OUTER HOUSE, COURT OF SESSION

[2023] CSOH 83

P309/20

OPINION OF LORD RICHARDSON

In the Petition

WILLIAM FREDERICK IAN BEGGS

Petitioner

for

Judicial Review of a decision of the Parole Board for Scotland dated 8 January 2020

Petitioner: Loosemore; Drummond Miller LLP
Respondent: Lindsay KC; Brodies LLP
Interested Party: Scullion; Scottish Government Legal Directorate

17 November 2023

Introduction

[1] The petitioner is a prisoner in Her Majesty's Prison Edinburgh. He is currently serving a life sentence for murder. The petitioner completed the punishment part of his sentence on 27 December 2019.

[2] On 8 January 2020, an oral hearing of the Tribunal of the Parole Board took place in respect of the petitioner. On the same day, the Tribunal refused the petitioner's application for parole.

[3] In the present proceedings, the petitioner seeks to challenge the decision of the Tribunal on two grounds. Both the Parole Board, as respondent, and the Scottish Ministers, as an interested party, were represented at the hearing before me.

The legal framework

[4] A life sentence is mandatory for a person who is convicted of murder. The sentencing judge will set a mandatory punishment part. In the petitioner's case, this was 20 years. Once the punishment part has been served, the offender's continued imprisonment is based on whether the Board considers that it is necessary for the protection of the public (see section 2(4) and (5) of the Prisoners and Criminal Proceedings (Scotland) Act 1993).

[5] In *Ryan* v *Parole Board for Scotland* 2022 SLT 1319 the Inner House recently provided guidance as to how the application of the statutory test should be approached (at paragraph 14):

> "(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;
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> (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."

[6] The Court went on to say the following of the Board's task:

> "[15] 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.'"

The Tribunal's decision

[7] In setting out the reasoning for its decision, the Tribunal began by stating that, having considered the evidence, it was satisfied that it was necessary for the protection of the public that the petitioner be confined.

[8] The Tribunal set out that it had taken account of the following factors (at paragraph 48):

> "a) the circumstances of the index offence and any offending history;
> b) the assessed levels of risk and needs described at paragraphs 44-46;
> c) conduct since sentence, and intentions if released;
> d) all relevant information in the dossier; and
> e) the evidence heard at the hearing."

[9] The reference in sub-paragraph (b) to the assessed levels of risk and needs was to three assessments of the petitioner which were summarised by the Tribunal at paragraphs 44 to 46 of the decision as follows:

"44. Using LS/CMI, William Beggs is assessed as presenting a moderate level of risk and needs.

45. Using the Stable 2007 risk assessment tool, Mr Beggs is assessed as presenting a moderate level of risk.

46. The 2015 PRA suggests that Mr Beggs presents a high risk of sexual reoffending."

[10] The remaining reasoning of the Board was set out in paragraphs 49 to 52 of the decision:

"49. Mr Beggs [*sic*] index offence was described by the trial Judge as a 'most horrific crime'. The libel of which he was convicted included that he penetrated his victim's hinder parts with his private member, and that he murdered him. He then dismembered his victim's body and disposed of it at various locations. Mr Beggs has previous convictions for unlawful wounding at Teesside Crown Court, and assault to severe injury, permanent disfigurement and to the danger of life at the High Court at Kilmarnock. The latter conviction led to a sentence of imprisonment for a period of 6 years.

50. The Tribunal recognise that Mr Beggs maintains his innocence of his index offence, and that he has largely avoided misconduct reports in prison. However, he has also refused to comply with offence-focused work which has been identified as necessary, on the basis of the terms of the charge of which he was convicted. His refusal has been notwithstanding the availability of the course (MFMC) to those who deny their offences. This leaves Mr Beggs with unaddressed offence-focused needs, and has restricted professionals' insight into his offending and the triggers for it.

51. Mr Beggs has also not been tested in less secure conditions. Mr Smith suggested that there was little point to such testing, but the Tribunal did not accept this submission. Mr Beggs has been out of the community for 20 years. The last time he was in the community he committed his index offence, and the Tribunal are also aware that he relocated to the Netherlands when he became aware that police were looking for him. In such circumstances, Mr Beggs' reintegration back to the community must be done with great care. The Tribunal would expect testing to begin with special escorted leaves, and then increase slowly as was considered appropriate. He should be extensively tested by whatever means are available. It is important for him to build up the relationships which will support and monitor him in the community, and it is also important that these relationships are fully tested prior to his release. The Tribunal note that both the PBSW and CBSW do not support release without such testing, and the Tribunal agreed with their position.

52. The Tribunal carefully considered Mr Smith's submissions in relation to a short review period. However, standing the Tribunal's view that Mr Beggs should complete offence-focused work and then be extensively tested prior to his release,

> the Tribunal concluded that a short review period would serve no purpose. Mr Beggs will now be clear what work he should do to support his application for release, and this work is likely to take more than the 24 month review period selected by the Tribunal."

Petitioner's submissions

[11] Counsel advanced two separate grounds of challenge.

- First, the petitioner argued, at common law, that the Tribunal's decision was vitiated by a material error of law in that the Tribunal failed appropriately to identify and weigh relevant factors and has failed adequately to explain how it weighted these factors in its decision;
- Second, the petitioner argued that the decision is unlawful as it is in contravention of Article 5(4) of the European Convention on Human Rights.

The petitioner's first ground of challenge

[12] The petitioner's first ground of challenge turns on the Tribunal's treatment of the Psychological Risk Assessment of the petitioner from 2015 which is referred to in paragraph 46 of the decision (above at [9]).

[13] It was apparent from paragraph 48(b) of the decision that the Tribunal had taken account of the 2015 Psychological Risk Assessment. However, there was no explanation in the decision of what the Tribunal had made of it.

[14] Counsel noted that the Tribunal had referred to the index offence together with the petitioner's previous convictions (in paragraph 49). Counsel accepted that the index offence was plainly extremely serious but pointed out that it had occurred more than 20 years ago. The Tribunal required to consider the up-to-date position. Thereafter, in paragraphs 50 and 51 the Tribunal sets out two matters which might reduce the level of risk represented by

the petitioner. These were, first, for the petitioner to complete the "Moving Forward Making Changes" course, something which he has, so far, declined to do. The second was for the petitioner to be tested in less secure conditions. However, the critical point was that the Tribunal had not clearly articulated what it considered was the level of risk currently presented by the petitioner.

[15] One was left with the references made by the Tribunal to the risk assessment tools in paragraphs 44 to 46 and, in particular, counsel focussed on the reference to the 2015 Psychological Risk Assessment in paragraph 46. In the petitioner's submission, this assessment should have been expressly disregarded as it was 5 years old. It was not relevant to the task of the Tribunal to assess the current risk presented by the petitioner.

[16] Counsel submitted that it was not particularly significant whether one characterised what the Tribunal had done as having considered an irrelevant factor, namely the 2015 Psychological Risk Assessment, or as having attached undue weight to it. The critical point, so far as the petitioner was concerned, was that the Tribunal had made express reference to the 2015 Psychological Risk Assessment and had highlighted that it assessed the petitioner as presenting a high risk of sexual reoffending. However, having made the reference, the Tribunal had given no explanation of what it took from the assessment.

[17] In this regard, counsel drew my attention to an affidavit sworn by Dr Peter Pratt, a consultant Clinical and Forensic Psychologist. In his affidavit, Dr Pratt discloses that he has worked in high secure hospital settings since 1976. He currently works almost full time as an expert witness in the areas of serious crime and child protection. In his affidavit, Dr Pratt opined that psychological reports such as the 2015 Psychological Risk Assessment have a "shelf life" of nine months to a year. This is because risk assessment is dynamic, variable

and needs to be reviewed at appropriate intervals. On this basis, Dr Pratt concludes that "little, if any, weight" should be attached to the 2015 Psychological Risk Assessment.

[18] Finally, counsel submitted that, in the event that the Tribunal had considered that the 2015 Psychological Risk Assessment was out-of-date, then it was open to the Tribunal to continue the hearing to enable a new assessment to be made. The carrying out of a new assessment could have been achieved in a shorter period than the two year review period selected by the Tribunal.

[19] Although not the subject of oral submissions, in the written Note of Argument lodged on his behalf (which was adopted by counsel), an additional argument was advanced on behalf of the petitioner. This was to the effect that the Tribunal had placed undue weight on the fact that the petitioner had not undertaken the recommended offence-focussed work namely, "Moving Forward: Making Changes" (see paragraph 50 of the decision). Although the Tribunal had recognised that the petitioner maintained his innocence, the Tribunal had, it was said, failed to consider the "objectively reasonable basis" for the petitioner's position. This basis was said to be set out in an Opinion of Counsel dated 21 December 2018 which was produced. When this basis was considered, the petitioner's failure to complete such a course was not relevant to the assessment of his current risk to the public.

The petitioner's second ground of challenge

[20] The petitioner's second ground of challenge was based on his right, in terms of Article 5(4) ECHR, to have the lawfulness of his detention decided by a court. Counsel accepted that the Tribunal of the Parole Board had been held many times to be a court for the purposes of Article 5(4) (see, for example, *O'Neill* v *HM Advocate* 1999 SLT 958 at 961H-I,

Lord Justice General (Rodger)). Counsel also recognised that section 40(1) of the Management of Offenders (Scotland) Act 2019 (which came into force on 1 October 2020) stated:

> "40 Continued independence of action
>
> (1) The Parole Board is to continue to act as an independent tribunal when exercising decision-making functions by virtue of Part 1 of the 1993 Act (or decision-making functions by virtue of another enactment relating to the same things)."

[21] However, the petitioner submitted that, in the particular circumstances of the present case, the Tribunal had not acted as an independent and impartial court. Counsel was careful to make clear that she was not suggesting that any individual concerned had been deliberately unfair. It was a question of how matters appeared. She urged me to take a careful cumulative view of the following factors.

[22] The first factor relied upon by the petitioner were the circumstances in which the Chief Executive of the Parole Board for Scotland, Colin Spivey, had come to attend the petitioner's hearing. The Chief Executive was the highest ranking civil servant at the Board and a person employed by the Scottish Government. It appeared that the petitioner had received advance notice that Mr Spivey intended to attend his hearing. At the beginning of the hearing, the petitioner's legal representative objected to the attendance of Mr Spivey on the basis of the managerial role he played for the Board. Having heard and considered these submissions, the Tribunal allowed Mr Spivey to attend subject to certain conditions. Against this background, it was submitted that the attendance of Mr Spivey created an objective lack of independence between the Tribunal and the Scottish Ministers.

[23] The second factor was the role played by the Chairperson of the Parole Board, John Watt, in the petitioner's trial and subsequent appeal. It was acknowledged that the Chairperson had recused himself from the petitioner's case. However, it was submitted that

by so acting the Chairperson had highlighted his prior involvement in the petitioner's case. My attention was also drawn to the role that the Chairperson had, in terms of the 1993 Act (as amended), to make recommendations in respect of the reappointment of members (see Schedule 2, paragraph 2HA(4) of the 1993 Act) and in respect of having regard to participation of members (see Schedule 2, paragraph 2J of the 1993 Act). It was accepted that there was no suggestion of any deliberate undermining of the petitioner's hearing. However, it was submitted that this factor contributed to a perception of a lack of independence and impartiality.

[24] The third factor was an alleged absence of robust measures to ensure confidentiality in prisoners' correspondence with the Parole Board. In this regard, reference was made to an affidavit prepared by the petitioner which referred to two occasions on which correspondence addressed to him from the Parole Board had been opened by members of Scottish Prison Service Staff. It was submitted that this was a further illustration of the way in which the Parole Board and the Scottish Government (as the Scottish Prison Service) were "intertwined".

[25] The fourth factor was said to be lack of a clear dividing line to ensure "that administratively and legislatively" the Parole Board is objectively independent from the Scottish Government. In this regard, reference was made to the fact that the Parole Board used administrative and physical facilities provided by the Scottish Prison Service.

[26] The final factor was said to be the absence of an available mechanism for the review of the Tribunal's decision. It was acknowledged that there is no general requirement for such review in terms of Article 5. However, it was submitted that the particular circumstances of the present case highlighted that the issues highlighted in the other factors would have been mitigated if the Parole Board were, for example, to be transferred to the

Scottish Tribunals system and provided a route of appeal. The transferral of the Parole Board to the Scottish Tribunals had been considered by the Scottish Government in the consultation process that preceded the 2019 Act but not, ultimately, proceeded with. Reference was made to paragraphs 298 to 304 of the Policy Memorandum which accompanied the Bill which became the 2019 Act.

Respondent's submissions

[27] Senior counsel for the Parole Board began by moving me to dismiss the petition. He made clear that he would address the petitioner's first ground of challenge and the first two factors relied on by the petitioner in support of the second ground of challenge. Counsel for the Scottish Ministers was going to address the issues of institutional independence raised by the petitioner.

The petitioner's first ground of challenge

[28] Senior counsel submitted that the Tribunal had correctly applied the test set out in section 2(5)(b) of the 1993 Act. The decision clearly set out three reasons for its decision to refuse the petitioner's application for parole. These were: first, that the petitioner had been convicted of an extremely violent offence (paragraph 49); second, that he had failed to carry out any offence-focussed work (paragraph 50); and, third, he had never been tested in less secure conditions (paragraph 51). Senior counsel submitted that the familiar test of the well informed reader from *Wordie Property Co Ltd* v *Secretary of State of Scotland* 1984 SLT 345 was satisfied.

[29] The three reasons given by the Tribunal were clear and did not include the 2015 Psychological Risk Assessment. The Assessment was not one of the determining

factors identified by the Tribunal. Against this background, senior counsel submitted that the petitioner's criticisms of the Tribunal's treatment of the Assessment were essentially a criticism of the weight attributed by the Tribunal to that assessment. In this regard, senior counsel drew my attention to what was said by Lord Clark in a previous case involving the petitioner – *Beggs* v *Scottish Ministers* [2018] CSOH 72 at paragraph 37:

> "37. In *Tesco Stores Ltd* v *Secretary of State for the Environment* [1995] 1 WLR 759 , Lord Keith stated (764G-H) that: '… it is entirely for the decision maker to attribute to the relevant considerations such weight as he thinks fit, and the courts will not interfere unless he has acted unreasonably in the *Wednesbury* sense.'
>
> Lord Hoffman observed (780F-G) that: 'Provided that the planning authority has regard to all material considerations, it is at liberty (provided that it does not lapse into *Wednesbury* irrationality) to give them whatever weight the planning authority thinks fit or no weight at all.'
>
> Accordingly, the weight to be given to any particular factor is a matter for the decision maker, but the decision remains subject to the test for irrationality. Thus, to succeed on the issues concerning weight, the petitioner requires to show that individually or cumulatively, and taken along with the factors said to have been omitted from consideration, the alleged attachment of excessive or insufficient weight resulted in a decision which was irrational in the sense described by Lord Diplock [referring to *CCSU* v *Minister for the Civil Service* [1985] AC 374 at 410G]."

[30] Senior counsel submitted that, viewed from this perspective, the first ground of challenge made by the petitioner must fail as it could not be said that the Tribunal's treatment of the 2015 Psychological Risk Assessment was irrational. The Assessment formed part of the Parole Dossier before the Tribunal and the Tribunal could not be criticised for considering it.

[31] Senior counsel also drew attention to the fact there had been discussion of the 2015 Psychological Risk Assessment before the Tribunal. At paragraph 22 of the Tribunal's decision the following is recorded:

> "22. Ms Dwyer confirmed that the last Psychological Risk Assessment (PRA) had been prepared in 2015, by Marc Kozlowski. She explained that nothing had changed since that time."

Senior counsel explained that Ms Dwyer was the petitioner's Lifer Liaison Officer. She did not have psychological expertise but was a specialist prison officer trained to deal with matters of parole. The decision also recorded the fact that there had been discussion before the Tribunal of the fact that the petitioner had brought judicial review proceedings in respect of the 2015 Psychological Risk Assessment which were ongoing at the date of the Tribunal hearing (see *Petition of William Beggs* [2021] CSOH 12).

[32] Senior counsel highlighted that the petitioner had not challenged the Assessment on the basis of its age before the Tribunal. Clearly as at the date of the Tribunal's hearing, neither the petitioner nor the Tribunal had the benefit of Dr Pratt's affidavit. In any event, senior counsel submitted that Dr Pratt's opinion did not establish that the Tribunal's consideration of the 2015 Assessment, such as it was, represented an objectively verifiable error of fact. Dr Pratt's opinion did not go so far.

[33] As to the suggestion that the Tribunal ought to have continued the hearing for the preparation of an updated Psychological Risk Assessment, senior counsel pointed out that the petitioner's representatives had not made such a motion. It was notable that at the hearing the petitioner had, for the first time and against the background of his ongoing dispute over the 2015 Assessment, agreed to engage with psychology in the preparation of a new report. In any event, even if the Tribunal had taken such a step and a further assessment had been prepared, both the failure to carry out offence-focussed work and the lack of testing in less secure conditions would remain and, on the Tribunal's reasoning, would require to be addressed. Against this background it could not be said that no

reasonable Tribunal would have failed to continue the hearing to enable a further Assessment to be carried out.

[34] In relation to the Opinion of Counsel which was relied upon by the petitioner, this had been obtained in connection with a further appeal by the petitioner against his conviction. It was simply not relevant to the question of risk with which the Tribunal was concerned. It provided no explanation as to why the petitioner had failed to engage with the "Moving Forward: Making Changes" course.

The petitioner's second ground of challenge

[35] Senior counsel submitted that neither of the first two factors relied upon by the petitioner in respect of the second ground of challenge meant that the Tribunal had failed to act as an independent and impartial court.

[36] In respect of the attendance of the Parole Board's Chief Executive, Colin Spivey, at the hearing, senior counsel explained that he had wished to attend the hearing as an observer. This was not unusual for staff members to attend hearings as part of their ongoing training. The Tribunal had acted reasonably and properly in allowing the petitioner's representative an opportunity to set out any objections to the Chief Executive's attendance. The Tribunal had then taken time to consider the issue before setting out their reasoning:

> "10. The Tribunal adjourned to consider the attendance of Mr Spivey. Upon resumption, the Tribunal advised that it decided to authorise the attendance of Mr Spivey. It would be made clear to Mr Spivey that he was attending as an observer, and could not participate in the proceedings. Mr Spivey would also leave the Tribunal room at the conclusion of the Tribunal, but before the members commenced their deliberations. During the Tribunal he would be seated in view of Mr Smith and Mr Beggs, to provide assurance that he restricted himself to observing the proceedings. The Tribunal were of the view that these safeguards, together with the non-disclosure agreement signed by Mr Spivey removed any unfairness or perception of unfairness.

> 11. Mr Spivey then entered the Tribunal. He was reminded that he was attending simply as an observer, and should not participate in the proceedings in any way."

[37] If one considered this, as one was required to, from the perspective of a fair minded and well informed observer, there was no real possibility that the Tribunal was not independent and impartial (see *Helow* v *Secretary of State for the Home Department* 2009 SC (HL) 1 at paragraphs 1 and 2).

[38] As to the involvement of the Parole Board's Chairperson, John Watt, senior counsel drew my attention to an affidavit which had been prepared by Mr Watt. It was clear from that affidavit that Mr Watt had had no involvement in the consideration of the petitioner's application for parole. Mr Watt had recused himself as soon as he became aware that the petitioner's application was coming up for consideration. This was not disputed by the petitioner.

[39] The affidavit also set out Mr Watt's role as Chairperson of the Parole Board. Senior counsel submitted that the Chairperson was *primus inter pares*. He had no management authority or control over other members of the Board. He did not assign members to particular panels. This was done by a dedicated case scheduler.

[40] Senior counsel understood that the criticism being made of Mr Watt was that by recusing himself at the first opportunity he had made matters worse by alerting others to his prior involvement. On this basis, it was difficult to see what Mr Watt was supposed to have done. Furthermore, it was not clear what further interest Mr Watt was thought to have in the petitioner's case more than 20 years after his conviction. In any event, given Mr Watt's recusal, there was no basis for saying that there had been any infringement of the petitioner's rights under Article 5(4) ECHR.

Interested party's submissions

[41] Counsel for the Scottish Ministers made clear that his sole interest in the petition was to challenge the contention that the Tribunal of the Parole Board was not a court in terms of Article 5(4) ECHR. In summary, he submitted that the petitioner's submissions had no merit and nothing had been presented to revisit or overturn a well settled issue.

[42] Counsel submitted that the Strasbourg Court had clearly set out the requirements of a "court" for the purposes of Article 5(4) ECHR. He made reference to *Weeks* v *United Kingdom* (1988) 10 EHRR 293 at paragraphs 61 to 65 and *Stephens* v *Malta (No 1)* (2010) 50 EHRR 7 at paragraphs 94 to 95. Counsel submitted that the following principles could be derived from the Strasbourg jurisprudence. First, as Article 5(4) itself made clear, an individual detained must be entitled to bring proceedings to have the continued lawfulness of his detention determined speedily by a court. Second, the court in question need not be a traditional court, but it must be a body of a judicial character offering certain appropriate procedural guarantees. Third, the body concerned must be impartial and independent from both the executive and the parties to the case. Fourth, the body must have the power to order release, a power to make recommendations was not sufficient. Finally, there was no requirement in terms of Article 5 to set up an appellate jurisdiction.

[43] Counsel then made submissions as to the Parole Board. In its current form, the Parole Board was established by the 1993 Act as amended. The 1993 Act set out the Parole Board's power to order the release of a prisoner (Section 1(3), Section 2(4) and (5)). Schedule 2 of the 1993 Act made provision as to the Board including, among other things, security of tenure of members of the Board (paragraphs 2A and 3). In this regard, counsel submitted that paragraph 2HA(4) of Schedule 2, which had been referred to by the petitioner (see paragraph [23] above), restricted the circumstances in which a

recommendation by the Chairperson could be made. Such a recommendation could only be made either as a result of a failure by the member to comply with the terms and conditions of appointment or if the number of members was such that other members were no longer required by the Board. Counsel took me to the terms and conditions of members and submitted that these made clear that members were independent office holders. This approach mirrored, for example, the approach taken to legal members of Scottish Tribunals.

[44] Based on a consideration of the relevant legislation, counsel highlighted the following: the Parole Board's members were appointed by an independent body; the tenure of Parole Board's members were protected by significant statutory safeguards; and the Board's proceedings before the Tribunal were the subject of detailed procedural rules which include rights in relation to disclosure, the right to make representations and be represented. Counsel also drew attention to the fact that, as the present proceedings demonstrated, decisions of the Tribunal of the Parole Board could be challenged by way of judicial review which represented an additional safeguard.

[45] On this basis, counsel noted that it was unsurprising, in his submission, that the Parole Board (and its equivalent in England and Wales) had been repeatedly and consistently described as being a court in terms of Article 5(4) in decisions of the Supreme Court (see, for example, *Brown* v *Parole Board for Scotland* 2018 SC (UKSC) 49 at paragraph 61; *R (on the application of Pearce)* v *Parole Board for England and Wales* [2023] AC 807 at paragraph 3). As against this, the petitioner had put nothing forward to cast doubt on these arrangements.

[46] In respect of the case specific factors relied on by the petitioner, counsel submitted that the petitioner had failed to explain how, in the circumstances, the attendance of the chief executive, whose role was of an administrative and financial nature, called into

question in any way the independence or impartiality of the Tribunal. The same could be said of the fact that the Chairperson had been previously been involved in the prosecution of the petitioner.

[47] Finally, in relation to the issue of the confidentiality of prisoners' correspondence with the Parole Board, counsel understood that on two occasions correspondence addressed to the petitioner had been opened, in error, by prison service staff. This had occurred because the correspondence had not been labelled as coming from the Parole Board. As a result of this issue having been highlighted (by the petitioner raising judicial review proceedings), action had been taken to ensure that it would not happen again. This involved the Parole Board clearly labelling the correspondence and instructions being given to prison service staff in this respect. However, counsel submitted that the petitioner had entirely failed to explain how these incidents cast doubt on the independence and impartiality of the Parole Board as a whole.

Decision

[48] I do not consider that either of the grounds of challenge set out in the petition is established.

The first ground of challenge

[49] The first ground of challenge focusses, primarily, on the treatment by the Tribunal of the 2015 Psychological Risk Assessment. The principal criticism is that the Tribunal placed undue weight on that Assessment because, so it is argued, it was so out of date that little or no weight should have been placed on it.

[50] I agree with the submission by senior counsel for the Parole Board that the correct test for this type of situation was set down by Lord Clark at paragraph 37 of his judgment in *Beggs* v *Scottish Ministers* (above at [29]). In other words, the petitioner requires to show that the weight attached by the Tribunal to the 2015 Psychological Risk Assessment was irrational in the sense of being

> "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" (*CCSU* v *Minister for the Civil Service* [1985] AC 374 at 410G)

[51] The first problem with this argument is that it is not apparent from the decision that the Tribunal placed any particular weight on the 2015 Assessment. The three principal reasons for the Tribunal's decision are given in paragraphs 49, 50 and 51 (see paragraph [10] above). These were: first, the horrific nature of the offence of which the petitioner was convicted together with his other previous convictions; second, that, as a result of his refusal to undertake the "Moving Forward: Making Changes" course, the petitioner had unaddressed needs; and, third, that the petitioner not been tested in less secure conditions.

[52] By contrast, the 2015 Assessment is simply referred to in the decision as being one of the factors which the Tribunal "took into account" (at paragraph 48 of the decision). Viewed from this perspective, the petitioner's position comes to be that the Tribunal's decision is to be regarded as irrational because the Tribunal even made this reference to the 2015 Assessment.

[53] I have no hesitation in rejecting this argument. The 2015 Assessment formed part of the petitioner's dossier. It was referred to during the course of the hearing before the Tribunal both by Ms Dwyer, the petitioner's Lifer Liaison Officer and the petitioner's representative. I consider that the Tribunal would have been more open to criticism had they failed to mention the 2015 Assessment.

[54] The subsidiary criticism advanced by the petitioner was that the Tribunal's reasoning was inadequate because the Tribunal had not properly articulated what it made of the 2015 Assessment.

[55] I consider that this criticism of the Tribunal is also misconceived for two reasons.

[56] First, essentially, the Tribunal is being criticised for not dealing in its decision with an argument as to weight to be attached to the 2015 Assessment which was not advanced before it. That argument was advanced before me based on the affidavit of Dr Pratt which was also not before the Tribunal

[57] Second, and more fundamentally, the petitioner's argument fails properly to take account of the nature of the task which the Parole Board requires to carry out. As the Inner House made clear in paragraph 15 of *Ryan* (above at [5] and [6]), the test which the Parole Board requires to carry out is not easy and is not black and white. It requires 360° view taking account of all relevant factors. As such, the Tribunal requires to take a holistic approach. In my opinion, it would be unreasonable to expect the Tribunal in its decision to break down what it made of each of the multiplicity of factors before it.

[58] Ultimately, the critical question to be asked in assessing the reasoning of the Tribunal's decision is that the well informed reader should be in no real and substantial doubt as to the reasons for the decision and the material considerations that were taken into account in making it (*Wordie* above at [28]). I am entirely satisfied that the Tribunal's decision meets this test. The material factors which were determinative are clearly set out in paragraphs 49 to 51 of the decision.

[59] There are two final issues raised by the petitioner as part of the first challenge which I require to address. Both can be dealt with shortly.

[60] First, there is the petitioner's criticism that the Tribunal failed to continue the hearing to enable an updated Psychological Risk Assessment to be prepared. I do not consider that the Tribunal can properly be criticised for this. At the time of the hearing, the issue of the impact of the age of the 2015 Assessment had not been raised. Furthermore, this criticism fails to take account of the fact that the issues identified by the Tribunal in paragraphs 50 and 51, which determined its decision, were what drove the selection of a 24 month review period.

[61] Secondly, there is the petitioner's criticism of the Tribunal for placing weight on the petitioner's failure to complete offence-focussed work. The basis for this criticism is said to be that the Tribunal failed to take account of material lodged by the petitioner (including counsels' opinion) which showed the objectively reasonable basis for the fact that he maintains his innocence. This argument is entirely misconceived. The fact that the petitioner maintains his innocence does not detract from the fact that this offence-focussed work was identified as being necessary in his case. As the Tribunal makes clear in the decision, the "Moving Forward: Making Changes" course in question is available to those who maintain their innocence.

The second ground of challenge

[62] The petitioner' second ground is that, in light of the factors relied upon, the Tribunal of the Parole Board in its actions in this case has not acted as an independent and impartial court. Accordingly, the petitioner submits that his rights under Article 5(4) ECHR have been infringed. In advancing this argument, counsel for the petitioner stressed two things. First, she was careful to make clear that the petitioner was not suggesting that there had been any deliberate unfairness by any individual concerned. Second, she stressed that the petitioner's

challenge was based on there being a lack of an appearance of independence and impartiality in his particular case (see *Weeks* at paragraph 62; and *Campbell and Fell* v *UK* (1985) 7 EHRR 165 at paragraph 78).

[63] On this basis, I consider that, by analogy, Lord Hope's guidance as to the fair minded observer considering the real possibility of bias in *Helow* at paragraphs 2 and 3 is of particular assistance:

> "[2] The observer who is fair minded is the sort of person who always reserves judgment on every point until she has seen and fully understood both sides of the argument. She is not unduly sensitive or suspicious, as Kirby J observed in *Johnson* v *Johnson* (p509, para 53). Her approach must not be confused with that of the person who has brought the complaint. The 'real possibility' test ensures that there is this measure of detachment. The assumptions that the complainer makes are not to be attributed to the observer unless they can be justified objectively. But she is not complacent either. She knows that fairness requires that a judge must be, and must be seen to be, unbiased. She knows that judges, like anybody else, have their weaknesses. She will not shrink from the conclusion, if it can be justified objectively, that things that they have said or done or associations that they have formed may make it difficult for them to judge the case before them impartially.
>
> [3] Then there is the attribute that the observer is 'informed'. It makes the point that, before she takes a balanced approach to any information she is given, she will take the trouble to inform herself on all matters that are relevant. She is the sort of person who takes the trouble to read the text of an article as well as the headlines. She is able to put whatever she has read or seen into its overall social, political or geographical context. She is fair minded, so she will appreciate that the context forms an important part of the material which she must consider before passing judgment."

[64] Were the fair minded observer described by Lord Hope to consider the particular factors relied upon by the petitioner in this case, I have no doubt that she would not consider that there was a real possibility that the Tribunal was not independent and impartial.

[65] I consider that the fair-minded observer would take as her starting point the fact that, in terms of its institutional framework, the Tribunal of Parole Board for Scotland had been held to be, consistent with the requirements of Article 5(4), a judicial body which is

independent of the Scottish Ministers and impartial in its duties (see *Brown* above at paragraph 45; and *Hutton* v *Parole Board for Scotland* 2021 SLT 591 at paragraphs 12 and 52).

[66] From this starting point, I do not consider that any of the factors relied upon by the petitioner, either individually or collectively, would cause her to conclude that there was an appearance of a lack of independence or impartiality.

[67] In respect of each of the first two factors: the attendance of the Chief Executive at the hearing; and the prior involvement of the Chairperson (see paragraphs [22] and [23] above), one imagines the fair-minded observer asking herself – so what? In neither case does the petitioner explain why either factor would create an appearance of a lack of independence or impartiality.

[68] In the case of the attendance of the Chief Executive, the petitioner's position seems to amount to no more than he objected to Mr Spivey's attendance and the Tribunal overruled this objection and allowed Mr Spivey to attend subject to conditions (see paragraph [36] above). This decision, while adverse to the petitioner, simply does not constitute an objective basis for considering that there is a lack of independence or impartiality.

[69] In the case of the Chairperson, standing his immediate and entirely appropriate recusal, the petitioner's position seems to boil down to the role that the Chairperson played with respect to his fellow members of the Parole Board and, in particular, his power to make a recommendation, in certain circumstances, in relation to their reappointment (see paragraphs 2J and 2HA(4) of Schedule 2 of the 1993 Act). I do not consider that there is any substance in either of these points. The affidavit prepared by the Chairperson, which was not challenged, makes clear that he does not assign members to particular parole panels. It also explained that the Chairperson has had no involvement in the consideration by the Board of the petitioner's application for parole. As to the Chairperson's duties and powers

contained in Schedule 2 of the 1993 Act, properly understood, I do not consider that these have any impact at all on the question of the Board's independence and impartiality.

[70] I consider that the third factor founded upon by the petitioner, the two occasions on which correspondence between the petitioner and the Board was opened by Prison Service staff, is so lacking in specification as to be of little relevance. Based on the explanation that was provided to me by counsel for the Scottish Ministers (see paragraph [47] above), which was not disputed by the petitioner, I do not consider that this administrative oversight by the Prison Service staff in any way calls into question either the independence or impartiality of the Parole Board.

[71] This leaves the final two factors relied upon by the petitioner being: first, the alleged lack of a clear dividing line to ensure "administratively and legislatively" the Parole Board is objectively independent from the Scottish Government; and second, the absence of an available mechanism for review of the Tribunal's decision (see paragraphs [25] and [26] above). These factors are general and relate to the overall legislative and institutional framework in which the Parole Board is placed. No circumstances particular to the petitioner's case are identified in relation to either of these factors.

[72] Standing my conclusions in respect of the first three factors together with the authoritative guidance provided in respect of the Parole Board for Scotland (see above at [65]), I do not consider that either the fourth or fifth factors alter my conclusion that whether taken individually or cumulatively, the factors identified by the petitioner would not lead the fair-minded observer to conclude that there was a real possibility that the Tribunal lacked either independence or impartiality.

Order

[73] Accordingly, I will sustain the third plea-in-law for the respondent and the second plea-in-law for the interested party and refuse the petition. I will reserve all questions of expenses meantime.