EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2021] CSIH 20
P529/20

Lord Malcolm
Lord Woolman
Lord Doherty

OPINION of the COURT

delivered by LORD MALCOLM

in the Petition

by

ANDREW BROWN

Petitioner

against

THE PAROLE BOARD FOR SCOTLAND

Respondent

Petitioner: Mackintosh QC, Crabb; Drummond Miller LLP
Respondent: Lindsay QC; Anderson Strathern LLP

23 March 2021

[1] In 1988 Andrew Brown was convicted of the murder of David Dunn. He was sentenced to life imprisonment with a punishment part of 14 years. This meant that in 2002 he could apply for parole. Since then the Parole Board for Scotland has reviewed his case on numerous occasions, however he remains in custody in closed conditions, currently in HMP Greenock. In April 2020 a life prisoner tribunal of the board declined to order his release on licence.

[2] In this petition for judicial review Mr Brown, hereafter referred to as the petitioner, challenges that decision. After a brief oral hearing the Lord Ordinary refused permission to proceed to a substantive hearing and dismissed the petition. The petitioner has appealed to this court in terms of section 27D of the Court of Session Act 1988. (The appeal follows the same procedure as a reclaiming motion, see Rule of Court 58.10.) The question is whether the petition has real prospects of success in the sense described in *Wightman* v *The Advocate General for Scotland* 2018 SC 388 at paragraph 9. That is a matter to be addressed of new by this court, see *PA* v *The Secretary of State for the Home Department* 2020 SLT 889. If there are such prospects, the appeal should be allowed and permission to proceed granted.

The background circumstances

[3] At the outset it should be noted that the petitioner has been in custody for 33 years, well over double his tariff. In order to do justice to the submissions made on behalf of the petitioner and in recognition of the importance of what is at stake it is necessary to set out the circumstances in some detail.

[4] Prior to the index offence the petitioner had not accumulated any serious or significant convictions. His early years in prison were marked by the misuse of drugs. In or about 1992 he assaulted another prisoner, but there have been no violent incidents since then. Drug failures and negative behaviour on his part, such as refusing to provide urine samples, were noted in the first parole review and proved an obstacle to the petitioner's progress in the prison system. In the mid-2000s he undertook offence focussed programmes and one to one work with the prison social worker. In 2007 Dr Gary Macpherson, a consultant clinical forensic psychologist, and at the time the lead psychologist at the State Hospital, reported that based on a structured review of risk:

> "Andrew Brown presents a low risk of serious harm or violence at this time. I consider there to be a low likelihood (in the absence of any significant episodes of violence in prison) that he would resort to serious use of violence."

He formed the clear impression that the petitioner was "stuck" in the system. The recommendation was that he needed to progress to more open conditions.

[5] A review in 2009 concluded that the petitioner had overcome his drug misuse problems. A review the following year noted that he had refused mandatory drug tests and recommended that he should progress to national top end conditions ("NTE"). Such facilities allow for a range of privileges, for example special escorted leave ("SEL"), designed to prepare the prisoner for the open estate. In a 2012 review, concern was expressed about the petitioner's lack of engagement with a risk management plan. There was no indication of illegal drug use. While he had not progressed to NTE, the view was that within 15 months he should be in open conditions and accessing the community. As at September 2012 he was classified as "low supervision" and had no outstanding programme needs.

[6] In 2013 a review noted that the petitioner had been transferred to HMP Shotts and that no progress had been made. The reasons for this were unclear. In 2015 it was recorded that the petitioner had lost all faith in those managing his sentence. The need for progress towards gradual release was restated. At the next review it was noted that in June 2015 he had been assessed as suitable for NTE at Greenock but no places were available. In June 2017 he was still in HMP Shotts and that year a review tribunal expressed much the same views as before.

[7] The petitioner was transferred to HMP Greenock NTE in June 2018. At an August 2018 review reference was made to positive reports on the petitioner and his approval for SEL. Six SELs proved successful and he was engaging with addiction services.

It was anticipated that he would be transferred to the open estate in about March 2020. In the meantime an application had been made for his temporary release for unsupervised access to the community and for a work placement.

The documentary evidence before the tribunal of April 2020.

[8] This petition concerns the outcome of the next tribunal, originally scheduled for 2019 but in the event proceeding by way of an oral hearing in April 2020. Throughout the intervening period the petitioner remained in HMP Greenock NTE. He continued to enjoy SELs but there was no further progress towards gradual release. An application was made for his immediate release. (This was unusual in that the norm is for such applications to be made once a prisoner has experience of the open estate, though it can be noted that this is not a requirement of the statutory test for release.) The application was supported by Ms Gail Hughes, head of social work at the prison; Mr Alan Brown, life prisoner liaison officer; Mr Michael McFarlane, a community based social worker and the petitioner's prospective supervising officer; and Dr John Baird, now retired but formerly a consultant forensic psychiatrist at the State Hospital and then with Greater Glasgow and Clyde Health Board. He has also served as a member of the board and its equivalent south of the border.

[9] In a letter dated 18 November 2019 Ms Hughes stated that she considered that the petitioner could be managed in the community. The package proposed by Mr McFarlane would offer an alternative to the traditional progress pathway. Risk assessors did not regard him as presenting a risk of serious harm. Rather than risk management, he required support in terms of his institutionalisation and community resettlement. In a further letter to the board of 11 February 2020 Ms Hughes stated that she had had discussions with Dr Baird and Alan Brown. Unlike his feelings about the prison service, the petitioner's

attitude towards the community social worker was positive. She remained of the view that further seriously harmful offending was not likely. It was anticipated that any problems after release would involve non-compliance with licence conditions or public order offences.

[10] Reports to the board from Mr McFarlane began with the view that there should be a staged return to the community. However in his subsequent report of 5 November 2019 he indicated that after reflection and consultation with colleagues he had come to the view that the petitioner could be managed in the community by a robust management plan. He noted that the petitioner had been in custody for 31 years and, despite the propensity for conflict situations in the prison environment, he had not acted violently since 1992. In 2013 a generic assessment reported that he had no further programme needs. Mr McFarlane recommended immediate release. In a further report he informed the board that the petitioner's daughter would provide support after her father's release which would be of considerable value in his transition.

[11] Dr Baird prepared a report dated 19 August 2019. He reviewed the petitioner's time in prison and parole board assessments. He dealt with the petitioner's history and personal circumstances before the index offence. He noted that previously two psychologists had expressed the view that the risk of further serious offending was low. Nonetheless over the years the view that there should be a gradual return to the community prevailed. After interviewing the petitioner it was apparent that his daughter is an important figure in his life. He took full responsibility for the index offence. The petitioner was of the view that his sentence has been managed unfairly, however he spoke positively about his current community social worker and his personal officer. He did not harbour anger or resentment, and there was nothing to suggest a negative attitude which might obstruct future professional contact and supervision. He was cognitively intact and there was no evidence

of mental illness. Being on maintenance methadone would be a challenge for him but his good relationship with those supervising him would be of value in assisting him to adjust to his release.

[12] Dr Baird expressed the opinion that if released the petitioner would not present a risk of causing serious harm or of serious offending. He had not demonstrated violent conduct since 1992. His progress in the system had been obstructed for other reasons. He now has a constructive relationship with those working with him.

[13] As a matter of generality, Dr Baird supported a gradual return to the community for life prisoners, but direct release from closed conditions was not without precedent. Occasionally a case will come along where a different approach can be considered. This was such a case. Further reports would be necessary for the purpose of developing a comprehensive and robust release plan, and in advance of expressing a firm opinion he would require another interview with the petitioner.

[14] A second report from Dr Baird was provided in a letter dated 27 January 2020. In the meantime he had spoken to Ms Hughes, Mr Brown and Mr McFarlane and he interviewed the petitioner twice. Mr McFarlane had explained the preparatory work carried out by himself and colleagues and what was proposed for the petitioner by way of support in the community from himself, other agencies and the petitioner's daughter. Mr McFarlane did not foresee re-offending; any problems would probably be related to self-isolation. From his knowledge of the area where the petitioner would live, his exploitation by others was unlikely. Similarly Ms Hughes had no concerns regarding further offending or risk to the public. The petitioner's community outings were successful. He had resisted exploitation in prison. Ms Hughes identified no particular vulnerability in this regard in the community.

Both she and Mr Brown told Dr Baird that they supported the immediate release of the petitioner on licence.

[15] Dr Baird expressed his opinion as follows:

> "Based on my own assessments of Andrew Brown and his case, and supported by the opinion of the various officials who are currently involved, all the information and opinions point in the same direction and support release when the issue is considered against the test".

The test referred to is that contained in section 5(b) of the Prisoners and Criminal Proceedings (Scotland) Act 1993, namely whether continued confinement is necessary for the protection of the public.

The oral evidence at the tribunal hearing

[16] The petitioner was present and represented by a solicitor at the tribunal hearing on 6 April 2020. The tribunal minute summarises the evidence led.

[17] Mr Brown provided an update on behalf of the prison service. He spoke in positive terms about the petitioner. In December 2019 an application for temporary release had been made, however these take several months to process. If not released the petitioner would have been expected to continue with SELs and take up a work placement with a Scottish Premiership football club; however because of the pandemic all community access was suspended.

[18] Ms Hughes confirmed her support for immediate release. She came to this view after having discussed matters with Dr Baird. The petitioner had a strong relationship with Mr McFarlane and the risk management plan was extremely robust. The pandemic was a cause for concern, but she deferred to Mr McFarlane's view on whether this would interfere

with the necessary support. In her view the petitioner did not pose a risk of violence or serious harm to others.

[19] Mr McFarlane stated that he had been heavily influenced by Dr Baird's view as to the petitioner's suitability for release. His earlier position had been quite risk averse. He altered his view after considering Dr Baird's position and discussing the case with colleagues. After over 30 years in prison clearly the petitioner would require considerable help to develop everyday skills. The petitioner presented a low risk of harm; progression to the open estate was not necessary. Mr McFarlane would have very regular contact with the petitioner who would be helped to access a range of support services. Despite the pandemic restrictions he could be safely managed in the community. His supervisors had approved the risk management plan. He would be able to visit the petitioner in his home, including by way of unannounced visits. Life sentence prisoners were not usually offered home visits.

[20] The petitioner could phone Mr McFarlane at any time. Any needs would be addressed by support staff. A flat had been identified in a suitable community. Mr McFarlane did not know whether housing officials and other agencies would be able to attend the petitioner's home, but in any event he and his assistant could provide the necessary support and assistance. He had not investigated the position regarding GP registration nor whether addiction services were operating on a face to face basis. The petitioner had coping mechanisms and substance abuse was not a concern. He was stable on a methadone prescription. Mr McFarlane was struck by the daughter's connection with her father. She would alert him if she had concerns.

[21] Dr Baird spoke to his reports (summarised above). Notwithstanding the pandemic he remained supportive of immediate release; indeed the quiet climate could be beneficial. To his knowledge GPs were still functioning and he had no concerns in respect of the

methadone prescription. Even if things went awry, he did not foresee any risk to the public. The petitioner's continued confinement some 18 years after the expiry of his tariff was not related to any question of risk to the public. It was not necessary for him to progress to the open estate. He met the statutory test for release.

[22] The petitioner gave evidence. If he was not managing he would ask for help. His daughter could assist him, for example with form filling. The pandemic restrictions would help him as he could isolate himself. He preferred his own company. The property identified is perfect. No one knew him there. He had enough sense not to put himself at risk. In prison he had been housed with sex offenders and he had not reacted to them. (This was said in the context that his victim's reputation of having indecently assaulted women was an element in the motivation for the index offence.) He would abide by licence conditions and follow Mr McFarlane's instructions. He would let him know if he was not coping. If the view was that he should return to prison he would accept that. Cognitive behavioural therapy had helped him learn where his violent conduct came from. He was stable on methadone and his daughter was his number one reason to remain drug free. He had had enough of prison.

The tribunal's decision and reasoning

[23] After summarising the submissions made on behalf of the petitioner the tribunal noted that using what it described as the LSCMI risk assessment tool, the petitioner had been assessed as presenting a medium level of risk and needs. Identified risk factors were contained in the social work reports in the dossier. The tribunal said that the only "objective support" for immediate release was founded almost wholly on Dr Baird's opinion. This was because Ms Hughes' view was influenced by Mr McFarlane who in turn had been "heavily

influenced" by Dr Baird. So far as Dr Baird's evidence was concerned, the tribunal could not agree that the petitioner met its test for release. One member might have approved release but was concerned as to whether the pandemic restrictions would affect the availability of the necessary support. In particular there was a lack of clarity as to how local GP, housing, and drug services were operating.

[24] The tribunal noted that the petitioner had been in custody for over thirty years and had experienced no unescorted time in the community. Even in the absence of a pandemic there would be grave concerns about releasing him in such circumstances. In the current climate the board could not be persuaded that he could be safely managed in the terms suggested by Mr McFarlane. To release him after such a long period in prison with no prior unescorted testing would require an exceptionally robust and detailed management plan. The proposed plan was not materially different from that usually encountered.

[25] Two of the tribunal's three members took the view that even without the current difficulties the petitioner would not be suitable for release until he had undertaken some unescorted community testing. He had been in custody for a long time. In their view to release him before progression to the open estate would be indefensible and would in all likelihood set him up to fail. The majority view was that he could not be considered for release until he had progressed to the open estate. A review period of 12 months was fixed though the tribunal did not necessarily expect him to have reached the open estate in that period or to be suitable for release within a year. The dissenting member did not see progress to the open estate as essential to further consideration of his release and would have preferred a review within 6 months.

The submissions on behalf of the petitioner

[26] The over-arching submission for the petitioner was that the minute of the tribunal hearing demonstrates that the tribunal failed to give the matter the anxious scrutiny, or careful consideration, required having regard to the importance of what is at stake. The same obligation rests on the court in these proceedings. The statutory test is whether continued confinement is necessary for the protection of the public. The tribunal's reasoning failed to engage with the expert evidence on this critical issue. No remotely adequate justification was provided for the tribunal's decision, especially since it was in the face of all the relevant evidence. The conclusion reached did not follow from the evidence nor from anything said by the tribunal in its reasoning. The tribunal acted unreasonably.

[27] Moreover the tribunal reached its decision on the basis that only Dr Baird's evidence had a bearing on the relevant issues. There was no good reason to discount or ignore the evidence and reports from other professional persons giving their own expert assessments on various matters, not least the low risk to the public if the petitioner was released and the robustness of the plan to manage him in the community. Furthermore the majority of the tribunal adopted an *a priori* position that progression to the open estate was essential before suitability for parole could be considered. This diverted the decision-maker from the statutory test and from the preponderance of evidence as to the low risk of harm to others. It appeared from its reasoning that the longer the petitioner remained in closed conditions the more difficult it would be for him to gain release. If the tribunal was primarily concerned that he might simply fail to adjust to life in the community, this would have to be associated with public protection issues of sufficient gravity to justify continued confinement.

[28] The focus on points of detail which could easily and quickly have been checked, for example whether the petitioner could register with a GP and as to the medical services available, illustrated a lack of the appropriate intensity of scrutiny and care.

[29] The submission was that there is a case of substance on a matter of great importance to the petitioner which should be allowed to proceed to a substantive hearing on its merits.

[30] In the course of the submissions for the petitioner a number of cases were cited, including; *Bugdaycay* v *Secretary of State for the Home Department* [1987] 2 WLR 606 ; *Pham* v *Secretary of State for the Home Department* [2015] 1 WLR 1591; *R(Wells)* v *Parole Board* [2019] EWHC 2710 (Admin); and *R(D and another)* v *Parole Board and another* [2019] QB 285.

The submissions for the board

[31] For the board it was contended that the court could interfere only in an exceptional case or if no sensible person applying their mind to the matter could have reached the tribunal's decision. The outcome was reasonably available to an expert tribunal which should be afforded due deference. The assessment of risk is a specialist matter requiring fine judgment. Regard was had to all relevant and material issues. It was reasonable to conclude that the petitioner's case rested on Dr Baird's opinion, and it was open to the tribunal to disagree with him.

[32] The tribunal was entitled to have concerns as to the services available to the petitioner in the community. The majority was entitled to require this prisoner to undertake unescorted leave in the community before considering his suitability for release. This was not elevated to an absolute rule in all cases. Overall the reasoning was clear, coherent, and more than sufficient to explain the outcome. The case will be reviewed again in or about

April 2021 when, amongst other things, issues relating to the pandemic restrictions can be addressed.

[33] It was doubted that the concept of anxious scrutiny had any application to the case. The petitioner had no right to liberty unless the tribunal so directed after addressing the specific statutory test, a matter which it was accepted would require to be given careful consideration.

[34] Reliance was placed on observations made in *B* v *Parole Board for Scotland* 2020 SLT 975 at paragraph 64, and on *Laidlaw* v *Parole Board for Scotland* 2008 SCLR 51 at paragraph 33.

Analysis and decision

[35] In *Pham*, (cited above) the UK Supreme Court observed that a flexible approach can be taken to the principles of judicial review, especially when important rights are at stake. Reasonableness review (and proportionality) involve considerations of weight and balance, with the intensity of the scrutiny and the weight to be given to the primary decision-maker's view dependent on the context: paragraph 60. The common law no longer insists on the uniform application of the rigid test of irrationality once thought applicable under the so-called *Wednesbury* principle. The court observed that in the context of fundamental rights it is a truism that the scrutiny is likely to be more intense than where other interests are involved: paragraphs 94/95.

[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] In our view it is not necessary to resolve whether article 5 is engaged. It is clear that the above authorities are not dependent on ECHR jurisprudence: see *Osborn*. 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.

[38] Rather than address this body of evidence, the tribunal appears to have attached significance to a medium LSCMI (Level of Service Case Management Inventory) assessment of risks and needs. This seems to be a reference to a report of 22 March 2018 carried out by a social worker when the petitioner was at HMP Shotts. This measure requires a combined assessment of risks and needs – it is not a specific risk assessment tool. A medium score was a reduction from the previous level. The author of the report stated that the petitioner did not have a pattern of perpetrating serious harm and did not meet the criteria for a risk of serious harm.

[39] Be that as it may, the only question before the court is whether the real prospects of success test as described in *Wightman* is satisfied. If the answer is yes, permission must be granted and the proceedings remitted to the Outer House for further procedure; we cannot use this appeal to resolve the merits of the legal challenge. In our opinion there are arguments of sufficient substance to the effect that the tribunal did not give the evidence the required degree of scrutiny, and that its reasons for rejecting the evidence of Dr Baird and the other professional witnesses are inadequate. In other words, the petition has a real prospect of success. It follows that the appeal is allowed, permission to proceed is granted, and the case will return to the Outer House for a substantive hearing.