OUTER HOUSE, COURT OF SESSION

[2018] CSOH 106

P376/17

OPINION OF LADY CLARK OF CALTON

In the cause

MARGARET PATRICIA PATERSON

Petitioner

against

THE SCOTTISH CRIMINAL CASES REVIEW COMMISSION

Respondent

for

JUDICIAL REVIEW

Petitioner: McLean; Balfour + Manson LLP
Respondent: Pirie; Scottish Criminal Cases Review Commission

16 November 2018

Summary

[1] In 2013 the petitioner was convicted of a number of connected offences contrary to the Criminal Law (Consolidation) (Scotland) Act 1995 sections 11(4), 11(5)(a) and (6) relating to aiding or compelling prostitution and keeping or management of a brothel; the Proceeds of Crime Act 2002, section 329(1)(c) relating to possession of criminal property, and section 327(1)(c) relating to conversion of criminal property. The offences were libelled in terms of section 29 of the Criminal Justice and Licensing (Scotland) Act 2010 between

specified dates in 2010 and 2011 as aggravated by a connection with serious organised crime. Sentences of imprisonment, to be served concurrently, of 3 to 5 years imprisonment were imposed in respect of the offences.

[2] The petitioner sought leave to appeal against conviction and sentence. The court granted leave to appeal against sentence only. After a full hearing the sentence appeal was refused.

[3] In December 2014, the petitioner made an application to the respondent and alleged that she had suffered a miscarriage of justice setting out various grounds. After investigation and further procedure, the respondent issued a decision and statement of reasons dated September 2015 and a decision and supplementary statement of reasons dated 31 May 2016. A further decision and statement of reasons dated 27 January 2017 was made by the respondent in response to an application for review by the petitioner dated 19 December 2016. The respondent concluded for the various reasons given not to make a reference to the High Court of Justiciary in respect of all the grounds raised by the petitioner.

[4] In this judicial review petition, the petitioner sought reduction of the respondent's decision dated 27 January 2017 and *inter alia* an order requiring the respondent to reconsider the decision. The basis of the challenge was that the respondent decided not to make a reference after taking into account material, in the form of two letters from Crown Office, which had not been seen by the petitioner. The letters related to a Crown Office policy about prosecution. It was not disputed that the information from Crown Office played a central part in the respondent's decision to refuse to refer the petitioner's case in respect of one of the grounds raised by the petitioner and the judicial review focussed on that. The petitioner alleged in relation to the respondent's reliance on the Crown Office letters that

"the respondent afforded an opportunity for injustice to be done, and its decision was procedurally unfair" (paragraph 12 of the petition).

[5] By interlocutor dated 11 July 2017 permission was granted by the Lord Ordinary for the judicial review petition to proceed. Thereafter in the course of proceedings, a motion on behalf of the respondent was enrolled to restrict the hearing to time bar issues raised by the respondent in their second plea in law and by the petitioner in their second and third pleas in law. The motion was unopposed and was granted by interlocutor dated 24 April 2018.

The issues to be determined in the judicial review proceedings

[6] The principle issue was whether on the correct interpretation of section 27(1)(a) of the Court of Session Act 1988 (The 1988 Act) the petitioner made an application to the supervisory jurisdiction before the end of the period of 3 months beginning with the date on which the grounds giving rise to the application first arose. The subsidiary issue was whether in the circumstances of the petitioner's case, it is equitable to extend the 3 month period under section 27A(1)(b)

The decision making of the respondent

[7] With the assistance of her solicitors, the petitioner made an application to the respondent in December 2014 and submitted that she had suffered a miscarriage of justice in relation, *inter alia*, to alleged defective representation, prejudicial pre-trial publicity and judicial misdirection. The respondent investigated and issued a detailed statement of reasons dated September 2015. The respondent, for the reasons given, did not believe that there had been a miscarriage of justice and decided not to refer the case to the High Court. Paragraph 40 stated:

> "The Commission will consider any further submissions in the applicant's case, based on the present grounds of review, and may reconsider its decision. All such submissions should reach the Commission within 28 days of the date of the letter accompanying this statement of reasons."

[8] By letter dated 19 November 2015 and received by the respondent 24 November 2015, additional submissions were made by the solicitor acting for the petitioner. The letter stated:

> "…At Edinburgh Sheriff Court a number of accused appeared in relation to an indictment matter in which they were being prosecuted for similar offences as those on Ms Paterson's indictment. Although we have not had an opportunity to consider the terms of the indictment we understand that the individuals were all accused of operating saunas in the City of Edinburgh and contravening the Civic Government (Scotland) Act plus money laundering offences.
>
> The case was withdrawn against all accused.
>
> Although we do not have full details we understand that potentially it related to a Crown investigation regarding a Crown Office Policy not to prosecute individuals operating such premises…"

Although the submissions were made outwith the 28 day time limit, the respondent carried out further investigation. In the respondent's supplementary statement of reasons in May 2016, the respondent identified "a new issue" in relation to sheriff court proceedings relating to brothel keeping in which the Crown had withdrawn the indictment. Paragraph 24 stated:

> "In January 2016, the Commission itself wrote to the Crown, seeking clarification of the position. The Crown responded to the Commission in a letter dated 24 March 2016, and, at the Commission's request, provided additional information in a letter dated 6 April 2016. The second letter maintained that there was no 'policy restricting the prosecution of brothel keeping cases'. It did, however, confirm that there was information available to the Crown about the establishment in the 1980s of a local authority licensing scheme for premises at which prostitution may have taken place. The information included reference to a prosecutor taking part in a meeting about the scheme and discussing the circumstances in which prosecution for prostitution offences in such licensed premised would not take place. The Commission does not believe that this information is relevant to the applicant's case. The applicant denied that she had been running a brothel of any description. There is no suggestion that she may have been operating a licensed sauna."

The respondent intimated the supplementary statement of reasons by letter dated 31 May 2016 which stated that the respondent had now "finally decided" not to refer the petitioner's case to the High Court. The petitioner was informed that she was not prevented from applying again if she believed that new matters arise which the respondent had not addressed as part of the application.

[9] On 16 August 2016 there was informal correspondence by email from a relative of the petitioner in which it was said that the petitioner required further information including "Crown Office letters" to be sent to her lawyer, "so they can go ahead to see if she can go down the judicial review:". The respondent replied by letter dated 22 August 2016 and stated:

> "…The Commission operates within a framework of statutory non-disclosure provisions, as set out in the Criminal Procedure (S) Act 1995 (CPSA), section 194J, and the Data Protection Act 1998. Section 194J(1) of CPSA provides that a person who is or had been a member or an employee of the Commission shall not disclose any information obtained by the Commission in the exercise of any of its functions unless the disclosure of the information is excepted from s194J by s194K of CPSA…"

[10] A further application to the respondent dated 19 December 2016 was made personally by the petitioner, albeit she had some legal advice. The application included part of the Judge's charge to the jury; an article from the Daily Record entitled "Lawyer Who Foiled Massive Police Operation to Close Down Edinburgh Sex Saunas"; and a draft note of appeal which stated, *inter alia*:

> "…Prior to the trial diet the Crown failed to disclose to the appellant that there was a Crown Office policy in place that individuals in Edinburgh who traded in prostitution and brothel keeping would not be prosecuted. Such a policy resulted in the Crown ceasing prosecutions against 11 individuals… the appellant was unaware that such a Crown Office policy existed… The Crown therefore failed to disclose material likely to be of assistance to… the appellant's defence at trial… If there had been disclosure there was a real possibility that the jury would have reached a different verdict…"

In the additional information, there was no request to the respondent to disclose the Crown Office policy in full in the form of the Crown Office letters or otherwise and no complaint was made to the effect that the respondent's consideration and determination of the issues was flawed in any way because the petitioner did not have access to the full terms of the Crown Office policy.

[11] By letter dated 13 January 2017, the legal officer of the respondent wrote to the petitioner and stated:

> "…My summary of your grounds of review is as follows:
>
> (1) Prior to the trial diet the Crown failed to disclose to you and to the public that there was a Crown Office policy in place that individuals in Edinburgh who traded in prostitution and brothel keeping would not be prosecuted. Such a policy resulted in the Crown ceasing prosecutions against eleven individuals named upon indictments. On one of the indictments (PF Reference ED13137726) reference was made not only to saunas but to other premises. Prior to your trial you were unaware that such a policy existed or that there was a meeting in or around 1986 with the police, the Crown Office and other interested parties to effectively decriminalise prostitution in Edinburgh. You were aware that Edinburgh 'saunas' operated as brothels. The failure by the Crown to disclose the details of the original meeting and any policy for non-prosecution was a material failure on the part of the Crown. The issue of Edinburgh 'saunas' arose during the trial; there was no evidence that the saunas operated as brothels in the knowledge and with the cooperation of the authorities. The trial judge directed the jury about the saunas at pages 22-23 of his charge.
>
> (2) The Crown therefore failed to disclose material likely to be of assistance to the proper preparation and presentation of your defence at trial (*McDonald v HMA* 2008 SCCR 954). If there had been disclosure there is a real possibility that the jury might have reached a different verdict (*McInnes v HMA* 2010 SC (UKSCS) 28; *Fraser v HMA* 2011 SC (UKSC) 113). Additional investigation and enquiries would have been made on your behalf. Evidence could have been led from police officers and from your accountant regarding the knowledge of the police in relation to your venture which was advertised and open, in relation to your contact with the police and to the fact that there was a Crown Office policy. Evidence was led at trial regarding the saunas which must therefore have been determined as relevant to the issues at trial despite the trial judge's directions. There has been a miscarriage of justice.

By letter dated 1 February 2017 to the petitioner, the respondent referred the petitioner to the statement of reasons dated 27 January 2017 to explain the decision not to make a reference. The respondent stated that the ground of review is "the same, or substantially the same, as one of the grounds submitted by the applicant's solicitors to the Commission in the course of its previous review"; there was no good reason for disagreeing with the outcome of the earlier review under reference to paragraph 24 of the supplementary statement of reasons dated May 2016; and at page 3 thereof stated that:

> "…Any discussions in the 1980s about the circumstances in which prosecution would not take place for prostitution offences in premises licensed under a local authority scheme are not relevant to the applicant's case. The applicant's convictions did not relate to any premises licensed by the local authority. There was no suggestion in the evidence that the applicant may have been operating a licensed sauna. The applicant's position throughout was that she denied running a brothel of any description."

The statutory framework governing the operation and decision making of the respondent

[12] The respondent, the Scottish Criminal Cases Review Commission, is a statutory body which has the remit and powers set out in section 194 of the Criminal Procedure (Scotland) Act 1995. In terms of section 194C(1) the grounds upon which the respondent may refer a case to the High Court are that they believe:

> "(a) that a miscarriage of justice may have occurred; and
> (b) that it is in the interest of justice that a reference should be made."

In terms of section 194F, the respondent has wide powers which include a power to request the Lord Advocate for information and under section 194R a power to obtain documents on application to the High Court. Special provisions also relate to circumstances in which the respondent may not disclose information without consent in terms of section 194L.

The time limits in the Court of Session Act 1988

[13] Section 27A of the 1988 Act states:

> "(1) An application to the supervisory jurisdiction of the Court must be made before the end of –
> (a) the period of 3 months beginning with the date on which the grounds giving rise to the application first arise, or
> (b) such longer period as the Court considers equitable having regard to all the circumstances."

Submissions by counsel for the respondent

[14] The principal submission of counsel for the respondent was that the application by the petitioner for judicial review was time barred. He addressed the court on the correct interpretation of section 27A(1)(a) under reference to the interpretation of what he described as "not materially dissimilar time bar provisions in England and Wales". Reference was made to *R* v *Secretary of State for Trade and Industry, ex parte Greenpeace Limited* [1998] Env LR 415 at paragraphs 420-4 and *Payne* v *Secretary of State for the Home Department* [1999] Imm AR 489 at page 492. The approach in the Greenpeace case was followed in *R* v *Commissioner for Local Administration, ex parte Field*, High Court, 29 July 1999. The time bar provisions in the 1988 Act are framed by reference to "the date on which the grounds giving rise to the application first arise" that may be a reference to a specific decision challenged but it is important to consider what is the real substance of the challenge made in the judicial review process. The legislative objective of the time bar provisions reflected the public interest in challenges being made promptly. Where such time bar provisions applied, they could not be defeated merely by a repetition of the substance of the submissions in order to obtain a later decision. Reference was made to *Wightman* v *Advocate General* 2018 SLT 356, paragraph 33 in which Lord President (Carloway) observed:

> "So far as time bar is concerned, the three month limit in section 27A of the 1988 Act cannot be circumvented simply by persuading a person to repeat a decision or other act complained of…"

[15] Counsel identified the grounds of review raised by the petitioner which were to the effect that the decision was procedurally unfair because it was based on material from the Crown Office letters that had not been seen by the petitioner. He submitted that it was plain from the decision and reasons dated 27 May 2016 that it would have been open to the petitioner from the end of May 2016 to raise an action of judicial review on the basis of the grounds which now underpinned the present petition. If there was any doubt about that it was plain such grounds arose when the respondent refused on 22 August 2016 the petitioner's request of 16 August 2016 to provide a copy of the Crown letters about the prosecution policy. The time limit started to run from 27 May or at the latest 22 August 2016. The petitioner missed the 3 month time limit specified in section 27A(1)(a) because the petition was not lodged until 25 April 2017.

[16] If the court did not accept the submissions about time bar, counsel submitted that it was not equitable in all the circumstances to extend the 3 month period in terms of section 27A(1)(b). He relied on the general public interest including the efficiency of administration; the length of delay; the lack of any fault by the respondent for delay; the lack of legal or factual complication; the availability of legal representation and assistance to the petitioner and the existence of clear information available to the petitioner on which to raise a judicial review petition timeously. Counsel was also critical of the attempt by the petitioner to make the fresh application on 19 December "to provide necessary clarification". There were no new matters or clarification required. No notice was given to the respondent about the possibility of a judicial review and the respondent was not asked to agree not to take the time bar point. Reference was made to *R (International Masters Publishers Ltd)* v

Commissioners for Her Majesty's Customs and Excise [2006] EWHC 127 (Admin). No general principle of public importance arose as the petitioner's case was very fact specific. Counsel submitted that the onus lay on the petitioner to give good reasons for an extension and she had failed in that.

[17] I was invited to uphold the second plea in law which was the time bar plea and refuse the petition.

Submissions by counsel for the petitioner

[18] The factual history and interpretation of the time bar provisions in the 1988 Act were set out in detail in written submissions. I understood from oral submissions that counsel did not dispute the interpretation relied upon by the respondent and in particular he accepted that merely asking the decision maker to make another decision does not in itself defeat the time bar provisions. Counsel disputed that the petition was time barred and made detailed reference to the particular circumstances of the case. He submitted that there was sufficient new information put forward in the application in December 2017. There was a challenge to the understanding of the respondent that there was no general Crown policy of non-prosecution. By October 2017, new information had become available that the non-prosecution policy was wider than that described by the respondent in its statement of reasons dated May 2016. There was new information about how specific cases had been disposed of when the prosecutions were dropped. The petitioner was not simply asking the respondent to remake an earlier decision. The petitioner was asking the respondent to look at new information and for a decision to be taken based on that information. The December 2016 application amounted to a fresh application. That application had as its sole focus the Crown Office prosecution policy. The information provided by the petitioner

strongly suggested that the policy was potentially more widely framed than had been represented by the Crown Office in their letters to the respondent and that the policy had been in place at all material times. A wide application would be consistent with the aims of the policy. In summary, counsel submitted that the December 2016 application was sufficiently different from the earlier application to be regarded as a fresh application. In that event the 3 month time limit ran from 1 February 2017 (the date of notification to the petitioner of the decision and statement of reasons dated 27 January 2017). The petition, having been lodged on 25 April 2017, was not *prima facie* time barred.

[19] In relation to extending the time bar, counsel accepted that the onus lay upon the petitioner to persuade the court that it was equitable to extend the 3 month period having regard to all the circumstances. There were factors both for and against extending discretion in favour of the petitioner. He emphasised that public interest considerations in this type of case were different from the considerations which often arose, for example in planning cases. He accepted there was a public interest in the finality of criminal proceedings, but submitted there was also a general public interest in prosecutions not being oppressive. This was a case in which the petitioner had been prosecuted in circumstances where the Crown did not disclose potentially relevant information and in particular kept private information about a relevant prosecution policy. There were important considerations in relation to the interest of justice if an individual accused was convicted in a miscarriage of justice. The effect of a successful judicial review would be the most realistic way in which the petitioner could obtain Crown Office letters and the full opportunity to make representations to the respondent about the policy and its effect on the prosecution of the petitioner. This was a case in which the hearing had been limited to time bar issues. The petitioner was entitled to rely on the fact that at an earlier stage of proceedings, the Lord

Ordinary had allowed the case to proceed to a full hearing of the merits. The case raised some important points of principle about the extent to which the respondent required to make full disclosure of information on which its decision making had relied.

[20] Taking into account all the matters raised on behalf of the petitioner, I was invited to find in favour of the petitioner, by sustaining the second plea in law for the petitioner, failing which to sustain the third plea in law to the effect that it would be equitable to extend the 3 month period.

Decision and reasons

[21] My starting point is a consideration of the terms of section 27A(1)(a) of the 1988 Act. In my opinion the statutory wording is perfectly plain. It is necessary to identify "the date on which the grounds giving rise to the application first arise". In some cases this identification might cause some difficulty but not in this case. I consider that the grounds underpinning the petition relate to the decision by the respondent to reach a decision based on material not seen in full by the petitioner. The petitioner claimed that this was procedurally unfair and contrary to natural justice. It is clear from the factual history, which I have summarised, that the petitioner was informed that the respondent relied on the Crown Office letters as partially disclosed in its decision and supplementary statement of reasons dated 31 May 2016. I consider that it was open to the petitioner thereafter to make a timeous challenge by way of judicial review on the grounds which underpin the present petition. The petitioner failed to do so and the present judicial review was not brought within the time limits specified in section 27A(1)(a) of the 1988 Act.

[22] I note that the respondent in giving reasons stated that the application by the petitioner dated 19 December 2016 "…is the same, or substantially the same, as one of the

grounds submitted by the applicant's solicitors to the Commission in the course of its previous review". There is no ground of challenge to that decision in the petition. But counsel for the petitioner submitted that it was relevant that there was a fresh application with new information. I consider that the respondent was entitled to reach the conclusion made but even if the respondent was wrong, that does not affect my decision. The Commission were not deciding the same issue which I require to decide. In my opinion it is irrelevant to the issue of the time limit under the 1988 Act whether the information provided by the petitioner in the application dated 19 December 2016 was new information or not.

[23] In considering the submissions by counsel for the parties in relation to the extension of the time limit under section 27A(1)(b), it is important to remember the nature of the proceedings. The proceedings are not a criminal trial. The respondent has statutory and investigatory powers in relation to matters which may be sensitive and is subject to disclosure provisions. A fresh application may be brought after a decision by the respondent.

[24] Counsel for the petitioner fairly accepted that the equitable considerations did not lie entirely with the petitioner. I understand that at the relevant time after May 2016, the petitioner was in custody but that she continued to have some legal assistance and advice about potential further legal action. The petitioner did appear to be aware of the remedy of judicial review as that was raised on her behalf in the informal correspondence dated 16 August 2016. It was not submitted that the petitioner or her solicitors were unaware of such a remedy. Counsel for the petitioner raised in his submissions the difficulties for the petitioner arising from a possible lack of clarity about the remedy, in circumstances where it was possible to make a fresh application to the respondent. I did not agree with this submission as I considered that the remedy of judicial review was not only the appropriate

remedy but a remedy which was under consideration by the petitioner. He also submitted that there were powerful arguments in favour of the petitioner who was concerned about a potential miscarriage of justice. That is a serious matter but in the course of submissions it became apparent that insofar as the Crown Office policy was disclosed, it did not appear to assist the petitioner. The expectation of counsel for the petitioner appeared to be that if the full terms of the Crown Office letters could be obtained, somehow this would assist the petitioner. This expectation seemed to be based on a rather unrealistic hope standing the terms of the prosecution policy which had been disclosed. I take into account that there have been months of delay before raising the present petition and in my opinion no good reason has been advanced to justify such a delay.

[25] Having considered all the factors prayed in aid by counsel for both parties, I am not persuaded that it is equitable to extend the period of 3 months selected by the legislature for reasons of good governance and public policy. I therefore refuse the petition reserving all questions of expenses.