OUTER HOUSE, COURT OF SESSION

[2022] CSOH 13

P572/21

OPINION OF LORD SANDISON

In the Petition

THOMAS O'LEARY

Petitioner

for

Judicial review of a Decision of the Parole Board for Scotland dated 29 April 2021

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

2 February 2022

Introduction

[1] Thomas O'Leary is presently a prisoner in HMP Barlinnie. He is subject to an order for lifelong restriction, pronounced on 19 August 2014, in respect of his conviction of certain serious criminal offences. The punishment part of that order, ie the period before the expiry of which his release from custody on licence could not lawfully be considered, was fixed at 5 years beginning on 31 August 2012.

[2] 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 orders for lifelong restriction. It performs that function, amongst others, through a Tribunal established in terms of Part IV of the Parole Board (Scotland) Rules 2001. The Tribunal is an independent and impartial judicial body. In terms of section 2(5)(b) of the 1993 Act, it can only properly direct the release on licence of a prisoner subject to an order for lifelong restriction if satisfied that it is no longer necessary for the protection of the public that the prisoner in question should be confined.

[3] By way of a decision dated 29 April 2021, a Tribunal of the Board declined to order Mr O'Leary's release from custody on licence. In this petition for judicial review, Mr O'Leary seeks reduction of the decision not to direct his release on licence and an order requiring a differently-constituted Tribunal of the Board to reconsider his application for such release within a reasonable time, on the grounds that the decision in question was the product of legal error and procedural unfairness on the part of the Board.

Background

[4] There was a considerable backdrop to the Tribunal's decision of April 2021. So far as relevant for present purposes, it includes the following features: Mr O'Leary's first application for release on licence after the expiry of the punishment part of his sentence was refused by a Tribunal of the Board on 18 July 2018. In August 2019 he was briefly placed in a Segregation and Reintegration Unit on the basis of intelligence that he was bringing drugs into prison. On 6 December 2019 a Tribunal of the Board directed his release on licence. He was at liberty for four days before, on a reference from the Scottish Ministers, the Board recalled him to prison. He again applied to the Board for release on licence. It became apparent that intelligence emanating from both Police Scotland and the Scottish Prison

Service was available which might bear upon the question which the Board's Tribunal would require to determine, and that some of that material was considered to be of a kind which might be withheld from Mr O'Leary and his legal representatives on the basis that its disclosure to them might damage the public interest in one or more than one of the ways set out in Rule 6 of the 2001 Rules.

[5] Questions about the appropriate treatment of the intelligence information and its impact on the procedure to be adopted in dealing with Mr O'Leary's application for release on licence rumbled on in various respects throughout 2020. During that year he also unsuccessfully sought judicial review of another aspect of the process of assessment of his risk to the community: see [2020] CSOH 81. Ultimately some of the intelligence available to the Board was disclosed *in specie* to Mr O'Leary's representatives. In respect of other aspects of the intelligence, a "gist" was so disclosed, ie an indication of the tenor of the intelligence insofar as that could be disclosed without risk of damage to the public interest(s) said to justify it being withheld from full disclosure. Some of the available intelligence, however, was not disclosed even in gist form. Some consideration was given to attempting to mitigate the effect on Mr O'Leary's position of the use of intelligence which had not been disclosed in whole or part to him. For example, his solicitor was permitted to formulate questions about intelligence material which the Board then posed in his absence to an officer of Police Scotland. In the event, that officer was unable to answer most of the (entirely reasonable) questions which were so posed and at the hearing before me it was accepted on behalf of the Board that this episode had not moved matters forward in any positive way. The other expedient which Mr O'Leary's solicitor invited the Board to adopt at various points was the appointment of a special advocate, that is to say a legal representative specifically put in place to represent Mr O'Leary's interests in relation to the material which was to be

withheld from him, and to whom that material would be disclosed. On 21 April 2020 the Board stated to Mr O'Leary's solicitor that it considered that there was no need to appoint a special advocate for him "at this stage" and that it would indicate the reasons for its view on that matter in the final decision to be issued by its Tribunal. The matter was not thereafter raised again on behalf of Mr O'Leary.

[6] The decision of the Board's Tribunal refusing to direct Mr O'Leary's release on licence narrated that, in coming to the conclusion that he continued to pose a risk of committing offences that might occasion serious harm, it had *inter alia* attached weight to intelligence that was not disclosed to him. It acknowledged the "the inherent difficulty of a decision that is largely based on intelligence information" and accepted that it was "difficult for Mr O'Leary to refute such information". The decision did not provide any explanation as to why the Board had decided not to appoint a special advocate as part of the processes it had applied in disposing of Mr O'Leary's parole application.

Petitioner's submissions

[7] In written and oral argument on behalf of Mr O'Leary, senior counsel submitted under reference to *Brown* v *Parole Board for Scotland* [2021] CSIH 20, 2021 SLT 687 at paragraph 37 that the court should very anxiously scrutinise the procedure adopted by the Board in the case given that it involved a prisoner remaining in custody long after the expiry of his punishment part. A procedure ought to have been adopted which fairly reflected the importance of what was at stake for the prisoner and society, and which enabled the prisoner to present his case to best advantage – R (*Roberts)* v *Parole Board for England and Wales* [2005] UKHL 45, [2005] 2 AC 738 at paragraphs 15 and 16. What was fair or not was in the final analysis a matter for the court and not the Board – *R (Osborn)* v *Parole Board* [2013]

UKSC 61, [2014] AC 1115, at paragraph 65. This was not a case in which the criticisms advanced involved any issue within the ambit of special knowledge or experience on the part of the Board's Tribunal to which the court should properly defer.

[8] The Board had an inherent power to appoint a special advocate to assist in the discharge of its functions notwithstanding the absence of specific rules enabling it to do so – *Roberts*, paragraph 83; *Gallagher* v *Parole Board for Scotland* [2005] CSOH 126 at paragraph 81. It should do so where it became (or ought to have become) apparent at any stage up to and including the point of final determination that the proceedings would not otherwise be fair and that the involvement of a special advocate might assist the prisoner's position – *Roberts* at paragraph 83. Proceedings were likely to be unfair if the prisoner did not have the opportunity to see and comment upon information put before the Tribunal and upon which it relied in coming to its decision. In the present case, although it was unnecessary to demonstrate even on a *prima facie* basis that Mr O'Leary's position before the Tribunal would have been improved by the appointment of a special advocate, the potential for such an improvement in various ways by use of that expedient clearly existed.

[9] The Tribunal was, further, under a duty to provide reasons for its decision on the substantive issue before it which left the informed reader and the court in no real and substantial doubt as to the material considerations which it had taken into account, why it had determined the matter in the way it had, and whether there might be any good ground for challenge of the decision – *Hutton* v *Parole Board for Scotland* [2021] CSOH 34, 2021 SLT 591 at paragraph 62; *Crawford* v *Parole Board for Scotland* [2021] CSOH 44, 2021 SLT 822 at paragraphs 11 and 12. The reasons given in the present case, constrained as they were by the Tribunal's inability to refer frankly to the nature of all of the intelligence which weighed in its decision, failed to meet those tests and thus rendered the decision itself unreasonable:

cf *R (Wells)* v *Parole Board* [2019] EWHC 2710 (Admin), [2019] ACD 146 at paragraph 34. The same conclusion could separately be reached by considering the Board's unfulfilled undertaking that the Tribunal would provide reasons in its final decision for the refusal to appoint a special advocate.

Respondent's Submissions

[10] On behalf of the Parole Board, senior counsel submitted in writing and orally that the decision complained of was lawful and reasonable. So far as special advocates were concerned, the leading case was *Roberts*, the effect of which was conveniently summarised in *R (Rowe)* v *Parole Board for England and Wales* [2012] EWHC 1272 (Admin) at paragraph 15 as being that the need to appoint a special advocate would depend on the whole circumstances of any individual case in which information upon which the Board's Tribunal proposed to proceed was withheld from the prisoner and his ordinary representatives, and in particular whether other steps could be and were taken effectively to mitigate the effects of non-disclosure, as by partial disclosure or the provision of gists. Only if the procedure adopted by the Board had resulted in significant injustice to the prisoner, a question to be determined by the court, would the relative substantive decision fall to be reduced. It was accepted that the context of the present case required compliance on the part of the Board with the highest standards of procedural fairness. Reference was also made to *Campbell, Petitioner* [2008] CSOH 16, 2008 SLT 231 and *Laidlaw* v *Parole Board for Scotland* 2008 SCLR 51.

[11] In the present case, Mr O'Leary had had access to almost all of the intelligence information available to the Board, either *in specie* or in gist form. It was clear from what had been disclosed and from the questioning of Mr O'Leary by the Tribunal that the principal areas of concern were his supposed involvement in organised crime, alleged

threats towards his ex-partners and others, and his claimed involvement in the misuse of drugs in prison. The key points of intelligence had been put to him when he appeared before the Tribunal and, with one possible exception, he had been able to answer all of the questions posed without difficulty. Further, no argument that the procedure had been unfair to him was advanced in the final submissions made on his behalf. In these circumstances the Board had been correct to conclude that the mitigations put in place were sufficient to render unnecessary the appointment of a special advocate. It was accepted that speculation as to what might have happened had a special advocate been appointed was inappropriate; rather, the question given the criticism advanced in this regard was simply whether the procedure adopted was, in context, unfair in the absence of such an appointment.

[12] It was, further, accepted that the sufficiency of the Tribunal's reasons fell to be determined by reference to the considerations described in *Hutton* and *Crawford*. Another way of putting the question was whether the Tribunal's reasoning had fallen below an acceptable standard in public law in the particular circumstances of the case: *Brown* at paragraph 36. In the present case the reasons given passed the relevant tests standing the lawful restriction imposed on the disclosure of some of the intelligence to Mr O'Leary and the circumstances already referred to.

[13] However, it was accepted that the failure of the Tribunal to explain in its final decision why a special advocate had not been appointed despite the prior undertaking of the Board that that would be done amounted to an error of law. Nonetheless, that error was not of sufficient materiality to vitiate the Tribunal's decision, because the circumstances in which it was and was not necessary for a special advocate to be appointed were clear from *Roberts* and other authorities and it was (or ought to have been) therefore obvious that the reason for

the refusal to appoint a special advocate in the present case was that the Board considered that the other mitigations deployed were sufficient to render the procedure before its Tribunal fair. Since that was clearly all that could properly have lain behind the decision not to appoint a special advocate, nothing of materiality had been lost by an inadvertent failure to make that reasoning explicit.

Decision

Procedural Unfairness

[14] The Board's Tribunal is a judicial body performing important public functions in the course of the proper administration of criminal justice in Scotland. Given the subject matter of the questions with which it has to deal, it has been made specifically clear by way of statutory instrument in the form of Rule 6 of the Parole Board (Scotland) Rules 2001 (SSI 2001/315) that the Board is entitled not to disclose to the prisoner with whose case it is dealing certain types of information relevant to it in the performance of its functions and to the decision which its Tribunal requires to make in the case of that prisoner. No suggestion has been made in the present case that the Board was not entitled in terms of Rule 6 to withhold from Mr O'Leary the information which was withheld from him, or that the Tribunal was not entitled to proceed to make a decision based in part on that information. Rather, the suggestion is that, in the context of the Board having withheld that information from Mr O'Leary and the Tribunal having proposed to make a decision based in part on that information, procedural fairness required the Board to put in place a specific mitigation, in the form of a special advocate, against the consequence of the situation which was thereby created, which was that Mr O'Leary's interest in being able to participate to the fullest extent

reasonably possible in a process which would lead to a decision about his liberty or continued detention was not being fully realised.

[15] Neither Mr O'Leary nor the court is in a position to review the accuracy or sufficiency of the intelligence gists which the Board did provide, and thus no criticism of the Board can be advanced on any possible deficiency of that nature. The focus must accordingly be on the information which was not provided in any form to Mr O'Leary. About that, nothing was expressly made known to him as part of the processes to which he was subject. It was suggested in argument on behalf of the Board that he might reasonably have surmised that the particular information withheld was similar in nature to that which had been disclosed, and that it would thus have related to the three broad themes of supposed involvement in organised crime, in the misuse of drugs in prison, and of alleged threats made by him, about which he was overtly questioned. I am far from sure that the correctness of that proposition is self-evident, but ultimately what cannot be disputed is that the Tribunal in fact proceeded to its decision in partial reliance on the basis of information withheld from Mr O'Leary and in respect of which his position might have been improved by the Board's appointment of a special advocate in his interests. I do not accept the suggestion that the Board was not required to consider the issue of procedural fairness other than as and when any such issue was made the subject of complaint to it on behalf of Mr O'Leary. That would be contrary to the principle that the provision and maintenance of procedural fairness is first and foremost the responsibility of the body whose procedures are in question, and to the observation in *Roberts* at paragraph 83 to which reference has already been made.

[16] In determining whether the procedural situation created by the Board in Mr O'Leary's case is an acceptable one, I did not find the notions of "anxious scrutiny" or

"ever more anxious scrutiny" and the like expressions, well-used though they are in various legal contexts, very helpful. I do not consider that the concept of anxiety, whether mild, moderate or extreme, quite captures the mental attitude with which the Court ought to approach its task in this or other similar kinds of case, which might more accurately be described as one of meticulousness. Further, and probably more importantly, the whole idea of "anxious scrutiny" and its related expressions seem to me to risk suggesting that it is the process of examination of the facts before the court to which the relevant attitude ought to be applied, perhaps differentially in different cases, whereas in most cases of the present kind, at least, the process of examining and ascertaining the features of the procedure adopted, meticulous though it must be, will in essence be reasonably straightforward, and it is at the stage of considering the result of that examination against the importance of the matters at stake at which a differential approach may well be required. Put more simply, a process which may be deemed fair enough where not very much of importance is at stake may be adjudged to be inadequate where more weighty interests are in play.

[17] Viewed in that light, it is clear that, Mr O'Leary's future at liberty or in detention well after the expiry of the punishment part of his sentence being the *de quo* of the Tribunal's task, and the issue of the use of intelligence material in that context being one of more than usual sensitivity in his case because of the history already narrated, the Board was correct to accept in the argument before me that the highest standards of procedural fairness were required. Certainly that must be the case where the procedure being considered relates directly to Mr O'Leary's ability to engage to some degree with undisclosed intelligence information. When the question is put in that form, the answer becomes straightforward; the highest procedural standards were not met because there was an expedient – the appointment of a special advocate – which could have made the process more fair, but

which was not adopted. While it is true that the Tribunal had before it weighty considerations, quite independent of the withheld intelligence information, which might well have led it in any event to the same conclusion which it reached with that information, I consider that the parties were correct in their position before me that, so long as the appointment of a special advocate might have made a difference to Mr O'Leary's position, even if only to the extent of making a reasonable perception of the fairness of proceedings more favourable than it otherwise might have been, the requisite highest standards were not reached. It follows that the Tribunal's decision which is the subject of complaint falls to be reduced on the ground that it was arrived at by way of a procedure which was in its context not sufficiently fair. It was not disputed that the ancillary order sought, namely that Mr O'Leary's application for release on licence should be considered of new by a differently-constituted Tribunal of the Board within a reasonable time, should be granted if the existing decision were to be reduced.

Adequacy of Reasons

[18] Although it is not strictly necessary for me to express a view on the adequacy of the Tribunal's reasons, given that its decision is to be reduced on grounds of procedural unfairness, I should indicate that, apart from the issue of the Board's undertaking that its reasons for not appointing a special advocate would be explained in the final decision of the Tribunal on the application, which I will deal with shortly, I would not have found the Tribunal's reasons inadequate on the application of the criteria set out in *Hutton* and *Crawford*. In explaining the substantive reasons for its view that Mr O'Leary should not be released on licence, the Tribunal had to take care that it did not expressly or by implication disclose the nature of the intelligence material which was properly being withheld from

him. Taking that unavoidable constraint into account, its decision fully explained what it had considered, why it had determined the matter in the way it had, and whether there might be any good ground for challenge of the decision. In particular, it was made quite clear that the decision did proceed to some extent on the undisclosed material. The Tribunal cannot properly be faulted for having gone to that extent, and no further, in the circumstances already discussed.

[19] However, the special fact that the Board had undertaken that the reasons for its refusal to appoint a special advocate would be explained in the Tribunal's final decision, and that no such explanation appeared, takes the case into a different category from that contemplated in *Hutton* and *Crawford*. If an explanation of a particular matter has clearly been promised in the final decision, and no attempt at all is in fact made there to explain that matter, then the content of the final decision has fallen foul of the more broadly-expressed criterion in *Brown*, namely that it has to meet an acceptable standard in public law in the particular circumstances of the case.

[20] I do not accept the Board's argument that, since the only good reason for its refusal to appoint a special advocate would have been that it considered that the other mitigations deployed were sufficient to render the procedure before its Tribunal fair, that reasoning ought to be regarded as implicit in the Tribunal's final decision even if not explicitly stated there, and that the error made in not stating it explicitly accordingly falls to be regarded as a nugatory one. Firstly, the fact that there is only one good reason in law for a particular course of action carries no necessary implication that that was indeed the reason behind that course of action being taken in a particular case. A suggestion otherwise implies the proposition that administrative bodies do not make mistakes in the discharge of their duties, which experience shows is not necessarily correct. Secondly, a merely formulaic recitation

of the kind contemplated would not have met the tests for comprehensibility set out in *Hutton* and *Crawford* and so would have failed to meet the required standard of reasoning even if it had been made express.

Conclusion

[21] For the reasons stated, I shall sustain the petitioner's second plea-in-law, repel the respondent's pleas, reduce the Tribunal's decision of 29 April 2021 and direct that a differently-constituted Tribunal reconsider the petitioner's application for release on licence within a reasonable time. All questions of expenses are meantime reserved.