OUTER HOUSE, COURT OF SESSION

[2019] CSOH 55

P975/18

OPINION OF LORD ARTHURSON

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
Respondents: Reid; Scottish Government Legal Directorate

19 July 2019

Introduction

[1] On 13 August 2018, while the petitioner was a serving prisoner at HMP Castle Huntly, the respondents informed the petitioner that he would not be able to apply for a Home Detention Curfew licence until 9 November 2018. The petitioner was at that time serving a 5 year custodial sentence in respect of a firearms offence and was accordingly a long-term prisoner for the purposes of the Prisoners and Criminal Proceedings (Scotland)

Act 1993 (hereinafter referred to as "the 1993 Act"). In his application for judicial review before this court, the petitioner has sought declarator that in so determining matters, the respondents acted unlawfully, and, that having so acted, the challenged decision of 13 August 2018 should be reduced.

[2] The pertinent facts can be stated with relative brevity. The date upon which the petitioner had served one half of his sentence was 23 April 2019. This date is conventionally referred to as the parole qualifying date (hereinafter referred to as the "PQD"). In terms of the petitioner's sentence, his earliest date of liberation, being the date upon which he would have served two thirds of his sentence (hereinafter referred to as the "EDL") was scheduled to be 23 February 2020. The petitioner was in fact released on parole licence on 26 April 2019. On 24 July 2018 the petitioner wrote to the prison governor in respect of his interest in applying for the maximum period available in terms of a potential Home Detention Curfew licence. Following a reply dated 6 August 2018, the petitioner wrote again to the governor on 8 August 2018 and received a reply dated 13 August 2018, which decision letter is the subject of challenge in these proceedings. That letter confirmed that the petitioner's application process in respect of any home detention curfew licence would not commence until 9 November 2018, being a date 165 days before his PQD. This decision in terms had the effect that the petitioner would not be in a position to apply for the potential maximum period on such a licence of 180 days.

[3] The Home Detention Curfew scheme (hereinafter referred to as the "HDC scheme") was introduced by the Management of Offenders etc (Scotland) Act 2005 and allows for prisoners admitted to the scheme to serve a period of their sentence at an approved address, subject to certain conditions as prescribed by the Home Detention Curfew Licence (Prescribed Standard Conditions) (Scotland) (No 2) Order 2008. The scheme was brought

into force on 3 July 2006, and was extended to long-term prisoners on 21 March 2008. In terms of section 3AA (1)(b) of the said 1993 Act, a long-term prisoner, such as and including the petitioner in the circumstances of this case, may only be released on licence under the HDC scheme once he or she has been recommended for such release, on having served one half of his or her sentence, by the Parole Board for Scotland (hereinafter referred to as "the PBS"). In the case of the petitioner, that period of sentence would have been served by him on his PQD of 23 April 2019.

Submissions for the petitioner

[4] Counsel for the petitioner's contention in this case was that in not referring the petitioner's case to the PBS on a date earlier than 9 November 2018, being the application process initiation date referred to in the challenged decision letter of 13 August 2018, the respondents had thereby unlawfully fettered their discretion. Counsel advanced the following two propositions in support of the submission: (i) the respondents had shut their ears to the petitioner's application; and, (ii) proof of fettering of discretion should be looked at, not in terms of the wording of the relevant policy, but in the context of whether there could be said to be any willingness to entertain exceptions to that policy. Counsel submitted that there was no evidence, in the circumstances of the petitioner's case, of the respondents being willing to listen to exceptions to the general policy in this area and that the respondents had accordingly shut their ears to the petitioner's application. This conduct of the respondents being unlawful, the petitioner sought relief from the court by way of the remedies of declarator and reduction.

[5] Counsel referred to two authorities in advancing his focused submissions on the question of fettering of discretion generally. First, counsel referred to a dictum of Lord Reid

in *British Oxygen Co Limited* v *Minister of Technology* [1971] AC 610 at 625, which was in the following terms:

> "The general rule is that anyone who has to exercise a statutory discretion must not 'shut his ears to an application'… I do not think there is any great difference between a policy and a rule. There may be cases where an officer or authority ought to listen to a substantial argument reasonably presented urging a change of policy. What the authority must not do is to refuse to listen at all."

Counsel also referred to the dicta of Laws and Treacy LJJ in *R (West Berkshire District Council)* v *Secretary of State for Communities and Local Government* [2016] 1WLR 3923 at paragraphs 16 and 17, in which their Lordships stated:

> "It is important first to notice a distinction in this area of the law which is at the core of the debate in this appeal. It is between these two principles. (1) The exercise of public discretionary power requires the decision-maker to bring his mind to bear on every case; he cannot blindly follow a pre-existing policy without considering anything said to persuade him that the case in hand is an exception… But (2): a policy-maker (notably central government) is entitled to express his policy in unqualified terms. He is not required to spell out the legal fact that the application of the policy must allow for the possibility of exceptions."

[6] Counsel thereafter embarked on a short analysis of section 3AA (1) to (4) of the 1993 Act, which provides as follows:

> "(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.
>
> (2) The power in subsection (1) above is not to be exercised before the prisoner has served whichever is the greater of—
>
> (a) one quarter of his sentence; and
>
> (b) four weeks of his sentence.
>
> (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."

[7] Counsel submitted that four points arose from consideration of these provisions, namely: (i) long-term prisoners may be released on home detention curfew licence; (ii) to be so released, the prisoner must have had his or her release on parole recommended by the PBS; (iii) the relevant power in these provisions is the ability to release a prisoner on licence; and (iv) while legislation places time-limits on release on licence, it does not place time-limits on when an applicant's case can be referred to the PBS. Counsel further noted that, in terms of subsections (2) and (3), the maximum period available on HDC licence in terms of the current iteration of these provisions was 180 days, being the period of 166 days referred to in subsection (3), as amended, which period ended on the day 14 days before the prisoner's PQD.

[8] In support of his contention that the respondents had failed to entertain exceptions and had accordingly thereby unlawfully fettered their discretion in this matter, counsel referred to the terms of certain documentary productions lodged in process. First, in terms of a letter dated 12 November 2018 from the senior legal services manager at the Scottish Prison Service, the position was that as at the date of that letter no long-term prisoners had been released for a period of 180 days under the HDC scheme. It could be said therefore, counsel observed, that some ten years after the increase in the available period of days referred to in section 3AA (3), it was of significance that not one long-term prisoner had been released for the new maximum figure of 180 days under the HDC scheme. Referring secondly to the lodged report of proceedings in the Scottish Parliament on 25 October 2018,

and in particular a statement given by the cabinet secretary for justice at column 56 thereof, counsel noted that the cabinet secretary had stated as follows: "At any time, there are around 300 people on HDC, which is approximately 4% of the prison population". Third, in terms of an affidavit of Mr Paul Yarwood, deputy governor of HMP Castle Huntly, dated 6 June 2019, counsel noted Mr Yarwood stating therein that long-term prisoners generally become aware that they can apply for an HDC Licence "around 24 weeks" before their PQD "when we start preparing their parole dossier and at the same time issue them with an HDC application form." Mr Yarwood had further stated that he was "not aware of any mechanism for a prisoner to ask for and receive an HDC application form early and have their dossier referred to (the PBS) ahead of the established timetable", and indeed that this had never happened in his experience. From this counsel sought to fortify his proposition that there were no mechanisms in place for entertaining exceptions such as would allow a prisoner in the position of the petitioner to seek and obtain the full 180 day period potentially available to him or her. Counsel fourthly and finally noted the terms of an affidavit of Mr John Watt, chair of the PBS, dated 13 June 2019, in which Mr Watt stated:

> "If SPS sent a dossier too early, then the information is likely to be insufficient as it would be too long before the PQD to allow a decision to be made. The Board reacts to the Scottish Ministers' timetable as it cannot initiate cases by itself. I do not know of any exceptions to the administrative arrangements."

Mr Watt further stated that there were administrative arrangements in place which required the prisoner dossier assembly process to be commenced some six months before the PQD, and that the dossier is sent to the PBS four months before the PQD. Counsel submitted that it was clear from Mr Watt's comments that a dossier could be sent in at any point, and that if the PBS was not satisfied on matters of risk, the PBS would not require to make a recommendation at that point but could simply continue the application for further

information. Mr Watt had made it clear that he thought it "very unlikely" that the PBS would recommend release on parole six months before a PQD, and stated on this matter, "If asked if it was possible – I would never say never. If asked if it was likely – I would say no."

[9] Drawing these adminicles together, counsel submitted that it was apparent that there was no mechanism in place for entertaining exceptions such as would permit a prisoner to seek and obtain the maximum 180 day period available under the HDC scheme. It was plain, counsel submitted, that the respondents' ears were closed to such an application, and this was supported by the undisputed fact that no prisoner had been able to obtain the maximum 180 day period, at least until November 2018. In terms of the practice and reality of those agencies engaged in these processes, as evidenced in the said affidavits, notwithstanding the clear provisions of the 1993 Act, and the obvious point that there must be some way an applicant prisoner such as the petitioner can apply for the maximum potential available period under the HDC scheme, there was nothing in the material before the court to indicate how in even an exceptional case there could be a successful application for the maximum period.

Submissions for the respondents

[10] Counsel for the respondents accepted that it was a well-established principle of public law that a policy should not be so rigid as to amount to a fetter on the discretion of a decision-maker, under reference to *R (Lumba)* v *Home Secretary* [2012] 1AC 245 at paragraph 21, per Lord Dyson. In that regard, a decision-maker must be prepared to listen to someone with something new to say. That said, however, a policy maker is entitled to express a policy in unqualified terms: see *West Berkshire District Council*, supra, at paragraph 21:

> "It would surely be idle, and most likely confusing, to require every policy statement to include a health warning in the shape of a reminder that the policy must be applied consistently with the rule against fettering discretion".

[11] Counsel proceeded to advance certain general submissions with regard to the provisions set out in section 3AA of the 1993 Act. The power to release on licence under the HDC scheme which was held by the respondents was a discretionary one, and was subject to a condition precedent to the engagement of that discretion, namely that a recommendation had been made by the PBS in terms of subsection (1)(b). Counsel submitted that subsection (2) was not relevant to long-term prisoners, and I did not understand this point to be disputed on behalf of the petitioner. Counsel for the respondents, however, submitted that it was plain from the terms of subsection (3) that the power to release was to be exercised only during the period referred to in that subsection, which ended 14 days prior to the prisoner's PQD on the basis that practical arrangements would require to be put in place, such as the installation of electronic monitoring equipment at an approved address. There was accordingly a time period in which the said discretion could be exercised by the respondents, in the event that the said condition precedent was met. The language in the provision not being mandatory, it could not be said that a prisoner was entitled to apply for and obtain the potential maximum period available of 180 days. Pressed by the court on this matter, counsel for the respondents accepted that it was not the respondents' position that the 180 day period was never achievable; rather, the measure had been introduced to assist with flexibility in the management of the prison population, and had been designed to allow a group of prisoners, already approved by the PBS for release, to be held in less restrictive conditions, albeit still conditions of restricted liberty, on a 12 hour curfew. Counsel noted that in terms of subsection (4), in exercising the subsection (1) power, the respondents required to have regard to considerations of public protection, prevention

of reoffending, and securing the successful reintegration of the prisoner into the community. The enactment of these provisions in respect of the HDC scheme could be seen therefore not to be for the benefit of an individual prisoner, but as an enactment which had as its object the management of the prison population together with the securing of the reintegration of prisoners into the community along with matters of public interest.

[12] It was understandable, counsel submitted, that, as expressed in the affidavit of Mr Watt, the preferred position of the PBS was to make a decision as close to the PQD as possible, this exercise necessarily involving the anticipation of the prisoner's position at the PQD. Indeed, in considering matters of risk, the further ahead in time from the PQD that the PBS engaged in that exercise, the less confidence the PBS could have in the assessment which it was making, and it was, counsel submitted, essential that the PBS must have confidence in any release decision. Insofar as Mr Watt had in express terms stated that he "would never say never" in regard to the making of a recommendation at the earliest possible stage in the process, it was plain that there was on the part of the PBS a willingness to listen, if an exceptional case was indeed being made. Such a case, counsel for the respondents submitted, should involve the prisoner himself engaging in an early explanation of the exceptional circumstances which he or she claimed meant that he or she had at least, as counsel put it, a sporting chance with the PBS of securing a positive decision six or seven months before the PQD. The logic of the petitioner's argument was that all prisoners should have the opportunity to go to the PBS in sufficient time to obtain the maximum 180 day period available to them in terms of the HDC scheme, but counsel for the respondents submitted that if every prisoner was granted and in turn sought that opportunity, such an exercise would necessarily involve a significant duplication in the

preparation of essential reports and other work to be undertaken by the PBS in the making of a recommendation.

[13] Referring to the record of proceedings in the Scottish Parliament on 27 March 2008 during discussion of the extension of the HDC scheme to long-term prisoners, counsel for the respondents noted that at column 7383, the then cabinet minister for justice had stated that the order under discussion formed part of a package of measures which ministers hoped to put in place to ease the ongoing problem of prison overcrowding. The cabinet secretary further at 7384 had sought to assure Parliament that prisoners who were serving long-term sentences could not be released on HDC unless the PBS had already recommended their release at the first PQD, and that these prisoners had also subsequently met the assessment criteria for the HDC scheme. At column 7385 the cabinet secretary stated as follows:

> "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 ten weeks. In reality, we estimate that the period spent on HDC is likely to be nearer six weeks."

Counsel submitted that it was accordingly clear that Parliament was aware in March 2008 of how the system operated at the time it was debating the extension of the HDC scheme to long-term prisoners. The Cabinet Secretary in column 7385 had also emphasised matters of management, flexibility and using the tools that were available to ministers, such as HDCs. Counsel submitted that this was consistent with the terms of the legislative provision itself, and further submitted that what Parliament had conferred by way of the provision in question was a tool to allow flexibility in the management of the whole prison population. Counsel further submitted that the timetable for the preparation of a parole dossier as contained in the Parole Handbook, the lawfulness of which had not been challenged in these

proceedings, provided for a timetable for action of 26 weeks before the PQD, EDL or next review date, as applicable. There was a significant lead-in period for the preparation of a dossier, and from the terms of paragraph 4.2 of the handbook it was clear that the HDC scheme was working in the background during the lead-in period in order that a favourable decision could lead in turn to a quicker consideration of an application under the HDC scheme.

[14] The policy in question in this case was based on unchallenged rules, counsel submitted, and it was incumbent upon an applicant to pray in aid features justifying a departure from that policy in order to seek to obtain a period of 180 days under the HDC scheme. For an applicant simply to express an interest in that period, or to make a bold assertion that he or she was a model prisoner, as the petitioner had done in this case, was insufficient to make an exceptional case, counsel submitted. The handwritten material attached to the petitioner's prisoner complaint forms dated 24 July 2018 and 8 August 2018 contained nothing expressed on the petitioner's part of such a character which would justify the respondents listening to his application or departing from their established policy. In such circumstances it could not be said, counsel submitted, that the respondents had acted unlawfully by not initiating an earlier application process in terms of the HDC scheme. Counsel for the respondents accordingly invited the court to dismiss the petition and in so doing to sustain the respondents' first, third and fourth pleas in law.

Discussion and decision

[15] I have reached the view that in determining not to initiate the petitioner's HDC application process until 9 November 2018, being a date 165 days before his PQD, all as intimated to the petitioner in the challenged decision letter of 13 August 2018, the

respondents did not act in such a way that could be characterised as comprising an unlawful fettering of their discretion in the course of their management of the petitioner's case. In these circumstances, I accordingly propose to refuse the petitioner's application for relief by way of declarator and reduction and to dismiss the petition.

[16] In terms of section 3AA of the 1993 Act, Parliament has conferred upon the respondents a discretionary power to release, which power can only be engaged in respect of a long-term prisoner such as the petitioner once that prisoner's release, on having served one half of his or her sentence, has been recommended by the PBS. The respondents require to have regard, in the exercise of that power, once the said antecedent condition is established and the power is thereby engaged, to considerations of public protection, prevention of reoffending by the applicant prisoner, and the successful reintegration of that prisoner into the community. The time period referred to in section 3AA, totalling 180 days at its maximum, is permissive and not mandatory in its nature, nor should it be viewed as creating any expectation of release on the HDC scheme for that maximum potential period. It is important to understand that the exercise of this discretionary power, having regard to the clear terms of the provision in question, is located and anchored firmly around public interest matters, being the protection of the public, prevention of reoffending and community reintegration of the long-term prisoner in question. Once viewed in that light, section 3AA cannot be seen as a statutory provision enacted for the benefit of the prisoner, nor can it be characterised as conferring some form of entitlement upon prisoners within the relevant cohort within the prison estate.

[17] These points of construction, which I have taken from the wording of section 3AA of the 1993 Act itself, are fortified when one has regard to the terms of the discussion in March 2008 led by the then cabinet secretary for justice in respect of the extension of the

HDC scheme, from which it is plain that the objects involved in bringing long-term prisoners into the scheme were primarily those of managing, with flexibility, the prison population together with the public protection and interest matters referred to above. I have reached the view that nothing said by the authors of the affidavits referred to by counsel for the petitioner in this case in the course of his argument on the construction of section 3AA is indicative of an unlawful fettering of discretion on the part of the respondents.

[18] If the question necessarily arising on the issue of unlawful fettering is whether the decision-maker in the course of the exercise of a public discretionary power has refused to, or made it clear that she or he is unwilling to, listen to anyone with something new to say (*British Oxygen Co Limited*, supra, per Lord Reid at 625), it then follows in my opinion that an applicant must have actively made a case to persuade the decision-maker that the case in hand is indeed an exception justifying a departure from the established policy (*West Berkshire District Council*, supra, per Laws and Treacy LJJ at paragraph 16). I am satisfied that nothing of such a character was expressed by the petitioner in the annexations to his complaint forms dated 24 July 2018 and 8 August 2018, in which the petitioner in terms asserted his status as a model prisoner with an entitlement to apply for the maximum period, to justify the respondents listening to his particular application for consideration for release under the HDC scheme at an earlier stage than that determined and intimated in the challenged decision letter of 13 August 2018. There being no exceptionality advanced by the petitioner at that stage, and there accordingly being no reason for the respondents reasonably to expect or require the PBS to accelerate its own consideration of the petitioner's case in terms of the relevant processes leading to the making of a recommendation by the PBS in respect of the petitioner at his PQD, it was thus in my view not unlawful for the

respondents to decline in turn to accelerate consideration of the petitioner for release under the HDC scheme.

[19] Having considered the material placed before the court and the full submissions thereon advanced by counsel, I have therefore not been persuaded that the respondents, in the course of the exercise of their statutory discretion in respect of the power contained in section 3AA, did in this case in effect shut their ears to the petitioner's application. In addition, I have further not been able to conclude that the respondents in the course of the said exercise conducted themselves unlawfully in applying their policy so rigidly that it was being applied by them in such a way as to fetter the exercise of their own statutory discretion.

[20] For these reasons I have concluded that the public law challenge advanced on behalf of the petitioner in respect of the decision of the respondents not to commence the petitioner's application for release on licence under the HDC scheme until 9 November 2018, as expressed in the challenged decision letter of 13 August 2018, is not-well-founded, the respondents' conduct in this matter not having been in my view unlawful.

Disposal

[21] Having so determined, I propose accordingly to sustain the third and fourth pleas in law for the respondents and to dismiss the petition. I will meantime reserve all questions of expenses.