OUTER HOUSE, COURT OF SESSION

[2021] CSOH 83

P128/21

OPINION OF LORD BRAID

In the petition

GEORGE SMITH

Petitioner

against

THE SCOTTISH MINISTERS

Respondents

Petitioner: Leighton; Drummond Miller LLP
Respondent: McGuire; Scottish Government Legal Directorate

13 August 2021

Introduction

[1] The short point at issue in this petition is whether a decision reached by the respondents' Risk Management Team (RMT) regarding the petitioner's progression within the prison estate operated by Scottish Prison Service (SPS) was procedurally unfair due to a failure to invite the petitioner to attend the meeting at which the decision was taken. I have concluded that it was.

[2] The petitioner is serving a life sentence of imprisonment for murder, currently in closed conditions. He wishes to be released on licence by the Parole Board for Scotland, but to have any realistic chance of achieving that he will first require to be transferred to open

conditions. He has formally applied for "progression", that is, a transfer to less secure conditions.

[3] That application was considered by the RMT at a meeting held on 18 November 2020. The outcome of the meeting was a recommendation that the petitioner progress to National Top End (NTE), which has semi-open conditions, rather than to the Open Estate (OE).

[4] The petitioner is dissatisfied with this decision. He maintains that it will take him at least two years to progress through NTE to the Open Estate, thus delaying his possible release date by at least that period. He challenges the decision not on its merits but on the ground that it was reached in a procedurally unfair manner due to his not having been invited to attend the RMT meeting. He seeks declarator that the decision was taken in a procedurally unfair manner, and reduction of the decision.

The petitioner

[5] The petitioner was sentenced to life imprisonment for the murder of his neighbour, his sentence commencing on 17 June 1985. His punishment part of 14 years expired in 1999. In 1995, after he had been transferred to an open prison, he confessed to a social worker that he had raped his victim before he murdered her, which had not previously been known, whereupon he was transferred back to closed conditions where he has remained ever since. Varying views have been expressed from time to time as to the level of risk which he poses. His case has been considered by the Parole Board for Scotland on several occasions, the last review before the RMT meeting under consideration taking place on 24 June 2020. The Board's decision and relative Minute appear from page 298 of the joint bundle. In summary, the Board was satisfied that it was necessary for the protection of the public that the

petitioner should be confined. It accepted recommendations from the Prison Based Social Worker (PBSW) and the Community Based Social Worker (CBSW) that a phased return to the community by way of progression to open conditions was necessary to ensure that a robust risk management plan could be appropriately tested by staged and managed periods of home leave (joint bundle, page 303).

The prison estate

[6] The prison estate comprises closed conditions, which are secure; and NTE and OE, which are less secure. The issues of where to hold a prisoner and when if at all to move a prisoner to another place of detention are matters for the discretion of the respondents: Prisons (Scotland) Act 1989, section 10. Detailed guidance has been adopted by the respondents in relation to how they will determine the progression of prisoners towards less secure conditions and eventual release: Risk Management, Progression and Temporary Release Guidance version 1.0, (6/5 of process). According to the guidance, section 8.2 (joint bundle, page 403), the purpose of NTE is:

> "primarily to provide the opportunity for life sentence offenders to prepare for release, have increased self-responsibility and to be gradually tested in the community, in order that they are better prepared for transfer and succeed within open conditions."

The "ultimate aim" is said to be:

> "gradual re-integration into the community and/or to allow the offender to evidence reduction in their risk."

The purpose of OE (section 8.3) is:

> "to provide an opportunity for suitable… life sentence… offenders to have exposure to additional responsibilities associated with increased freedoms in the community and to allow the offender to further evidence reduction in their risk and demonstrate to the Parole Board that they are suitable for release."

[7] Section 13.1 of the guidance describes the "progression pathway for life sentence offenders". It states that:

> "The SPS seeks to provide a life sentence offender with a reasonable opportunity, by the time of the punishment part expiry … to demonstrate that they are suitable for release by the Parole Board for Scotland.
>
> In the vast majority of cases this is unlikely to require more than two years in the NTE followed by two years in the OE. The actual time required to spend in the NTE and OE will be a matter for the RMT, based on the risks presented" (joint bundle, page 440).

A range of relevant factors is then set out, followed by a number of means by which an offender might be tested in the community, it being stressed that:

> "the opportunities required to demonstrate reduction of risk is a matter for the RMT and it is for the RMT to decide what is necessary at each stage …".

The ultimate aim is for:

> "the offender to demonstrate that their risk is manageable and that they are suitable for release."

[8] While there is no absolute requirement that a prisoner must progress to the Open Estate before being released on licence, standing the current assessment of the petitioner's risk he is unlikely to be released without first progressing through the Open Estate and demonstrating that he can be safely managed in the community. Further, while the respondents do not formally admit that the petitioner will require to spend two years in NTE before being transferred to the Open Estate, the reference to two years in the guidance makes clear that two years is if nothing else a useful rule of thumb as to how long he might spend there: on any view, a transfer to the NTE will delay the time by which he might be considered no longer to present a danger to the public. Finally, although counsel for the respondents was at pains to draw a distinction between decisions taken by the Parole Board

and decisions taken by the RMT, the repeated references to the Parole Board in the guidance show that, in the context of progression, there is a clear and obvious link between the two.

Membership of the RMT

[9] The guidance includes specific provisions in relation to the membership and role of the RMT. In brief, the RMT is a multi-disciplinary team of professionals representing a range of agencies involved in the management of offenders. It is the decision-making body that considers offenders for progression to less secure conditions. Section 10 of the guidance states that the chair of the RMT (the deputy governor whom failing the governor in charge) must give consideration to the required membership of the RMT meeting to ensure that it contains an appropriate range of disciplines that accurately reflects the specific risk and need of the offender. In addition,

> "the Chair of the RMT should consider the benefits on a case by case basis, of each prisoner making their own representation through attending the RMT meeting, where appropriate" (joint bundle, page 410).

The petitioner's progression to date

[10] The petitioner's management and possible future progression was considered by the RMT at a meeting on 11 September 2019. It was decided that there was no need to retain a previous recommendation that the petitioner undertake certain psychological work, and that an application for progression would be appropriate. The petitioner was not invited to that meeting and subsequently lodged a complaint about that (and about other matters, not relevant to this petition). The initial response to that complaint by a Residential First Line Manage included the following:

> "… your initial RMT was for discussion. It is not deemed appropriate or necessary at this stage of the RMT to invite prisoners to attend as it is only for discussion, not

> progression. As your RMT has not started in terms of progression, you will definitely receive an invite from the chair." (joint bundle, page 334)

[11] The petitioner was not happy with that response and escalated his complaint to the Internal Complaints Committee (ICC). His complaint was not upheld, the ICC stressing that the RMT in question had been a "general discussion" rather than a "Progression RMT", and referring to section 10 of the guidance (above). The ICC further stated that the Chair had concluded that there was no requirement for the petitioner to attend "at this stage" (joint bundle, page 342).

[12] In 2020 the petitioner applied for progression as he had been invited to do. The application form appears at pages 470 and 471 of the joint bundle. It is a two-page pro-forma document with limited space for free text. The petitioner (literally) ticked all the necessary boxes to qualify him as eligible for consideration for progression. He referred to a psychological risk assessment (PRA) conducted by Rachel Roper in 2019, commissioned by his solicitors, which recommended that he be transferred to the Open Estate, and to the recommendations of the PBSW and CBSW to the Parole Board to similar effect. In all, his submissions amounted to just over 15 lines of text, only five of which were devoted to his desire to transfer to Open Estate rather than National Top End.

[13] The RMT met on 18 November 2020. The composition of the meeting comprised a range of professionals from different disciplines in accordance with the guidance. However, the petitioner was not invited. Counsel for the respondents told me that no consideration was given to inviting him, because of a blanket policy decision previously taken during Covid to suspend the attendance of all prisoners at all RMT meetings. The petitioner was not told in advance of the meeting that he was not to be invited. The meeting had available to it a wealth of information about the petitioner (listed at page 348 of the joint bundle)

which included the Parole Board for Scotland's recommendations but not, apparently, the PRA nor the reports of the PBSW and CBSW although it did know of their existence. A detailed risk assessment was prepared in advance of the meeting, covering various matters which it is unnecessary to list for present purposes. The decision of the RMT is set out at page 367 of the joint bundle. In so far as material it states:

> "Following a detailed explanation of the information available, the group acknowledged that [the petitioner] had made significant progress during his time in HMP Edinburgh. After an in-depth discussion, the RMT concluded that [the petitioner] would benefit from progressing to National Top End. The RMT recognised that [the petitioner] has previously stated that he was only motivated to progress to the Open Estate. However, due to the length of time he has spent in closed conditions the RMT concluded that a progression route through the National Top End would be more beneficial for [the petitioner]. As such the RMT concluded that they supported the application for [the petitioner] to progress to National Top End."

A number of reasons were then listed, all of which justify a transfer to less secure conditions but none of which bear upon the decision to opt for National Top End as opposed to the Open Estate.

The law

[14] 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. While ultimately the decision as to whether a process was fair or not may ultimately be an intuitive one, and to an extent is context specific, as a matter of generality fairness will very often require that a person who may be adversely affected by a

decision should have an opportunity to make representations on his own behalf, and should be informed of the gist of the case which he has to answer: *Doody*, above, page 560.

[15] Further guidance is found in the Supreme Court case of *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:

1. It is for the court to determine whether the procedure adopted was fair;
2. 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;
   (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.
3. Cost. While not of direct relevance to the present case, 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. Cost was not a conclusive argument against the holding of an oral hearing.

[16] Since the above authorities also make clear that the standards of fairness are not immutable but change from time to time, to those observations might be added, in the present climate, an observation about the extent to which the Covid pandemic may impact upon the practicability of the procedure to be followed in any given case. In that sense, it is not dissimilar to cost, inasmuch as it is an external factor which may have a bearing on the procedure. However, like cost, I would suggest, it cannot be determinative.

[17] The issue in *Osborn* was whether the Parole Board, as a matter of procedural fairness, required to hold oral hearings before determining an application for release or transfer to open conditions. That case was distinguished by the Court of Appeal in *Regina (Hassett)* v *Secretary of State for Justice* [2017] EWCA Civ 331, where the decision-making body was not the Parole Board but CART (Category A Review Team). The Court of Appeal held that the considerations affecting CART were different from those affecting the Parole Board; that the guidance issued by the Supreme Court was specific to the Parole Board, where the common law dictated that oral hearings be held in a wider range of cases; and that the guidance did not apply with the same force to security categorisation decisions by CART.

[18] *Osborn* and *Hassett* were recently considered by Lord Tyre in *Brown* v *Scottish Ministers* [2020] CSOH 45; 2020 SLT 1303. That case is similar to the present one in as much as it was the fairness of an RMT meeting to which the petitioner had not been invited which was in issue. Although Lord Tyre held, on the facts, that the meeting in that case had not been unfair, he expressed the opinion that in any such case what matters is the nature of the decision that has been made, rather than the identity of the body tasked with making it. If in all the circumstances of a case procedural fairness required personal attendance by an applicant then provision must be made for it (para [19]).

Submissions for the petitioner

[19] Counsel for the petitioner adopted his written note of argument. The nub of his argument was simply that the procedure adopted was unfair. The petitioner had completed his application on the understanding that he would be permitted to attend the RMT. There was more that he could and would have said on his own behalf had he been told he was not after all invited (reference in this regard was made to an affidavit by the petitioner lodged in process). The assurance previously given was a factor to be taken into account in assessing procedural fairness even if it fell short of giving rise to a legitimate expectation in itself. Only two of the attendees at the meeting had any real knowledge of the petitioner. There may have been factual matters in dispute which he could have clarified had he been there. The unfairness was compounded by the fact that the professionals who knew the petitioner were not at the meeting either. The fact that the petitioner was significantly post-tariff was also relevant in deciding whether or not it had been fair not to invite him: *cf Brown* v *Parole Board for Scotland* 2021 SLT 687. The petitioner ought to have had the opportunity of addressing the RMT in person, in order that they might have "the measure of the man". Counsel invited me to follow *Osborn* in preference to *Hassett*; and to distinguish *Brown* v *Scottish Ministers* (above) on its facts. He sought reduction of the decision, rather than merely declarator, even though that might have the practical effect of delaying the petitioner's transfer to less secure conditions.

Submissions for the respondent

[20] Counsel for the respondent also adopted his written note of argument. He reminded me, under reference to *Doody*, above, that the question was not whether a fairer procedure might have been adopted but whether procedural fairness required the attendance of the

petitioner at the RMT meeting; which, he submitted, it did not. He emphasised the nature of the decision being taken - an internal prison management decision. He drew attention to the guidance and to the nature of the risk assessment process which had to be carried out. There were no factual disputes, as could be seen from a reading of the papers before the RMT. A comprehensive analysis of risk had been carried out. The RMT knew about the views and recommendations of the PBSW, the CBSW and the PRA. Those reports had in any event been prepared for the Parole Board of Scotland and were not directly relevant. The authors had not specifically been considering the question of whether the petitioner should be moved to National Top End or Open Estate. The petitioner could not have added anything which he had not said in his application or which the RMT did not already know. That he was post-tariff was irrelevant. The RMT was aware of that. The decision whether he should transfer to OE or NTE was exclusively one for the RMT. The present case was closer on its facts to *Hassett* than to *Osborn*. While to an extent counsel agreed with Lord Tyre in *Brown*, he qualified this agreement by submitting that it was often difficult to divorce the nature of the decision from the identity of the person taking it. It could not be said that any unfairness had arisen from what had happened at the meeting. Even if, absent Covid, the petitioner might have been at the meeting, his non-attendance in the circumstances was not unfair. On the question of remedy, were I against the respondents, although the respondents were of the view that a declarator would suffice, they did not oppose reduction if the petitioner insisted upon it.

Decision

[21] I respectfully agree with Lord Tyre in *Brown* (above) that the nature of the decision is more important than the identity of who happens to be taking it. While *Osborn* happened to

be a case involving the Parole Board, Lord Reed made clear that the observations referred to above were of general application. The same can be said of the observations made by Lord Mustill in *Doodey*. In the present case, however it is described, the nature of the decision was one which was likely to have a significant impact on the petitioner's release date, and, as such, one which had the potential to significantly affect his rights. It has a clear bearing on the date when he may be considered by the Parole Board to be suitable for release. While the RMT minute records that a move to NTE would "benefit" the petitioner, it is not suggested that the benefit would consist of an expedited release date. On any view, a transfer to NTE will have the likely effect of delaying that date in comparison with a transfer to Open Estate. The decision being taken cannot be viewed simply as one about where the petitioner should be detained.

[22] If that is correct, then in my view it is not helpful to ask whether the case is closer on its facts to *Osborn* or to *Hassett* or to focus on the identity of the decision-maker. Instead, the court should address the broader question: in the circumstances of this case, having regard to the nature of the decision and bearing in mind the general principles referred to above, did procedural fairness require the petitioner's attendance at the RMT meeting (even, if necessary, by remote means)?

[23] The first whiff of unfairness comes from the apparently blanket instruction, due to Covid, that no prisoner was to attend any RMT. This runs counter to the implicit acknowledgement in the guidance, reinforced by the responses to the petitioner's complaint in 2019, that there will be cases where fairness does require the prisoner's attendance at the RMT meeting. Although the guidance requires consideration to be given to this in each case, that was not done here. The Covid cart cannot be allowed to drive the fairness horse, any more than considerations of cost can be determinative. It is for decision-making bodies,

such as the RMT, to devise procedures which remain fair notwithstanding the strictures imposed by the pandemic. It should be observed that the attendees at the RMT meeting all attended in person.

[24] That whiff becomes stronger when it is noted that in this particular case the petitioner had been told, in terms, that he would be invited to the RMT which considered his case for progression. That a year had elapsed since he was told this is neither here nor there: the fact is that the meeting in November 2020 was the RMT progression meeting to which he had been told he would be invited. Even though that statement was made by a Residential First Line Manager, it was not contradicted by the ICC, chaired by the governor, whose response reinforced the impression that the petitioner would be invited to attend his progression RMT.

[25] In my view in those circumstances the very least that fairness required, if different circumstances (Covid) rendered his attendance impossible (or undesirable for health reasons) and if attendance by remote means was not possible, was that he be informed of that fact, so as to give him the opportunity to make further and fuller representations if he wished.

[26] The whiff of unfairness becomes stronger still when one adds to the mix the fact that the petitioner was some 20 years beyond his tariff date. While that card should not be overplayed (bearing in mind that *Brown* v *Parole Board for Scotland* was merely a permission decision) nonetheless it feeds into the value at play highlighted by Lord Reed in *Osborn*: in this case, the sense of injustice likely to be felt if a prisoner is not afforded a hearing when an issue which had a significant bearing on his liberation was to be discussed. That sense of injustice is likely to be all the greater in the case of a prisoner significantly beyond tariff, as was the petitioner.

[27] The respondents say that none of the foregoing matters: that the RMT had all the information it needed to reach a reasoned decision and that nothing that the petitioner could have said would have made any difference. Several comments can be made in response to that. First, it focusses on Lord Reed's first purpose of procedural fairness - to allow better decisions to be taken, the argument being that no better decision could have been reached had the petitioner been present - but somewhat ignores the second value highlighted, namely, the sense of injustice if not heard. Second, when one analyses the actual decision taken and the reason given for it – to transfer the petitioner to NTE for his benefit – the submission does not stand up to scrutiny. The decision did not on the face of it turn on the level of risk posed by the petitioner, so much as on what was perceived to be beneficial to him. That is precisely the sort of qualitative decision where dialogue with the petitioner might have persuaded the RMT to recommend a transfer to Open Estate. That this is not a fanciful suggestion can be seen from the fact that three professionals all favoured a move to open conditions. While they may not have been considering that precise question, all of them can be taken to have known that transfer to NTE was also an option.

[28] For all these reasons, while recognising that the dividing line between "unfair" and "could have been more fair" is not necessarily an easy one to draw, I am satisfied that in this case the line has been crossed and that the procedure adopted was unfair. For completeness, I do not fully accept the submission of counsel for the petitioner that the meeting was unfair because the social workers who had most knowledge of the petitioner and who had recommended transfer to Open Estate were not present. The better way of viewing that is perhaps to say that, if they had been there, the unfairness which already existed might have been mitigated. Nor have I attached any weight to the submission that had the petitioner been at the meeting he might have been able to clear up any factual dispute which might

have existed. The petitioner has not been able to identify any factual inaccuracy in the papers before the RMT.

[29] Finally, I am conscious that I have reached a different conclusion from that reached by Lord Tyre in *Brown* v *Scottish Ministers*. As I have said, each case must turn on its own facts. The features in this case, absent in *Smith*, are the specific representations made to the petitioner that he would be invited; and the tariff date. It is those factors in combination (together with the failure to consider whether to invite the petitioner to the meeting, which may or may not have been the case in *Brown*) which rendered the procedure unfair. In *Brown*, too, any unfairness was alleviated by the fact that the RMT included the individuals most closely familiar with the petitioner, which could not be said in the instant case.

[30] In the event, as invited to do by counsel for the petitioner, I have sustained the petitioner's second and third pleas in law, repelled the respondent's pleas in law; and granted the remedies of reduction and declarator sought by the petitioner.