OUTER HOUSE, COURT OF SESSION

[2021] CSOH 42

P513/20

OPINION OF LADY CARMICHAEL

In the petition

BRIAN HANDS

Petitioner

against

THE PAROLE BOARD FOR SCOTLAND

Respondent

Petitioner: Templeton; Tony Bone solicitors
Respondent: Lindsay QC; Anderson Strathern

27 April 2021

Introduction

[1] The petitioner seeks reduction of a decision of the respondent's life prisoner tribunal taken on 31 March 2020. The petitioner is detained by virtue of a life sentence imposed by Lord MacLean at the High Court in Edinburgh on 12 February 1999, after the petitioner pleaded guilty to robbery and murder. Following review in terms of the Convention Rights Compliance (Scotland) Act 2001, and an appeal, a punishment part of 11 years and 6 months was assigned. The punishment part came to an end on 13 May 2011. He has previous convictions, a number of which were for offences of violence. Since he was sentenced in 1999 he has acquired two further convictions, one under the Misuse of Drugs Act 1971,

in 2003, for concern in the supply of diamorphine, and the other for assault to severe injury, in 2007.

[2] The petition contains a narration of occasions in 2011, 2013 and 2015 when the respondent has considered whether the petitioner should be released on licence. On each occasion the respondent's tribunal has determined that he should not be released. In August 2018 the petitioner was in national top end conditions, and had had 11 episodes of special escorted leave, and a first grant of temporary release. He was expected to be considered for a move to the open estate in May 2019. The tribunal set a review period of 18 months.

[3] The petitioner avers that he was moved to open conditions in June 2019, and that he progressed to phased community access and full community access with appropriate unescorted community access. He resided at his mother's address during community leave, and engaged in work placements. On 22 October 2019 the petitioner was subject to a search, and tablets were found in his cell. He avers that he had been losing weight and was afraid he had cancer; that he had sought medical assistance but not been given medication; and that he had then obtained steroids to try to supplement his food intake and stem his weight loss. He was returned to closed conditions. The tablets were found to obtain no illegal substances, and no criminal charges were brought.

[4] The tribunal refused to direct the petitioner's release on 31 March 2020, and set a review period of 12 months. The minute of the hearing records that the tribunal considered that the period the petitioner had spent in the open estate was not sufficient to allow adequate testing as to whether the risk the petitioner posed could be managed satisfactorily in a community setting. It was concerned that the incident in October 2019 demonstrated

poor problem-solving and consequential thinking, and that the petitioner lacked insight in the risk that he presented.

[5] There is no dispute as to the test that the tribunal required to address. Before directing the release of a life prisoner on licence, it must be satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined: Prisoners and Criminal Proceedings (Scotland) Act 1993, section 2(5)(b).

Preliminary matters

[6] Senior counsel for the respondent indicated at the start of the substantive hearing that he was no longer advancing two preliminary points. The first had been as to whether the Scottish Ministers should have been a respondent to the petition.

[7] The second was in relation to the circumstance that the petitioner had failed to comply with the order for intimation and service, and had not served the petition within seven days. A Lord Ordinary had extended that period retrospectively by interlocutor of 2 October 2020. Senior counsel maintained that it was not competent for the Lord Ordinary to have done so. To ask me to dismiss the petition because it had not been served in time, however, would be to request me in effect to depart from the interlocutor of 2 October 2020, and he did not invite me to do that.

Petitioner's submissions

[8] Counsel submitted that the effect of the decisions of the respondent on all the various occasions when it had declined to direct release was to impose a condition on him that he required to spend time in top end and open conditions prior to release. He referred to the extracts from the minutes recording the decisions in question.

19 May 2011

"The management plan proposed by the Scottish Ministers will give you the best opportunity to demonstrate that the risks which you present can be managed in the community. You should progress to top end conditions and have Special Escorted Leaves. Thereafter, if an application for a First Grant of Temporary Release is granted, you should have a community placement for a period prior to consideration of your transfer to the open estate."

30 May 2013

"Members agree that you should complete 1:1 work identified for you to address the issues raised by the circumstance of your downgrade. You need then to evidence the learning from that and your other programme work over a sustained period, including progression through Top End to the Open Estate if you are to persuade a future Tribunal that your risk is manageable."

31 August 2015

"The Tribunal selects as a reasonable period for your case to be reviewed of 24 months. That time should enable you to progress back to national top end."

22 August 2018

"In the view of the Tribunal and the social workers, Mr Hands needs a period of time in the open estate to allow him gradual reintegration back into the community"

[9] Counsel submitted that the respondent knew on 31 March 2020 that no movement of prisoners was taking place because of the pandemic. It imposed a condition on the petitioner's release that he could not comply with at the time of their decision. As a matter of fact, since the decision of 31 March 2020, there had been no opportunity for the petitioner to progress, because of the pandemic. It was outwith the respondent's powers to impose a condition of this sort. It was further unlawful to impose a condition with which the petitioner could not comply, because to do so was irrational, and because to do so was incompatible with the rights protected by Article 3 ECHR. In the context of a life sentence, Article 3 required the de facto and de jure reducibility of the sentence, in the sense of a review which allowed the domestic authorities to consider whether any changes in the life

prisoner were so significant, and such rehabilitation had been made in the course of the sentence as to mean that continued detention could no longer be justified on legitimate penological grounds. Counsel referred to the Council of Europe *Guide on the case-law of the European Convention on Human Rights, Prisoners' Rights*, at paragraph 240, which cites the Grand Chamber decisions in *Kafkaris* v *Cyprus* (2009) 49 EHRR 35 and *Vinter and others* v *United Kingdom* (2016) 63 EHRR 1. He referred also to *Murray* v *Netherlands* (2017) 64 EHRR 3, paragraphs 123-126. The effect of imposing a condition with which the petitioner could not comply was to render the sentence de facto incapable of reduction.

[10] The respondent had available to it the option of release on licence subject to conditions, and it should have given fuller consideration to that option that it did, when it knew that, because of the pandemic, the petitioner would be unable to progress to less secure conditions.

Respondent's submissions

[11] Senior counsel submitted that the court might only reduce the decision if the decision were so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. The respondent was a specialist tribunal, and the court should be slow to interfere with its assessment of risk: *R (DSD, NBV & others)* v *Parole Board & others* [2019] QB 285, paragraphs 116-121; *AB* v *Parole Board for Scotland* 2020 SLT 975 per Lord Pentland at [64] and [65]; *R(X)* v *Secretary of State for Justice* [2017] 4 WLR 106, paragraph 46; *R (Carman)* v *Secretary of State for the Home Department* [2005] 2 Prison LR 172, Moses J at paragraph 33.

[12] The respondent had not imposed conditions that the petitioner must satisfy prior to release. One tribunal could not bind the next. The tribunal sitting on the various occasions

referred to by the petitioner had been indicating what evidence it thought would be required to demonstrate that it was no longer necessary that the petitioner remain confined. The tribunal sitting in March 2020 could not bind any future tribunal. It would be for a future tribunal to consider the merits of the material before it at that stage of new. While it was generally the case that long term prisoners progressed to open conditions in order to demonstrate that they could be trusted, and that they were able to deal with the stresses of life in the community, that was not invariable.

[13] The tribunal in March 2020 was considering matters at the start of the pandemic, just after the first period of lockdown. Exactly how matters would progress at that stage was not known, and the tribunal could not have known the timings or extent of restrictions that would follow in the intervening period. When the tribunal next considered the petitioner's case, it would be open to him to submit that it should be satisfied as to the statutory test notwithstanding that he had been unable to move to open conditions because of the pandemic. He could invite it to examine, for example, evidence of how he had coped with the stresses of prison life in the meantime. He could submit a report from a social worker or psychologist instructed on his behalf supporting his position that the tribunal ought to be satisfied as to the statutory test.

[14] The decision of the tribunal had been a reasonable one on the basis of the information available at that time. It was taken in a context in which neither the prison social worker nor the community social worker supported the petitioner's release.

[15] Consideration of the statutory test was a holistic process. There was no requirement on a tribunal to state in every case that it had considered whether or not the petitioner could be released on licence with conditions. Life licences always contained conditions. It was implicit in a decision not to direct release that release on licence with conditions would not

suffice in the interests of public safety. The position might be different if release on particular conditions had been proposed but rejected by the tribunal. The tribunal might then require to give reasons explaining why the proposal had been rejected.

[16] As the respondent had not imposed conditions in the way that the petitioner suggested, there was no basis for his case in relation to Article 3 ECHR. The matter would be revisited by the tribunal in due course, and it would not be bound by the conclusions of the earlier tribunal.

The tribunal's decision

[17] The tribunal had before it information from Mr Mackie, a Life Liaison Officer ("LLO"). It is to that information that the tribunal refers at paragraph 76 of its decision. It is recorded more fully at paragraphs 18-24 of the decision. So far as progression was concerned, Mr Mackie told the tribunal that the progression paperwork for the petitioner had been completed and added to the risk management team's ("RMT") planning list. All RMT meetings had been suspended as a result of the pandemic, and Mr Mackie was unable to provide any timescale for progression. In normal circumstances, Mr Mackie would have expected the petitioner to return to the open estate by August or September 2020, allowing for the matter to be considered by the RMT, and for approval of a first grant of temporary release.

[18] The tribunal's reasons for declining to direct release are recorded at paragraphs 70-76.

> "70. In reaching its decision, the Board took into account:
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> a) the circumstances of the index offence and any offending history;
> b) the assessed High level of risk and needs;

c) conduct since sentence, and intentions if released;
d) all relevant information in the dossier; and
e) the evidence heard at the hearing.

71. Within 4 months of his progression to the Open Estate, Mr Hands breached prison rules by being in possession of prohibited articles. Those articles included tablets which he had obtained from another prisoner. While he believed the tablets to be steroids, he accepted that he had no clue what they were. Given the risk that a return to drug use presents, it is a matter of significant concern that Mr Hands chose to cope with a stressful situation by consuming an unknown substance. The Board considered that this demonstrated poor problem solving skills and called into question his decision making and consequential thinking. It also raised concern for the Board about the extent to which Mr Hands understood his own risk, given his view that he presented no risk.

72. Mr Hands did not consider his breach of prison rules to be significant against his recent progress, positive reports on community access and the lack of any criminal proceedings. The Board did not agree. It considered that Mr Hands' lack of compliance in the prison environment and his attempts to minimise the significance thereof were matters of concern and provided little confidence for the Board of compliance in the community.

73. The PBSWs [prison based social workers] at the Open Estate and at Shotts and the Community Based Social Worker (CBSW) do not support Mr Hands release at this time and the Board agrees with their assessments.

74. It is very disappointing that after the programme work that Mr Hands has undertaken, his eventual progression to the Open Estate after 4 failed attempts at the National Top End and his apparently promising start at the Open Estate that he showed such poor coping strategies when faced with difficult situations. That is a matter on which he may wish to reflect, because he is very likely to face stressful situations in the community and the ability to implement effective coping strategies would be essential to allow him to manage his own risk.

75. The Board did not consider that the access to the community which Mr Hands has taken from the Open Estate provided sufficient testing that his risk could be managed in the community having regard to the nature of the index offence and his history of compliance. It considered that Mr Hands would require to progress again to the Open Estate to allow him to demonstrate through a sustained period of successful testing that his risk can be safely managed in the community.

> 76. The Board considered very carefully the submissions of Mr Bone with regard to the review period and it also took into account that the LLO was unable to provide a timescale for progression in the current situation. Arrangements for progression are a matter for SPS, but should Mr Hands progress in August 2020, as would have been expected in the normal course, a review in 12 months would allow 8 months at the Open Estate before the next consideration of his case. While further time may be required to allow him to show a sustained period of stability and compliance, the Board considered that that period would provide motivation for Mr Hands to work again towards progression and release."

Decision

[19] I do not accept as correct the petitioner's analysis that the decision of the respondent's tribunal on 31 March 2020, or that decision read with earlier decisions relating to the petitioner, imposed a condition that he spend a particular length of time in national top end or open conditions. What the tribunal required to consider on 31 March 2020 was whether or not it was satisfied that it was no longer necessary for the protection of the public that the prisoner remain confined.

[20] The matters recorded in the passage quoted from the tribunal's decision at paragraphs 71 to 74 are matters that the tribunal was entitled to take into account. They are obviously relevant to the question that the tribunal had to address. The tribunal was entitled to take the view, recorded at paragraph 75, that a sustained period of testing in open conditions was required, having regard to the index offence and petitioner's history of compliance during his time in custody. At the time of the hearing, the petitioner had not completed a sustained period in open conditions.

[21] The information before the tribunal when it made the decision was that progression might normally be expected to happen by August 2020. It also knew that the LLO was unable to provide a timescale for progression. The position, therefore, was one in which the

tribunal did not know whether or when the petitioner might come to be able to access open conditions again. It explicitly recognised that in paragraph 76. It is incorrect to say that the tribunal knew that the petitioner could not achieve a sustained period in open conditions by the next review. The tribunal recognised that the matter was uncertain, and it was possible that he would not have achieved that. A fortiori it is wrong to say that the tribunal knew that the petitioner could never achieve a sustained period in open conditions, with the result that he, in effect, faced custody for an indefinite period.

[22] The next tribunal looking at the case will be assessing the material that is before it at the time. It will be for it to consider how to approach the assessment of risk against the background of the restrictions imposed because of the pandemic during the period since March 2020. It will not be prevented from making its own, independent, assessment in relation to the statutory test because of the terms in which the tribunal expressed its decision on 31 March 2020. No condition has been imposed on the petitioner.

[23] The situation is not one in which the sentence is de facto incapable of reduction in the way described by the Strasbourg court. In *Murray*, the applicant was assessed before sentence as needing treatment. There was no treatment or assessment of his treatment needs after sentence, with the result that there was no chance of a favourable outcome on the only periodic review that had taken place in his case. That is not the situation here.

[24] The tribunal was not obliged to give more weight to the possibility of release on licence because of the uncertainty with which it was faced as to the timing of the petitioner's progression. The single question for the tribunal was that encapsulated in the statutory test. Had the tribunal directed release because of that uncertainty in circumstances where it was not satisfied that the petitioner no longer required to be confined for the protection of the public, it would have acted unlawfully.

Disposal

[25] I therefore sustain the fourth plea-in-law for the respondent and refuse the petition. Parties were agreed as to how I should dispose of expenses in the event that I were to do so. I therefore find the petitioner liable to the respondent as an assisted person, and modify that liability to nil.