OUTER HOUSE, COURT OF SESSION

[2019] CSOH 18

P975/18

OPINION OF LORD DOHERTY

In the petition

NIALL DINSMORE (AP)

Petitioner

against

THE SCOTTISH MINISTERS

Respondents

for

Judicial Review of a decision of the Scottish Ministers not to commence the Petitioner's application for a Home Detention Curfew Licence until 9 November 2018

Petitioner: Crabb; Drummond Miller LLP
Respondent: Reid; Scottish Government Legal Directorate

1 March 2019

Introduction

[1] The petitioner is a prisoner in HMP Castle Huntly. He is serving a sentence of 5 years imprisonment. He is a long term prisoner in terms of the Prisoners and Criminal Proceedings (Scotland) Act 1993.

[2] 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 where the Parole Board for Scotland ("PBS") have recommended his or her release once half of the sentence has been served (Prisoners and Criminal Proceedings (Scotland) Act 1993, section 3AA(1)(b) and Management of Offenders (Scotland) Act 2005, section 15). Half of the petitioner's sentence will have been served on 23 April 2019 (his parole qualifying date ("PQD")).

[3] The petitioner wished to be considered by the respondents for the grant of an HDC licence. He wanted to have the opportunity of obtaining a licence for the maximum permitted period of 180 days. He communicated that desire to the Scottish Prison Service ("SPS"). In order for it to be possible for the petitioner to obtain a 180 day HDC licence SPS would have to have compiled his dossier and have sent it to PBS sufficiently in advance of 180 days before his PQD to enable PBS to make its decision whether to recommend release on parole before the commencement of that 180 day period. SPS's response to the petitioner's request was that its practice was to refer dossiers to PBS about 12-16 weeks before a PQD. That was confirmed in a letter dated 1 August 2018 by the chief executive of SPS to the petitioner's MSP. On 6 August 2018, in response to a complaint by the petitioner to the prison governor that his HDC application had not been actioned by SPS, the governor responded by referring to the explanation given in the chief executive's letter of 1 August 2018. On 13 August 2018 the governor wrote to the petitioner stating that his HDC application would not be initiated until 9 November 2018 (165 days before his PQD).

[4] At the time the present petition was served on the respondents they had not referred the petitioner's parole dossier to PBS.

The petition and answers

[5] In Stat 4 the petitioner seeks (i) declarator that the decision of 13 August 2018 is unlawful; (ii) reduction of that decision; (iii) an order requiring the respondents to refer the petitioner's parole dossier to PBS; (iv) an order requiring the respondents to update their guidance "to give effect to section 3AA(3) of the Prisoners and Criminal Proceedings (Scotland) Act 1993"; (v) the expenses of the petition; and (vi) such other orders as may seem to the court to be just and reasonable.

[6] The petitioner avers that he has standing, and the respondents admit that averment (Stat 1 and Ans 1). The petitioner also avers that the decision of 13 August 2018 was unlawful. He maintains that the respondents erred in law in failing to make rules or guidance which gave effect to the policy underlying section 3AA(3), namely Parliament's wish that long term prisoners should have the opportunity of obtaining a 180 day HDC licence. Moreover, in operating a system whereby long term prisoners' parole dossiers are not referred to PBS until, at the earliest, about 12-16 weeks before their PQD, the respondents unlawfully fettered their discretion. Finally, the respondents' decision not to initiate the HDC process until 9 November 2018 was irrational. In relation to permission to proceed, the petitioner avers that he has sufficient interest in the subject matter of the petition "as he is a person who is entitled to seek an HDC licence," and that he has a real prospect of success (Stat 28). The respondents admit that the petitioner has sufficient interest in the subject matter of the petition, but they deny that he has a real prospect of establishing that the respondents erred in law in failing to make rules or guidance to give effect to the policy underlying section 3AA(3), and they deny that the decision of 13 August 2018 was irrational (Ans 28). In their answers the respondents did not oppose permission to

proceed being granted in so far as it was grounded on the respondents having fettered their discretion.

Refusal of permission

[7] On 13 December 2018 the Lord Ordinary considered whether to grant permission to proceed (RCS 58.7(1)(a)(i)). She refused permission on the papers without putting the case out for an oral hearing (RCS 58.7(1)(b)). The petitioner requested a review of that decision at an oral hearing (RCS 58.8(1)). On 28 January 2019 I granted the request for an oral hearing to review the issue of permission to proceed (RCS 58.8(2)). I had misgivings about the reasons which had been given for refusal of permission. On the face of things it seemed odd that no oral hearing had been thought necessary, particularly as the respondents had not opposed permission being granted on one of the grounds upon which the petitioner founded.

The relevant statutory provisions

[8] Section 3AA of the Prisoners and Criminal Proceedings (Scotland) Act 1993 (as amended by the Management of Offenders etc (Scotland) Act 2005 and the Home Detention Curfew Licence (Amendment of Specified Days)(Scotland) (Order) 2008 (SSI 2008/126)) provides:

> "**3AA Further powers to release prisoners**
> (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) ... [T]he 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.
> ..."

Circular JD 7/2008

[9] The Scottish Prison Service ("SPS") Circular JD 7/2008: Home Detention Curfew – Guidance for Agencies (updated to April 2018) provides guidance on the procedure to be followed where the grant of an HDC licence is being considered. The Circular acknowledges that HDC is available to certain long term prisoners, and that the maximum period which a prisoner can be released on HDC is 180 days before the date on which he or she will have served one-half of a sentence. The Circular does not specify when (or, in particular, how long before the PQD) a prisoner's parole dossier should be referred to PBS.

The oral hearing

[10] In advance of the oral hearing counsel for both parties lodged written notes. The respondents' note disclosed (i) that on 4 January 2019 (109 days before the PQD) they referred the petitioner's parole dossier to PBS; (ii) that the petitioner's parole application was expected to be considered by PBS at its meeting on 12 February 2019 (70 days before the PQD) with a decision being issued shortly thereafter.

[11] Mr Crabb submitted that, notwithstanding these developments, the petition had a real prospect of success and that permission to proceed should be granted. The respondents had erred in law in failing to make rules or guidance to ensure that long term prisoners had

an opportunity of obtaining a 180 day HDC licence. The practice of not submitting parole dossiers until 12-16 weeks before the PQD resulted in a situation where no long term prisoners could obtain a 180 day HDC licence. The practice failed to give effect to the policy objective of permitting any eligible prisoner to apply for a period of 180 days on HDC licence. The respondents had wrongfully fettered their discretion (*British Oxygen Co Ltd* v *Minister of Technology* [1971] AC 610, per Lord Reid at pp 625G-626F). The decision on 13 August 2018 that an application could not be initiated until 9 November 2018 was irrational. In their answers the respondents did not resist permission being granted on the fettering of discretion ground. However, it was submitted that each of the grounds had a real prospect of success.

[12] Mr Crabb further submitted that the issues raised by the petitioner were not academic. The petitioner continued to have standing and interest notwithstanding the fact that his dossier had now been referred to PBS. He had been wrongfully deprived of an opportunity to have his application for a 180 day HDC licence considered and granted. The petition sought to secure the preservation of the rule of law, which is an essential function of the courts (*AXA General Insurance Co Ltd* v *Lord Advocate* 2012 SC (UKSC) 122, per Lord Reed at para 169). *Beggs* v *Scottish Ministers* 2018 SLT 199 was distinguishable. In that case there had been no practical or continuing purpose in the declarator sought. Here there was a practical point. The absence of appropriate guidance affected all long term prisoners who wished to apply for a 180 day HDC licence, as did the fettering of the respondents' discretion through the indiscriminate application of their policy.

[13] Mr Reid submitted that the petition had no real prospect of success. Moreover, the petition was now academic, and the petitioner no longer had standing or interest to seek the remedies which he sought. There was no practical purpose in granting any of those

remedies. Even if the complaint had some substance (which was not accepted), what was sought was really no more than a rebuke of the respondents for a past error. As Lord Tyre observed in *Beggs* v *Scottish Ministers*, *supra*, at para 19:

> "It is well settled that the court will not grant declarator without there being some practical purpose or benefit to be achieved thereby ... This court does not...grant declarators for no purpose other than to rebuke a party for a past act with no practical or continuing consequences."

[14] Mr Reid further maintained that the rule of law did not require that permission to proceed be granted. If the complaints as to the lack of appropriate rules or guidance and the fettering of discretion were well founded they would affect any long term prisoner who wished to seek a 180 day HDC licence. It was not necessary that the petitioner be granted permission to proceed in order to protect the interests of other long term prisoners. The rule of law could be secured by one or more of those prisoners seeking judicial review at a time before the issue affecting them became academic.

[15] In any case, the ground that the respondents erred in law in failing to make rules or guidance which gave effect to the policy underlying section 3AA(3) had no real prospect of success. The respondents were under no common law or statutory obligation to make any such rules or guidance. Besides, the order sought at Stat 4 part (iv) was hopelessly vague and unspecific. So far as the irrationality ground was concerned, there was no real prospect of the court finding that the decision to act in accordance with the respondents' established practice was irrational. However, if, contrary to Mr Reid's submission, the petition was not now academic in so far as it proceeded on the fettering of discretion ground, the respondents did not oppose permission being granted to that limited extent.

Decision and reasons

[16] At the oral hearing on 31 January 2019 it was common ground that I required to consider *de novo* whether permission to proceed should be granted. In my opinion that is correct (see Court of Session Act 1988 section 27C(5)), and that is the basis upon which I have proceeded. After hearing submissions I was persuaded by Mr Reid's arguments. I refused permission to proceed. I gave brief oral reasons indicating that I accepted Mr Reid's submissions. As the petitioner has now reclaimed it is appropriate that I set out my reasons more fully.

[17] There is also another reason why it is right that I should do that. On further reflection I am not convinced that I was correct to refuse permission in relation to the fettering of discretion ground. Having had the opportunity to consider that matter further, it now appears to me that that ground has sufficient substance for permission to be granted, and that I ought to have granted it. I am not persuaded that the ground is academic, or that the petitioner has no standing or interest in relation to it. He has lost the opportunity to seek an HDC licence for the maximum permitted period. At present, the petition does not seek damages for the loss of that opportunity, but it is possible that such a claim might be advanced if there is an opportunity to recast the pleadings to take account of events since the petition was lodged. In any case, I think there is substance in the argument that there is a public law interest in this ground being adjudicated upon. It affects all long term prisoners who are eligible for HDC. I was informed that although the maximum licence period had been increased to 180 days on 21 March 2008, no long term prisoner had been granted a licence for the maximum period. It was not suggested that the respondents properly considered whether their policy ought to be applied in the particular circumstances in this case, or that they had carried out that exercise in any of the other cases where long

term prisoners have sought or are seeking an HDC licence. I am unimpressed by the suggestion that the petition is academic because other long term prisoners could vindicate their rights by seeking judicial review before the question becomes academic for them. It seems to me that other prisoners who raise proceedings are very likely to run into the same sort of practical difficulties caused by the effluxion of time as the petitioner has experienced.

[18] I remain of the view that neither the rules or guidance ground nor the irrationality ground have real prospects of success. I am not persuaded that there is any substantial basis for maintaining that the respondents are obliged to issue the suggested rules or guidance. I see no good basis for saying that the respondents ought to be required to alter the terms of the Circular. Similarly, I am unconvinced that there is any substance in the irrationality ground. There is nothing irrational in applying a clear policy consistently. It seems to me that the real nub of the complaint is not that the particular decision was unreasonable, but that the respondents act unlawfully in applying their policy rigidly in all cases, with the result (it is said) that they have fettered their decision.

Oral hearings and Practice Note number 3 of 2017

[19] I drew attention earlier to the fact that no oral hearing was ordered before the refusal of permission on 13 December 2018. There is no doubt that the court has a discretion whether to order an oral hearing before deciding the question of permission (Court of Session Act 1988, section 27B(5); RCS 58.7(1)). There will undoubtedly be cases where it is very clear indeed that permission ought to be refused, and where an oral hearing would be pointless. However, I think it is important to bear in mind the guidance in paragraph 12 of Practice Note 3 of 2017: Judicial Review:

> "12. The Lord Ordinary must make a decision on whether to grant or refuse permission or order an oral hearing (RCS 58.7). The Lord Ordinary will ordinarily order an oral hearing if considering refusing permission…."

That suggests that oral hearings should be the norm where the court is minded to refuse permission. My impression is that does not in fact represent what is happening in practice. I rather think that in a large majority of cases where permission is refused there is no oral hearing. I very much doubt whether it was anticipated, or intended, that that should be the case.