OUTER HOUSE, COURT OF SESSION

[2025] CSOH 19

P574/24

OPINION OF LADY HALDANE

In the Petition of

LUKE MITCHELL

Petitioner

for

Judicial Review

Petitioner: S McPhee, advocate; Drummond Miller LLP
Respondent: Lindsay KC; Anderson Strathern

19 February 2025

Introduction

[1] On 21 January 2005, at the High Court of Justiciary in Edinburgh, the petitioner was convicted of murder. The petitioner was sentenced to life imprisonment with the punishment part of the sentence fixed at 20 years. His sentence was backdated to 14 April 2004. The petitioner therefore became eligible to be considered for release on licence in April 2024.

[2] The respondent is the Parole Board for Scotland ("the Parole Board"). The Parole Board for Scotland is a statutory body existing and discharging functions under the Prisons (Scotland) Act 1989, the Prisoners and Criminal Proceedings (Scotland) Act 1993, the Convention Rights (Compliance) (Scotland) Act 2001 and the Criminal Justice (Scotland)

Act 2003. One of its functions is directing the release on licence of prisoners subject to life sentences. It performs that function, amongst others, through a panel established in terms of the Parole Board (Scotland) Rules 2022. The panel is an independent and impartial judicial body. It can only direct the release on licence of a prisoner subject to a mandatory life sentence if satisfied that it is no longer necessary for the protection of the public that the prisoner in question should be confined.

[3] The petitioner was considered for release on licence by a panel of the Parole Board on 15 April 2024. The petitioner was provided in advance with his dossier comprising detailed information and reports, in accordance with the relevant rules and practice, before the panel considered his application for release on licence. Additional material was prepared in respect of the petitioner, in the form of two Serious Offender Liaison reports dated 1 February 2022, and 28 June 2023 ("the SOLS Reports"). The petitioner's solicitor sought to obtain copies of the SOLS reports and was provided with redacted copies of them following a subject access request submitted on behalf of the petitioner. The panel was provided with un-redacted copies of the SOLS reports. The petitioner was given notice that the un-redacted reports would not be provided as they were deemed to contain "damaging information" as that term is defined in rule 9 of the Parole Board (Scotland) Rules 2022.

[4] The petitioner's solicitor wrote to the respondent on 3 April 2024 intimating that he wished to raise as a preliminary issue at the oral hearing on 15 April. Specifically, he wished to address the question of whether or not the hearing could be conducted fairly, in the absence of the petitioner having sight of the un-redacted versions of the SOLS reports, or alternatively the appointment of a special advocate to consider the material. A motion to adjourn the hearing for that purpose was made, considered, and rejected by a majority of the panel. The panel determined by a majority that that the hearing could go ahead, and be

conducted fairly, without referring to the SOLS and further consideration of those reports would take place once the other evidence had been taken. The dissenting member felt the hearing was unfair but thereafter took an active part in the hearing without referring to the SOLS report.

[5] The decision to proceed with the oral hearing without having regard to the SOLS reports is the subject of the present challenge. The petitioner contends that the failure to have direct regard to these reports was unfair, and accordingly invites this court to reduce (declare to be of no legal effect) the decision of the Parole Board not to direct the release of the petitioner. The respondent denies any such unfairness, and contends that in any event the challenge is misconceived. Properly understood, the challenge is to the decision not to adjourn the hearing and appoint a special advocate to consider the SOLS reports. Further and in any event, if that be the true characterisation of the challenge, it is made in any event too late.

[6] Therefore, in summary, the question for determination is whether, the terms of the relevant rules and guidance notwithstanding, in putting the terms of the SOLS reports to one side in reaching its decision, the respondent acted unfairly in its consideration of the petitioner's application for release.

The relevant law and guidance

[7] For present purposes the relevant parts of the Parole Board (Scotland) Rules 2022 are as follows:

> **"Non-disclosure of information**
> 9.—(1) This rule applies where information mentioned in paragraph (2) is determined by the Scottish Ministers, a panel or the Board, as the case may be, to be information which should not be disclosed to the person concerned ('damaging information') for one of the following reasons—

(a) the disclosure would be likely to adversely affect the health, welfare or safety of any person,
(b) the disclosure would be likely to result in the commission of an offence,
(c) the disclosure would be likely to facilitate an escape from legal custody or adversely affect the safe keeping of any person in legal custody,
(d) the disclosure would be likely to impede the prevention, investigation or detection of offences, or the apprehension or prosecution of suspected offenders,
(e) the disclosure would be likely to have an adverse effect on national security,
(f) the disclosure would be likely to otherwise damage the public interest.

(2) The information is any—
(a) dossier information relating to the case,
(b) other information identified by the Scottish Ministers as relevant to the case,
(c) written representations made by a victim in relation to the case, a family member of such a victim, or a family member of the person concerned or any written record of oral representations made by such a person,
(d) other information or document provided in relation to the case.

(3) Where this rule applies—
(a) the damaging information is not to be sent to the person concerned,
(b) a written notice is to be sent to the person concerned—
(i) informing that person that certain information has not been sent to them because it has been classed as damaging information,
(ii) specifying the reason, of those listed in paragraph (1), for the information being classed as damaging information, and
(iii) setting out, as far as is practicable without prejudicing that reason, the substance of the damaging information.
(c) if the notice mentioned in sub-paragraph (b) is sent by the Scottish Ministers, a copy of the notice is to be sent to the Board at the same time.

(4) The panel is then to consider the damaging information and determine whether it is material to their consideration of the case.

(5) If the panel determines that the information is not material to their consideration of the case, the case may be determined without having regard to that information.

(6) If the panel determines that the information is or could be material to the case, it may make arrangements for the withholding of the information from the person concerned to be scrutinised at a preliminary hearing or such other proceedings as the panel considers appropriate.

(7) For the purpose of paragraph (6), the arrangements may include the appointment of a special advocate to review the damaging information and make representations to the panel as to—
(a) the justification for withholding the information from the person concerned, and
(b) whether the interests of justice, balanced against that justification, require any additional disclosure of any part of the information to the person concerned.

(8) The special advocate must not disclose the content of the damaging information to the person concerned, their representative, or to any person who is not a member of the panel.

(9) Following any steps taken under paragraph (6), the panel must determine whether any further disclosure of the information to the person concerned is required in the interests of justice, and, if so, must make arrangements to send that information to that person as soon as possible.

(10) In this rule—
'special advocate' means an independent solicitor or advocate,
'victim' means any victim of the offence for which the person concerned's current sentence was imposed.

Written representations

10.—(1) The person concerned may submit written representations in relation to their case, together with any other information or document which that person considers to be relevant and wishes the panel to take into account, within four weeks of the date on which the dossier information is sent to the person under rule 5.

(2) Subject to paragraph (3), where any other information, or any written notice under these Rules, is sent to the person concerned, that person may submit representations on that information or notice within four weeks of the date on which the information or notice was sent.

(3) Where information in relation to a case is provided to the Board or to a panel at a time which does not allow the period of four weeks mentioned in paragraph (2) to be made available, the panel must allow 5 working days (or such shorter period as appears to be in the interests of justice, having regard to the nature of the information) for the person concerned to submit representations.

(4) Representations under paragraph (2) may, in particular, include representations about the nondisclosure of any damaging information to which a written notice under rule 9(3)(b) relates.

Matters to be taken into account

11. In considering a case, the panel may take into account any matter which it considers to be relevant to the case, including—

(a) the nature and circumstances of any offence of which the person concerned has been convicted or found guilty by a court,

(b) the conduct of the person concerned over the duration of their current sentence or sentences,

(c) the risk of the person concerned committing any offence or causing harm to any other person if that person were to be released on licence, remain on licence or be re-released on licence (as the case may be),

(d) what the person concerned intends to do if released on licence, permitted to remain on licence, or re-released (as the case may be), and the likelihood of that person fulfilling those intentions,

(e) the effect on the safety or security of any other person (including in particular any victim or any family member of a victim, or any family

> member of the person concerned), were the person concerned to be released on licence, remain on licence, or be re-released on licence (as the case may be)."

[8] There is also published guidance to inform the Parole Board members in the discharge of their duties. Paragraph 32 is entitled "the operation of Rule 9" and provides as follows:

> **"32.1 General principles**
>
> 32.1.1 The Parole Board for Scotland is a judicial body created by statute. Its role is to make decisions on whether those serving sentences may serve the remainder of their sentence in the community, subject to licence conditions and under the supervision of a social worker. It sits as a court for the purposes of making such decisions. The Board makes decisions based on the application of the appropriate test for release or recall, depending on the type of sentence. All the release or recall tests applied by the Board are based on the Board's assessment of the risk presented by the prisoner. The Board must have regard to fairness and the need for public protection.
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> 32.1.2 The Board must consider all information which may be relevant to its assessment of the risk posed by the offender, and whether these can be managed in the community. It is a matter for the Board how much weight to attach to this information in reaching its decision. The Board is not constrained by the fact that information has not resulted in a criminal conviction, although this may affect the weight attached to the information.
>
> 32.1.3 The Board requires any and all information in the possession of other public bodies which might be relevant to risk. It is then a matter for the Board to decide how to treat that information. The Board's responsibility as a court includes the need to act fairly and in accordance with the European Convention on Human Rights. It will have regard to fairness, the rights of victims and information providers, and public protection in deciding how to treat the information.
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> **32.2 Legal principles**
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> 32.2.1 The Board requires to ensure that its proceedings are fair. Generally, the requirement for fairness will include a requirement that the offender is provided with all information available to the Board in reaching its decision, in order that they can address this information, either by challenging it, or providing their position in relation to it. This is provided for in Rule 5 of the Parole Board (Scotland) Rules 2022 which describes the dossier requirements and reflects common law and ECHR principles of fairness.

> 32.2.2 However, there can be cases where it would be contrary to the public interest to disclose information which is significant in assessing risk and applying the tests for release. Examples of this might include police intelligence in relation to an ongoing investigation, or information which might lead individuals to be vulnerable to retaliation. Rule 9 of the 2022 Rules is designed to deal with such situations. (*The terms of Rule 9 are then set out*)
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> 32.2.3 It can be seen that the information can be deemed to fall under Rule 9 either by Scottish Ministers, by the panel which is considering the case, or the Board… There will be infrequent occasions where the issue arises within the oral hearing, in which case the panel should make the decision. Where this arises, the panel will require to be satisfied that one of the criteria set out at 9(1)(a)-(f) is met before the information can be determined to fall under Rule 9. If so, the panel will then require to consider what information can be disclosed to the offender as the substance of the information, or whether it is not possible to provide the substance without prejudicing the reason for not disclosing the information. Rule 9(3) provides that the offender is notified in writing although it is likely that where the issue arises within the oral hearing, the panel will waive this requirement and notify the offender orally (using Rules 18, 20 and 24)."

[9] So far as the question of fairness in this context is concerned, the relevant considerations in a general sense were succinctly summarised recently in *Smith* v *Parole Board* [2021] CSOH 83 at paragraph 14 by Lord Braid as follows:

> "It is not enough for the petitioner 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, Lord Mustill at 560-561. As the respondents submitted, this involves consideration of what fairness requires as opposed to what might simply be desirable. Each case must turn on its own facts and circumstances."

[10] In *Osborn* v *Parole Board* [2014] AC 1115 Lord Reed, with whose judgment the other members of the court agreed, made three observations of general application in relation to procedural fairness (at paragraphs 65-72). These can be summarised as follows:

(i) It is for the court to determine whether the procedure adopted was fair; its function is not merely to review the reasonableness of the decision-maker's judgment of what fairness required .

(ii) The purpose of procedural fairness engages three values: (a) better decision-making; (b) avoidance of the sense of injustice which the person who is the subject of the decision will otherwise feel. The reason for that sense of injustice, said Lord Reed, was that justice is intuitively understood to require a procedure which pays due respect to persons whose rights are significantly affected by decisions taken in the exercise of administrative or judicial functions, failing which there can be a detrimental effect on their motivation and respect for authority; and (c) the rule of law: procedural requirements that decision-makers should listen to persons who have something relevant to say promote congruence between the actions of decision-makers and the law which should govern their actions.

(iii) Cost. As in *Smith*, that is not a consideration of direct relevance to the present case, however for completeness the point made was that in considering cost, account should be taken of the benefit of the long term savings achieved by better decision-making.

The petitioner's submissions

[11] Mr McPhee, on behalf of the petitioner, adopted his note of argument and submitted that the challenge to the decision in question had three aspects to it; firstly that the respondent had acted unlawfully in failing to have regard to the two SOLS reports and considering the evidence of witnesses, which had given rise to procedural unfairness; secondly that the respondent had failed to have regard to relevant factors, specifically that the content of the SOLS reports might have had a bearing on the question of risk; and

thirdly that in adopting an unfair procedure the respondent had violated the article 5 rights of the petitioner which, amongst other things, protects individuals from arbitrary detention.

Procedural unfairness

[12] Mr McPhee amplified those general propositions to submit that each ground arose from the approach taken by the respondent to the handling of the SOLS reports. The procedure adopted in relation to these reports was, looked at in the round, unfair. In the present context, and having regard to the key principles underpinning the need for procedural fairness as explained in *Osborn*, the two considerations that were particularly engaged were the fact that fair procedure is liable to result in better decisions, if decision-makers have all the relevant information and were able properly to test it, and secondly that fair procedure avoids the sense of injustice that a person subject to that procedure wold otherwise feel.

[13] Mr McPhee submitted that five propositions could be drawn from authorities such as *Osborn* which were applicable to the question of procedural fairness:

(i) That procedural fairness was about process, not outcome;

(ii) That a core virtue of fair procedure is respecting the dignity of those about whom decisions were being made and them being able to answer charges against them;

(iii) That a person should be able to participate and have a say in the process;

(iv) That the perception of fairness matters;

(v) That fair procedure is particularly important in parole cases where an unfair process can lead to resentment, hamper rehabilitation and ultimately be detrimental to public safety.

Mr McPhee acknowledged however that what fairness requires in practice depends on the circumstances (*O'Leary* v *Parole Board for Scotland* 2022 SLT 623 at paragraph 16).

[14] Turning to the application of those considerations to the question of why the hearing in this case was unfair, Mr McPhee suggested that there were three examples of this, firstly the lack of notice given under rule 9 of the intention to withhold damaging material; secondly, and linked to the first example, the inability to take informed legal advice on the matter, and thirdly the question of the evidence relied upon in the reports' conclusions. This submission provoked an intervention on the part of Mr Lindsay, for the respondent, intimating the respondent's concern that the grounds of challenge now being advanced bore no relation to the single ground of challenge in the petition. Mr McPhee acknowledged the validity of this concern, but nevertheless submitted that these matters all came under the umbrella of an inherent lack of procedural fairness, citing in support of each factor, firstly that only 20 minutes notice had been given of the intention to withhold the un-redacted SOLS reports under rule 9, the linked inability to give or take detailed legal advice, and the inability of the petitioner to know whether there might be any material in the un-redacted reports that might have been of assistance to him, notwithstanding the overall negative conclusions so far as his suitability for release was concerned.

[15] Mr McPhee also pointed to the part of the decision minute (paragraph 26) dealing with the question of whether and to what extent the report prepared by social workers contained within the dossier which was before the panel, known as the "Throughcare Assessment for Release on License" report ("TARL") might have had regard to what was contained in the un-redacted SOLS reports. What he suggested was the element of uncertainty on this point was another example of procedural unfairness where the social workers preparing the TARL report might have had regard to information in reports not

disclosed to the petitioner. In this regard the reasoning of the dissenting member in relation to the fairness of proceeding without having regard to the SOLS reports was adopted and endorsed by Mr McPhee.

Failure to have regard to relevant factors

[16] The SOLS reports were a relevant factor to which the respondent failed to have regard. This was so because these reports were prepared to address the question of risk, the reports may have influenced the authors of the TARL report in coming to their own conclusions; and the dissenting member considered that the reports might have raised questions worthy of exploration during the hearing. The respondent was required to take a "360" view considering all relevant factors (*Ryan* v *Parole Board for Scotland* 2022 SLT 1319). Equally, the respondent was fully entitled, indeed obliged, to take a proactive role in questioning all the available evidence (*R(D)* v *Parole Board for England and Wales* [2019] QB 285 at paragraph 117). The suggestion in the SOLS reports that the murder in question might have been, at least in part, sexually motivated, was not something that had been suggested previously and was relevant to the question of risk and ought to have been explored at the hearing. In short, the SOLS report was a relevant factor to the consideration of risk even if it did not assist the petitioner.

Convention rights

[17] Mr McPhee touched briefly on this part of the challenge. In short, the unfair procedure adopted by the panel had breached the petitioner's right to liberty and security in terms of article 5 ECHR. The convention mandated a fair procedure. If the procedure was held to be unfair at common law then it followed that it was incompatible with his article 5

rights (*Osborn*, paragraph 113). In closing, Mr McPhee emphasised that procedural fairness was not necessarily about outcome. Therefore, so far as disposal was concerned, reduction of the decision of 15 April 2024 would result in the mater being remitted back to be considered again. Even though that course would not achieve, in and of itself, release of the un-redacted SOLS reports, even that arguably symbolic outcome would be significant so far as the petitioner was concerned.

Submissions for the respondent

[18] The motion on behalf of the respondent was to refuse the order sought by the petitioner. There was no merit in any of the arguments in the petition, or anything submitted orally during the course of the hearing. It was of note, Mr Lindsay submitted, that in accordance with the decision made on 15 April 2024, there would require to be another review within a year of that date in any event, that is to say by April 2025. The panel considering the matter at that time would not be bound by what had gone on before, and would look at matters afresh. If, as the respondent contended, the true complaint being made by the petitioner was that a special advocate should be appointed, then that was a motion that could be made of new. Therefore there was very little in the way of practical consequence to this petition.

[19] Mr Lindsay adopted his note of argument. He submitted that at the outset it would be helpful to identify exactly what the true complaint was, and be clear as to what decision was actually under challenge. That was because there were two decisions actually made on 15 April 2024. The first was procedural, when by a majority the panel refused the petitioner's motion to adjourn and appoint a special advocate. That motion had been refused, and on that basis the panel proceeded to put the SOLS reports out of their minds

and determine the case on the basis of other evidence available to them. It was clearly stated in the decision minute that had that not been possible then they would revisit the question of the weight, if any, to be given to the SOLS reports at the end of the hearing.

[20] The second decision was the substantive decision to refuse the application for release on licence. Whilst those two decisions were related, they were nevertheless distinct. Importantly, the petition only sought to challenge the second decision. There was no challenge to the first decision to refuse the motion for adjournment and to appoint a special advocate. There were no averments in the petition challenging the first decision, and any arguments introduced in the note of argument and in oral submission based on lack of notice, lack of properly informed legal advice and the like were not in the petition and permission to proceed had not been granted in respect of those. Even if it was permissible to advance these arguments they were relevant to the first decision and not the second. Once it was appreciated that there were two distinct decisions, with the first not the subject of challenge, then the court required to proceed on the basis that the first decision was a lawful decision, lawfully made. It followed that the lawful basis of the second decision had to be assessed in the context of the unchallenged decision being lawful. Thus if it was lawful to refuse to adjourn and to refuse to appoint a special advocate, then the sole relevant challenge was that the panel should have taken into account the SOLS reports because there might have been something favourable to the petitioner contained within them. Since for present purposes there was no material difference between what was required at common law and under article 5 in terms of fairness, the only other aspect to the challenge was that a relevant consideration had been left out of account when the panel put aside the SOLS reports.

[21] That being so, Mr Lindsay submitted that since no special advocate had been appointed it would have been clearly unfair to have had regard to, or to take account of un-redacted copies of the SOLS reports when a redacted copy only was available to the petitioner and no special advocate had been appointed to remedy an procedural unfairness. Put another way, the whole petition was misconceived. Not only was there an absence of challenge to both decisions, but the misconceived nature of the petition was underlined when regard was had to the affidavit of the petitioner who was trenchant in his criticism of those who prepared the SOLS reports and indicated his intention to report medical personnel involved to the GMC in respect of some of their conclusions. That being so, it was surprising to think that the petitioner might want reports he considered to be fundamentally flawed to be taken into account by the panel.

[22] Mr Lindsay also pointed to the admission made on behalf of the petitioner at statement 9 of the petition where it is averred and admitted in response to the respondent's averments, that the panel put the SOLS reports out of their minds and considered other evidence in isolation. If the petitioner's position is to be understood as considering the reports to be fundamentally flawed, coupled with an admission that the same reports had been left out of account by the panel, it was hard to understand exactly what was the nature of the petitioner's complaint.

[23] It was important to note that there was no challenge to the lawfulness of rule 9 of the Parole Board Rules, or to the relevant guidance in chapter 32 of the published guidance. The panel had correctly had regard to rule 9, and to the associated guidance, and applied both to conclude that they should put the rule 9 information out of their minds and consider the other information available. There was nothing irrational or perverse in that approach, it

was clearly open to the panel to consider all of the other information relating to release on licence and leave out of account the un-redacted SOLS reports.

[24] Much had been made of the assertion that the social workers involved in preparing the TARL report might have had access to the SOLS reports, and perhaps have been influenced in some way by them. The panel had dealt with this question at paragraph 26 of the decision minute where it noted the concern raised in this respect. The minute records that in order to address any such concerns, the petitioner's solicitor was invited to make a request for the attendance of the social workers concerned, so that this matter could be explored with them. No such application was made. Mr Lindsay characterised this particular complaint as idle speculation, and submitted that there was nothing in the TARL report, which had been disclosed in un-redacted form as part of the dossier provided to the petitioner, to suggest that the conclusions of the social workers were based on anything other than the material listed within that report. If there was any genuine issue of potential "cross contamination" then the remedy lay in calling the social workers to give evidence.

[25] For all those reasons, Mr Lindsay submitted that the petition was entirely misconceived, and renewed his motion to refuse the order sought.

Analysis and decision

[26] That there is a requirement for procedural fairness in the context of administrative decision making is uncontroversial. That such a requirement might be thought to be particularly heightened in a situation where the liberty of the individual lies at the heart of the particular decision making process, is similarly uncontroversial. Exactly why this should be so, is elegantly and authoritatively set out in the passage from *Osborn*, quoted at paragraph 10 above.

[27] Here, the complaint in the petition and in respect of which permission to proceed was granted is a focussed one: that in failing to have regard to what was contained in the SOLS reports made available to them, the panel put aside material that might potentially have had relevance to the question of risk, even if the ultimate conclusions of the report were unfavourable to the petitioner. That was procedurally unfair, and in breach of the petitioner's article 5 rights. The challenge as developed in oral submission was undoubtedly wider than that contained within the four walls of the petition, and so I deal firstly with the question of the relevance, if any of those submissions.

[28] I accept Mr Lindsay's submission that, looked at fairly, the decision of 15 April 2024 is in fact comprised of two decisions, a procedural and a substantive one. The procedural decision, to refuse the motion to adjourn, and the allied motion to appoint a special advocate, has not been challenged by the petitioner. Issues of whether or not adequate time was afforded to consider the rule 9 notice, take legal advice and the like are all issues flowing from that procedural decision. Mr Lindsay is correct to say that in the absence of any challenge that procedural decision must be taken to be a lawful one.

[29] The focus then is on the question of whether or not there is any procedural unfairness, as that term is explained and understood in the relevant authorities, in the actions of the panel in this case in putting aside the SOLS reports and coming to a view on risk, and thus the question of whether or not the petitioner's application for release on license should be granted, on the basis of the other material available to it. Important context for that consideration is found in the following observations:

> "The evaluation of risk, central to the Parole Board's judicial function, is in part inquisitorial. It is fully entitled, indeed obliged, to undertake a proactive role in examining all the available evidence and the submissions advanced, and it is not bound to accept the Secretary of State's approach. The individual members of a panel, through their training and experience, possess or have acquired particular

> skills and expertise in the complex realm of risk assessment" (*R(D)* v *the Parole Board for England and Wales*, at paragraph 117).

[30] Thus it is to be assumed that such panel members, being possessed of the requisite skill and experience, are well equipped not only to assess risk, but to recognise when they are possessed of insufficient or inadequate information with which to make such an assessment. In the present case, an example of the panel applying that approach may be found in paragraph 26 of the decision minute where, in considering whether or not further information about the conclusions in the TARL report were required:

> "if the panel came to the view that further information about social workers' recommendations was required then the panel could adjourn the hearing for their attendance, but there was enough information to proceed at this point."

Later in paragraph 28, the minute records:

> "The panel agreed by majority that the hearing could go ahead without referring to the SOLS and further consideration would take place once the other evidence had been taken. The dissenting member felt the hearing was unfair but thereafter took an active part in the hearing without referring to the SOLS report."

[31] Having considered all of the evidence before it, the panel then concluded, as recorded in paragraphs 52 and 53 as follows:

> "52. The panel required to decide if it was satisfied that it was no longer necessary for the protection of the public that Mr Mitchell was confined. In undertaking this task, the panel had to first decide if it was considering attaching weight to the un-redacted SOLS reports, which had been submitted under Rule 9 of the Parole Board (Scotland) Rules 2022.
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> 53. The panel elected to approach this by putting the SOLS reports out of its mind, and considering the other evidence in this case in isolation. This is a familiar situation for the panel, as the preparation of the SOLS reports was unusual. The panel began by considering the index offending……."

[32] Having clearly set out the approach taken to the SOLS reports, the panel then set out its' conclusions on the question of risk and concluded that the petitioner should not be released. The factors bearing on that decision were, broadly, six in number, and might be

summarised as being (i) having regard to the index offence, it was clear that the petitioner was capable of causing serious and permanent harm; (ii) the nature and seriousness of the index offence made testing in the community particularly important and such testing was in its early stages; (iii) the petitioner had been downgraded back to closed conditions as a consequence of two incidents in which he administered controlled drugs to himself; (iv) the petitioner's substance misuse was significant as the trial judge had identified substance misuse as a factor in his index offending and substance misuse had been identified as a warning sign; (v) the petitioner's relationship with professionals was poor and he was not always honest with them; and (vi) the prison-based and community-based social workers did not support his release on licence as he presented a high risk of serious harm.

[33] Therefore, there was no requirement to consider what weight if any to attach to the SOLS reports, as, having brought to bear their skills and experience in the assessment of risk, the panel concluded that the other material available was sufficient for a concluded view on risk to be taken. It is noteworthy in this respect that the member of the panel who dissented in relation to the procedural decision, did not ultimately dissociate themselves from the conclusions on risk having considered all of the other material available which bore on that question.

[34] As was observed in *Smith*, the question is not whether a better or fairer procedure might have been adopted. The question, rather, is what fairness requires in this particular context. That assessment must be performed having regard to the fact that it is for the court to determine whether the procedure adopted was fair; its' function is not merely to review the reasonableness of the decision-maker's judgment of what fairness required (*Osborn, supra).*

[35] Once the decision had been taken to withhold the un-redacted SOLS reports in terms of rule 9, the panel were bound to proceed in accordance with the procedure set out in that rule. That procedure is not binary, and offers different options in terms of how to proceed, depending on the view taken by the panel of the significance, or otherwise, of the rule 9 material to their determination of the question of risk. The approach adopted in this case is supported by sub-paragraph (5) as follows: "If the panel determines that the information is not material to their consideration of the case, the case may be determined without having regard to that information."

[36] The panel determined to consider all of the material available to them without having regard to the SOLS reports, and see whether a concluded view on risk could be taken. The panel explicitly records that it would revisit the question of the SOLS reports in the event that it was not able to reach a decision on the available material. Such a staged approach is entirely consistent with the terms of rule 9 and the associated guidance. In particular, paragraph 32.2.1 of the guidance provides:

> "32.2.1 The Board requires to ensure that its proceedings are fair. Generally, the requirement for fairness will include a requirement that the offender is provided with all information available to the Board in reaching its decision, in order that they can address this information, either by challenging it, or providing their position in relation to it."

[37] The petitioner was provided with all information available to the panel used in reaching its decision, including the un-redacted TARL report. The petitioner expresses concern that the authors of that report may have been influenced by having read the SOLS reports before coming to their own conclusions on risk. There is no explicit reference to the SOLS reports within the body of the TARL report. The author of the SOLS reports is a consultant psychiatrist at the Orchard clinic in Edinburgh (name redacted). Within the TARL report there is a list of all documentation considered in its' preparation. In that list

there is reference to a psychological risk assessment and a personality assessment carried out by the same named psychologist at HMP Shotts. This does not in any way match or resemble the description of the author of the SOLS reports. The petitioner's concerns, however sincerely held, are not borne out by an objective consideration of the terms of the TARL report or the list of documentation actually considered by its' authors. In any event if there were any real concerns about this matter an invitation was extended to call the social workers who authored the report to give evidence. That invitation was not taken up on behalf of the petitioner.

[38] There is therefore no objective justification for concluding that the procedure adopted in this case was unfair. The SOLS reports which, as the respondent pointed out, are (i) adverse in their conclusions so far as the petitioner is concerned and (ii) in any event heavily criticised by the petitioner, was not taken into account in the assessment of risk. This approach accorded entirely with the relevant rules and guidance and in any event was not unfair to the petitioner. There is no basis to conclude that the members of the panel, skilled and experienced in the work that they do, did not do as they stated and put the terms of those reports out of their minds in their initial consideration of risk. This is what rule 9 required them to do. They felt able to reach a unanimous conclusion based on the other material before them. Again, there is nothing procedurally unfair in their doing so. No doubt the petitioner feels aggrieved at their conclusion. That is unsurprising from his perspective and may well lead to feelings of resentment as discussed in *Osborn.* However it is to be expected that the petitioner may well resent any outcome which is not the one that he hopes for. That does not mean that the process itself, considered from a "360" perspective, was unfair. For completeness, I should indicate that had I concluded that there was procedural unfairness in the approach of the panel to this case, the fact that the

petitioner will shortly have another opportunity to seek release on licence would not have been an answer to such unfairness. I accept Mr McPhee's submission in that regard.

[39] The challenge at common law to the decision of the Parole Board dated 15 April 2024 therefore does not succeed. Mr McPhee accepted that the challenge at common law and the challenge alleging a breach of article 5 ECHR were linked, and in effect stood or fell together. It follows that the article 5 challenge also does not succeed.

Conclusion and disposal

[40] In light of the foregoing conclusion, I shall repel the pleas-in-law for the petitioner, sustain the fourth plea-in-law for the respondent, repel the first second and third pleas, repel also the fifth plea for the respondent as being unnecessary, and refuse the petition. I will reserve all questions of expense meantime.