OUTER HOUSE, COURT OF SESSION

2020 CSOH 81

P561/20

OPINION OF LORD BRAID

In the petition of

THOMAS O'LEARY

Petitioner

for Judicial Review

of the failure to conduct a risk assessment of him by Scottish Ministers and Glasgow City Council

Petitioner: Leighton; Drummond Miller LLP
First Respondents: Byrne; Scottish Government
Second Respondents: Fraser; Morton Fraser LLP
Third Interested Parties (Parole Board for Scotland): Lindsay, QC; Anderson Strathern
Sixth Interested Parties (RMA): Welsh, Harper MacLeod LLP

2 September 2020

Introduction

[1] The petitioner, a convicted prisoner detained at HMP Barlinnie, is subject to an order for lifelong restriction ("OLR") imposed on 19 August 2014. The punishment part was five years, backdated to 31 August 2012. The petitioner has therefore been eligible to be considered for parole since the expiry of that part on 30 August 2017. However, the Parole Board for Scotland ("the Board") may not direct his release unless satisfied that it is no longer necessary for the protection of the public that the petitioner should be confined. The

petitioner contends that the Board is unlikely to be so satisfied unless and until the Scottish Ministers (the first respondents) prepare what the petition describes as a community facing risk management plan; failing which, until Glasgow City Council (the second respondents) prepare, again adopting the terminology of the petition, a robust risk management plan; and that the continuing failure of those bodies to produce such plans is unlawful, and a breach of his rights in terms of articles 5 and 14 of the European Convention of Human Rights. He seeks various orders (set out more fully at paragraph [28] below) in redress. The petition is opposed by the first respondents, the basis of their opposition being, in summary, that the risk management plan which has been prepared in respect of the petitioner complies with the law; that neither the court, nor the Board, can dictate the content of the plan; that no further plans need, or should, be produced; and that none of the petitioner's complaints of unlawfulness or unfairness is well founded. The second respondents also oppose the petition, in their case principally on the ground that they owe no duties to the petitioner. The Board and the Risk Management Authority (the "RMA") have also lodged answers to the petition, as third and sixth interested parties respectively. A substantive hearing took place before me on 17 August 2020 by Webex video link. No evidence was led, although reference was made during the hearing, without objection, to an affidavit by Deirdre O'Reilly, of the second respondents, the terms of which were not disputed by the petitioner.

Background

[2] The petitioner was convicted in the sheriff court of assault to severe injury and danger of life; assault to injury (x 4); and assault to injury and danger of life. The assaults were committed against two former partners. His record of previous convictions included two assaults in respect of which he had been the subject of an extended sentence totalling

eight years. The gravity of the offences on this occasion was such that the case was remitted to the High Court for sentence, resulting in the imposition of the OLR. The opinion of the risk assessor was that the risk to the safety of the public at large of the petitioner being at liberty was high.

[3] On 6 December 2019, the Board directed the petitioner's release. The minutes of the Tribunal Hearing which took place on that date state that the Board was satisfied that it was no longer necessary for the protection of the public that the petitioner should be confined. Various licence conditions were attached. The petitioner was released on 9 December 2019.

[4] His freedom was short-lived. The Board's decision appears to have taken other agencies by surprise, to say the least, and a so-called breach report (although the petitioner had not in fact breached his licence conditions) dated 9 December 2019 was submitted to the Board by the second respondents, requesting the Board to consider recall. In section 6 of the breach report, under the heading "Circumstances and details of the breach and licence conditions that have been broken", it was stated that the petitioner had been released:

> "…without a forward facing community risk management plan being in place to adequately meet critical elements of Supervision, Monitoring, Intervention and Victim Safety Planning."

The report went on to state:

> "until this plan is compiled and approved by the [RMA] – it is assessed that he currently poses an unmanageable risk in the community."

A panel of the Board considered the breach report on 12 December 2019. The minute of the resultant decision noted, at paragraph 13, the terms of the report. The minute further recorded, at paragraph 14, that the Board had received intelligence on the petitioner in terms of rule 6 of the Parole Board (Scotland) Rules 2001 that may impact upon his risk. The Board went on to recommend recall because, on this occasion, it was not satisfied that such risk as the petitioner posed could be safely managed in the community. In reaching that decision,

the panel of the Board made clear that the decision was based not on the proposition in the breach report that the petitioner was unmanageable in the community (paragraph 27), but on the rule 6 intelligence (paragraph 29). The first respondents subsequently revoked the petitioner's licence and he remains in custody. The petitioner does not challenge the Board's decision of 12 December 2019 and accepts that his release falls to be considered again *de novo*.

The statutory framework

[5] At this stage it is helpful to note the various statutory provisions which are relevant to the petitioner's situation.

Section 210F of the Criminal Procedure (Scotland) Act 1995

[6] The OLR was imposed on the petitioner in terms of section 210F of the Criminal Procedure (Scotland) Act 1995. Such an order constitutes a sentence of imprisonment (or detention) for an indeterminate period: section 210F(2). The High Court must make an OLR where on the balance of probabilities the *risk criteria* are met: section 210F(1). The *risk criteria* are defined in section 210E as being that the nature of, or the circumstances of the commission of, the offence of which the convicted person has been found guilty either in themselves or as part of a pattern of behaviour are such as to demonstrate that there is a likelihood that he, if at liberty, will seriously endanger the lives, or physical or psychological well-being, of members of the public at large. Those criteria were satisfied in relation to the petitioner.

The Criminal Justice (Scotland) Act 2003

[7] Where a prisoner is subject to an OLR, various provisions in Part 1 of the Criminal Justice (Scotland) Act 2003 ("the 2003 Act") apply. In particular, he must be the subject of a risk management plan. Section 6, insofar as it is material to this case, provides:

> "**6 Risk management plans**
>
> (1) A plan (a "risk management plan") must be prepared in respect of—
> (a) any offender who is subject to an order for lifelong restriction made under section 210F (order for lifelong restriction) of the 1995 Act; and
> (b) …
> (2) …
> (3) The risk management plan must—
> (a) set out an assessment of risk;
> (b) set out the measures to be taken for the minimisation of risk, and how such measures are to be co-ordinated; and
> (c) be in such form as is specified under subsection (5).
> (4) The risk management plan may provide for any person who may reasonably be expected to assist in the minimisation of risk to have functions in relation to the implementation of the plan."

[8] The RMA is established under section 3 of the 2003 Act for the purpose of ensuring the effective assessment and minimisation of risk in terms of section 6(3). It has a statutory duty under section 4 of the 2003 Act to monitor and keep under review information, research and development in relation to the assessment and minimisation of risk. Section 5 of the 2003 Act requires the RMA to prepare and issue guidelines as to the assessment and minimisation of risk and standards to which measures are to be judged. It has duly issued standards and guidelines in the published document *Standards & Guidelines for Risk Management 2016.* This document contains detailed guidance as to what is expected of a risk management plan, the considerations to be taken into account in assessing risk and how proportionate measures to manage the risk should be identified.

[9] The preparation of a risk management plan, where an offender is serving a sentence of imprisonment, is carried out by the Scottish Ministers in accordance with section 7(1) of

the 2003 Act. When the offender's imprisonment comes to an end, the risk management plan becomes the responsibility of the local authority in whose area the offender resides, in accordance with section 7(3). For the purposes of the 2003 Act, the authority who is responsible from time to time for the risk management plan is referred to as the lead authority. Thus, in the present case, the first respondents are the lead authority, and they currently have responsibility for the risk management plan. If and when the petitioner is released, but not before then, the second respondents will become the lead authority.

[10] When the risk management plan has been prepared by the lead authority it must be submitted to the RMA under section 8(4) of the 2003 Act. The RMA must then consider the risk management plan and either approve it, or reject it if it does not comply with the requirements of section 6(3) or if it disregards any guidance or standard published by the RMA. If a plan is rejected, the lead authority must revise it and resubmit it to the RMA under section 8(5). Where the RMA is still not satisfied with the risk management plan, it is able to direct the person responsible for the plan (or those with functions under the plan), and those directions must be complied with in accordance with section 8(6) (subject to a right of appeal to the sheriff).

The Prisoners and Criminal Proceedings (Scotland) Act 1993

[11] The release of a prisoner subject to an OLR is regulated by section 2 of the Prisoners and Criminal Proceedings (Scotland) Act 1993 ("the 1993 Act"), which, insofar as material, provides:

> "**2.— Duty to release discretionary life prisoners.**
>
> (1) In this Part of this Act *"life prisoner"* except where the context otherwise requires, means a person—
>
> …
>
> (ab) who is subject to an order for lifelong restriction in respect of an offence;

…
and in respect of whom the court which sentenced him for that offence made the order mentioned in subsection (2) below.
…
(2) The order referred to in subsection (1) above is an order that subsections (4) and (6) below shall apply to the life prisoner as soon as he has served such part of his sentence ("the punishment part]") as is specified in the order, being such part as the court considers appropriate to satisfy the requirements for retribution and deterrence taking into account—
(a) the seriousness of the offence, or of the offence combined with other offences of which the life prisoner is convicted on the same indictment as that offence;
(b) any previous conviction of the life prisoner;
…
(4) Where this subsection applies, the Secretary of State shall, if directed to do so by the Parole Board, release a life prisoner on licence.
(5) The Parole Board shall not give a direction under subsection (4) above unless—
(a) the Secretary of State has referred the prisoner's case to the Board; and
(b) the Board is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined."

[12] Section 26B of the 1993 Act further provides that the Board shall, whenever it is considering the case of a person in respect of whom there is a risk management plan, have regard to that plan.

Social Work (Scotland) Act 1968

[13] Section 27(1) of the Social Work (Scotland) Act 1968 ("the 1968 Act"), insofar as material, provides:

"**27.— Supervision and care of persons put on probation or released from prisons etc**
(1) It shall be a function of every local authority under this Part of this Act to provide a service for the following purposes, that is to say—
…
(ac) the provision of advice, guidance and assistance for persons who are in prison or subject to any form of detention and who -
(i) resided in their area immediately prior to such imprisonment or detention; or
(ii) intend to reside in their area on release from such imprisonment or detention,

> and who on release…, it appears to the local authority, will be required to be under supervision…
>
> …
>
> (ae) making available to the Scottish Ministers such background and other reports as the Scottish Ministers may request in relation to the exercise of their functions under Part 1 of the Prisoners and Criminal Proceedings (Scotland) Act 1993..;"

[14] Thus, section 27(1)(ae) requires the second respondents to provide the first respondents with such background and other reports as the first respondents may request.

The petitioner's risk management plan

[15] A risk management plan has been prepared by the first respondents in respect of the petitioner, as required by section 6 of the 2003 Act. It is reviewed from time to time, the most recent plan being dated 17 April 2020. That plan was approved by the RMA on 23 April 2020. The plan assesses the petitioner as being a medium risk of offending whilst in custody, and a high risk of committing violence if released to the community without appropriate community testing or risk management plans in place. It also assesses him as a medium risk of committing further intimate partner violence whilst in custody and a high risk of recidivism in this area should he be released to the community without appropriate testing and in the absence of a release risk management plan in place. The plan observes that there is no such plan in place as neither the lead authority nor CBSW (Community Based Social Work) believe the petitioner's risk to be currently manageable in the community on release and have recommended a staged and gradual approach to increased community access. The lead authority and CBSW also agree that a period of three months would be required to amend the current plan for strategies to be identified and implemented that would sufficiently mitigate the risks should he be released. The plan sets out numerous activities to be undertaken to manage the petitioner's risk, all within a custodial setting. As regards contingency planning should the petitioner be released, the plan states that an

emergency MAPPA meeting should be held to identify interim strategies, whilst social work liaise with the RMA to agree a time-frame for the creation of an amended community risk management plan.

The Parole Board for Scotland

[16] The Board is a Tribunal non-departmental public body which exists under the provisions of the Prisons (Scotland) Act 1989, the 1993 Act, the Convention Rights (Compliance) (Scotland) Act 2001 and the 2003 Act. It is a judicial body which is independent of the Scottish Government and impartial in its duties: see *Brown* v *Parole Board for Scotland* 2018 SC (UKSC) 49 *per* Lord Reed at [61].

[17] Tribunals of the Board are Article 6 compliant by virtue of the Convention Rights (Compliance) (Scotland) Act 2001, the Prisoners & Criminal Proceedings (Scotland) Act 1993, as amended, and the Parole Board (Scotland) Rules 2001 ("the Rules").

[18] As has been seen from section 2(5)(b) of the 1993 Act, the Board will grant parole to a prisoner subject to an OLR if it considers that it is no longer necessary for the protection of the public that the prisoner should be confined.

The Parole Board (Scotland) Rules 2001

[19] The Rules, as amended, set out the matters which may be taken into account by the Board in considering references by the Scottish Ministers. Rule 5 provides, insofar as material:

> "**5.— Scottish Ministers' dossier**
> (1) Subject to paragraph (2) and rule 6 … 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."

Paragraph 7 of the Schedule specifies:

> "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."

[20] Rule 8 provides that the Board may take into account any matter which it considers to be relevant, including 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 to 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."

[21] Rule 19 provides for a tribunal of the Board to regulate its own procedure for dealing with a case. Rule 19(2) permits the chairman of the tribunal to give directions in respect of, among other things, the submission of evidence.

[22] Rule 24 provides that the chairman of the tribunal may require any person to attend to give evidence or to produce any books or other document.

The Board decisions

[23] The salient parts of the Board's decision to recall the petitioner are set out at paragraphs [25] to [30] of the Board's decision minute of 12 December 2019, as follows:

> "25. The Board having considered all of the above information is of the view the risks posed by [the petitioner] cannot be managed safely in the community.
> 26. The Tribunal which sat on 6 December 2019 took account all of (*sic*) the information before it in deciding that [the petitioner's] risk could be safely managed in the community. The Board must make it clear that this Panel is not reviewing that decision.
> 27. Criminal Justice Services, in consultation with MAPPA, have submitted a Breach Report stating that [the petitioner's] risk is not manageable in the community without a comprehensive risk management plan that has been developed and

> subsequently approved by the RMA. The Board wish to make clear that its decision to recall is not based on this proposition.
> 28. It is incumbent on agencies to ensure that all relevant information is available to Tribunals who are tasked with assessing risk and making decisions about release. It is unacceptable that agencies who are to assess and manage offenders in the community are unprepared for the offender's release when they are aware that this is a potential outcome of the Tribunal.
> 29. Subsequent to [the petitioner's] release the Board have been provided with two items of information, submitted in terms of Rule 6 of [the Rules], that may affect his risk level. This information does not seem to have been available to the Tribunal which directed release. This information is significant, and has led the Board to conclude that [the petitioner's] risk cannot be managed safely in the community.
> 30. The Board would observe that it is unclear why this information was not provided in advance of the Tribunal which directed release. All agencies should ensure that information which bears on risk and public protection are available to the judicial body tasked with making these decisions, before any decision is made. However, the Board have to have regard to this information, and its responsibilities to protect the public, and accordingly recommend revocation of [the petitioner's] licence and his immediate recall to custody."

[24] A Preliminary hearing of a Tribunal of the Board took place on 27 April 2020 when evidence was led from Alistair Findlay, community based social worker, as to what community-based support would be available for the petitioner should he be released. The hearing was adjourned until June 2020, the Minute of 27 April also recording that:

> "The Board also require an updated Risk Management Plan which refers to how [the petitioner's] risks can be managed in the community."

[25] The next significant hearing took place on 13 July 2020, at which the petitioner's solicitor moved the Board to make a direction that the first respondents should produce a community facing risk management plan. In support of this motion, the solicitor relied upon rules 19(2)(d) and 19(3)(b) of the Rules. The Board held that rule 19(2) should be interpreted in the ordinary sense of producing documents already in existence or that would be expected to be in existence. The Board noted that it had heard from witnesses who were consistent in their view that a community facing risk plan could not be prepared. Accordingly the Board declined to make the order sought by the petitioner. That decision is not the subject of challenge.

[26] The petitioner's solicitor then wrote to the Board by letter dated 27 July 2020, posing various questions as to how the Board might be willing to proceed. In response, the Board stated in an email dated 29 July 2020:

> "Given that [the petitioner is an OLR] prisoner, the Board would prefer to see a community facing risk management plan in place prior to consideration of [his] release. However, in the event that this is not available, the Board would expect to see a robust risk management plan produced which outlines in detail how all identified areas of risk will be managed in the community."

[27] Yet another hearing took place before the Board on 10 August 2020, when the petitioner's solicitor moved the Tribunal to direct the second respondents to produce a robust risk management plan outlining in detail how all identified areas of risk will be managed in the community. That request was made in terms of rule 19(2)(d) and 19(3)(b) of the 2001 Rules. That motion has been continued until 8 September 2020 and remains outstanding. The panel of the Board stated in its decision that it required to hear evidence from Deirdre O'Reilly of the second respondents as to whether such a management plan can be produced and the format of such a plan.

The orders sought

[28] The petitioner seeks the following orders against the first respondents: (a) reduction of the decision of 17 April 2020 insofar as it refused to commission a "community-facing" risk management plan; (b) declarator that the first respondents are acting unlawfully by failing to commission such a plan; (c) declarator that the first respondents' failure to commission such a plan is a breach of the petitioner's rights in terms of article 5 *et separatim* article 5 taken with 14 of the European Convention of Human Rights; and (d) an order ordaining the first respondents to commission a "community-facing" risk management plan. In the event that none of the foregoing orders is granted, he seeks the following orders

against the second respondents (retaining the lettering in the petition): (e) declarator that the second respondents are acting unlawfully by failing to create a robust risk management plan; (f) declarator that the second respondents' failure to create such a plan is a breach of the petitioner's rights in terms of articles 5 *et separatim* articles 5 and 14; and (g) an order ordaining the second respondents to create such a plan in the terms provided for in the email from the Parole Board of Scotland dated 29 July 2020.

Parties' submissions

[29] Counsel for each party adopted the full written notes of argument which had been lodged in process prior to the substantive hearing. These were amplified at the oral Webex hearing. The parties' submissions were as follows.

Petitioner

[30] The overall tenor of the petitioner's submission was that for the petitioner to have a fair chance of release, the Board required to have contingent information about how his risk could be managed in the community in the event of release, and they were not being provided with information which they were requesting. The contingency planning currently in the risk management plan was inadequate. The continuing refusal of the first respondents, whom failing the second respondents, to provide the information which the Board required was unfair and unlawful.

[31] Insofar as the case against the first respondents was concerned, six distinct grounds were advanced.

(a) Breach of implied obligation / legitimate expectation

[32] It was an implicit representation within the second respondents' breach report, which contained the first mention in this case of a community facing risk management plan, that such a plan would be forthcoming, giving rise to a legitimate expectation: *cf Re Finucane's application for Judicial Review (Northern Ireland)* [2019] HRLR 7 187, paragraphs 55 and 58. Fairness required the preparation of such a plan now.

(b) Breach of Parole Board Rules

[33] Rule 5 of the rules, read with paragraph 7 of the schedule, required up to date reports. A community-facing risk management plan would be such a report. The failure to produce it, when it was reasonably practicable to do so, was a breach of the Rules.

(c) Failure to comply with a requirement of Parole Board

[34] It was incumbent upon the first respondents to comply with the Board's decision of 27 April 2020 which had required a community facing risk management plan.

(d) Procedural unfairness

[35] Procedural fairness required the commission of a community facing risk management plan. Procedural fairness was particularly important in relation to the parole process: *Osborn* v *Parole Board* [2014] AC 1115. Fairness was an ever-evolving standard: *R* v *H and Others* [2004] 2 AC 134, paragraphs 11 and 13. Everyone involved in the process had a duty to act fairly. The first respondents were in a position to produce a community-facing risk assessment and the petitioner was not. The petitioner was being unfairly deprived of

the opportunity that the Board have the full picture. Reference was also made to *E* v *SSHD* [2004] QB 1044 at paragraph 66.

(e) ECHR – Article 5

[36] Article 5(4) of ECHR was engaged. It required equality of arms, which was a fundamental guarantee of article 5: *Reinprecht* v *Austria* [2007] 44 EHRR 39 at paragraph 13(c). Circumstances where one party was at a significant disadvantage vis-à-vis the presentation of evidence was a breach of the equality of arms guarantee: *Ocalan* v *Turkey* [2005] 41 EHRR 45. The whole process was not an ordinary adversarial one. Failure to produce the relevant evidence undermined the effectiveness of the dependence of the Board.

(f) Breach of article 5 with article 14

[37] The Supreme Court case of *R (Steinfeld & another)* v *Secretary of State for International Development* [2020] AC 1 paragraphs 19-20 and 41-42 illustrated the correct approach. There was a difference in treatment on the basis of status, in that different information was provided in relation to contingency planning depending on the attitude of the first respondents to release. OLR prisoners had a different status from other prisoners: *Clift* v *UK* [2010] ECHR 1106; *R (Stott)* v *Secretary of State for Justice* [2020] AC 51. They were in an analogous situation to other prisoners seeking release on licence, including other OLR prisoners who were considered manageable in the community. The difference in treatment was not justified. Public policy pointed the other way. The failure to provide a community-facing plan was a failure to treat different cases dissimilarly, resulting in discrimination. Entirely standard home circumstance reports had been prepared anent the risks of the petitioner which might sometimes be adequate, but, standing the particular risks assessed as

being posed by OLR prisoners in general and the petitioner in particular, such an approach was inadequate in the present case.

[38] Turning to the case against the second respondents, it was contingent on the case against the first respondents failing. The second respondents had a statutory duty to produce a robust risk management plan, by virtue of section 27 of the 1968 Act, having regard also to the views which the Board had expressed. The existing reports had been prepared in an unfair manner. As regards article 5 of the ECHR, counsel acknowledged that *Ansari* v *Aberdeen City Council* [2017] SC 274 appeared to be against him, but submitted that it could be distinguished since that case concerned rehabilitation rather than release. The second respondents were on an equal footing with the first respondents in that latter regard.

[39] Dealing with the criticisms made by the respondents of the orders sought, counsel submitted that the orders were sufficiently precise. Neither respondents could have any doubt as to what was meant by either a community-facing risk management plan or a robust one. The orders sought were not futile nor were they incompetent. It should not be assumed that the RMA would not approve a revised plan. The petitioner was not looking to fetter the first respondents' discretion; he simply sought information in order to have a fair hearing before the Board. He did not need to reduce the risk management plan. The 2003 Act, properly construed, did not require that a risk management plan could not deal with the possibility of release even where the prisoner was assessed as a high risk of harm in the community.

First respondents

[40] Counsel for the first respondents referred in detail to the provisions of the 2003 Act. The thrust of his submission was that the Act provides a coherent, comprehensive and fair

system for the assessment and management of risk, which should not be undermined by the provision of the type of satellite reports sought by the petitioner. The lawfulness, fairness, and ECHR compatibility of the Act, the sentencing regime of OLRs and the risk management plan itself were not challenged by the petitioner. The first respondents had a statutory duty to apply their own specialist judgment in preparing a risk management plan under section 6 of the 2003 Act. Their assessment of risk, and of the measures necessary to minimise it, could not be fettered in the manner proposed, either by the Board or by the court. The measures to minimise risk must be proportionate, that is, neither unreasonably restrictive nor unduly lax. The plan for the petitioner had been approved by the RMA and so by definition it was a proportionate assessment of risk. A plan which at the same time assessed the petitioner's risk as being unmanageable in the community, and contained measures to manage him there, would not be one which the first respondents could properly prepare having regard to the Act and to the guidance published by the RMA thereunder. It was absurd to expect the first respondents to state measures to minimise the risk which they had already ruled out as being inadequate. In any event, such a plan would not be approved by the RMA. Accordingly the orders sought against the first respondents were futile, and incompetent to the extent that the petitioner sought to fetter the first respondent's discretion. The first respondents' conclusion that he could not be managed in the community was unchallenged. The phrase "community-facing risk management plan" was not one which appeared in the legislation and its meaning was unclear. Any order to produce such a plan would be too imprecise to be enforced, even if competent.

[41] Counsel then addressed the various grounds of unlawfulness relied upon by the petitioner, as follows.

Legitimate expectation

[42] There had been no clear and unambiguous undertaking by the first respondents. The only legitimate expectation the petitioner could have of the first respondents was that they would produce a risk management plan in accordance with the 2003 Act, as they had done. An expectation could not be legitimate if it required a public authority not to comply with its statutory duty. The public interest did not require the production of a plan which conflicted with the assessment of risk.

Breach of Parole Board Rules

[43] The Rules, properly construed, had not been breached. The first respondents had a discretion as to what documents to produce, which could be impugned only on *Wednesbury* grounds. No such challenge was made.

Breach of Parole Board decision of 27 April 2010

[44] On no legitimate view could paragraph 19 of the minute of 27 April 2020 be construed as a coercive order against the first respondents to produce a community-facing risk management plan. Any such order would be *ultra vires.* In any event, the Board did not regard itself as having made a coercive order, as its minutes of 13 July 2020 and 15 July 2020 showed.

Procedural unfairness

[45] Fairness was context specific. The balance of fairness to the petitioner was struck by the legislation under which the first respondents had to act. Their role was to produce a risk management plan. The Board must then act fairly in its determination of the petitioner's

case. The Board had extensive powers, including the power under rule 24(2) to compel the attendance of witnesses. It could accept or reject the evidence before it but the content of that evidence was left to the integrity of the professionals presenting it. There was no procedural unfairness.

Articles 5 and 14

[46] The petitioner's imprisonment satisfied article 5. He was serving a sentence issued by a competent court. He did not challenge the ECHR compatibility of a system which withheld his release until his risk could be adequately managed in the community. The Parole Board was entitled to reject the first respondents' conclusion that his risk could be managed and minimised only in prison, and to reach a contrary conclusion. There was no discrimination. The petitioner was not in a comparable position to an individual who was not subject to an OLR and therefore different treatment was not discriminatory*: R (on the application of Mormoroc)* v *Ministry of Justice* [2017] EWCA Civ 989, *inter alia*, 31, 32, 35, 58, 59, 60 and 61. Nor was the petitioner in an analogous situation to non-OLR prisoners: *Stott, supra* at 155, 180, 181, 186-195 and 219. He represented a high risk of reoffending which other prisoners did not. If the petitioner had been treated differently from someone to whom he was in an analogous situation, then that difference was justified by the production of a risk management plan which complied with the 2003 Act and which identified him as posing an enhanced risk. He did not rely on a core characteristic but on "other status", and the further away one got from core characteristics the less justification that was required to justify the difference in treatment. Having been identified, it was justifiable to treat him differently from other prisoners.

Second respondents

[47] Counsel for the second respondents submitted that the second respondents had no power or statutory duty regarding the preparation of a risk management plan, robust or otherwise. There was therefore no act or omission falling within the supervisory jurisdiction of the court. An order such as the one contended for would undermine the statutory regime governing the petitioner. In terms of section 27(1)(ae) of the 1968 Act, the second respondents merely had a duty to produce such background and other reports as the first respondents may request. This they had done by producing home background reports. No obligation had been created by the email of 29 July 2020, which had not even been sent to the second respondents. The Board could not order production of a report which did not exist and which the prospective author said could not be prepared. A robust plan was not a document which had any basis in statute, nor was it one which one would expect to be in existence. In any event, how was it to be judged whether any report produced was sufficiently robust? The second respondents' view was that any plan that was produced which involved the petitioner being in the community would not be a robust plan. If the Parole Board decision was to release the petitioner, the Board could defer release for eight weeks to give time for a revised risk management plan to be prepared.

[48] As regards procedural unfairness, no procedural unfairness flowed from the actions of the second respondents.

[49] As regards the article 5 and article 14 grounds, article 5 was not engaged as far as the second respondents were concerned. Even if it was engaged there was no breach of the petitioner's rights in terms thereof by the second respondents and no breach of his article 14 rights. Any duty to ensure equality of arms which arose did not apply to the second respondents. They were not the arm of the state responsible for depriving the petitioner of

liberty or reviewing his detention. Reference was made to *Ansari*, *supra*, paragraph 27. Although that case concerned rehabilitation it was indistinguishable from the present case. If, contrary to the foregoing submission, the second respondents did owe the petitioner a duty, any difference in treatment was justified.

The Board

[50] Senior Counsel for the Board stressed that the Board adopted a neutral stance in these proceedings. His submission was limited to explaining the Board's statutory functions and its decision making processes in connection with the petitioner. To that extent his submission forms the basis of paragraphs [16] to [22] above, no part of which is disputed by the petitioner. He refuted the suggestion by the second respondents that the Board had the power to direct release but to suspend it. The Board had no such statutory power. Rather it had to make a binary decision: was it necessary for the protection of the public that the petitioner be confined, or not? In coming to that decision it was necessary for all the risk assessment information to be available. After the Board had directed release, the first respondents had a duty, in terms of section 17(4) of the 1993 Act, to implement that decision. The Board had to act as an impartial judicial body. Its main aim was to ensure that those prisoners who were no longer regarded as presenting a risk to public safety may serve the remainder of their sentence in the community on licence under the supervision of a supervising officer. It was not the responsibility of the Board to consider questions of punishment and general deterrence. The 2001 Rules set out the matters which may be taken into account by the Board when considering references by the Scottish Ministers. There were no restrictions (beyond those of fairness) on the form of evidence which the Board could consider. In addition to having regard to the statutory risk management plan it could

have regard to oral evidence. Rule 24 gave the Board power to summon witnesses. The risk management plan was not the only means by which risk could be assessed. The Board had to evaluate the material placed before it and reach its own objective judicial decision: *Osborn* v *Parole Board* [2014] AC 1115 *per* Lord Reed at [90]. The evaluation of risk was in part inquisitorial. The Board was obliged to undertake a proactive role. It was not bound to accept the first respondents' approach. The individual members of a panel, through their training and experience, possess or have acquired particular skills and expertise in the complex realm of risk assessment: *R (D)* v *Parole Board and Others* [2019] QB 285 *per* Leveson P at [117] to [121]. The Board granted release only in cases where the level and nature of risk was deemed to be manageable. This decision was informed by the evaluation of risk assessments. The type of sentence imposed would determine both at which point in the sentence the Parole Board will consider release and under what procedures the review will take place. In relation to OLR prisoners, the role exercised by the Board was explained by Lord Justice Clerk Carloway (as he then was) in *Ferguson* v *HM Advocate* [2014] SCCR 244 at [94].

[51] Turning to the Board's decisions in this case, senior counsel submitted that the minute of 27 April 2020 could not be read as having any coercive effect. It was simply a statement of what the tribunal required. That was reinforced by a reading of its subsequent minutes of 13 and 15 July 2020, which made clear that no decision had been made by the tribunal to order the Scottish Ministers to produce any particular document. The email of 29 July 2020 was likewise not an order but was also simply a statement of the information that the Board required. If an order had been made on 27 April having coercive effect, the entire discussion before the tribunal in July would have been otiose. In particular the petitioner's solicitor would not have made the motion which he did. Finally turning to the

Board's minute of 10 August 2020 no decision had been made as to whether the Board would make any order directed against the second respondents. That matter has been continued.

Risk Management Authority

[52] The essence of the submission of counsel for the RMA was that a risk management plan was a creature of statue with a specific purpose and with specific requirements placed upon those responsible for its creation. There was no basis in law for a so-called community-facing risk management plan as a discrete form of risk management plan. The Board had no power or authority to order that a risk management plan be created on any particular basis. The content of the risk management plan was a matter entirely for the lead authority and its risk management team, subject to the standards and guidelines published by the RMA, and the statutory approval of the RMA. The robustness or otherwise of a risk management plan was exclusively a matter for the RMA in the exercise of its statutory function to consider and either approve or reject risk management plans in terms of section 8(4) of the 2003 Act. There was no basis to suggest that a risk management plan required (or was even permitted) to be produced which misrepresented as manageable in the community risks which had been assessed to be unmanageable there. Counsel referred to the terms of the 2003 Act set out above. He further referred to the *Standards and Guidelines for Risk Management 2016*. These provided for a holistic and consistent approach to be taken to the assessment of risk and the management of risk. Any measures taken had to be proportionate. The Board was required by section 26B of the 1993 Act to have regard to the risk management plan where one had been prepared. The phrase "*have regard to*" had been judicially considered as involving a greater degree of consideration than an obligation

simply to consult; it did not mean follow or slavishly obey, but where a decision maker decided to depart from guidance or other material to which he was to "have regard", clear reasons must be given for choosing to do so: *R (Governing Body of the London Oratory School)* v *Secretary of State for Education* [2015] EWHC 1012 (Admin) at paragraphs 50-61 but particularly at 58. There were three distinct stages in a risk management plan. The lead authority was responsible for assessing risk, and producing the plan. The RMA reviewed the plan. The Board then had regard to the plan. What the petitioner sought to do was subvert those rules and to take part of one body's role and give it to another. There was no basis in law for doing that. The plan did in fact contain, at page 32, a measure catering for the possibility that the petitioner might be released, namely, to hold an emergency MAPPA meeting. There was no lacuna. Satellite reports were not to be encouraged. They would undermine the fully informed approach inherent in the statutory scheme. There would be a risk of a satellite plan wrongly assessing the risk, because the author would not have access to a full body of information. The appropriate way of assessing risk was through the creation of a risk management plan produced in terms of the statutory scheme.

Decision

[53] Since the petitioner's principal complaint centres on the first respondents' continuing failure to prepare a community-facing risk management plan, it is appropriate, as counsel for the first respondents submitted, to begin by asking: what is a community-facing risk management plan? That is not a term which appears in the legislation. For its genesis in the present case one must look to the second respondents' breach report dated 12 December 2019 which stated that the petitioner:

> "has been released without a forward facing community risk management plan being in place to adequately meet critical elements of Supervision, Monitoring, Intervention and Victim Safety Planning."

The report went on to state that "[g]iven the absence of a comprehensive community facing risk management plan for [the petitioner]", the petitioner presented as a very high risk to potential partners, prior victims and males both known and unknown, and that until "this plan is compiled and approved by the Risk Management Authority – it is assessed that he currently poses an unmanageable risk in the community." I will revert to what one might legitimately take from those passages later in this opinion but meantime, since the phrase first appeared in a report by the second respondents, it is appropriate now to turn to the affidavit of Deirdre O'Reilly, referred to above. She manages the second respondents' community-based justice teams. Ms O'Reilly described a "community-facing plan" simply as one which indicates that someone could be released into the community. Since the petitioner's risk management plan, dated 17 April 2020, states in terms that his risk of reoffending is such that he is not currently manageable in the community, the petitioner's case appears, at first sight, to fail to get off the starting blocks, in the absence of any challenge to the legality of the risk management plan itself, since he appears to be seeking an order for a plan which, by definition, he is not ready for.

[54] Nevertheless, the background to the case is unusual, in as much as in December 2019, the Board did reach the view that the test for release was met, notwithstanding the terms of the risk management plan as it then stood, which, as did the most recent version, assessed the petitioner as unmanageable in the community; and setting to one side for the moment what precisely is meant by a community-facing risk management plan, the Board has since then made several pronouncements to the general effect that it would like to see more information than there is currently available as to precisely how the petitioner's risk

would be managed in the community were he once again to be released. The first respondents, for their part, have resolutely set their face against providing any further information, at least in the context of a risk management plan, and there is an apparent tension between the role of the first respondents, as lead authority, in assessing risk in a risk management plan, on the one hand; and that of the Board, which also has to assess risk in considering release, or re-release, on the other. The first respondents say that they cannot state what measures in the community would mitigate risk when their view is that no such measures would mitigate risk to a safe level. The Board has approached the problem from the other end, as it were, by asking a slightly different question, namely: if the petitioner were in the community, what measures could be taken to mitigate his risk? It is also true to say that it is the Board, not the first respondents, who are the ultimate arbiters as to whether or not the petitioner should be released.

[55] However, it does not follow that the petitioner is entitled to the orders sought. Before considering the specific grounds relied upon by the petitioner, it is germane to remind ourselves that the lawfulness and fairness of his continued detention are determined, and assured, by the statutory provisions set out above. The OLR to which he is subject was imposed in order to protect the public from the high risk which he posed. In terms of section 210F, the court had no option other than to impose that sentence once the risk criteria were met. The risk management plan to which he is subject was drawn up, and is regularly reviewed, under the 2003 Act having regard to the risk management principles and guidance devised by the RMA. The most recent version has been approved, as previous versions have been, by the RMA. It assesses that the petitioner's risk cannot safely be managed in the community. The measurements to address his risk, including his continuing imprisonment, must be considered to be proportionate by the first respondent

and the RMA. His continued imprisonment is reviewed by the Board, which must have regard to the risk management plan. While they are not obliged to follow it, they must give reasons should they choose to depart from it: *R (Governing Body of the London Oratory School)* v *Secretary of State for Education* [2015] EWHC 1012 (Admin). The plan is, therefore, a crucial element in the statutory regime for managing the petitioner's risk and protecting the public. In the performance of its role in considering the petitioner's risk, and the requirement to have regard to the plan, the Board has extensive powers to compel evidence to be led before it and to question witnesses. However, the Board has no power to specify what the plan should contain, and such a power would run counter to the statutory regime. Neither the foregoing system, nor any decision of the Board to date, nor the risk management plan itself, is challenged by the petitioner. This is the prism through which the grounds upon which this petition is based, particularly those of legitimate expectation, unfairness and contravention of his ECHR rights, fall to be considered. I therefore now turn to consider those various grounds.

Legitimate expectation

[56] The authorities on legitimate expectation, and when such an expectation may arise, were considered by Lord Kerr in *Finucane*, *supra*, at para [62]:

> "From [the] authorities it can be deduced that where a clear and unambiguous undertaking has been made, the authority giving the undertaking will not be allowed to depart from it unless it is shown that it is fair to do so. The court is the arbiter of fairness in this context. And a matter sounding on the question of fairness is whether the alteration in policy frustrates any reliance which the person or group has placed on it."

Lord Kerr went on to add that it was not a prerequisite of a substantive legitimate expectation claim that the person relying on it must show that they had suffered detriment.

[57] Applying that to the present case, the questions which arise are: first, has there been a clear and unambiguous undertaking by the first respondents that a community-facing risk assessment will be prepared? Second, if so, is it fair to allow them to depart from it? Third, does the first respondents' refusal to prepare a community-facing risk management plan frustrate any reliance which the petitioner may have placed on any undertaking given?

[58] None of these questions fall to be answered in the petitioner's favour. Not only can the first respondents, as lead authority responsible for the creation of the risk management plan, not be held bound by any undertaking given by the second respondents, nothing in the breach report submitted by the second respondents can be regarded as a clear and unambiguous undertaking that a community-facing risk management plan (or a community-facing risk assessment) would be produced. Read as a whole, the report does not so much state that a community-facing risk assessment should now be produced, but that the petitioner should not be released until such time as the risk management plan is "community-facing" – that is, until such time as the risk management plan assesses that the petitioner can safely be managed in the community. That stage has not yet been reached.

[59] Turning to the meaning of the breach report, the first section of that report, set out in paragraph [4] above, simply records as a fact that the petitioner had been released without a community-facing risk management plan being in place; and the second part appears after a section making clear that the petitioner's risk should continue to be addressed, in the immediate future, in a custodial setting. Since the breach report also refers to the need for the plan to be approved by the RMA, the only legitimate expectation that could be taken from it is that the petitioner's risk management plan would continue to be reviewed in accordance with statutory procedures and guidance. That being so, there is no question of any unfairness. There is nothing unfair about the petitioner's release being considered by

the Board having regard (as it must) to the terms of a risk management plan which has been drawn up and reviewed in line with procedures which are not themselves challenged as being unfair and which are designed to ensure that all measures which are taken to address the risk which the petitioner (admittedly) poses are proportionate, that is, neither unreasonably restrictive nor unduly lax. Finally, there can in any event have been no reliance by the petitioner on the terms of the breach report since the Board, in recommending his recall, made clear that their decision in that regard was not based on the absence of a community-facing risk management plan.

[60] The petitioner's challenge on this ground must therefore fail.

Breach of Parole Board Rules

[61] This ground can be disposed of shortly. Rule 5 requires the preparation of a dossier containing, read short, any information which the first respondents consider to be relevant, including, where practicable, the information and documents specified in the schedule. Paragraph 7 of the schedule specifies up to date reports by those involved in supervising, caring for, or counselling, the prisoner on the prisoner's circumstances (including home background) and on his behaviour and on his or her suitability for release. As counsel for the first respondents submitted, that leaves the question of what is to be included in the dossier for the discretion of the first respondents and there is no challenge to the exercise of that discretion on *Wednesbury* grounds. There is a further qualification conferred by the words "wherever practicable" but in any event, the first respondents have provided up to date reports which do comment on the petitioner's suitability for release, the comment being that he is unsuitable. It would be absurd were the Rules to provide that a report must state that a prisoner is suitable for release when, in the opinion of the author of the report, he is

not; and the Rules do not so provide. The petitioner argued that a community-facing risk management plan would be a report in the terms specified in the rule, and so it would, but so equally is a plan which states that the petitioner is not safe to be released into the community.

[62] Accordingly, I reject the argument that the Rules have been breached because of the fact that the plan does not assess the petitioner's risk in the community, when he is assessed as unsuitable for release. The petitioner's challenge on this ground must also fail.

Breach of an order of the Parole Board

[63] The only pronouncement, to use a neutral term, of the Board which might conceivably be construed as an order having coercive effect, is that of 27 April 2020, when the Board stated that it "required" an updated risk management plan setting out how the petitioner's risks might be managed in the community. Senior counsel for the Board submitted that this was not so much a coercive order as a statement of what the Board required, although that submission might be thought to give rise to the conundrum: when is a requirement not a requirement? If the Board was merely making a request for information, it is perhaps unfortunate that a word implying some sort of coercion was used. I am also not persuaded by the further submission for the Board that an order can properly be construed by having regard to subsequent minutes, nor for that matter by the fact that the petitioner's solicitor made a subsequent motion which he would not have had to do had there already been a coercive order in place: it is not uncommon for motions to be refused as unnecessary. Nonetheless, while the meaning of the minute of 27 April 2020 may be shrouded, if not in mystery, then in a degree of uncertainty, I have concluded that it did not have the effect of obliging the first respondents to prepare a community facing risk

management plan. I reach that view for a number of reasons. First, no motion for a coercive order had been made on that occasion. Second, had the Board intended to ordain the first respondents to produce an amended plan, one might expect to have seen that expressed more clearly rather than in what almost appears as a throw-away remark after a sentence stating when the next hearing should be. Third, and most compellingly, it is clear from the scheme of the legislative provisions and from what I have said earlier, that the Board has no input to the content of a risk management plan. That is not its function. It may query the plan, but it cannot insist upon a revised plan. I do not consider that the Board would have intended to make an order which it had no power to make; but even if it did, such an order would be *ultra vires.*

[64] The petitioner's challenge on this ground also fails.

Procedural unfairness

[65] Counsel for the first respondents described this ground as delphic but as the argument came to be developed, I understand it to be as follows. Procedural fairness is integral to the parole process. It is incumbent upon all parties involved, including the first respondents, to ensure that the process is fair. The first respondents' decision not to produce a community-facing risk management plan is unfair because (a) it reduces the chances of the petitioner being released and (b) the petitioner is not in a position himself to commission such an assessment.

[66] It is of course a given that the Board's proceedings and procedure must be fair. Lord Reed addressed procedural fairness in *R (Osborn)* v *Parole Board* [2014] AC 1115. Of relevance to the present case are the first two of three preliminary matters regarding procedural fairness which Lord Reed dealt with at paragraphs 64-72. The first is that it is for

the courts, not the Board, to determine whether the procedure followed was fair. Accordingly, this court would be entitled to intervene should it conclude that the procedure has been unfair. However, the second is that the purpose of procedurally fair decision making is, first, that it is liable to result in better decisions by ensuring that the decision maker receives all relevant information and that it is properly tested (paragraph 67). Two other important values are also engaged, viz., first, the avoidance of the sense of injustice which the person who is the subject of the decision will otherwise feel and, second, the rule of law: procedural requirements that the decision maker should listen to persons who have something relevant to say promote congruence between the actions of the decision maker and the law which should govern their actions.

[67] At paragraph 90 Lord Reed also observed that it was fundamental to procedural fairness that the Board must be, and appear to be, independent and impartial. Its function is to evaluate the material placed before it and reach its own objective judicial decisions with no predisposition to favour the official view of events or the official risk assessment over the case advanced by the prisoner.

[68] It may indeed be, as counsel for the petitioner submitted, that fairness is an ever-evolving standard (*R* v *H and Others* [2004] 2 AC 134) and that perceptions of fairness may change over time, although it is hard to see how that truism assists the petitioner in this case, since practices which were fair in the past may equally continue to be fair by modern standards. I can also accept the petitioner's submission that all those involved in the process must act fairly in a procedural sense.

[69] That said, I confess that it is not clear to me how the petitioner's case could ever be one of *procedural* unfairness. One can easily see how, in different circumstances, procedural unfairness might arise from a plan not being disclosed, or inadequate opportunity being

given to challenge it, but that is a far cry from saying that procedural unfairness can arise from the content of a plan with which the petitioner happens to disagree. Nonetheless, one of the authorities cited to the court, *E* v *SSHD* [2004] QB 1044, supports the proposition that any unfairness may give rise to a ground for a decision to be overturned, and in that case the Court of Appeal held that a mistake as to an existing fact could give rise to unfairness if the mistake were uncontentious and instantly verifiable, at least in a situation where the parties shared an interest in co-operating to achieve the correct result, as is the case here.

[70] That said, there is no question of the risk management plan in this case giving rise to unfairness in that sense either, since it is not alleged that the plan contains any mistakes. However, out of deference to the petitioner's argument, rather than getting caught up in a debate as to whether any unfairness is procedural or not, I will simply address the broader question of whether there has been unfairness at all (bearing in mind Lord Reed's comments that the overall purpose of fairness is to ensure better decision making).

[71] Even on this wider approach, it is impossible to identify any unfairness. Not only has nothing been said to impugn the fairness of the Board's procedure in any way, but the premise underlying the petition, that the petitioner's chances of release are diminished by the absence of a community-facing risk management plan, does not bear scrutiny, standing the requirement on the Board to act impartially and without any predisposition towards the plan. The Board has already shown that it is not prepared simply to take the plan at face value and that it wishes further information as to how the petitioner would be managed in the community were he to be released. That is information which the Board is well able to seek outwith the confines of a risk management plan, and its rules permit it to obtain such evidence. As I have said, the petitioner's complaint at heart is that he disagrees with the content of the risk management plan insofar as it does not contain a community-facing risk

management assessment, but in no sense can that be said to be unfair. On the contrary, the plan having been prepared in accordance with the 2003 Act and been approved by the RMA and being kept under constant review, is quintessentially fair not only to the petitioner but to the public. There is nothing in the Rules or the guidance which requires a risk management plan to contain measures which, in the view of the lead authority, are inadequate to mitigate the prisoner's risk. Again, it is pertinent to note that the petitioner does not challenge the conclusion of the plan that he continues to present a high risk of violent offending, which risk cannot be managed in the community. That being the honest view of the authority responsible for preparing the plan, it simply cannot be said that the plan, as it stands, is likely to lead to a less good decision than if the further plan desiderated by the petitioner were available. On the contrary, it might well be said, as the first respondents, and sixth interested party do say, that to provide a satellite plan would undermine the decision making process since such plans would not be prepared in accordance with the guidelines and would not be based on the full information which of necessity goes into the preparation of the statutory risk management plan. Stated shortly, a community facing risk management plan would not in the circumstances of this case result in the Board having better information, but might result in its having less reliable information which conflicted with the risk management plan. The petitioner cannot properly feel any sense of injustice if no community facing risk assessment is produced. A sense of injustice cannot be conflated with disagreement with, or a sense of grievance caused by, the conclusions of a risk management plan prepared in accordance with the law. Finally, I stress that while it is relevant for the Board to know, and have regard to, the first respondents' view of risk as it is expressed in the risk management plan, they are not bound to follow that view. The Board not only has the power, but has a duty, to act impartially and

independently of the first respondents, to question the plan and to seek such further information as it deems appropriate. It may cite such witnesses as it deems necessary to enable it to discharge its duties. There is no reason to suppose that the Board will fail in that duty. Indeed, its various pronouncements since April would strongly suggest the opposite. For all these reasons, I have concluded that there has been no unfairness, procedural or otherwise, and this ground of challenge must also fail.

Articles 5 and 14 of ECHE

[72] It is convenient to deal with these grounds together. There is no dispute that article 5 is engaged. It provides, insofar as material:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (a) the lawful detention of a person after conviction by a competent court.
>
> …
>
> 4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

[73] Article 14 provides:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

Dealing swiftly with the petitioner's case that article 5 standing alone has been breached, he has not shown any relevant grounds in support of that assertion. The alleged lack of equality of arms is essentially founded on the same factors as were prayed in aid in support of the procedural unfairness ground and must fail for the same reasons. There is no inequality of arms. Such inequality cannot arise from the submission of a plan with which the petitioner disagrees. The process is not adversarial but, as already noted, the Board has

the power to compel witnesses to attend and to give evidence. Such witnesses may be questioned by the petitioner. The petitioner's continued detention is in accordance with procedures prescribed by law and which are article 5 compliant. There is no stand-alone breach of article 5.

[74] However, the article 14 argument deserves closer scrutiny. The correct approach to an article 14 claim was described by Lady Black at paragraph 8 of her judgment in *R (on the application of Stott)* v *Secretary of State for Justice* [2020] AC [51] as follows. For a difference in treatment to amount to a breach of article 14 it is necessary to establish four elements, viz: (1) the circumstances must fall within the ambit of a convention right; (2) the difference in treatment must have been on the ground of one of the characteristics listed in article 14, or "other status"; (3) the claimant and the person who has been treated differently must be in analogous situations; and (4) objective justification for the different treatment will be lacking. As Lady Black observed, it is not always easy to keep the third and the fourth elements entirely separate. In some cases the court may focus on whether the situations are analogous; in others, upon the question of justification.

[75] Here, there is no dispute as to ambit, nor does there appear to be any dispute that the petitioner is treated differently from other classes of prisoner, although whether that difference can properly be described as "a failure to provide evidence about possible release" as the petitioner does in his note of argument, or is more properly described as being subjected to a regime whereby he may be released only when he is deemed to be manageable in the community, is perhaps a moot point. Be that as it may, there is no dispute, either, that the difference in treatment, however it is described, is due to the petitioner's status as an OLR prisoner (see *Clift* v *UK* [2010] ECHR 1106; *Stott*, supra). The two issues which are in dispute are whether the petitioner can be said to be in an analogous

position to other prisoners, and whether the difference in treatment can be justified. The petitioner argues that as an OLR prisoner he can be compared to other classes of prisoner, or to other classes of indeterminate sentence prisoners or to other classes of prisoner who require to be considered by the Parole Board before release, or even to other OLR prisoners who are considered manageable in the community.

[76] The short answer to that last proposed comparator group is that even if they are treated differently, they do not have a different status from the petitioner, and even if they did, the difference could easily be justified on the self-evident basis that the one group was manageable in the community and the other group not. In relation to the other suggested comparators, while the point in issue in this case is not the same as that which arose for decision in *Stott*, the same principle applies, namely that prisoners serving sentences under different sentencing regimes are not in an analogous situation. Prisoners who are serving an OLR are subject to a different sentencing regime from each of the proposed classes of prisoner suggested by the petitioner and accordingly are not in an analogous situation. Even if they could be regarded as analogous, the non-provision of information regarding management in the community is justified by having regard to the need for public safety and the prevention of disorder and crime.

[77] This ground must therefore also fail.

[78] For completeness, even had I found in favour of the petitioner in respect of any of the grounds advanced in relation to his case against the first respondents, I would not have granted an order ordaining the first respondents to commission a community-facing risk management plan as craved, since I agree with counsel for the first respondents that such an order would amount to an unlawful fettering of the first respondents' discretion as to the content of a risk management plan. If I had detected any error in the first respondents'

approach, the appropriate course would have been to remit the matter to them for reconsideration. However, I would not have accepted that any order would necessarily have been futile or provided no practical purpose since I do not consider that it could be assumed at this stage, as was argued by counsel for the first respondents, that the Risk Management Authority would necessarily have rejected any amended plan which might have been submitted to them for approval. As regards specification, although the term does not feature in the legislation, all parties appear agreed as to what a community-facing risk management plan is, and it is not lack of specification which dissuades me from granting the orders sought against the first respondent.

[79] However that leads on to the case against the second respondents, to which I must now turn.

[80] The first and most obvious difficulty is that, in contrast to the term community-facing risk management plan, the term "robust risk management plan" is utterly devoid of specification. It would be impossible for the second respondents or indeed the court to know whether a plan was sufficiently robust to meet the requirements of an order to produce one. Further, such an order would arguably be futile since the second respondents are of the view that a robust risk management plan, as desiderated by the petitioner, is one which involves the petitioner remaining in custody.

[81] The case against the second respondents was advanced only upon receipt of the Board's email of 29 July 2020. However as counsel for the second respondents submitted, that did not give rise to any enforceable obligation vis-à-vis the second respondents, not least as it is neither a decision of the Board nor was it communicated directly to the second respondents. Moreover the orders sought against the second respondents are fundamentally misconceived in so far as they seek the creation of a risk management plan.

For the reason submitted by the Risk Management Authority such a plan would undermine the legislative purpose of the 2003 Act as regards the creation, approval and review of a risk management plan for an OLR prisoner. It is a function of the first respondents as lead authority to prepare a risk management plan; the function of the RMA to approve or reject the plan; and for the Board to then have regard to it. The creation of a separate plan by a local authority would serve only to confuse, and potentially undermine, the risk management plan, which is an integral part of the statutory regime.

[82] The 1968 Act cannot be construed as imposing an obligation on the second respondents to prepare or provide a risk management plan. Their sole obligation in terms of the provision of information is to provide the first respondents with such background and other reports as the first respondents may request, in terms of section 27(1)(ae), which the second respondents have done. The petition, insofar as it is founded upon breach of duty by the second respondent, is therefore irrelevant. It is unnecessary to deal again with procedural fairness, but for completeness the reasons for rejecting that argument insofar as it is relied upon in relation to the first respondents apply with at least equal force in relation to the case against the second respondents.

[83] As regards the human rights aspect of the orders sought against the second respondents, I consider that *Ansari* v *Aberdeen City Council* [2017] SC 274 is indistinguishable in all material respects from the present case. Although that case concerned rehabilitation, there, as here, it was the Scottish Ministers on whom the duty to rehabilitate was incumbent, the corresponding duty here being to prepare a risk management plan. Even if obligations were incumbent on the second respondents by virtue of article 5 and 14, the case against them on those grounds would fall to be rejected for the reasons set out above in paragraphs [72] to [76].

Conclusion

[84] I will therefore repel the petitioner's pleas-in-law. I will sustain the first respondents' first and third pleas-in-law; the second respondents' first plea-in-law; and the sixth interested party's first plea-in-law. Since the third interested party professed to be seeking no particular order, I will neither sustain nor repel its plea in law. Thereafter, I will refuse the petition. Expenses were not mentioned by any party and I will simply reserve all questions of expenses.