



OUTER HOUSE, COURT OF SESSION

[2026] CSOH 74

P506/26

OPINION OF LORD BRAID

in Petition of

WALTER THOMSON

Petitioner

for

Judicial Review of a decision of the Parole Board for Scotland dated 12 February 2026

Petitioner: Crabb; Drummond Miller LLP, Edinburgh
Respondent: Pugh KC; Anderson Strathern LLP, Edinburgh

14 August 2026

The issue

[1] The short issue raised by this petition for judicial review is whether, in considering whether a life prisoner ought to be released, the Parole Board for Scotland (the respondent) must consider whether release would give rise to a substantial risk of serious violence to the public similar to that occasioned by the index offence (that is, the offence which led to the imposition of a life sentence), sometimes referred to as a “life and limb” test (as in *Brown v Parole Board for Scotland* [2021] CSIH 20 at para [36]); or whether the test for release is broader than that. There is a prior issue as to whether the petition is now of academic interest only, given that a further review of the petitioner’s case by the respondent is looming.

Background

[2] The petitioner is a life prisoner whose punishment part expired in April 2016. He is therefore now more than 10 years over his punishment part, although, as his counsel acknowledged, that is not as significant a factor as it would have been had he not already been released twice on licence: first, in July 2020, from which he was recalled in October 2023, following the commission of offences of which he was later convicted, under section 38(1) of the Criminal Justice Licensing (Scotland) Act 2010 and the Police and Fire Reform (Scotland Act) 2012, for which he was sentenced to 45 days in custody; and again in April 2024. On 3 May 2025, he was arrested on three charges under the Road Traffic Act 1988: driving a motor vehicle with an excess of drugs in his body, contrary to section 5A of the Act; driving without a licence, contrary to section 87; and driving without insurance, contrary to section 143. The petitioner's licence was again revoked, and he was recalled to custody (which he accepts was justified). He subsequently pled guilty to, and was convicted, of those offences and sentenced (in England, where the offences occurred) to a 12-month conditional discharge. The offences came to light because members of the public had alerted police to the erratic manner of the petitioner's driving. On 12 February 2026, the respondent's panel refused to direct the petitioner's release on licence. The petitioner challenges that decision, essentially on the basis that the nature of the new offending was not sufficiently closely linked to the index offending as to justify his continued detention in custody.

[3] Shortly before the hearing of the petition it emerged that the respondent has set a further date for review of the petitioner's case, 2 September 2026.

The law

[4] The test to be applied by the respondent, when considering release on licence, is that contained in section 2 of the Prisoners and Criminal Proceedings (Scotland) Act 1993 life, which, insofar as material, provides:

“2 Duty to release discretionary life prisoners

...

- (4) Where this subsection applies, the Secretary of State shall, if directed to do so by the Parole Board, release a life prisoner on licence;
- (5) The Parole Board shall not give a direction under subsection (4) above unless —
 - (a) the Secretary of State has referred the prisoner's case to the Board; and
 - (b) the Board is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined.”

[5] In applying that test, the respondent must also have regard to the Parole Board (Scotland) Rules 2022, rule 11 of which states (those which are of particular relevance to this case appearing in italics):

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

- (a) the nature and circumstances of any offence of which the person concerned has been convicted or found guilty by a court,
- (b) the conduct of the person concerned over the duration of their current sentence or sentences,
- (c) *the risk of the person concerned committing any offence or causing harm to any other person if that person were to be released on licence, remain on licence or be re-released on licence (as the case may be),*
- (d) what the person concerned intends to do if released on licence, permitted to remain on licence, or re-released (as the case may be), and the likelihood of that person fulfilling those intentions,
- (e) *the effect on the safety or security of any other person (including in particular any victim or any family member of a victim, or any family member of the person concerned), were the person concerned to be released on licence, remain on licence, or be re-released on licence (as the case may be).”*

[6] Subject to one exception, the parties are agreed that the following principles can be derived from the case law as to how section 2(5)(b) ought to be applied by the respondent.

- (i) The assessment to be performed by the respondent is a judicial function, involving balancing protection of the public as against the hardship of the

continued detention of a person seeking release: *R (Brooke) v Parole*

Board [2008] EWCA Civ 29.

- (ii) The relevant question, when performing that function, is not whether a person whose release is being considered will remain “offence free”, but rather it is whether any potential risk is proportionate to continued detention: *Brooke*, paragraph 53 and *R (on the application of Wells) v Parole Board* [2019] EWHC 2710 (Admin), paragraph 26.
- (iii) Continued confinement will be justified where there is a substantial risk of serious harm to the public. The shorthand “life and limb” reference to that test ought not to obscure the statutory language: *Ryan v Parole Board for Scotland* [2022] CSIH 11, paragraph 15.
- (iv) The role of the respondent is to take a “360 degree” view of the case, taking into account all relevant factors: *Ryan*, paragraph 15.
- (v) The respondent has a duty to provide reasons in support of its decision. That duty is heightened if expert evidence is being rejected: *Ryan*, paragraph 14 and 17.
- (vi) The longer the time in custody after expiry of the tariff the respondent’s scrutiny should be ever more anxious as to whether the level of risk is unacceptable: *Ryan*, paragraphs 14 and 17.

[7] Where the parties differ is in relation to the matter identified at the outset of this opinion: whether, to justify continued confinement after the expiry of the tariff period, the perceived danger to the public must involve a substantial risk of serious violence, or whether to express it in that way involves an unjustified gloss on the statutory test.

The decision complained of

[8] In considering the petitioner's release, the respondent had before it a report from the petitioner's community-based social worker, Alistair Findlay dated 11 February 2026. In it, Mr Findlay advised the respondent that the petitioner had been convicted of the three road traffic offences mentioned above and of the sentence imposed. The circumstances were that he drove a motor vehicle on the M6 motorway without a valid driving licence, or insurance, and with a concentration of benzoylecgonine above the prescribed limit. His partner and 2-year-old son were passengers at the time. Benzoylecgonine is the primary pharmacologically inactive metabolite of cocaine, and the specific compound detected in most cocaine drug tests. Mr Findlay expressed the view that this conviction caused concern regarding the petitioner's involvement in offending behaviour in respect of his illicit drug use and his road traffic offending and that by behaving as he had, he had exposed his partner and 2-year-old son and numerous other road users to significant risk of serious harm. The petitioner had previously reported that he had consumed alcohol and illicit drugs on the occasion in question in response to distressing personal news. He had appeared to attempt to justify his substance misuse by saying that relapse was a normal part of recovery. He had claimed to have driven his partner's car without knowing that he was breaking the law. It was Mr Findlay's assessment that the petitioner required to evidence a significant shift in his attitudes and responses in order to reduce his risk of reoffending. He went on to assess the petitioner as posing a high risk of reoffending and as a medium risk of serious harm. He did not recommend the petitioner for release.

[9] The respondent's decision is contained in its letter of 12 February 2026.

At paragraph 2 of the letter, it correctly noted the test it had to apply (in terms of section 2(5), above). After referring to certain aspects of the petitioner's case, including the

index offence, subsequent offending and the new offences, it went on to refer to oral evidence given by Mr Findlay. In paragraph 29, it noted that Mr Findlay had said that the petitioner had been reckless without consideration to the consequences, which linked back to the index offence in that there were similarities in terms of lack of consequential thinking and poor problem solving; he had driven under the influence of drugs, and it was possible and likely that this would cause serious harm. At paragraph 34, it recorded Mr Findlay's evidence that the petitioner might not pose a substantial risk of serious direct violence but that his recent offending behaviour did put the public at serious risk. The respondent also recorded the petitioner's evidence, in which he acknowledged (paragraph 57) that his actions were "extremely dangerous". In paragraphs 75 to 84, the respondent set out the submissions made by the petitioner's solicitor. In an echo of the submissions made to this court, he argued that the test to be applied by the respondent was whether it was likely that the petitioner would cause harm to the public by violent behaviour.

[10] The respondent's decision, and the reasoning underpinning it, is contained within paragraphs 87 to 97 of the decision letter. The respondent recorded that it took into account the circumstances of the index offence and offending history; the assessed level of risk and needs; conduct since sentence and intentions if released; all relevant information in the dossier; and the evidence heard at the hearing (paragraph 87). The panel was impressed by the petitioner's candour and his remorse (paragraph 88). However, after careful assessment, it had concluded that he did not meet the legal test for release at that time (paragraph 89). The nub of the reasoning, with emphasis added to the part with which the petitioner takes particular exception, appears at paragraph 91, as follows:

"Mr Thomson appeared to Mr Findlay to be managing well between September 2024 and May 2025. This was clearly, even on the evidence of Mr Thomson, not correct. Within days of his electronic monitoring being relaxed, he took a fateful decision to

drink alcohol. This led to drug use. His decision to drive the following day without a licence or insurance and with his partner and child in the car whilst under the influence was clearly not a good one. Reports were made by a member of the public that his car was being driven erratically. Whilst not charged or convicted for erratic driving, the panel considered that but for this member of the public's concern and phone call, the journey may have continued, and this could have resulted in tragedy. The stupidity of Mr Thomson's decision to drive was not lost on him and one he fully accepted. However, he made an active decision to breach his licence, to drink, to buy and take drugs and to drive without valid papers to do so. He failed to think through the consequences of his actions. The public and his loved ones, as well as Mr Thomson were all put in significant danger. **A car is as much of a weapon when being driven by someone not qualified to drive, more so by someone who is under the influence of substances, as any other weapon in the panel's view. Further, the panel was not persuaded by Mr Smith's view that the panel should restrict itself to considering acts of violence as opposed to acts of stupidity, to use Mr Thomson's own words. The panel accepted that the public had been and could be put at risk again by Mr Thomson."**

Submissions

[11] Counsel for the petitioner submitted that the test was not whether there was merely a risk of further offending (which the respondent does not dispute), but whether the prisoner posed a risk of committing offences that may occasion serious harm, being ones of serious violence like the index offence. In support of this submission, he relied upon the following passage from *Wells* (above) at paragraph 27:

"... as a post-tariff IPP prisoner, Mr Well's continued detention depended upon whether he posed a risk of committing offences that may occasion serious harm. That is, offences of serious violence like his index offence: *R (Sturnham) v Parole Board* [2013] 2 A.C. 254, per Lord Carnwath at para. 45. The question being: is there a risk to life and limb from which the public needs protection by way of the Claimant's continued detention? That is very different from asking whether the Claimant would remain 'offence free'."

He further submitted that there had to be some link between the index offence, and the new offending said to give rise to a risk to the public. In the present case, there was a qualitative difference between the index offence (murder) and the driving offences which had led the respondent to conclude that the test for release was not met. It was no different than if the

petitioner had merely driven at say 30mph in a 20mph zone, which might equally be said to give rise to risk to the public but was not of such a nature as to justify his continued confinement 10 years post-tariff. The reference by the respondent to the car being a weapon was not justified. The respondent had not given the matter the requisite degree of anxious scrutiny which it demanded, and its decision could not withstand such scrutiny by the court.

[12] Senior counsel for the respondent submitted that the statutory test did not require the respondent to assess the level of violence said to give rise to the risk to the public. The reference in *Wells* to violence had to be read in context; and, read as a whole, that case did not support the petitioner's argument. While both the court and the respondent had to apply anxious scrutiny, the respondent had done so, as the reasons given in its decision letter demonstrated. It was plain that the respondent had reached its decision having regard to a detailed risk assessment carried out by Mr Findlay, and it was significant that the petitioner himself had accepted that his actions had been very dangerous. The reference to a car being a weapon was not an integral part of the respondent's reasoning. The court must be careful not to fall into the trap of substituting its own decision for that of the respondent, a specialist tribunal.

Decision

Is the petition academic?

[13] As senior counsel for the respondent pointed out, the question whether the petition is academic is in itself somewhat academic given that both parties addressed the court on the merits. The difference between the parties is whether reduction of the decision would have any practical effect given that the petitioner's case is in any event due to be

reconsidered by the respondent on 2 September 2026. Counsel for the petitioner submitted that an unlawful decision should not be allowed to remain on the petitioner's dossier.

Any departure from it would require to be explained (*cf Wells*, paragraph 42). If unlawful, there was benefit to the petitioner in having it reduced. Senior counsel for the respondent submitted that the question of risk would be considered afresh on 2 September 2026 based on up-to-date information available at that time. There would be no point in reducing the decision, even if unlawful. However, both parties appeared to be keen that the court's decision in this petition should be available before 2 September 2026, and on that practical basis alone the matter would not appear to be entirely academic in the eyes of either party.

Further, while I take the respondent's point that risk will be considered again at the forthcoming hearing, there is a difference between asking whether the risk has diminished since February 2026 on the one hand, and revisiting the question of risk without the backdrop of the decision reached then; in other words, the starting point for the assessment of risk may differ depending upon whether the February 2026 decision stands or not.

I therefore find that the petition has not become academic, and that there is some practical benefit to the petitioner in a decision being reached on the merits, to which I now turn.

Was the decision unlawful?

[14] The petitioner's argument is largely predicated upon the passage in *Wells* at paragraph 27, quoted above. However, that must be read in the context in which it appears, which was a rejection of the approach taken by the Parole Board in that case, which had been to ask itself whether there was no risk of reoffending. The correct approach was set out at paragraph 26, as follows:

“The Panel’s approach does not to my mind faithfully apply the terms of the statute or ... important judicial guidance. Rather than evaluating whether the Claimant would be ‘offence free’ (effectively, no risk of reoffending), they should have instead assessed whether any potential risk was proportionate with his continued detention.”

Further, the passage in *Sturnham*, referred to in *Wells*, does not quite say that the risk must be of “serious violence like [the] index offence”. What Lord Carnwath actually said in that case, at paragraph 45, was that the claimant had *not* [emphasis added] carried the logic of his argument to the point of suggesting that the risk must be of the commission of the same kind of specified offences as those for which he was originally sentenced; although he did go on to say that what mattered when release was being considered was whether the prisoner presents a continuing risk to “life or limb”. The use of that phrase was commented on by the Inner House in *Ryan* at paragraph 15, as follows:

“The Parole Board is entrusted with a sensitive task. It must carry out a delicate balancing exercise. Whilst the use of a shorthand, such as ‘life and limb’, may be useful this should not obscure or embellish the statutory test. Reference to a ‘life and limb’ test has often been used to contrast with asking merely the inadequate question whether the individual would remain offence free. The Parole Board must take a 360° view taking account of all relevant factors. In our view the matter was well expressed by Lord Phillips of Worth Matravers in *R (Brooke) v Parole Board*, para 53, as follows:

‘Judging whether it is necessary for the protection of the public that a prisoner be confined is often no easy matter. The test is not black and white. It does not require that a prisoner be detained until the board is satisfied that there is no risk that he will re-offend. What is necessary for the protection of the public is that the risk of re-offending is at a level that does not outweigh the hardship of keeping a prisoner detained after he has served the term commensurate with his fault. Deciding whether this is the case is the board’s judicial function.’”

[15] Reading those *dicta* together, and for that matter simply faithfully applying the words of section 2(5) as one is enjoined to do by the case law, it is clear that the Parole Board need not, and indeed should not, confine itself to the question of whether there is a risk of serious violence, when considering a prisoner’s release.

[16] Counsel for the petitioner submitted that the exercise of anxious scrutiny should lead the court to find that the respondent's reasoning was inadequate, and the decision flawed. The respondent accepts that "anxious scrutiny" is required. That phrase was explained by the Inner House in *Ryan*, at para [17] as meaning that the graver the issue, the more rigorously the court should examine the decision to ensure that it was in no way flawed. The decision to continue to confine the petitioner, 10 years post-tariff, is undoubtedly a decision which requires such scrutiny, albeit in the context that he has previously been released twice. However, what anxious scrutiny does not require, let alone permit, is that the court substitute its own decision for that of the respondent. As was also said in *Ryan*, at para [16]:

"It is axiomatic that giving deference to the decisions of an expert tribunal such as the Parole Board means that the court should not substitute its own views for those of the Tribunal, but it must nevertheless carefully examine the reasons given by the expert tribunal. The need to recognise the expertise of the Tribunal does not, indeed cannot, prevent the court from interfering with the decision if it is satisfied that the decision cannot withstand the appropriate level of scrutiny."

[17] When the respondent's decision is viewed through the prism of what was said in *Ryan*, it cannot be faulted. The respondent's panel did ask itself the correct question and then reached a view on the risk posed by the appellant which it was patently entitled to reach, for the reasons which it gave in paragraph 91 of its decision letter, namely, that the public and the petitioner's loved ones had all been put in significant danger by his actions. The reference to a car being used as a weapon was perhaps an unnecessary, and to the extent that it suggested that the car had in fact been used as a weapon, unhelpful, gloss on what had gone before but the point being made is clear enough: that a car can cause serious injury, or even death, when driven by someone under the influence of drugs. There is a qualitative difference between the petitioner's offending, and the example posited by

counsel of someone (otherwise fit to drive) driving at 30mph in a 20mph zone. The respondent's reasoning does make clear that it had adopted a cautious, indeed meticulous, approach and explains why the respondent was of the view that confinement remained necessary in the public interest. That view was reached having regard to the evidence of both Mr Findlay and the petitioner himself. Finally, the respondent was correct, as I have found, to say at the end of the passage complained of, that it was not restricted to considering acts of violence as opposed to acts of stupidity. Put shortly, the respondent's reasoning does withstand anxious scrutiny by the court. That being so, it is not for this court to substitute its own view as to risk. To do so would be to impinge upon the function of the respondent. The decision reached was not unlawful.

Disposal

[18] I will sustain the respondent's fourth plea-in-law, repel the petitioner's pleas-in-law, and refuse the petition. I will find the respondent entitled to an award of expenses. It was agreed that in that event, the petitioner, who is legally aided, should intimate any motion for modification in the usual way.