OUTER HOUSE, COURT OF SESSION

[2024] CSOH 73

P747/23

OPINION OF LORD SCOTT

In the Petition

BRIAN HANNAH

Petitioner

for

Judicial Review

Petitioner: Dewar KC, Sloan; Drummond Miller LLP
Respondent: Welsh; Scottish Government Legal Directorate

30 July 2024

Introduction

[1] The petitioner is a serving prisoner who brought the present action in order to seek reduction of a disciplinary decision of 4 June 2023 regarding his conduct.

[2] I granted permission only on the issue of rationality. I refused permission in relation to three other grounds relating to: a consequential decision by the risk management team on 8 June 2023; failure to give adequate reasons; and procedural improprieties.

[3] I heard counsel for both parties at a substantive hearing on 7 May 2024.

[4] At the outset of the hearing, the petitioner sought to lodge an updated report by consultant radiologist, Dr John Miller, in which he offered comment on the report by

consultant radiologist, Dr Andrew Baird, which had been lodged by the respondent. This was opposed by the respondent on the basis that the report was late and irrelevant to the issues in the case. Having heard from counsel and being assured by counsel for the respondent, who had read the report, that allowing it to be received would not cause any prejudice, I allowed it to be received.

The petitioner's history

[5] In 2007, the petitioner was convicted of murder. He was sentenced to life imprisonment with a punishment part of 17 years. The sentence was backdated to 30 May 2006. The punishment part expired on 29 May 2023. At the time of the disciplinary decision, the Parole Board for Scotland were considering the petitioner's first life prisoner review.

The disciplinary proceedings

[6] On 1 June 2023, the petitioner was required to undertake a body scan on his return to HMP Barlinnie from community access. Anomalies were identified on the scan which led two prison officers to conclude that the petitioner was secreting an item or items internally.

[7] He was served with a notice of charge of breach of discipline under paragraph 20 of schedule 1 to the Prison and Young Offenders Institutes (Scotland) Rules 2011 ("the Rules"). This provides that it is a breach of discipline for a prisoner to have "in his … possession, or concealed about his … body or in any body orifice, any article or substance which he … is not authorised to have or a greater quantity of any article or substance than he … is authorised to have."

[8] The petitioner was monitored in the segregation unit following the body scan. No prohibited item was found. He was scanned again and provided a clear scan.

[9] On 4 June 2023, inquiry was made into the charge at a disciplinary hearing. What took place at the hearing was agreed between the parties.

[10] The record of the conduct of the hearing as prepared by the adjudicator was produced. The petitioner accepted that: he had received written notice of the charge at least two hours before the hearing; he understood the charge and the purpose of the hearing; he was ready for the hearing to proceed; he did not wish an adjournment; and he was prepared to accept the written evidence presented to the hearing without requiring the charging officer, or any other witness, to appear. The petitioner entered a plea of not guilty. He opted not to make a written statement or to call any witnesses.

[11] The adjudicator had before him a report (ADJ1) from prison officer Chris Lawrie dated 1 June 2023. This stated:

> "On the above date [1 June 2023] and time 6986 Hannah [the petitioner] had returned from comminuty (sic) access and had been put through the body scanner in Reception. Officer Robertson and I both believe Mr Hannah is concealing an item internally. As a result of the positive body scan, Mr Hannah has been placed on MORS [Management of an Offender at Risk due to any Substance] and Governor's Report. He will be located in an observation cell until a negative image can be produced."

[12] The petitioner said, "I get the machine said I have something concealed but I did not." Relying on the report, the adjudicator found the petitioner guilty. The petitioner did not appeal against this decision.

The petitioner's submissions

[13] Senior counsel for the petitioner adopted his written note of argument. The decision at the disciplinary hearing was irrational. The adjudicator did not have a factual basis for

his decision which was "so unreasonable that no reasonable [decision maker] could have reached or imposed it". It was not a "material error of law" but it was close to such. The scan result was "merely presumptive". It could not support a finding to the necessary standard of proof beyond reasonable doubt about the existence of an article or as to its identification, primarily due to the possibility of normal bodily gases producing similar findings, as explained in the expert reports. The belief of the two prison officers about the existence of an article was not enough. Senior counsel queried the quality control aspects of training to allow officers to make assessments about scan results. The petitioner was not given adequate notice of the charge, for example as to the identity of the article. The explanation for the decision was inadequate. The note of argument suggested that it was unlikely that the petitioner would conceal an illicit substance internally. Some additional steps might have avoided a claim of irrationality – relevant intelligence (in this case there was none); a second scan later the same day (the translucence might have gone if it was gas); CT scan at hospital (justified by the possible consequences if the item was a drug, albeit carrying possible risks to health); monitoring the petitioner when his bowels moved. Senior counsel acknowledged that these additional steps involved varying degrees of practicability and intrusion.

The respondents' submissions

[14] The conduct of the disciplinary hearing had not been contrary to the Rules. The focus of the petition was on the decision of the adjudicator, not the assessment of the image by the officers. The adjudicator did not see the image. The adjudicator was entitled to make the decision. It was not a question of what decision the court would reach on the basis of material now available. It was not even a question of whether the decision was correct. The

officers had received specific training on the use of the scanner, including the need to consider other possible explanations for anomalies such as gas. They were trained in, and familiar with, a range of scan results using the particular scanner, including those which detected items and those which did not. The petitioner had no authority to conceal any article, so it was not necessary to prove what the article was. The petitioner understood the charge and evidence against him. The expert reports did not exclude concealment of an article. The suggestion of gas did not come from the petitioner at or near the time of the scan but only after the first expert report raised the possibility. The additional steps suggested by counsel for the petitioner were unrealistic, unsafe or would represent a significant intrusion on the petitioner's rights.

Decision

[15] It was accepted by parties that the relevant test remains that set out by the Lord President in *Wordie Property Co Ltd* v *Secretary of State* 1984 SLT 345 at pages 347/348:

> "A decision of the Secretary of State acting within his statutory remit is ultra vires if he has improperly exercised the discretion confided to him. In particular it will be ultra vires if it is based upon a material error of law going to the root of the question for determination. It will be ultra vires, too, if the Secretary of State has taken into account irrelevant considerations or has failed to take account of relevant and material considerations which ought to have been taken into account. Similarly it will fall to be quashed on that ground if, where it is one for which a factual basis is required, there is no proper basis in fact to support it. It will also fall to be quashed if it, or any condition imposed …, is so unreasonable that no reasonable Secretary of State could have reached or imposed it."

[16] As pointed out by the Lord President in *BBC* v *Chair of the Scottish Child Abuse Inquiry* 2022 SC 184:

> "In determining that issue, the court has to be careful not simply to substitute what it might have decided in the particular circumstances. It should ask whether the decision was one within the range of reasonable responses open to the decision-maker in these circumstances."

Reference was also made to *R (on the application of Shreeve)* v *Secretary of State for the Home Department* [2007] EWHC 2431 (Admin). This case had superficial similarities to the present petition although, unlike that case, the present petition involved the second situation covered by the relevant rule as mentioned in paragraph 37 of the Judgment. I did not find it of assistance.

[17] There was no dispute about what occurred at the disciplinary hearing on 4 June 2023.

[18] Paragraph 113 of the Rules sets out the procedure to be followed. It provides that the adjudicator may take into account oral evidence and written evidence at the hearing. Written evidence may only be considered without associated oral evidence if the prisoner agrees. The paragraph also provides that the adjudicator must allow the prisoner to call witnesses and to cross-examine any witness not called by him.

[19] The record of the disciplinary hearing notes the petitioner's agreement that the hearing should proceed upon the basis of the report (ADJ1), which had been provided to the adjudicator. The petitioner did not seek to cross-examine either prison officer. He offered no evidence, just a denial without elaboration.

[20] The report was therefore the only evidence at the hearing and formed the basis of the decision by the adjudicator. This was in accordance with the Rules. It cannot be said that the finding was irrational or outwith "the range of reasonable responses open to the decision-maker in these circumstances". That is sufficient to deal with the petition. However, as senior counsel for the petitioner prayed some other matters in aid, I will now address them briefly. While presented as part of the attack on rationality, these other submissions did not focus solely on this issue, rather seeking to shift the focus onto the assessment of the image by the officers.

[21] Although I was struck at the permission stage by the possibility that gas might be mistaken for "an article", ultimately that possibility was irrelevant to the key issue of the rationality of the decision. The expert reports and much of the evidence in affidavits before me focussed on the assessment of images and therefore did not assist. If this had been critical to the rationality of the decision it was apparent that the officers had received specific training on the particular equipment. They based their assessment on this and their experience of positive and negative results using this scanner, mindful of the possibility of a similar finding if the translucence was caused by gas. In all the circumstances, they were able to explain their exclusion of gas. The expert reports did not exclude concealment of an article.

[22] The ADJ1 report was not detailed but, taken with the other material, it was sufficient for the petitioner to understand the case against him and why the identity of the article could not be specified.

[23] The absence of an appeal was not fatal but the petitioner was not assisted by the absence of any mention of bowel gas until after the possibility was raised in an expert report.

[24] I did not find the argument about likelihood of any assistance.

[25] The additional steps suggested by the petitioner to exclude irrationality were largely unrealistic. Such steps may have represented an exercise in completeness in excluding other possibilities but I did not consider that their absence deprived the decision of rationality.

Disposal

[26] I shall sustain the third and fifth pleas-in-law for the respondents, repel their remaining pleas-in-law, repel the pleas-in-law for the petitioner and refuse the petition. I will reserve the question of expenses meantime.