OUTER HOUSE, COURT OF SESSION

[2022] CSOH 82

P502/22

OPINION OF LORD TYRE

in the Petition of

DEAN RYAN

Petitioner

for Judicial Review of a decision of the Parole Board for Scotland dated 17 March 2022

Petitioner: Crabb; Drummond Miller LLP
Respondent: Lindsay KC; Anderson Strathern

18 November 2022

Introduction

[1] The petitioner was convicted of murder and other offences in 1994 when he was aged 17, and sentenced to life imprisonment with a punishment part of 8 years. During the period since the punishment part expired he has been released twice on licence. The second of those releases ended on 29 August 2017 when he was recalled to custody following two allegations of rape having been made against him. Those allegations went to trial and on 12 June 2018 he was acquitted of both charges.

[2] On 17 March 2022 the Parole Board refused to direct the petitioner's release on licence. The petitioner seeks judicial review of that decision.

The respondent's duty

[3] In terms of section 2(4) of the Prisoners and Criminal Proceedings (Scotland) Act 1993, the Scottish Ministers must, if directed to do so by the Board, release a life prisoner whose punishment part has expired on licence. In terms of section 2(5), the Board may only give such a direction if the Scottish Ministers have referred the prisoner's case to the Board, and the Board is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined.

[4] The manner in which the statutory test ought to be applied by the Board – and the role of the court in reviewing the Board's decision – was set out in *Brown* v *Parole Board for Scotland* [2021] SLT 687, and formulated by the Lord Justice-Clerk (Lady Dorrian) in *Ryan, Wiseman and Meehan* v *Parole Board for Scotland* [2022] CSIH 11 at paragraph 13 as follows:

> "(i) The court must adopt anxious scrutiny of the decision;
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> (ii) It can interfere if the reasoning falls below an acceptable standard in public law;
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> (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';
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> (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
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> (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."

The Board's decision

[5] Applications for release are considered by a tribunal consisting of members of the Board. The tribunal in the present case consisted of three members. The decision was by a majority.

[6] The tribunal began by noting the details of the index offence. The petitioner had been convicted art and part along with his brother who was then aged 21. The deceased was assaulted, bound by his wrists and ankles, detained in his home against his will, threatened with violence, robbed of various items of his property, assaulted and ultimately murdered by strangulation. Attempts were made to steal a sum of money from an auto teller by means of the deceased's bank card and to steal his car by inserting into its ignition a key which had been stolen from him. The deceased's body and soft furnishings within the deceased's home were then set on fire.

[7] During his first release on licence between 2010 and 2013, the petitioner was convicted of various offences including theft by housebreaking for which he received a 4 month prison sentence. At the time of his most recent recall to custody, he was not living within his approved address and had been charged with two offences of rape. The tribunal narrated the details of these charges as follows:

> "23. The first charge alleged that on 18 June 2017, Mr Ryan met the complainer within licensed premises where she had been consuming alcohol, brought her in a taxi to the locus, assaulted her by striking her head on a kitchen worktop, punched her to the face and raped her whilst in the presence of another male. The complainer stated that references had been made to her, 'liking it rough'. On 6 July 2017, Mr Ryan was detained by the police in respect of the matter, questioned and released pending further enquiries.
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> 24. The second charge alleged that on 4 or 5 August 2017, Mr Ryan met the second complainer, previously unknown to him, in the street outside the locus. She had earlier consumed controlled drugs. She spoke of Mr Ryan smelling of alcohol. They engaged in conversation. She stated they discussed controlled drugs and that Mr Ryan said to her that he had heroin within the locus, before inviting her in.

> Within the locus she stated that Mr Ryan had consumed wine and that they both smoked a quantity of heroin. The complainer stated that she started to feel drowsy and awoke to find Mr Ryan raping her."

The tribunal noted that the petitioner was found not guilty of one of the rapes and that the other charge was found not proven.

[8] As regards the petitioner's recent conduct and progress in custody, the tribunal recorded that the petitioner was managed at a low supervision category and posed no concerns for prison staff in terms of his management. He had no formal outstanding intervention needs. He had been approved for progression to the open estate. However he had been removed from the "progression list" on 24 November 2021, having accrued two misconduct reports. One report related to a failed drug test; the sample tested positive for Pregabalin (a prescription drug used *inter alia* for pain relief). The second report related to the petitioner being found in possession of a bottle of liquid which appeared to be urine, intended to be used to circumvent Scottish Prison Service drug testing procedures. The bottle of liquid had been produced during a body search prior to the drug test being carried out. The petitioner had provided a further negative drug test on 14 March 2022 and had therefore become eligible to be returned to the "progression list". In the even t of the Board not directing Mr Ryan's release the SPS management plan was for Mr Ryan to incur no further misconduct reports, refrain from any further substance misuse and apply again to progress to the open estate. If approved for progression, he could be at the open estate by the end of June 2022.

[9] The tribunal heard evidence from a prison social worker (Mr McKenna) and a community social worker (Ms George). Neither recommended the petitioner's release, on the ground that his risks were not considered to be manageable in the community at that time.

[10] Mr McKenna stated that because of the recent failed drugs test the petitioner was now just within the "very high" risk bracket in the LSCMI risk assessment. No risk of serious harm assessment had been undertaken because the petitioner did not meet the criteria for such an assessment, having only one conviction for violence. That did not mean that he could not cause serious harm. Until such time as he had been tested successfully within conditions of lesser security than prison, there was no evidence of his manageability within the community. His two previous recalls to custody had arisen out of non-compliance with licence conditions. Mr McKenna had been unable to discuss the rape charges with him, and was concerned that "…there is a whole new area of risk I've not been able to address" with him. It concerned Mr McKenna that the petitioner found himself being charged with such offending which suggested at the very least that he had been involved in poor decision making and in putting himself in potentially high risk situations, despite having completed the Constructs programme after his first recall. The attempt to circumvent prison drug testing procedures compounded Mr McKenna's concerns because openness and honesty was a crucial element of management in the community. It was necessary for the petitioner to progress through the open estate prior to release in order to establish a better relationship with Ms George as his supervising officer in the community.

[11] Ms George also considered that it was essential for the petitioner to be tested by community access from the open estate before release on licence. This had been emphasised by his recent failed drug test and attempt to circumvent drug testing procedures because these events demonstrated that there were continuing concerns about his ability and motivation to be open and honest with those tasked to manage him when at liberty. In one passage the tribunal recorded her evidence as follows:

> "89. Ms George confirmed her view that simply because Mr Ryan had not been involved in violence whilst in custody or convicted of further violent offending in the community, did not mean that that she could support his release at this time or that he could be considered as not posing a risk of serious harm.
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> 90. She said, 'he has the propensity to use serious violence. We need to take that on board when assessing him'.
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> 91. Ms George confirmed that Mr Ryan had been recalled charged with very serious and violent sexual offending. Whether or not he had been convicted of that, she could not simply ignore the circumstances of these matters, she said, when considering her assessment of the risks posed by Mr Ryan.
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> 92. She said it was evident that Mr Ryan 'has the propensity to use serious violence causing serious harm'.
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> 93. She confirmed her view that he continues to pose a risk of causing serious harm."

Ms George agreed with Mr McKenna that the petitioner did not meet the criteria for a formal risk of serious harm assessment to be undertaken. She was not trained to undertake such an assessment but her professional opinion was that the petitioner had demonstrated that he was capable of causing serious harm and that he continued to pose a risk of serious harm.

[12] The tribunal also heard evidence from the petitioner. He explained that he had taken Pregabalin because he had been seeing the doctor for back pain. That particular day his back was sore and he decided to take the painkiller rather than wait for an appointment. The bottle had contained water, not urine. He realised that he ought rather to have told the testers that he had taken Pregabalin, but he stood by his decision to take it. In the community he could simply go to A&E or buy a painkiller; there would be no need to seek out an illicit drug. He was on a stable prescription of methadone and had been managing well on it for over two years. He had "self-medicated" for back pain on four or five occasions when the prison doctor had failed to prescribe adequate analgesia. During his most recent release on licence he had become complacent with his licence conditions and

recognised that he could make poor decisions. He did not have a drug problem outside prison. He acknowledged that he had to proactively manage who he was in contact with in the community.

[13] Having considered the evidence and submissions, the majority of the tribunal was in no doubt that his confinement remained necessary for the protection of the public. The current level of risk posed by the petitioner to the public was sufficiently unacceptable to justify his continued deprivation of liberty beyond the expiry of the punishment part. In reaching this decision, the tribunal took into account the circumstances of the index offence and any offending history, the petitioner's assessed very high level of risk and needs, his conduct since sentence and intentions if released, all relevant information in the dossier, and the evidence at the hearing.

[14] In relation to the rape allegations, the tribunal stated:

> "164. Although Mr Ryan was not convicted of either offence, it is of significant concern to the Board that he found himself in such circumstances. What is of even more concern to the Board is that after having been questioned by the police in respect of the first alleged rape, he made the choice to invite another unknown female into a property in which he was residing at that time and was present whilst she consumed illicit substances.
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> 165. To have put himself in such a position and behaved in such a manner demonstrates to the Board Mr Ryan's complete inability to manage his risks. It also demonstrates his inability to make good decisions or use consequential thinking and a significant lack of insight by him into his risks surrounding alcohol and/or substances."

[15] In relation to the petitioner's use of an illicit drug and attempted concealment of that use, the tribunal observed:

> "166. To compound all of that, Mr Ryan has admitted to 'making the conscious decision' to use illicit substances in custody as a means of 'self-medicating' for back pain. This again demonstrates to the Board Mr Ryan's very poor decision making and inability to use consequential thinking or recognise his risks surrounding substances. It was also the view of the Board that the deliberate decision to take non-prescription medication demonstrates that Mr Ryan displays an instrumental

disregard to rules and as such cannot be trusted to comply with licence conditions at this stage. The Board considered that Mr Ryan's argument for taking these drugs showed a poor regard for the consequences of his actions or a belief that he believes that the rules of custody do not apply to him. This did not invoke confidence that he would be amenable to licence conditions if released at this time."

[16] The tribunal then turned to consider the evidence from the social workers and stated:

"171. Both social workers in their evidence to the hearing informed of their professional opinion that Mr Ryan poses a risk of serious harm to the public on release, irrespective of the fact that he does not meet the criteria for a formal RoSH risk assessment. The Board accepted completely their rationale for this. The Board agreed wholeheartedly that an offender can pose a risk of serious harm despite not meeting the criteria for a formal RoSH risk assessment to be undertaken.

172. The Board accepted the evidence of both social workers to the hearing that, in their professional opinion, Mr Ryan poses a risk of serious harm to the public on release. The Board accepted their reasoning for forming such a professional opinion. The Board found their reasoning to be based entirely on the facts of Mr Ryan's case and the troubling circumstances of his two recalls."

[17] As regards the petitioner's evidence, the tribunal observed:

"173. By contrast, the Board found the evidence of Mr Ryan to be verging on being dismissive regarding his risks around alcohol and/or substances. His claim to have made the 'conscious decision' to use illicit substances in custody as a form of pain relief and to have no regrets surrounding this concerns the Board immensely given Mr Ryan's various incidents of non-compliance with supervision and licence conditions and the circumstances of his two recalls to custody.

174. Using illicit substances is, of itself, illegal. It requires the purchase of drugs from individuals involved in the sale and distribution of them. The majority of the drug trade is governed by serious organised crime. By its very nature those involved in serious organised crime present a significant and continuing risk of violence to the public. This applies to every stage of the drug trade: from production, to drug supply chains, to drug use. It is a risk from which the public require protection as it can, and often does, pose a risk of serious harm and to 'life and limb'.

175. The risk posed to the public by Mr Ryan's involvement in drugs in both prison and the community cannot therefore be underestimated by the Board."

[18] The tribunal concluded that it could not ignore the professionals' assessment of the risk posed by the petitioner, or the circumstances of his most recent recall. It was not satisfied that it was no longer necessary for the protection of the public from serious harm

that the petitioner should continue to be confined in custody at that time. Given that he was likely to have reached the open estate and commenced some form of phased community access by July or August 2022, the tribunal fixed a review period of nine months.

Argument for the petitioner

[19] On behalf of the petitioner it was submitted that the procedure adopted by the tribunal in reaching its decision was unfair.

- Firstly, it had acted unfairly by taking into account unproven allegations which had been rejected by a jury. That it had done so was clear from its narrative of the allegations of rape made by the two complainers, its recording of the evidence of the two social workers as to the significance of the allegations, and its acceptance of their evidence in its entirety.
- Secondly, it had acted unfairly by providing inadequate reasons. There was a heightened duty to provide adequate reasons because the petitioner was so far beyond his tariff. The tribunal's reasons were inadequate in respect of the unproven allegations: the informed reader was left in substantial doubt as to what the tribunal made of the allegations and the social workers' evidence. There was doubt as to whether the tribunal had excluded the allegations of sexual assault from its decision-making. The tribunal's reasons were also inadequate in relation to the link apparently made by it between the petitioner's use of an illicit painkiller and serious organised crime and the risk to "life and limb". If the tribunal's position is that anyone who takes illicit substances in prison has links to organised crime and is therefore a threat to life and limb, its reasoning fell below an acceptable standard.

- Thirdly, the Board had acted unfairly and unlawfully by not disclosing its policy on drug use in custody. It had employed similar reasoning and the same wording in *Ryan, Wiseman and Meehan* (above): that was indicative of application of an unpublished policy.
- Fourthly, the Board had acted unfairly by not giving clear notice of its criteria for the assessment of risk in relation to unproven allegations. Any self-imposed limitations on its discretion as an inquisitorial tribunal respect of use of unproven allegations in its assessment of risk required to be published.

[20] It was accepted that if the tribunal's decision had been based solely upon the petitioner's poor decision making while released on licence and on his lack of respect for conditions as demonstrated by his illicit drug use in prison (ie paragraphs 164-166 above), it would have been difficult to challenge. But the tribunal had gone further. It had accepted the evidence of the social workers, including Mr McKenna's description of the rape allegations as "a whole new area of risk", and Ms George's assessment which had been based on the seriousness of the allegations and not upon the peripheral facts surrounding them. The tribunal had found it appropriate to narrate details of the allegations which had not featured in previous decision minutes. It therefore appeared that the tribunal had taken into account the allegations of which the petitioner had been acquitted. The apparent link between the petitioner's illicit drug use in prison and organised crime – and hence need for public protection – had also apparently formed part of its reasoning.

[21] The procedure was unfair having regard to what was at stake. The petitioner was significantly over his tariff, and his case required a meticulous approach. The issues raised indicate that the process could have been made more fair, even if only to the extent of making a reasonable perception of the fairness being more favourable than it otherwise

might have been (cf *O'Leary* v *Parole Board for Scotland* 2022 SLT 623, Lord Sandison at paragraph 17). It could not be said here that any procedural defects made no difference to the outcome.

Argument for the Board

[22] On behalf of the Board it was submitted that the tribunal had provided adequate and comprehensible reasons which fully explained why it had refused the petitioner's application. In particular:

- The tribunal had explained why the admitted and undisputed circumstances involving the two rape allegations demonstrated that the petitioner was unable to manage his risks. The Tribunal had not taken into account the unproven allegations; rather, it had taken into account the circumstances relating to the petitioner's interaction with both complainers. Those circumstances demonstrated his inability to make good decisions or use consequential thinking and a significant lack of insight by him into his risks surrounding alcohol and/or substances, and were relevant and material considerations to which the tribunal could lawfully have regard when applying the statutory test in section 2(5)(b) of the 1993 Act.
- The petitioner's use of illicit substances had been regarded by the tribunal as demonstrative of his very poor decision making and inability to use consequential thinking or to recognise his risks surrounding substances. His decision to take non-prescription medication was regarded as demonstrating an instrumental disregard for rules, so that he could not be trusted to comply with

licence conditions at this stage. It was a relevant and material consideration that the tribunal could lawfully take into account when applying the statutory test.

- The Board did not have a policy on unproven allegations. There was no obligation on the Board to have such a policy. In *R (Pearce)* v *Parole Board* [2022] 1 WLR 2216, at paragraph 8, the Court of Appeal held that the (English) Parole Board was entitled to, but was not under a duty to, issue guidance on unproven allegations. The same applied in Scotland. In any event the tribunal was an independent specialist decision-maker which exercised its own expertise and judgement when applying the statutory test. The lawfulness of its decision was determined by having regard to its findings relating to the unproven allegations, rather than by the presence or absence of any policy.
- The Board did not have a policy on drug use in custody. Everything just said about the absence of a policy in relation to unproven allegations, and the determination of the lawfulness of the tribunal's decision, applied equally to its findings in relation to the petitioner's use of illicit drugs while in custody.

[23] As regards its acceptance of the social workers' evidence, the tribunal had focused upon what was said about the admitted surrounding circumstances rather than on the allegations. Its reasoning was not infected by any error committed by either of the social workers in placing weight on the allegations themselves. The sexual connection to the petitioner's poor decision-making had been correctly assessed as a risk. In any event it was reading too much into Ms George's evidence to suggest that she had disregarded the verdict of acquittal. Her view that the petitioner continued to pose a risk of serious harm should not be read as based upon the sexual allegations; it was a reference back to the index offence.

[24] So far as concerned the tribunal's observations about serious organised crime, this was not indicative of the existence of any policy. It was to be noted that the same person had chaired the previous tribunal when similar observations had been made. The context of the reference to organised crime was the petitioner's lack of insight into the significance of his illicit drug use which cast doubt on his ability to comply with licence conditions after release.

Decision

[25] At the outset of the hearing I inquired whether the issues had become academic, standing the fact that the review period fixed by the tribunal had almost passed. I was advised that since the tribunal gave its decision in March 2022 the petitioner has undergone testing in the open estate and that a review hearing has been fixed for 19 December 2022. Parties nevertheless wished the hearing to proceed; counsel for the petitioners considered that the same issues arose in other cases, and senior counsel for the Board did not seek to contend that the application had become academic. I proceeded to hear argument, but I remain doubtful that my decision will have either any enduring consequences for the petitioner himself or any significance beyond the present application.

[26] It is not in dispute that the decision of a specialist tribunal of the Parole Board must be given due deference and that the court may not substitute its own views for those of the tribunal. Nevertheless, as the court observed in *Ryan, Wiseman and Meehan* (above) at paragraph 14, the tribunal's reasons must be carefully scrutinised. Particularly anxious scrutiny must be applied where, as here, the prisoner remains confined long after expiry of the punishment part.

[27] I address firstly the submission that the tribunal acted unfairly in applying an undisclosed policy in relation to the use of unproved allegations when assessing risk. I find nothing in the reasoning of the tribunal to suggest that it was purporting to apply a policy, and I accept the assurance of senior counsel for the Board that no such policy exists.

[28] I also reject the contention that the terms of the decision demonstrate the application of a policy in relation to illicit drug use in prison. Senior counsel for the Board correctly drew a distinction between the Board itself, upon whom the task of formulating and publishing any policy would fall, and the members of the tribunal hearing a particular application, whose duty is to act as an independent quasi-judicial body with no policy-making role. The coincidence in the wording of paragraph 174 of the present decision and the wording of a previous decision appears to indicate nothing more than a choice made by the majority of the current tribunal to re-employ the same wording in the factual context of the present case.

[29] I turn therefore to address the reasoning of the tribunal in relation to, firstly, the rape allegations and their surrounding circumstances and, secondly, the petitioner's use of illicit drugs in prison. Counsel for the petitioner was correct, in my opinion, to concede that if the tribunal's reasoning had not gone beyond paragraphs 164-166 set out above, it would be hard to impugn its fairness. The weight to be attached to the undisputed circumstances that resulted in the making of the two rape allegations, in the context of the petitioner's ability to manage his own risk, make good decisions, and demonstrate insight into the risks posed by alcohol and drugs, and the consequences of all of that for the protection of the public, are matters for determination by the specialist tribunal. The same applies to the weight to be attached to the significance of the petitioner's use of illicit drugs in prison, in the context of his ability and willingness to comply with licence conditions and to be open and honest with

his supervising officers after release. Senior counsel for the Board insisted that the tribunal's reasoning had gone no further. The question is whether, on a fair reading of the decision of a whole, the court can be satisfied that that assertion is correct.

[30] As regards the rape allegations, a difficulty arises because of the tribunal's express and unqualified approval of both the evidence and the reasoning of the two social workers in relation to the risk of serious harm to the public posed by the petitioner if released. There are, to say the least, indications that both social workers placed weight not only on the circumstances that led to the allegations being made, but also on the allegations themselves. Mr McKenna is reported to have described the sexual charges as "a whole new area of risk". Ms George, having referred to the petitioner having been charged with "very serious and violent sexual offending", expressed the view that he had "the propensity to use serious violence causing serious harm", and that he continued to pose a risk of causing serious harm. I find it difficult to accept senior counsel's submission that all of this should be read as relating to the index offence; that would, for example, afford no indication of whether the petitioner "continued" to pose a risk of causing serious harm.

[31] Reference was made during argument to the distinction drawn in *R (Pearce)* (above) between, on the one hand, established or undisputed constituent facts associated with an overarching allegation, which could of themselves provide indications of risk and, on the other hand, assessment of the seriousness of the nature of an allegation with some evidential basis, which could according to the Court of Appeal amount to embarking down the route of "no smoke without fire". That distinction appears to me to apply with greater force where, as here, the allegations in question have been subjected to scrutiny in criminal proceedings and have been found not to have been proved to the requisite standard of proof. In that situation, a careful separation must be made between the established or

undisputed facts from which legitimate inferences may be drawn and the allegations which have been rejected as not proved.

[32] I am unable to conclude that such a separation has been achieved here. I cannot read the tribunal's treatment of the social workers' evidence and reasoning as amounting to no more than *obiter* observations, as senior counsel invited me to do. The paragraphs in question, including paragraphs 171 and 172 set out above, clearly form part of the tribunal's reasoning leading to its conclusion that the petitioners' confinement remained necessary for the protection of the public from serious harm. I conclude that, in respect that the tribunal took allegations of which the petitioner was acquitted into account in reaching its decision, it acted unfairly.

[33] In relation to the petitioner's illicit drug use, the difficulty arises because of the observations of the tribunal regarding the link between the drug trade and serious organised crime. Read in isolation, each of the observations made by the tribunal in paragraph 174 above about the link between the drugs trade at every level and the risks of serious harm posed to the public is unexceptionable. But the observations are then applied, at paragraph 175, to justify a conclusion that the petitioner's "involvement in drugs in both prison and the community" poses a risk to the community that "cannot… be underestimated by the Board". The context, it will be recalled, is the petitioner's use, as an end user, of an illicit prescription drug. Although the tribunal notes elsewhere that the petitioner is on a methadone programme it is nowhere suggested that that aspect of his drug use causes him to pose a risk. It must be concluded, reading paragraphs 174 and 175 together, that the tribunal regarded the petitioner's use of the illicit drug while in prison as constituting involvement in serious organised crime, and *therefore* of posing a risk of serious harm to the public. In my opinion that logical progression does not stand up to scrutiny and

falls below an acceptable standard of reasoning as a part of the justification for continuing to confine the petitioner so long after tariff expiry.

[34] It follows that in relation to each of the two aspects of the tribunal's reasoning challenged by the petitioner, I find that the tribunal's decision was unfair. Moreover I find that they constituted core elements of the tribunal's reasons for refusing to direct the petitioner's release on licence. The decision must therefore be reduced.

Disposal

[35] I shall repel the Board's pleas in law, sustain the petitioner's second and third pleas, reduce the decision of the tribunal dated 17 March 2022 and remit the matter for determination by a differently constituted tribunal of the Board. Questions of expenses are reserved.