SECOND DIVISION, INNER HOUSE, COURT OF SESSION

[2022] CSIH 11
P175/21
P176/21
P525/21

Lord Justice Clerk
Lord Turnbull
Lord Woolman

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in the Reclaiming Motions

by

(1) DEAN RYAN ; (2) BRUCE WISEMAN and (3) DAVID MEEHAN

Petitioners and Reclaimers

against

THE PAROLE BOARD FOR SCOTLAND

Respondent

Petitioners and Reclaimers: Mackintosh, QC; Crabbe; Drummond Miller LLP]
Respondent: Lindsay, QC; Anderson Strathern LLP]

4 March 2022

Introduction

[1] These reclaiming motions, brought by three life prisoners, concern decisions of the respondent's Life Sentence Prisoner Tribunal refusing to allow them to be released into the community. Dean Ryan and Bruce Wiseman appeal substantive decisions of the Lord Ordinary in each case refusing to grant their petition for judicial review of the Tribunal's

decision. Meehan challenges a decision refusing permission to allow his petition for judicial review to proceed.

Legislation

[2] Section 2 of the Prisoners and Criminal Proceedings Act 1993 provides:

> "(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."

The same test applies in England and Wales: section 28(6)(b) of the Crime (Sentences) Act 1997.

Background

[2] The punishment part of Wiseman's sentence expired in 2010, and that of Ryan in 2002. Both have therefore been in custody for a period well beyond the expiry of the punishment part. Each of them was released on licence but breached the licence which was then revoked. At a hearing on 18 December 2020, the Tribunal declined to direct Wiseman's release, concluding that it was necessary for the protection of the public that he remain confined. The Tribunal fixed a review period of 12 months in order for him to progress to the open estate, undertake home leave and start to build a relationship with his supervising officer. At a hearing on 10 December 2020, the Tribunal declined to direct Ryan's release, concluding that it was necessary for the protection of the public that he continue to be confined. It also fixed a review period of 12 months. We need not set out a summary of the factual position in either case. All we should note at this stage is that a submission was

made that the Lord Ordinary in Ryan's case misunderstood what was meant by the "open estate", based on the selection of two sentences from the Lord Ordinary's opinion that

> "It should be recalled that the Parole Board did not decide that he should remain in prison. It decided that he should re-enter the community but do so via the open estate."

Having regard to the terms of the whole of his opinion, it is clear that the Lord Ordinary understood what the open estate was, and the argument to the contrary is entirely unsupportable. That is because the only issues which arise are whether the statutory test has properly been identified. Its application to the facts is not a live issue.

[3] In Meehan's case the punishment part expired on 24 April 2021. The decision refusing to direct his release was taken two days later. It was considered that the drug addiction which he had developed whilst in custody increased the level of risk he presented to the public. During his time in custody he had accrued several misconduct reports. Two convictions, in 2011 and 2017, had demonstrated a history of substance misuse, and there was a lack of a sustained and successful period of unescorted community testing. The Tribunal also considered the index offence and that Meehan had been described as continuing to present a medium risk of causing serious harm. There was no real evidence that it was unlikely that he would commit similar offences again.

Further reviews in Wiseman and Ryan

[4] In Wiseman's case the review hearing on a further referral was adjourned on 20 December 2021 to a date to be fixed. Evidence was heard but further information was sought regarding supervision arrangements in the community. Although the most recent section 2(5) decision remains that under review, 18 December 2020, the question of his release is under active review and a fresh decision anticipated. So far as Ryan is concerned,

a hearing on a further referral under section 2(5) was continued from 7 January 2022 to a date to be fixed to enable attendance of the prison based social worker. Thus although the most recent section 2(5) decision remains the one under review, that of 10 December 2020, the question of his release is again under active review and a fresh decision anticipated.

The issues

[5] In these circumstances, the factual issues arising in the cases of Wiseman and Ryan are academic. Their respective circumstances have changed since the date of the decisions under challenge. There is no point in the court remitting to the Parole Board to reconsider the case, as that is already underway. However, it was maintained that there were two important legal issues at stake, which required to be resolved, and which would have a practical effect on future decisions in respect of the release of life sentence prisoners. The first was whether the "the life and limb" test, expressed in *R (Brooke)* v *Parole Board* [2008] EWCA Civ 29, at [53] and *R (Sturnham)* v *Parole Board (Nos 1 and 2)* [2013] 2 AC 254 at [23] and [24], applied in Scotland. The reclaimers maintained that it did. In other words the risk to be identified under section 2(5) was a risk of repetition of the sort of offence for which the life sentence was originally imposed.

[6] The second issue was whether, in the exercise of anxious scrutiny in such cases, the court was nevertheless constrained by the deference to be given to the decisions of an expert tribunal such as the Parole Board. Reference was made to *Brown* v *Parole Board for Scotland* 2021 SLT 687 at [36] and [37], and *AB* v *Parole Board for Scotland* 2020 SLT 975 at [64] & [65].

[7] In each case the proposition of the reclaimer was that the Lord Ordinary erred in respect of the test to apply. It was submitted that to justify continued confinement the danger posed by the prisoner must involve a substantial risk of serious harm to the public, ie

involving offences of serious violence (*Brown* v *Parole Board for Scotland*, [2021] SLT 68). This in turn hinged on whether there was a risk of repetition of the sort of offence for which the life sentence was originally imposed, in other words a "risk to life or limb" (*R* v *Secretary of State for the Home Department, Ex p Benson*, The Times, 21 November 1988 approved in *R (Sturnham)* v *Parole Board (Nos 1 and 2)* [2013] 2 AC 254; *R (on the application of Wells)* v *Parole Board*, [2019] EWHC 2710 (Admin)). The test did not require that a prisoner be detained until the Board was satisfied that there was no risk of re-offending (*R (Brooke)* v *Parole Board* [2008] 1 WLR 1950). In Ryan's case, the respondent's reasoning and the Lord Ordinary's assessment, which centred on the reclaimer's two prior recalls and poor decision making, proceeded on an erroneous understanding of the test for release.

[8] The standard to be applied by the court when reviewing the respondent's decision was one requiring anxious scrutiny, ever more so the longer the time in custody after the expiry of the tariff. Whilst due deference required to be given to the expertise of the Tribunal (*AB* v *Parole Board for Scotland* 2020 SLT 975), the courts had to be astute to apply the requirements of anxious scrutiny, particularly in respect of prisoners incarcerated long past the expiry of the punishment part.

Analysis and decision

[9] As we understood matters, the reclaimers' real argument seemed to relate to the application of the test and not to its identification. In *Brown* v *Parole Board for Scotland* the court noted (para 36):

> "The following can be taken from *R (on the application of Wells)* v *Parole Board* (cited above), where the prisoner remained in custody 12 years after the expiry of the tariff. To justify continued confinement the danger posed by the prisoner must involve a substantial risk of serious harm to the public, i.e. involving offences of serious violence. (From time to time reference has been made to a "life and limb" test). The longer the time in custody after expiry of the tariff the scrutiny should be ever more

> anxious as to whether the level of risk is unacceptable: see paras 20–21 and 27. Under the modern context specific approach to rationality and reasons challenges, in the area of detention and liberty the court must adopt an anxious scrutiny of the decision. The court can interfere if the board's reasoning falls below an acceptable standard in public law. The duty to give reasons is heightened if expert evidence is being rejected: paras 35, 38, and 40. It can be noted that the need for ever more anxious scrutiny as to whether the level of risk is unacceptable as time goes by is well established in England and Wales: see *Osborn* v *Parole Board*, Lord Reed at [2014] AC, p 1153, para 83; *R (on the application of King)* v *Parole Board*, Lord Dyson MR at [2016] 1 WLR, p 1956, paras 37–39. In the latter decision his Lordship referred to earlier authority that the longer the prisoner serves beyond the tariff 'the clearer should be the Parole Board's perception of public risk to justify the continued deprivation of liberty involved.'"

Wiseman

[10] In Wiseman the Lord Ordinary held that the danger posed must involve "a substantial risk of harm to the public, ie involving offences of serious violence." It appears therefore that she identified the correct test and the reclaimer's quarrel is with her application of that test. The Lord Ordinary noted and applied the test expressed in *Brown* v *PBS*, as she had been invited to do by counsel for the reclaimer, adding (para 19) that on her view of the authorities there was effectively a consensus "that confinement beyond the tariff is something that can never be condoned unless the decision withstands the closest analysis". Counsel for the reclaimer had acknowledged in his submissions that due deference must be given to the specialist nature of the Tribunal and its highly trained and experienced members. The Lord Ordinary agreed (para 20), noting that it was not for the court to substitute its own decision, however strong its view, for that of the Parole Board. None of this suggests any error of law on her part.

Ryan

[11] In Ryan, there appears equally to have been no dispute about the legal matters arising – the case was presented as a reasons challenge. Indeed, the Note of Argument does

not suggest that the Lord Ordinary erred in identification of the test, which in fact he specified at para 13 of his opinion. The substantive arguments for the reclaimer were designed to address the question whether there are errors in the application of anxious scrutiny to the statutory test for release, in other words a purely fact sensitive argument.

Meehan

[12] In Meehan's case, apart from a "reasons challenge", the primary basis of the petition was that the Tribunal had not applied the correct test relating to substantial risk to the public: it had instead asked whether the reclaimer was offence or substance free when he has been in the open estate. The Tribunal referred to the "life and limb" test, so whether or not that was a correct characterisation of the requirements of section 2(5), the matter, from the reclaimer's point of view was not in dispute: the only question was whether the Tribunal had in fact applied the test which it had identified.

[13] It was submitted that there was continuing uncertainty about the test, citing *Duffy* v *PBS*, unreported, 8 September 2021; and *Maclean* v *PBS* ([2022] CSOH 10) as examples. Those decisions show that there is no dispute as to the appropriate test: the question is whether it has been applied. The test remains that set out in the statute, namely whether it is necessary for the protection of the public that the prisoner should remain confined. How application of that test should be approached is clearly specified in *Brown* v *PBS* as follows:

(i) the court must adopt anxious scrutiny of the decision;

(ii) it can interfere if the reasoning falls below an acceptable standard in public law;

(iii) The duty to give reasons is heightened if expert evidence is being rejected;

(iv) The longer the prisoner serves beyond the tariff "the clearer should be the Parole Board's perception of public risk to justify the continued deprivation of liberty involved";

(v) While a cautious approach is appropriate when public protection is in issue, as time passes it is not only legitimate but necessary for there to be appropriate appreciation of the impact of confinement well beyond tariff and;

(vi) The decision maker should ensure that it is apparent that this approach has been adopted and its reasoning should provide clarity as to why confinement remains necessary in the public interest.

[14] 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] The reclaimers accept that it is necessary to give appropriate deference to the specialist nature of the Tribunal, but submit that the exercise of anxious scrutiny should not be constrained by that deference. We can find no indication to the contrary in the opinions of the Lords Ordinary in the present cases. The way in which it was expressed in the

Wiseman case was that "… there is effectively consensus that confinement beyond tariff is something that can never be condoned unless the decision withstands the closest analysis". 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.

[16] It is clearly understood that in applying the statutory test, as the Lord Ordinary in *Wiseman* noted, decisions to keep a prisoner confined after the expiry of the punishment part must be subjected to the closest analysis. The phrase "anxious scrutiny" has been understood to mean the graver the issue, the more rigorously the court should examine the decision to ensure that it was in no way flawed. The term has been used interchangeably with "careful consideration". It might be said that it is to be expected that any decision-maker, making any decision, would approach its task carefully. However, whatever one thinks about the utility of the phrase, it suggests that the decision-maker approaches its task with an enhanced focus.

[17] The reclaiming motions for Wiseman and Ryan must be refused.

Meehan

[18] In Meehan, the question is whether the petition has real prospects of success in the sense described in *Wightman* v *Advocate General for Scotland* 2018 SLT 356 at para.9:

> "The applicant has to demonstrate a real prospect, which is undoubtedly less than probable success, but the prospect must be real; it must have substance. Arguability or statability, which might be seen as interchangeable terms, is not enough."

Permission is a matter to be addressed *de novo* by this court (*PA (Pakistan)* v *Secretary of State for the Home Department* 2020 SLT 889).

[19] The Tribunal reached the view that, as a consequence of his drug use, Meehan was "involved in serious organised crime" and therefore presented a significant and continuing risk of violence to the public. It may be that such an inference may not properly be drawn, at least on the information available to us. However, his drug use was not the only consideration before the Tribunal. He was assessed as presenting (i) a medium level of risk and needs in terms of general reoffending and (ii) a medium risk of serious harm. The Tribunal also took into account the circumstances of the index offence described by the trial judge as having been "a killing of a callous and brutal character"; his conduct since sentence, including his accrual of several misconduct reports and two further convictions in 2011 and 2017 together with the lack of any sustained and successful period of unescorted community testing. His social workers did not support his release to the community. Looking at matters in the round, therefore, it appears clear that the Tribunal provided sufficient reasons for its decision. The petition cannot be said to have a realistic prospect of success.

[20] His reclaiming motion must also therefore be refused.