address for release and licence could have been clarified at an oral hearing. (iii) The respondent failed to consider the prisoner's legitimate interest in not being able to participate in a decision with important implications for him. The petitioner had positively engaged, worked on his anger issues and been compliant, being described as a model prisoner. It was his first time before the respondent. He did not attend school on a full-time basis and had limited reading and writing skills. An oral hearing would have insured his meaningful participation. Counsel referred to an affidavit from the petitioner which set out how he perceived the procedure to have been unfair. Fairness and decision-making has practicable consequences, including to avoid resentment and non-compliance in the future. The issue of fairness does not depend on the outcome (*O'Leary, R v Chelsea College of Art and Design Ex p. Nash* [2000] ELR 686).

Submissions for the respondents

[7] Senior counsel for the respondents submitted that the Board did not err in law when it refused the petitioner's motion for an oral hearing and its decision of 10 February 2022 was not vitiated by procedural unfairness.

[8] The petitioner had failed to show that the procedure was actually unfair (*Smith v Scottish Ministers* [2021] CSOH 83). The original report from the PBSW and the CBSW were readily understandable as were the report from the trial judge and the written submissions from the petitioner's solicitor. There was nothing in these reports that was uncertain or required to be clarified by way of oral evidence. The petitioner's solicitor did not dispute that the petitioner posed a high risk and imminent risk of serious harm: there was no alternative assessment suggesting that the petitioner posed a lower risk. There was no disputed issues of fact (*Brown v Scottish Ministers* 2020 SLT 1303) and the petitioner had not identified any particular issue which he would have raised with the social workers if they had given oral evidence that might have resulted in the Panel arriving at its decision.

[9] Counsel further submitted that the petitioner's application for release was refused because he had not completed the offence focused work which had been previously identified as being required before he could progress to conditions of lesser security: an oral hearing would not have changed these underlying facts.

Analysis and decision

[10] In *Booth*, Lord Reed, with whom the other justices agreed, summarised his conclusions as to the circumstances in which the Parole Board is required to hold an oral hearing as follows:

“ii) It is impossible to define exhaustively the circumstances in which an oral hearing will be necessary, but such circumstances will often include the following:

a) Where facts which appear to the board to be important are in dispute, or where a significant explanation or mitigation is advanced which needs to be heard orally in order fairly to determine its credibility. The board should guard against any tendency to underestimate the importance of issues of fact which may be disputed or open to explanation or mitigation.

b) Where the board cannot otherwise properly or fairly make an independent assessment of risk, or of the means by which it should be managed and addressed. That is likely to be the position in cases where such an assessment may depend upon the view formed by the board (including its members with expertise in psychology or psychiatry) of characteristics of the prisoner which can best be judged by seeing or questioning him in person, or where a psychological assessment produced by the Ministry of Justice is disputed on tenable grounds, or where the board may be materially assisted by hearing evidence, for example from a psychologist or psychiatrist. Cases concerning prisoners who have spent many years in custody are likely to fall into the first of these categories.

c) Where it is maintained on tenable grounds that a face to face encounter with the board, or the questioning of those who have dealt with the prisoner, is necessary in order to enable him or his representatives to put their case effectively or to test the views of those who have dealt with him.

d) Where, in the light of the representations made by or on behalf of the prisoner, it would be unfair for a ‘paper’ decision made by a single member panel of the board to become final without allowing an oral hearing: for example, if the representations raise issues which place in serious question anything in the paper decision which may in practice have a significant impact on management in prison or on future reviews.

iii) In order to act fairly, the board should consider whether its independent assessment of risk, and of the means by which it should be managed and addressed, may benefit from the closer examination which an oral hearing can provide.

iv) The board should also bear in mind that the purpose of holding an oral hearing is not only to assist it in its decision-making, but also to reflect the prisoner’s legitimate interest in being able to participate in a decision with important implications for him, where he has something useful to contribute.

v) The question whether fairness requires a prisoner to be given an oral hearing is different from the question whether he has a particular likelihood of being released or transferred to open conditions, and cannot be answered by assessing that likelihood.

...

vii) The board must be, and appear to be, independent and impartial. It should not be predisposed to favour the official account of events, or official assessments of risk, over the case advanced by the prisoner.

viii) The board should guard against any temptation to refuse oral hearings as a means of saving time, trouble and expense.

ix) The board's decision, for the purposes of this guidance, is not confined to its determination of whether or not to recommend the prisoner's release or transfer to open conditions, but includes any other aspects of its decision (such as comments or advice in relation to the prisoner's treatment needs or the offending behaviour work which is required) which will in practice have a significant impact on his management in prison or on future reviews."

[11] The 2001 Rules provide:

"15A Oral hearings

- (1) If it considers that it is in the interests of justice to do so, the Board may —
- (a) on the application of the person concerned; or
 - (b) of its own motion,
- determine to deal with the case by way of an oral hearing' (Rule 15A)

[12] For the petitioner to succeed, it is not enough for him to show that a different procedure than the one adopted would have been better or more fair: he must show that the procedure was actually unfair (*Regina v Secretary of State for the Home Department ex parte Doody* [1994] 1 AC 531, *Smith v Scottish Ministers* [2021] CSOH 83).

[13] In the petitioner's case, the Board was not satisfied that such risk as the petitioner posed could be managed safely in the community (para 20) because there was an outstanding requirement for him to complete the Self Change Programme ("SCP") (para 26). Following completion of the course, his case will be considered to determine if he has outstanding needs (para 26).

[14] As can be seen from the last paragraph of the Written Submissions, the petitioner sought an oral hearing for two reasons.

[15] The first reason was that the Board would not have sufficient information upon which to make a decision. There was no information as to whether a MAPPA decision was still outstanding. It was unclear whether an actual risk of harm assessment was conducted, and whether the social worker had come to a conclusion following a risk assessment or had just speculated. There was no information as to the availability of anger management and conflict resolution courses in the community. It was worth exploring with the social worker why there was a requirement to do further work in the community after prison based work, when work in the community would suffice.

[16] This first reason was rejected by the Board, which, having considered the dossier, was satisfied that it had sufficient information to reach a decision (para 20).

[17] In my opinion it was not necessary for an oral hearing to be held in order to establish whether the Board had sufficient information. The Board considered the Written Submissions (para 21) so it was aware of the respects in which the petitioner claimed that information was lacking. The Board took the view that the need to address the petitioner's violence through the Self Change Programme was still outstanding and he was to begin that programme in the next few weeks (para 14). Thereafter his case was to be considered by PCMB to determine if he had outstanding needs and it might be his learning would require to be tested in conditions of lesser security (para 26). The Written Submissions did not dispute the need to do the outstanding SCP course. The information which the Written Submissions said was lacking had no bearing on the need to complete that course, but related to the different issue of the risk in the community and the availability of different courses in the community. The Board was entitled to make its decision as to the need to complete the outstanding course on the basis of the Written Submissions and the other

information before it and it was not necessary for that information to be supplemented by further information at an oral hearing.

[18] The second reason why the petitioner sought an oral hearing was that it would allow the petitioner an opportunity to make his case for release directly to the Board and clarify his position in relation to the index offences.

[19] That second reason was rejected by the Board on the ground that an oral hearing was not fair or necessary at that stage because the petitioner required to complete the SCP course in custody before release given the seriousness of his index offence: the Board was in receipt of the Trial Judge Report and did not require to explore the circumstances of the index offences further in making its decision (para 27).

[20] In my opinion, it was not necessary for there to have been an oral hearing to allow the petitioner to make his case directly to the Board. His solicitors had made his case in writing on his behalf. Any disadvantage arising from the petitioner's illiteracy was cured by him having legal representation. Nor was it necessary for him to clarify his position in relation to the index offences at an oral hearing: his position was set out clearly in the Written Submissions which state that, despite his denial in the dossier, the petitioner takes full responsibility for his actions and the role he played in the offences. The decision of the Board that he required to complete the SCP course was based on the seriousness of the offences, not on whether he took responsibility for them.

[21] Further, the circumstances of this case are far from those in which an oral hearing will be necessary in terms of *Booth*. Here the facts relating to the central issue that the SCP had not been completed were not in dispute. That central issue did not turn on the credibility of the petitioner, nor on an assessment by the Board of characteristics best judged by seeing the petitioner in person. No tenable grounds were advanced that a face to face

encounter was necessary to put or test the petitioner's case: the petitioner's position was adequately put in writing, and the petitioner did not seek to test the Social Work evidence by cross-examining the social workers on the basis of an alternative report. The central issue could be, and was, decided on the Written Submissions and would not have benefited from closer examination at an oral hearing. The petitioner participated in the process by the full written submissions made on his behalf; any additional oral participation by him personally or through solicitors would not have usefully contributed to the decision on the central issue. The Board's decision to refuse the oral hearing was not on the basis of likelihood of outcome. The Board acted impartially. It took into account the Written Submissions. It was not predisposed to favour the social workers' assessment over the petitioner: it decided that further assessment should take place after the outstanding SCP course was completed. The future management of the petitioner did not form part of the decision as that will not fall to be assessed until after the outstanding SCP is completed.

[22] In coming to the conclusion in paragraph 22 that it was satisfied that the interests of justice did not require an oral hearing, the Board applied the correct test under Rule 15A. The Board acted within the scope of its discretion and within the requirements of *Booth*. Further and in any event, the petitioner has failed to show that the procedure was actually unfair. The petition is refused.

[23] In conclusion, I note that in the Decision, which was dated 10 February 2022, the Board stated that there should be a review for possible release on licence 12 months from the date of consideration. The effect of that is that, even although this petition has been refused, the petitioner will in any event have his case considered by the Board in early course.

Order

[24] I shall uphold the respondents' pleas-in-law, repel the petitioner's pleas-in-law and refuse the petition.