OUTER HOUSE, COURT OF SESSION

[2019] CSOH 106

P606/19

OPINION OF LORD DOHERTY

in the petition of

MARC McDONALD

Petitioner

for

Judicial Review of a failure by the Scottish Ministers to take timeous steps to refer his case to the Parole Board for Scotland

Petitioner: Leighton; Drummond Miller LLP
Respondents: McKinlay; Scottish Government Legal Directorate

18 December 2019

Introduction

[1] In this petition for judicial review the petitioner seeks reduction of certain decisions taken by the respondents. He also maintains that a policy of the respondents is unlawful, and that there has been a breach of his ECHR rights ("Convention rights").

[2] For brevity's sake I shall use the masculine gender when referring to prisoners, but where appropriate that should be read as referring to prisoners of any gender.

Short-term and long-term prisoners

[3] Prisoners sentenced to less than 4 years imprisonment are short-term prisoners; prisoners sentenced to 4 years or more are long-term prisoners s(27(1) of the Prisoners and Criminal Proceedings (Scotland) Act 1993 ("the 1993 Act")).

[4] Section 1 of the 1993 Act provides:

> "**1.— Release of short-term, long-term and life prisoners.**
>
> Subject to section 26A(4) of this Act, as soon as a short-term prisoner, not being a prisoner to whom section 1AA of this Act applies, has served one-half of his sentence the Secretary of State shall, without prejudice to any supervised release order to which the prisoner is subject, release him unconditionally.
>
> ...
>
> (2) As soon as a long-term prisoner has served two-thirds of his sentence, the Secretary of State shall release him on licence unless he has before that time been so released, in relation to that sentence, under any provision of this Act.
>
> (2A) As soon as a long-term prisoner has only 6 months of the prisoner's sentence left to serve, the Scottish Ministers must release the prisoner on licence unless the prisoner has previously been so released in relation to that sentence under any provision of this Act.
>
> (3) After a long-term prisoner has served one-half of his sentence the Secretary of State shall ...
>
> ...
>
> if recommended to do so by the Parole Board under this section, release him on licence.
>
> ..."

The Petitioner

[5] The petitioner was convicted of a contravention of s1 of the Road Traffic Act 1988. He is serving a sentence of 6 years and 4 months imprisonment for that offence. He is a

long-term prisoner. Since 7 August 2018 he has been a prisoner in HMP Castle Huntly, which is part of the Scottish Prison Service ("SPS") Open Estate.

Home Detention Curfew

[6] The Home Detention Curfew ("HDC") scheme allows for certain prisoners to serve part of their sentence at home. Release on HDC licence is at the discretion of the respondents. A long term prisoner such as the petitioner may only be released on an HDC licence if the Parole Board for Scotland ("PBS") has recommended release once half of his sentence has been served (1993 Act, section 3AA(1)(b)). Half of the petitioner's sentence will have been served on 10 March 2020 (his Parole Qualifying Date ("PQD")).

The relevant statutory provisions

[7] Release on HDC licence was introduced by s 3AA of the 1993 Act (which was inserted by s 15(5) of the Management of Offenders etc (Scotland) Act 2005 ("the 2005 Act)). Section 3AA provides:

> "(1) Subject to subsections (2) to (5) below, the Scottish Ministers may release on licence under this section—
>
> (a) a short-term prisoner serving a sentence of imprisonment for a term of three months or more; or
>
> (b) a long-term prisoner whose release on having served one-half of his sentence has been recommended by the Parole Board.
>
> ...
>
> (3) Without prejudice to subsection (2) above, the power in subsection (1) above is to be exercised only during that period of 166 days which ends on the day 14 days before that on which the prisoner will have served one half of his sentence.
>
> (4) In exercising the power conferred by subsection (1) above, the Scottish Ministers must have regard to considerations of—

(a) protecting the public at large;

(b) preventing re-offending by the prisoner; and

(c) securing the successful re-integration of the prisoner into the community.

...

(6) The Scottish Ministers may by order do any or all of the following–

...

(c) amend a number of days for the time being specified in subsection (3) above;

...

(7) For the avoidance of doubt, nothing in this section requires the Parole Board to make a decision by a particular date about whether to recommend that a long-term prisoner be released having served one-half of the prisoner's sentence."

Section 3AA(1)(a) made provision for short-term prisoners and s 3AA(1)(b) made provision for long-term prisoners. However, s 3AA(1)(a) was brought into force earlier than s 3AA(1)(b) (ie on 3 July 2006 by the Management of Offenders etc (Scotland) Act 2005 (Commencement no 2) Order 2006 (SSI 2006/331)). Section 3AA(1)(b) was not commenced until 21 March 2008 (by the Management of Offenders etc (Scotland) Act 2005 (Commencement no 4) Order 2008 (SSI 2008/21)). As enacted, s 3AA(3) provided that the maximum HDC licence period was 135 days before a prisoner had served one-half of his sentence. The maximum period of release on HDC licence a prisoner could obtain was increased to 180 days by the Home Detention Curfew Licence (Amendment of Specified Days) (Scotland) Order 2008 (SSI 2008/126). In accordance with s 45(3) of the 1993 Act a draft of SSI 2008/126 was laid before the Scottish Parliament and it was approved by resolution after debate on 12 March 2008. Thereafter SSI 2008/126 was made on 18 March

2008 and it came into force on 21 March 2008. Section 3AA(7) was inserted by the Management of Offenders (Scotland) Act 2019 ("the 2019 Act"), s 48(4). It was not brought into force until 11 October 2019 (Management of Offenders (Scotland) Act 2019 (Commencement no 1, Savings and Transitional Provisions) Regulations 2019 (SSI 2019/309), about five weeks after the hearing before me.

PBS

[8] PBS is a body corporate initially constituted by virtue by s 59(1) of the Criminal Justice Act 1967, and now constituted by s 18(1) of the Prisons (Scotland) Act 1989 and s 20(1) of the 1993 Act. It has statutory powers and duties in terms *inter alia* of the 1993 Act, the Human Rights Act 1998, the Convention Rights (Compliance)(Scotland) Act 2001, and the 2005 Act. When performing its statutory functions it acts as an independent and impartial decision-making body.

Parole Board Rules

[9] The Parole Board (Scotland) Rules 2001 (SSI 2001/315) ("the 2001 Rules") were made by the Scottish Ministers in exercise of the powers conferred by s 20(4) and (4A) of the 1993 Act. The Rules provide:

> "...
>
> **PART II**
> **GENERAL**
>
> ...

3. Application

Subject to paragraph (2) and except where otherwise expressly provided, this Part of these Rules shall apply to every case referred by the Scottish Ministers to the Parole Board.

...

4. Reference

Where a case of a person is referred to the Board by the Scottish Ministers, the Scottish Ministers shall, at the same time as referring the case, give written notification of that reference to that person.

5. Scottish Ministers' dossier

Subject to paragraph (2) and rule 6, not later than 10 working days after the date of the reference of the case to the Board, the Scottish Ministers shall send to the Board and to the person concerned a dossier containing any information in writing or documents which they consider to be relevant to the case, including, wherever practicable, the information and documents specified in the Schedule to these Rules.

...

7. Representations

A person shall have the right to submit written representations with respect to his or her case together with any other information in writing or documents which he or she considers to be relevant to his or her case and wishes the Board to take into account, following receipt of the dossier under rule 5(1), any other information sent to him or her by the Scottish Ministers or the Board or any written notice under rule 6(2).

Any such representations shall be sent to the Board and the Scottish Ministers within four weeks of the date on which the Scottish Ministers or, as the case may be, the Board sent to the person the dossier, information or written notice referred to above.

...

8. Matters to be taken into account by the Board

In dealing with a case of a person, the Board may take into account any matter which it considers to be relevant, including, but without prejudice to the foregoing generality, any of the following matters:–

(a) the nature and circumstances of any offence of which that person has been convicted or found guilty by a court;

(b) that person's conduct since the date of his or her current sentence or sentences;

(c) the risk of that person committing any offence or causing harm to any other person if he or she were to be released on licence, remain on licence or be re-released on licence as the case may be; and

(d) what that person intends to do if he or she were to be released on licence, remain on licence or be re-released on licence, as the case may be, and the likelihood of that person fulfilling those intentions.

...

Schedule

INFORMATION AND DOCUMENTS TO BE SENT BY THE SCOTTISH MINISTERS TO THE BOARD

...

7. Up to date reports by those involved in supervising, caring for, or counselling the prisoner on the prisoner's circumstances (including home background) and behaviour and on his or her suitability for release or, as the case may be, re-release on licence."

Parole Handbook

[10] Section 4 of the Parole Handbook provides:

"**4. GUIDANCE ON NON-TRIBUNAL CASES**

4.1 Introduction

Part III of The Parole Board (Scotland) Rules 2001 relates to non-Tribunal cases. This covers all determinate cases... Part III cases are generally considered by the Parole Board at a weekly Casework Meeting...

...

4.2 Timetable for preparation of dossier

The timetable for the preparation of parole dossiers is determined by the provisions of the 2001 Rules, and it is aimed at ensuring each prisoner receives a personal decision letter at least 2 months before their PDQ, EDL or Next Review Date where possible. This enables there to be consistency through the process, and also allows

those who are eligible to be released on Home Detention Curfew to receive a decision on parole at a stage which supports release on HDC for a period of 6 weeks. In summary the timetable for long-term prisoners is as follows:

Weeks before PQD/EDL/ Next Review Date	**Action**
26	• Review commenced for cases detailed in the PR2 Monthly Report • PBSW, CBSW, MAPPA Co-ordinator, Parole Board and Parole Unit are notified • Letter sent by Parole Unit requesting victim's representations where appropriate
26-18	• Preparation of reports for dossier
18	• Deadline for submission of reports to Parole Co-ordinator
16	• Parole Co-ordinator refers case to Parole Board or sends case to Parole Unit and shares dossier with the prisoner (refer to Annex C for further information)
14	• Deadline for prisoner's written representations to Parole Board
10	• Case considered at Casework Meeting
8	• Deadline for receipt of Parole Board's decision or recommendation
6	Prisoner released on Home Detention Curfew (if appropriate)

"

Circular JD 7/2008 Home Detention Curfew Guidance for Agencies

[11] Circular JD 7/2008 **(**referred to by the petitioner as SO 7/2008) provides:

"Part 1 - Role of the Scottish Prison Service

1. Identification of potentially eligible prisoners

1.1 The decision to release any prisoner on the HDC scheme must be taken having regard to considerations of:

- protecting the public at large;
- preventing re-offending by the offender; and
- securing the successful re-integration of the prisoner into the community.

1.2 SPS must therefore identify prisoners who present a low risk of (re)offending if released. To help identify which prisoners are most suitable, a robust assessment process has been developed.

1.3 Legislation directs SPS towards which prisoners should be considered. Two distinct categories of prisoners may be eligible. Short-term prisoners (under 4 years) sentenced to three months or more can be considered. Long term prisoners (4 years and over) granted Parole on their first application may be considered for HDC for the period from the granting of their application till their Parole Qualifying Date. This guidance deals with both groups of prisoners.

...

1.5 SPS should assess all prisoners sentenced to more than three months but less than four years.

1.6 SPS should also make an initial assessment of Long term Prisoners (4 years and over but excluding life) prior to the commencement of the Parole Dossier.

2. Assessment Process

2.1 The assessment process is based on the following:

- **Statutory Exclusions** The first stage of the assessment process is establishing those prisoners who are excluded from release on HDC by legislation...

...

2.4 Those prisoners who are not statutorily excluded must undergo a risk assessment....

...

2.5 Having identified short-term prisoners whose supervision level is low, the SPS should then invite an application for release on HDC.

2.7 Prisoners who wish to apply should complete form HDC 1 in full. The onus is on the individual prisoner to provide all relevant information including the proposed address to which (s)he would be curfewed.

2.8 When the completed application form has been returned, the remaining stages of the assessment process can commence.

2.9 With regard to the considerations described in paragraph 1.1, the risk assessment should now be undertaken. As this stage of the assessment is more subjective, SPS must take steps to ensure decisions are made in a fair and consistent manner. With this in mind, a list of static risk factors has been drawn up; this should be applied across all establishments.

- **SPS Risk Factors**: Although not contained in the list of Statutory Exclusions, the following should be considered as part of the overall risk assessment and should be taken into account when making the decision as to whether or not a prisoner is suitable for release on HDC:

- prisoners with a history of sexual offending;

- prisoners whose history includes a conviction for a Schedule 1 offence;

- prisoners whose conviction includes an element of domestic violence;

- prisoners who have failed to engage in the Core Screen/CIP processes inclusive of accessing interventions; and

- prisoners whose behaviour while in prison has given cause for concern (behaviour that is indicative of offending on release, e.g. providing positive drug tests).

...

2.16 Where it appears the prisoner may qualify for release on HDC, the proposed curfew address should be assessed for suitability. This assessment will be carried out by Criminal Justice Social Work (CJSW) Services. For Long Term Prisoners, this assessment will be carried out in tandem with the parole process.

...

> **3. Management decision**
>
> 3.1 In relation to a short-term prisoner, the appropriate HDC Manager will proceed to make the decision on whether to release the prisoner on HDC. In relation to a long-term prisoner, this stage of the process is held in abeyance until the decision of the Parole Board is known. If Parole is granted on this first application, the SPS will proceed to make its decision on whether to grant HDC...
>
> ..."

The steps which the petitioner took to apply for HDC and the SPS response

[12] In order for it to be possible for the petitioner to obtain release on HDC licence 180 days before his PQD SPS would have to have prepared his parole dossier and have submitted it to PBS sufficiently far in advance of 180 days before his PQD to have enabled PBS to make a positive recommendation before that 180 day period began.

[13] The petitioner wished to be considered for release on HDC licence for the maximum permitted period (180 days before his PQD). On 16 April 2019 he submitted a Prisoner Complaint Form PCF1 to SPS. In Part 1 of the form he described his complaint in the following terms:

> "I would like written confirmation to say if the SPS are prepared to start parole paperwork including HDC in good time so I can get the full 180 days on HDC in accordance with the circular SO 7/2008."

His response to the question "What in your view would resolve the problem?" was: "provide assurances required".

[14] The SPS Residential First Line Manager ("RFLM") discussed the complaint with the petitioner on the 16 April 2019. Part 3 of the PCF 1 was headed "Response by the Residential First Line Manager (RFLM)". Part 3 contained a box headed "Summary of investigation and evidence supporting your decision." The RFLM inserted the following in the box:

"SPS HDC GUIDANCE NOTES REFERENCED

SPS PAROLE GUIDANCE REVIEWED

CIRCULAR JD 7/2008 REVIEWED"

It also contained a box headed "Decision and Reasons". On 21 April 2019 the RFLM inserted the following in that box:

> "Mr McDonald, in reference to your PCF1 dated 16/4/19 regarding seeking confirmation that all parole paperwork will be submitted in time to ensure you have the ability to access HDC for 180 days I have reviewed 3 key documents relating to this.
>
> The Parole Guidance documents state the following:-
>
> The timetable for the preparation of parole dossiers is determined by the provisions of the 2001 Rules, and is aimed at ensuring each prisoner receives a personal decision letter at last 2 months before their PQD, EDL or Next Review Date where possible. This enables there to be consistency through the process, and also allows those who are eligible to be released on Home Detention Curfew to receive a decision on parole at a stage which supports release on HDC for the maximum period (6 weeks)."
>
> A copy of this document is attached to this PCF reply for your reference. However the key point is that the deadline for the Parole Boards (sic) decision regarding parole being granted is 8 weeks prior to the PQD.
>
> In addition the SPS HDC Guidance 2018 notes:-
>
> 45. "In relation to a long term prisoner, this stage of the process is held in abeyance until the decision of the Parole Board is known. If parole is granted on this first application, the SPS will proceed to make its decision on whether to grant HDC. If parole is not granted, the HDC application fails as the prisoner does not meet the statutory qualification. The prisoner should be advised that HDC cannot be granted (Form HDC 8)....
>
> In addition Circular JD 7/2008, which you reference in your complaint, states the following
>
> "Long term prisoners (4 years or over) granted Parole on their first application may be considered for HDC for the period from the granting of their application till their Parole Qualifying Date"
>
> I note that your HDC 1 form has not as yet been considered given that your PDQ is not until 10/3/20. Using the above as guidance your parole decision deadline will be

> approximately 14/1/20 and therefore any HDC decision will be held in abeyance pending this decision.
>
> I would suggest that if you remain unhappy with this response that you complete Part 4 of this form...to ask for the Internal Complaints Commission (ICC) to consider this complaint."

A copy of Section 4 of the Parole Handbook was attached to the RFLM's decision.

[15] The petitioner was not satisfied with the RFLM's decision. He complained to the ICC. Part 4 of the PFC 1 contained the following questions:

> "Why are you not satisfied with the RFLM's response? What could we do to put things right?"

The petitioner's written answer was:

> "I feel the guidance from the SPS and parole board is not using the law to its fullest effect. A change in the guidelines is possibly needed."

[16] The petitioner attended the hearing before the ICC on 25 April 2019. The ICC provided its decision the same day and attached it to Part 5 of the PCF 1:

> "Summary of the Hearing
>
> The ICC met to consider Mr McDonald's complaint... Mr McDonald did not wish assistance or witnesses. He felt that the guidance from the SPS and Parole Board were not using the law to its fullest effect. He thinks that a change in guidelines is needed.
>
> Decision and Reason (sic)
>
> The ICC considered all the points in Mr McDonald's complaint and referred to the current SPS Policy and Guidance – (1) Parole Guidance and (2) Home Detention Curfew Guidance for Agencies
>
> SPS work to the following timetable for preparation of Parole Dossiers – contained in current Parole Guidance (non-tribunal cases).
>
> - 18 weeks –Deadline for submission of reports to Parole Co-ordinator
> - 16 weeks – Parole Coordinator refers case to the Parole Board or sends case to Parole Unit and shares dossier with prisoner
> - 14 weeks – Deadline for prisoner's representations to the Parole Board

- 10 weeks – Case considered at Casework meeting
- 8 weeks – Deadline for receipt of Parole Boards (sic) decision or recommendation
- 6 weeks – Prisoner released on Home Detention Curfew (if appropriate)

SPS Home Detention Curfew Guidance states "The Parole Board for Scotland must first recommend release on Parole at the parole qualifying date ... before the SPS can make the decision to release a long term prisoner on HDC. "

Furthermore the guidance states "The SPS should make an initial assessment of long term prisoners prior to the commencement of the Parole dossier. For long term prisoners, this assessment will be carried out in tandem with the Parole process. In relation to a long term prisoner this stage of the process will be held in abeyance until the decision of the Parole Board is known."

Circular JD7/2008 states "Long Term prisoners (4 years and over) granted parole on their first application may be considered for HDC for the period from the granting of their application till their Parole Qualifying Date.

Mr McDonald has a PQD of 10th March 2020 and therefore his HDC application has not started yet.

The ICC have provided an explanation to Mr McDonald clarifying SPS guidance on both Parole and Home Detention Curfew."

[17] On the same day – 25 April 2019 – the prison governor decided to endorse the ICC's decision, and he completed Part 6 of the PCF 1 to that effect.

The petition

[18] The petitioner seeks the following remedies;

"1) reduction of the decisions of 21 and 25 April 2019 of the respondents not to take steps to refer his case to the Parole Board for Scotland so that the ...Parole Board ... can make a decision in relation to his case before he is first eligible for release on Home Detention Curfew; and

2) reduction of the policy, contained within the Parole Guidance document, of not sending long term prisoner dossiers to the Parole Board for Scotland until about 16 weeks before the date that they might first be released on licence...

> 3) declarator that the failure of the respondents to take steps to refer the case of the petitioner to the Parole Board...is unlawful *et separatim* a breach of his convention rights in terms of article 5 with 14 of the European Convention on Human Rights;
>
> 4) declarator that in order to act lawfully the respondents should take steps to refer the case of the petitioner to the Parole Board...as soon as possible
>
> ..."

He avers:

> "11. ...The scheme outlined in the policy...does not permit the petitioner to be released when he is first eligible for release. The policy restricts the amount of time that a long term prisoner can be on HDC licence to a maximum of 6 weeks.
>
> 12. That in deciding upon any policy in relation to a statutory power the respondents are obliged to follow the intention of Parliament. The endowment of a power to act can also confer a duty. In the present case it was the intention of Parliament that suitable prisoners could be released up to 180 days before they were eligible for release by the Parole Board...If the scheme presently operated by the respondents was the intention of the legislature then there was no reason for the increase in the time for which long term determinate prisoners might be released on license (sic)...
>
> 13. That the respondents have unlawfully fettered their discretion. By adopting the policies that they have they have made it impossible for them to release the petitioner (or any long-term prisoner) when those prisoners are eligible for release....they have limited the time when a long-term prisoner might be released on HDC licence from 180 days provided for in statute to the period of 6 weeks specified in their guidance...
>
> 14. That the petitioner's convention rights ... include rights under articles 5 and 14 ...
>
> 15. ...That the respondents have breached the petitioner's convention rights... The petitioner...is treated in a less favourable manner than short term determinate sentence prisoners and there is no objective justification for that treatment..."

Productions lodged by the petitioner

[19] Productions lodged by the petitioner in these proceedings which were not placed before SPS at the time of the decisions of 21 and 25 April 2019 include an affidavit from the petitioner dated 5 August 2019 and the Integrated Case Management ("ICM") minutes

relating to the petitioner dated 24 July 2019. In the affidavit the petitioner deponed that he had undertaken 13 periods of home leave without incident; that he had been attending a community work placement since January 2019; that while in custody he had engaged with everything that had been asked of him; that he had not failed any drug test and he had not had any misconduct or adverse circumstances reports; that he had undertaken work in relation to victim empathy and that he had not had any adverse reaction from the community in respect of home leave; that at no time had SPS advised him that he required to demonstrate that the application he was making was exceptional; and that he had not been interviewed by SPS to determine whether his application was exceptional or not. The ICM minutes paint a fairly bright picture. They confirm the petitioner's very positive response to custody, his good behaviour and his high levels of engagement within and outside the prison. He was assessed as being very motivated and remorseful, and as presenting a very low risk of serious harm. Everyone attending the case conference agreed that they had no concerns or objections to the petitioner applying for HDC.

Official Report of proceedings in the Scottish Parliament on 27 March 2008

[20] The respondents lodged a copy of part of the Official Report of proceedings in the Scottish Parliament on 27 March 2008. The proceedings concerned a debate on a motion by an opposition MSP concerning the Home Detention Curfew Licence (Prescribed Standard Conditions)(Scotland) (No 2) Order (SSI 2008/125). The Order had been made by the Scottish Ministers under the power conferred by s 12AA of the 1993 Act to prescribe standard conditions. The Order had been laid before the Scottish Parliament on 18 March 2008 and it had come into force on 21 March 2008. In terms of s 45(2) such orders were

subject to annulment by a resolution of the Scottish Parliament. The motion debated on 27 March 2008 was:

> "That the Parliament recommends that nothing further be done under the Home Detention Curfew Licence (Prescribed Standard Conditions)(Scotland) (No 2) Order (SSI 2008/125)."

The Cabinet Secretary for Justice opposed the motion on behalf of the Scottish Government. In doing so he observed:

> "The order forms part of a package of measures that we hope to put in place to ease the on-going inherited problem of overcrowding in our prisons. We are using the flexibility to extend the home detention curfew scheme that was built into the Management of Offenders etc (Scotland) Act 2005 by the previous Administration.
>
> We need prisons to lock up dangerous criminals, and we have to allow the SPS to work with those criminals to rehabilitate them for a return to society. However, the SPS is dealing with record numbers. Yesterday, the prison population was 8,001, with 379 of those on HDC. That makes it harder for the SPS to do the job that it needs to do with serious offenders." (Col 7383)
>
> "I assure members that prisoners who are serving long-term sentences cannot be released on home detention curfew unless the Parole Board has already recommended their release at the first parole qualifying date, and they also subsequently meet the current assessment criteria for HDC...
>
> Because of the way in which the parole process and the notification of the Parole Board's decision operate, the maximum time a prisoner could spend on HDC would be about 10 weeks. In reality, we estimate that the period spent on HDC is likely to be nearer six weeks." (Col 7385)

The Motion was defeated, with the result that the order was not annulled.

Counsel for the petitioner's submissions

[21] Mr Leighton submitted (i) that the respondents had unlawfully fettered their discretion; (ii) that their policy in relation to the time of submission of long-term prisoners' parole dossiers to PBS was not in accordance with the will of the Scottish Parliament; and (iii) that the policy breached the petitioner's Convention rights (article 14 read with article 5).

Unlawful fettering of discretion?

[22] The respondents' policy unlawfully fettered their discretion. Reference was made to *R (Lumba)* v *Secretary of State for the Home Department* [2012] 1 AC 245, per Lord Dyson JSC at paragraphs 20-21. The policy was stated in unqualified terms. As a matter of fact, it was being applied rigidly. Since 2008, when HDC was introduced for long-term prisoners, no dossiers had been referred to PBS earlier than the time set out in the policy, with the result that no long-term prisoners had been granted more than about 6 weeks release on HDC.

[23] In any case, as a matter of fact the policy had been applied rigidly in the present case, without any consideration of the petitioner's circumstances or whether an exception to the application of the policy should be made.

Policy frustrating effective operation of the statute?

[24] The policy was unlawful because it promoted an outcome which contradicted the aims of s 3AA(1)(b) of the 1993 Act. A statutory discretion must be deployed to promote the policy and objects of the Act (*Padfield* v *Minister of Agriculture, Fisheries and Food* [1968] AC 997, per Lord Reid at pp 1032G - 1034A). When it had enacted s15(5) of the 2005 Act, it had been the Scottish Parliament's intention that both short-term and long-term prisoners ought to have the opportunity of being considered for release on HDC for up to 135 days. Moreover, s 15(5) had introduced s 3AA(6)(c) which empowered the respondents to amend the number of days specified in s 3AA(3). The respondents had exercised that power by making SSI 2008/126, which had increased the period to 180 days. The respondents' policy promoted an outcome which contradicted the Scottish Parliament's intention.

[25] The enactment of the 2019 Act and the insertion of s 3AA(7) was of no assistance to the respondents. The petitioner did not suggest that PBS was under an obligation to make decisions on parole so as to permit the respondents to release long-term prisoners on HDC licence 180 days before the PQD. Rather, the submission was that in an appropriate case like the petitioner's the respondents ought to consider submitting a dossier earlier than the policy timetable indicated, with a view to giving PBS an earlier opportunity to make its recommendation. If the recommendation was made earlier that would enable the respondents to decide whether to release the prisoner on HDC licence at an earlier stage.

Breach of ECHR article 14 read with article 5?

[26] Mr Leighton submitted that the policy was in breach of article 14 read with article 5. The relevant principles were well established. A convenient summary of them was contained in *R (Stott)* v *Secretary of State for Justice* [2018] 3 WLR 1831, per Lady Black JSC at paragraph 8:

> "8. In order to establish that different treatment amounts to a violation of article 14, it is necessary to establish four elements. First, the circumstances must fall within the ambit of a Convention right. Secondly, the difference in treatment must have been on the ground of one of the characteristics listed in article 14 or "other status". Thirdly, the claimant and the person who has been treated differently must be in analogous situations. Fourthly, objective justification for the different treatment will be lacking..."

[27] It was common ground that the right to be considered for release on HDC licence fell within the ambit of article 5. As a result of the respondents' policy, there was a difference of treatment between long-term prisoners such as the petitioner and short-term prisoners. It was agreed that the difference in treatment was as a result of long-term prisoners' "other status". However, the parties were at issue as to whether, in relation to the right to seek HDC, short-term prisoners were in an analogous position to long-term prisoners. If short-

term prisoners were in an analogous position, the parties disagreed as to whether there was objective justification for the difference in treatment complained of.

[28] Mr Leighton maintained that for present purposes the position of short-term prisoners was analogous to that of long-term prisoners such as the petitioner. There was, of course, the difference that for long-term prisoners it was a precondition of HDC that PBS had recommended that the prisoner be released on licence on his PQD. However, it was significant that otherwise the factors which the respondents had to take into account for both types of prisoner were the same (s 3AA(4)). The position of a comparator did not have to be identical. The existence of some differences did not necessarily prevent positions from being analogous. The question was whether any differences were material (*Clift* v *The United Kingdom*, [2010] ECHR 1106, 7205/07, per the Judgment of the Court at paragraph 66).

[29] If, as the petitioner maintained, the position of short-term prisoners *vis a vis* HDC was analogous, the difference in treatment was not objectively justified. In *R (Steinfeld and another)* v *Secretary of State for International Development* [2018] 3 WLR 415, Lord Kerr of Tonaghmore JSC set out at paragraph 41 what objective justification entailed:

> "41. The four-stage test designed to establish whether an interference with a qualified Convention right can be justified is now well-established. The test and its four stages were conveniently summarised by Lord Wilson in *R (Aguilar Quila)* v *Secretary of State for the Home Department* [2011] UKSC 45; [2012] 1 AC 621, *para* 45. They are (a) is the legislative objective (legitimate aim) sufficiently important to justify limiting a fundamental right; (b) are the measures which have been designed to meet it rationally connected to it; (c) are they no more than are necessary to accomplish it; and (d) do they strike a fair balance between the rights of the individual and the interests of the community? (See also Lord Reed at *para* 75 of *Bank Mellat* v *HM Treasury (No 2)* [2014] AC 700 and Lord Sumption in the same case at *para* 20)."

While it was accepted that the precondition of a PBS recommendation of release on licence at the PQD satisfied each of these requirements and was a justified interference, the same could not be said for the respondents' policy. The policy was not objectively justified. It was

difficult to see what the legitimate aim of the policy might be. It was hard to maintain that it was the protection of the public, because PBS would take that into account when deciding whether to recommend release on licence at the PQD and the respondents would take that into account in deciding whether to grant release on HDC licence. If, contrary to Mr Leighton's submissions, the policy did have the legitimate aim of protection of the public, he accepted that it would be difficult to maintain that the policy was not rationally connected to that aim. However, the policy was not no more than was necessary to accomplish the legitimate aim, because PBS would not recommend release on licence unless satisfied in all the circumstances that it was appropriate and the respondents would not grant release on HDC licence unless the requirements of s 3AA(4) were fulfilled. It was important to bear in mind that here the right affected by article 14 was an important right - the article 5 right to liberty. It should also be remembered that a PBS decision to recommend or not to recommend release could be revisited. Not infrequently a recommendation to release would be reconsidered nearer the PQD at which time PBS would have the benefit of an Advanced Circumstances Report.

Counsel for the respondents' submissions

[30] Miss McKinlay moved the court to sustain the respondents' first plea-in-law (a plea to the relevancy of the petitioner's averments) and to dismiss the petition.

Unlawful fettering of discretion?

[31] Referrals to PBS were made in accordance with the policy set out in section 4 of the Parole Handbook. The respondents had not unlawfully fettered their discretion. Although the policy had been expressed in apparently unqualified terms, it required to be construed

as permitting of exceptions *(R (West Berkshire District Council & another* v *Secretary of State for Communities and Local Government* [2016] 1 WLR 3923, per the joint judgment of Laws and Treacy LJJ at paragraph 21).

[32] I enquired of Miss McKinlay if the respondents were able to clarify the sort of circumstances which might be treated as exceptional in order to justify a departure from the policy. The respondents' response was that it was very difficult to say. They confirmed that there had never been an exceptional case in which they had been persuaded that there ought to be submission of a dossier to PBS at a date earlier than the policy timetable provided. On the other hand, there had in fact been very few cases where there had been requests for early submission.

[33] It had been incumbent upon the petitioner to identify circumstances which justified making an exception to the policy, but he had failed to do that (*Dinsmore* v *Scottish Ministers* 2019 SLT 1000, per Lord Arthurson at paragraph 18). No exceptionality had been advanced by the petitioner (i) for SPS submitting his dossier to PBS earlier than the policy indicated it would to be submitted; or (ii) for expecting PBS to bring forward its decision whether or not to recommend release on licence at the PQD.

Policy frustrating effective operation of the statute?

[34] The respondents' policy did not promote an outcome which conflicted with the aims of the 1993 Act (as amended by the 2005 Act) or SSI 2008/126. Nothing in those provisions indicated a legislative intention that a long-term prisoner should be entitled to release on HDC licence for 180 days. The purpose of those provisions had not been to confer a benefit on individual prisoners. The main objects had been to reduce the numbers of prisoners in overcrowded prisons, and to reintegrate prisoners back into the community. It was only

once the release of a prisoner had been recommended by PBS that the power conferred by s 3AA(1)(b) was engaged. On a proper construction of s 3AA, having regard to the combination of the need for PBS approval and the permissive nature of the power to grant release on HDC licence, it was clear that the Scottish Parliament had not intended that any long-term prisoners would be released for anything like the maximum period. Given the fact that the Scottish Parliament would have been well aware of the timescales and practical constraints associated with the PBS recommendation process, it must have been clear to it that long-term prisoners could not qualify for anything like the maximum permitted period of HDC. If there was any doubt about that (and the respondents' primary position was that there was not) it was removed by looking at proceedings in the Scottish Parliament in 2008. It was legitimate to do that as an aid to construction if a provision was ambiguous or obscure (*Pepper* v *Hart* [1993] AC 593, per Lord Browne-Wilkinson at p634D-E). During the debate in the Scottish Parliament on SSI 2008/125 the Cabinet Secretary for Justice had clearly stated how it was proposed that HDC would work for long-term prisoners (Official Record, Thursday 27 March 2008, Col 7385):

> "Because of the way in which the parole process and the notification of the Parole Board's decision operate, the maximum time a prisoner could spend on HDC would be about 10 weeks. In reality, we estimate that the period spent on HDC is likely to be nearer six weeks."

Moreover, in 2019 the Scottish Parliament had amended s 3AA by inserting s 3AA(7). That amendment clarified that nothing in s 3AA required PBS to make a decision by a particular date about whether to recommend that a long-term prisoner be released when he had served one-half of his sentence. It made clear that the legislature had always intended that the PBS process should take precedence over the HDC licence scheme.

[35] In any case, since a short-term prisoner was released unconditionally once he had served half of his sentence (s 1(1)) without any requirement for a PBS recommendation, the paperwork for short-term prisoners was prepared so as to enable SPS to decide on release on HCD before the maximum permissible period available to the prisoner had commenced. However, that approach was impracticable with long-term prisoners because of the pre-condition of a recommendation by PBS. The timetable in the policy allowed for a decision to be taken by PBS about 8 weeks before a prisoner's PQD. The focus of PBS was the suitability of the prisoner for release at the PQD (Rule 8 of the 2001 Rules). In practice it was rarely likely to be possible for PBS to determine a prisoner's suitability early enough to permit the respondents to consider release on HDC licence for 180 days. Referral of a prisoner's dossier earlier than the timescale in the policy would invariably lead to PBS's decision being deferred until closer to the PQD. Information provided at such a stage would be likely to be insufficient as it would be too far in advance of the PQD.

Breach of ECHR article 14 read with article 5?

[36] While there had been no breach of article 5, the respondents accepted that the circumstances of which the petitioner complained fell within the ambit of that article; and that the difference in treatment between the petitioner and short-term prisoners seeking HDC was on the ground of the petitioner's "other status" (article 14) as a long-term prisoner. However, the respondents did not accept that short-term prisoners seeking HDC were in an analogous position to the petitioner. Nor was there a lack of objective justification for the difference in treatment.

[37] In determining whether groups were in an analogous position for the purposes of article 14 regard had to be had to the precise nature of the particular complaint made (*R*

(Stott) v *Secretary of State for Justice, supra,* per Lady Black JSC at paragraph 138). The petitioner's complaint was that his dossier was not sent to PBS earlier than the timescale provided in the policy. A short-term prisoner was not in a sufficiently analogous position to a long-term prisoner for the purposes of release on HDC licence. Short-term prisoners were entitled to be released unconditionally when half of their sentence was served, whereas long-term prisoners had no such entitlement. Long-term prisoners would only be released on the PQD if PBS recommended release. It was not until the precondition of PBS's recommendation was satisfied that short-term prisoners and long-term prisoners were in an analogous position for the purposes of consideration of release on HDC licence. It was only at that stage that the same considerations (those in s 3AA(4)) applied to both categories of prisoner.

[38] If, contrary to Miss McKinlay's submission, the position of short-term prisoners was sufficiently analogous, the difference in treatment was nevertheless justified because of the different statutory regimes for the release of long-term and short-term prisoners. The distinction drawn was rational and not arbitrary - in general long-term prisoners tended to present more of a public safety risk than short-term prisoners because of the more serious nature of the offences which they had committed. The legislation had been enacted after a very full consideration of parole and related issues by the Kincraig Review (Report of the Review Committee on Parole and Related Issues in Scotland (March 1989) Cm 598). The difference in treatment in relation to release on HDC licence was consistent with the fact that long-term and short-term prisoners were treated differently when it came to the question of release when half their sentence was served. The legitimate aim here was to ensure that the dossier provided to PBS was up-to-date with a view to good administration and to PBS's recommendation being made on the basis of information which allowed it to predict in a

reliable way what the prisoner's circumstances would be at his PQD. The timescales which the policy provided were rationally connected to that aim, and they were no more than were necessary to accomplish it. They struck a fair balance between the interests of the individual and the interests of the community.

Decision and reasons

Construction of s 3AA

[39] In my opinion s 3AA is not ambiguous or obscure. On an ordinary and natural reading it empowers the respondents to release both short-term and long-term prisoners on HDC licence. With long-term prisoners the power may not be exercised unless the prisoner's release on having served one-half of his sentence has been recommended by PBS. In the case of both short-term and long-term prisoners the period during which the power may be exercised is the same: between 180 days and 14 days before the date when one-half of the sentence would be served (s 3AA(3)). Section 3AA does not confer any entitlement to HDC release on either category of prisoner; but it contemplates the possibility of there being circumstances where it may be permissible and appropriate for prisoners from each category to be released on HDC licence for up to 180 days. In my view the object of the power to release is to facilitate the reintegration of prisoners into the community in appropriate cases, for the benefit of the community and of prisoners.

[40] As initially enacted s 15 of the 2005 Act (inserting s 3AA) contemplated the possibility of there being circumstances where it may be permissible and appropriate to release long-term prisoners on HDC licence for up to 135 days. I am not persuaded that there is any proper basis for using the statement by the Cabinet Secretary for Justice upon which Miss McKinlay relied as an aid to the construction of s 3AA. First, the meaning of

s 3AA is neither ambiguous nor obscure. Second, even if it was ambiguous or obscure (and I do not think it is, and Miss McKinlay's primary position was that it was not), the statement was not made in the course of the enactment of s 15. In those circumstances it is very difficult to see how it can be used to construe s 3AA. The statement was not founded upon as an aid to construing the Order (SSI 2008/126) which increased the specified days from 135 to 180. Even if it had been suggested that the terms of that Order were ambiguous or obscure (no such suggestion was made), the statement would not have been a legitimate aid to the Order's construction. The statement was made in the course of a debate on a different Order, the Home Detention Curfew Licence (Prescribed Standard Conditions) (Scotland) (No 2) Order 2008 (SSI 2008/125). No issue arises as to the interpretation of any of the terms of that Order. In my opinion there is no proper basis for praying the statement in aid to construe s 3AA (or to construe the Order which amended the days which were specified in s 3AA(3)).

[41] However, although in terms of s 3AA the maximum permitted period of HDC licence is the same for short-term and long-term prisoners, a long-term prisoner cannot be released unless and until PBS has recommended his release on licence at the PQD. When the provision was enacted the legislature was aware of the existing procedure for obtaining a PBS recommendation for release on parole at the PQD, including the 2001 Rules. It would have been aware that, ordinarily, information submitted by the respondents to PBS should be up-to-date; and that the information submitted was to assist PBS in assessing the prisoner's suitability for release on licence at the PQD. While the legislature wished to empower the respondents to release long-term prisoners on HDC for up to 180 days where that was appropriate, it must have known that generally a PBS recommendation would not be obtained until much later than that.

[42] I am not satisfied that s 3AA(7) has any real bearing on the disputed issue of construction which arises in this case. The petitioner does not suggest that before the enactment of that subsection s 3AA obliged PBS to make its decision by a particular date. In my view it would have been very difficult to maintain that the unamended provision had that effect. Section 3AA(7) now puts it beyond doubt that s 3AA does not have that effect.

Unlawful fettering of discretion and/or policy frustrating effective operation of the statute?

Construction of the policy

[43] The policy is stated in unqualified terms. However, I accept that unqualified statements of policy generally fall to be construed as allowing of exceptions in appropriate cases *(R (West Berkshire District Council & another* v *Secretary of State for Communities and Local Government, supra*, per the joint judgment of Laws and Treacy LJJ at paragraph 21). The question is, should that general principle be applied here?

[44] There are substantial arguments that it should not. First, in my opinion the respondents' submission that s 3AA does not confer power to release long-term prisoners on HDC for longer than 6 weeks or so is a misinterpretation of the provision. The unqualified terms of the policy might be thought to mirror that misinterpretation. Second, the fact that the respondents have never submitted a long-term prisoner's dossier earlier than the timescale in the policy tends to suggest that they have not in fact considered the policy to admit of exceptions. Third, the fact that they were unable to give any indication of the sort of circumstances which might be considered to be exceptional may show that the possibility of exceptions to the policy has not been something which they have in fact contemplated.

[45] Notwithstanding these misgivings (and not without hesitation), I have concluded that the general principle ought to be applied here. Given the obvious tension between the

respondents' submission relating to the construction of s 3AA and their submission that the policy ought to be construed as admitting of exceptions, I do not think it would be right to focus unduly upon the former submission when it comes to interpreting the policy. (It is also worth noting that the submission relating to the construction of s 3AA does not appear to have been advanced in *Dinsmore* v *Scottish Ministers*.) While at first blush the fact that there has never been early submission of a parole dossier might be thought to suggest that the policy has not in fact been treated by the respondents as permitting of exceptions, I have come to the view that it would be wrong to draw that adverse inference on the basis of the very limited information before me. I do not know how many applications for early submission there have been over the last 11 years. The respondents suggest that there will have been a relatively small number. I have no reason to doubt that. I confess to unease at the respondents' inability to give any indication of the sort of circumstances which might be considered to be exceptional. If prisoners are left completely in the dark it may be very difficult for them to make informed and meaningful representations to the decision-maker before a decision is made (*cf. R (Lumba)* v *Secretary of State for the Home Department, supra,* per Lord Dyson JSC at paragraphs 35 and 38). However, while that may raise issues of transparency (and, ultimately, natural justice) I am not persuaded that it justifies a departure from the rule of construction normally applied to policies expressed in unqualified terms.

Policy frustrating effective operation of the statute?

[46] I have already set out my interpretations of s 3AA and of the respondents' policy. Section 3AA permits the release on HDC licence of long-term prisoners for up to 180 days in appropriate cases. Properly construed, the respondents' policy allows for such release in

exceptional cases. In the whole circumstances I am not persuaded that the policy frustrates the effective operation of s 3AA in relation to long-term prisoners.

Application of the policy in the petitioner's case

[47] The question remains whether in reaching their decision the respondents considered the petitioner's particular circumstances or whether they rigidly applied the policy with no regard to those circumstances. In my opinion there is not the slightest indication that the respondents gave any consideration to the petitioner's particular circumstances. The RFLM and the ICC merely referred to and implemented the policy. There was no discussion of, and no enquiry as to, the petitioner's circumstances. For his part, the governor simply endorsed the ICC decision. In his affidavit the petitioner indicates that it was at no stage suggested to him that it was up to him to demonstrate that there were exceptional circumstances justifying a departure from the policy. I did not understand that to be controversial. Miss McKinlay did not maintain that any such explanation was given, and the relevant documentation contains no suggestion that it was.

[48] Miss McKinlay submitted that it was for the petitioner to apprise the respondents of any circumstances which made his case exceptional, and that he had not done that. In my opinion there would have been more force in that submission had the respondents informed the petitioner that it was up to him to show that he was an exceptional case. In fact, although the petitioner had made it very clear that he wished the process for consideration of his release on HDC to be commenced at a time which would permit his release for the maximum permitted period (if the necessary decisions went his way), he was not told that he required to show circumstances which made his case exceptional. In my opinion basic fairness required that he should have been told that. In that state of affairs I do not think

that the respondents ought to be able to absolve themselves from their failure to consider the petitioner's particular circumstances (most, if not all, of which SPS must have been cognisant of) by saying that it was up to the petitioner to put those circumstances forward.

[49] It follows that in my opinion the decisions of 21 and 25 April 2019 involved a rigid application of the policy without any attempt to consider the petitioner's particular circumstances. In my view those decisions were unlawful and they should be reduced.

Breach of ECHR article 14 read with article 5?

[50] The petitioner's complaint is that the respondents did not properly consider whether his dossier should be sent to PBS earlier than the timescale provided in the policy; whereas had he been a short-term prisoner the respondents would have considered his request for release on HDC licence much earlier than they propose to do.

[51] I consider it moot whether short-term and long-term prisoners applying for HDC are in analogous positions. In my opinion it is a very material difference that a long-term prisoner cannot be released on HDC licence unless and until PBS recommends his release on parole licence at the PQD. I incline to the view that that difference is sufficient to prevent the two categories from being analogous for the purposes of article 14.

[52] In any case, even if the categories are sufficiently similar to be analogous for the purposes of article 14, I am satisfied that the difference in treatment which is complained of is objectively justified.

[53] It is common ground that, in general, the different statutory regimes for the two categories of prisoners are objectively justified. In those circumstances it is unnecessary to dwell upon the Kincraig Review or the relevant statutory provisions dealing with each regime. It suffices to say that the distinction drawn between the two categories of prisoner is

rational and not arbitrary. In general, long-term prisoners tend to present more of a public safety risk than short-term prisoners because of the more serious nature of the offences which they have committed.

[54] I return to the particular complaint. According to the petitioner there is unjustifiable discrimination between him and short-term prisoners because the timescale for long-term prisoners in the policy differs from the timescale applied when the respondents consider and determine short-term prisoners' applications for HDC. I disagree. In my opinion the policy has a legitimate aim. It is designed to provide the information which PBS requires at a time when, ordinarily, it is sufficiently up-to-date to allow PBS to predict in a reliable way what the prisoner's circumstances will be at his PQD. The timescale which the policy provides appears to me to be rationally connected to that aim. I am satisfied that the policy guidance is no more than is necessary to accomplish the aim, and that it strikes a fair balance between the interests of prisoners and the interests of the community. In reaching my conclusions I consider it is important that the policy is guidance and that there may be exceptional cases where the timescale in the policy will not be applied. The policy contemplates that there may be cases where, for one reason or another (eg where a prisoner's circumstances are regarded as being favourable, stable, and unlikely to change) a dossier may be (and perhaps ought to be) submitted earlier than the specified timescale.

[55] It follows in my opinion that the petitioner's complaint that the policy gives rise to a breach of article 14 read with article 5 is not well founded.

The material which was not before the decision-makers

[56] I have proceeded on the basis of the material which was before the decision-makers at the times of their decisions. The ICM minutes and the petitioner's affidavit were not part

of that material. They post-date those decisions. Accordingly, although I have taken account of the affidavit in so far as it sets out what the petitioner says took place during the complaint proceedings, I have not otherwise had regard to the contents of either document (other than to observe that much of it must have been information which SPS would have been aware of at the time of the respondents' decisions). Of course, once those documents were submitted to the respondents they required to reconsider whether a case for early submission of a dossier was made out. However that matter does not form any part of the challenge brought in these judicial review proceedings.

Conclusions

[57] Although the policy guidance is stated in unqualified terms, it ought to be construed as admitting of exceptions. It does not frustrate the aims of s 3AA so far as long-term prisoners are concerned. If it is properly applied taking account of a prisoner's particular circumstances it does not fetter the respondents' discretion. There has not been a breach of the petitioner's article 14 (read with article 5) Convention rights. However, in my opinion in their application of the policy to the petitioner the decision-makers fettered their discretion. The decisions of 21 and 25 April 2019 involved the rigid application of the policy with no proper consideration being given to the petitioner's circumstances.

[58] It follows that the decisions should be reduced. For the reasons already discussed, the petitioner is not entitled to any of the other substantive remedies which he seeks. Nor do any of his pleas-in-law aptly encapsulate the basis upon which reduction is to be granted. Accordingly, it seems to me that the appropriate course is simply to pronounce decree of reduction of the decisions of 21 and 25 April 2019. It will then be for the respondents to

decide, having proper regard to the petitioner's circumstances, whether the policy ought to be applied or whether there is a good case for earlier submission of his dossier to PBS.

Disposal

[59] I shall pronounce decree of reduction of the decisions of 21 and 25 April 2019. I shall reserve meantime all questions of expenses.