OUTER HOUSE, COURT OF SESSION

[2022] CSOH 77

P313/22

OPINION OF LORD WEIR

In the petition

BRIAN MORRICE

Petitioner

against

THE SCOTTISH MINISTERS

Respondents

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

13 October 2022

Introduction

[1] The petitioner is a convicted life sentence prisoner. On 18 February 1974, when he was 17 years old, the petitioner was convicted of the murder of a 9 year old boy. The punishment part of the petitioner's sentence was fixed at 13 years and his sentence was backdated to 5 November 1973. The petitioner remains in custody. He has served in excess of 48 years in custody. The respondents are the Scottish Ministers. They are convened as respondents on the basis that they have responsibility for the management of the petitioner in custody.

[2] By this petition the petitioner challenges what he contends amounts to excessive delay in determining his application for a First Grant of Temporary Release ("FGTR") as a necessary precursor to his temporary release into the community. The petitioner seeks (a) declarator that the respondents have acted unlawfully by failing to make a decision in relation to his application for FGTR; (b) declarator that the respondents' failure to make such a decision breaches Article 5 of the ECHR, and (c) payment by way of just satisfaction for the delay that has ensued.

The legal framework

[3] Rule 134 of the Prisons and Young Offenders Institutions (Scotland) Rules 2011 (SSI 2011/331) is concerned with the eligibility of prisoners for temporary release. So far as relevant to the present proceedings it provides as follows:

> **"134. – Eligibility of prisoners for temporary release**
>
> (1) In this part "*temporary release*" means any of the forms of temporary release defined in rule 136.
>
> (4) Subject to paragraph (5), a life prisoner is disqualified from obtaining temporary release unless the Governor has obtained prior consent of the Scottish Ministers.
>
> (5) Any consent granted by the Scottish Ministers under paragraph (4) –
>
> (a) will apply to the first grant of temporary release and any further grants of temporary release; but
>
> (b) will cease to have effect if the prisoner is subsequently assigned a supervision level other than low supervision level."

Rule 136 describes the various different forms of temporary release, which include home leave, unescorted day release, temporary release for work and regular unescorted day release.

Background

[4] The circumstances giving rise to this petition are, at first sight, striking. The punishment part of the petitioner's sentence expired in 1986. The petitioner has been in prison for over 48 years. He is currently imprisoned within the National Top End ("NTE") facility at HMP Greenock. NTE is a facility for longer term prisoners to facilitate their progression to the more open conditions of the Open Estate. In the normal course a life prisoner would be expected to transfer from closed conditions to NTE and thence to the Open Estate before being released. In order to be considered for a work placement as part of his rehabilitation into the community the petitioner would require an FGTR. On 3 August 2020, an application for an FGTR in respect of the petitioner was submitted from HMP Greenock to the headquarters of the Scottish Prison Service. The petitioner avers that, so far as he is aware, that application remains outstanding.

[5] In their answers, and note of arguments, the respondents provided a factual exposition of the circumstances of the application for FGTR submitted in respect of the petitioner. Since its accuracy was not challenged it would be expedient to narrate what was said. Thus:

> "…An application for FGTR was made in respect of the petitioner via the Risk Management Team ('RMT') at HMP Greenock. The application was received by the Scottish Prison Service ('SPS') headquarters on or about 3 August 2020. The application includes a risk assessment ('RA') and a risk management plan ('RMP'). The RA and RMP have to be agreed between the RMT and SPS HQ. The RMP also requires to be agreed between Prison Based Social Work ('PBSW') and Community Based Social Work ("CBSW"). When the application was first received by SPS HQ, various clarifications were sought on aspects of the RMP and RA. On the third occasion that the application was passed back to SPS HQ (around 16 June 2021), the petitioner's RA had been increased to 'high risk'. This prompted SPS HQ to check on 22 June 2021 that the RMP had been agreed with CBSW. It had not been and so the input and agreement of CBSW was sought. The application was reviewed in May 2022 by the Director of Strategy and Stakeholder Engagement ('DSSE'). Had the

> DSSE been satisfied with the application, they would have referred it to the Minister for Community Safety and Legal Affairs ('the Minister') for their consideration. In the event, the DSSE was not satisfied. The application has been returned to HMP Greenock for further work to ensure that a sufficiently robust RA and RMP is [sic.] prepared to manage the complex risks that the petitioner poses and to have the RMP considered and approved by the RMT. Work on the RMP remains ongoing. It will be completed as soon as practicable. Once completed, assuming the RMT is content that the petitioner's risks are manageable on a temporary release licence, the application will be returned to SPS HQ to review. If satisfied, SPS HQ will submit the application to the DSSE, who will in turn, if satisfied, refer the application to the Minister with a positive recommendation. It will then be a matter for the Minister to decide."

[6] On 12 January 2022 the petitioner's case was considered by the Parole Board for Scotland. The Parole Board determined that the petitioner remained "an unacceptable risk". It was not satisfied that it was no longer necessary for the protection of the public that the petitioner should remain confined, and did not direct the petitioner's release. The determination of the Parole Board is not the subject of challenge in this petition. That said, the Parole Board is recorded as having described the delay in considering FGTR as "excessive" and "concerning".

Submissions for the petitioner

[7] In an address which was at once concise and candid, counsel for the petitioner relied on a number of grounds in support of the relief sought. He submitted, first of all, that inordinate delay constituted a stand-alone ground for review. He noted that one of the principles of good administration adopted by the UK Parliamentary Ombudsman was that decisions should be taken promptly. The Scottish Parliamentary Ombudsman too listed delay as one possible basis upon which maladministration might be considered to arise. By apparently refusing to make any decision the respondents had made *de facto* a decision to

refuse FGTR which was incapable of appeal. The rule of law was undermined if bodies could avoid a challenge to a decision simply by not making it.

[8] Counsel presented a separate and distinct argument that the failure to take a decision on FGTR timeously was procedurally unfair, and the continuing delay a breach of natural justice. Although rationality was one way in which the issue of delay could be approached – decision makers required to act rationally and fairly in any context (*Osborn* v *Parole Board* [2014] AC 1115, paragraph [65]) – fairness or natural justice was a continuously evolving standard (*R* v *H&C* [2004] 2 AC 134, paragraph [11]). What was fair in any particular case, or what natural justice required, would vary. In the instant case, the petitioner was a life prisoner who was substantially "post-tariff". He had been in prison since he was 17 years old. The decision being delayed was one which would have particularly important consequences (cf. *R* v *Parole Board, ex parte Bradley* [1991] 1 WLR 134). In all the circumstances the procedure adopted by the respondents relative to the application for FGTR was unfair.

[9] The provision of rehabilitative opportunities to post-tariff life prisoners engaged ECHR, Article 5. Article 5 required that any interference was lawful and in compliance with domestic law. If the delay was unlawful as a matter of domestic law, which it was, then it was unlawful for the purposes of Article 5. To the extent that Article 5 required that detention be not arbitrary, the petitioner required to be given a real opportunity to rehabilitate himself through community access (*Brown* v *Parole Board for Scotland* 2018 SC (UKSC) 49). No issue of resourcing arose in the petitioner's case. Any opportunity to rehabilitate was being undermined by the continuing failure of the respondents to take a decision which they intend to take. The effect of the consequent delay was to render the petitioner's detention arbitrary (*Brown* v *Parole Board for Scotland,* paragraphs [33], [45]).

[10] Finally, counsel submitted that a finding that the respondents were in breach of Article 5 was of itself insufficient and that the petitioner was entitled to the award of a monetary payment as just satisfaction for that breach under reference to the level of award in *James* v *United Kingdom* [2012] ECHR 1706.

Submissions for the respondents

[11] In his reply counsel for the respondents expanded on the timeline so far as relating to the application for FGTR. In doing so he acknowledged that between August 2020 and January 2021 there was period where it appeared that the application was not being advanced. However, on 15 January 2021 SPS HQ returned the application to HMP Greenock for further information to be provided before it could be taken further. The application was resubmitted to SPS HQ on 5 March 2021 and reviewed internally on 5 April 2021. On 20 May 2021 the application was referred back for further feedback from the RMT which was duly provided on 16 June 2021. On 26 June 2021 the application was again referred back to HMP Greenock for clarification of the Multi-Agency Public Protection Arrangements ("MAPPA") for the petitioner and a query as to whether his RMP had been agreed with CBSW. This was in the context of the petitioner's risk of serious harm assessment having been raised to "high". There was then further communication between SPS HQ and HMP Greenock from July through until December 2021. In May 2022 the DSSE considered the application and it was again returned to HMP Greenock for further work. The situation at present was that a revised RMP had been prepared and was awaiting sign-off. An RMT would be convened as soon as practicable thereafter with a view to the application being reconsidered by the DSSE and placed before the Minister.

[12] Dealing with the petitioner's submission that inordinate delay provided a stand-alone ground of review, counsel submitted that where a person only has a claim to a right, as opposed to an established right, then delay will only be unlawful if it is shown to result from actions or inactions which can be regarded as irrational (*R(O)* v *Secretary of State for the Home Department* [2019] EWHC 148 (Admin.). The petitioner did not contend that the respondents' action (or inaction) was irrational. The time taken to address the petitioner's case was not, in any event, irrational and his first plea-in-law should be repelled.

[13] Turning to the submission that the respondents' treatment of the petitioner's case was procedurally unfair, counsel submitted that it was not sufficient simply to assert unfairness. No particular aspect of the procedure was asserted to be unfair aside from the length of time taken to grant the application for FGTR. The requirement of fairness was an objective question for the court, and what fairness required was context dependent (*R (Citizens UK)* v *Secretary of State for the Home Department* [2018] 4 WLR 123). Law and guidance provided no timescale for consideration of an FGTR application. The process of consideration could, in theory, be straightforward; it could also be complicated and iterative. The serious and complex risks posed by the petitioner have required an iterative process involving HMP Greenock, SPS HQ and other agencies including social work. The process was intended to ensure that all relevant risk-related information was considered so that a proper decision could be taken as to whether it was safe for the petitioner to be granted FGTR. The petitioner recognised that the respondents' internal procedure was a matter for them. He had been kept informed of progress. The complexity of the process was recognised by the fact that the Parole Board had noted, as recently as January 2022, that the petitioner did not recognise the risk he still posed.

[14] Counsel acknowledged that a number of factors, including the Covid-19 pandemic, had meant that consideration of the petitioner's case had taken longer than usual. However, any delay was explicable and rational. The procedure adopted by the respondents was not unfair. It was designed to ensure that, in due course, the Minister would be able to make an informed decision on FGTR. Accordingly, the petitioner's second plea-in-law should be repelled.

[15] The key purpose of ECHR, Article 5, was to prevent arbitrary or unjustified deprivation of liberty (*McKay* v *United Kingdom* (2007) 44 EHRR 41). To establish a violation of Article 5 required the petitioner to surmount a high threshold, involving the demonstration of exceptional circumstances which warranted the conclusion that his detention had become arbitrary (*Brown* v *Parole Board for Scotland*). The circumstances of the petitioner's application for FGTR did not come close to justifying the conclusion that his detention had become arbitrary. The lawfulness of the petitioner's detention was considered and approved by the Parole Board in January 2022. There were sound reasons for why a decision in favour of FGTR had not yet been taken. Accordingly, the petitioner's pleas-in-law anent breach of convention rights and payment of damages by way of just satisfaction should also be refused.

Analysis and decision

[16] The issue raised by the petitioner in this case is whether the delay in determining the petitioner's application for FGTR is unlawful.

[17] Dealing with the petitioner's argument that inordinate delay constituted a stand-alone ground of review, I did not understand counsel for the respondents to argue that delay *simpliciter* could never found a basis for review. Rather, his submission was to the

effect that, since the petitioner's complaint of delay arose not out of an established right to be granted FGTR but a claim to a right, delay is unlawful only if it is shown to result from action or inaction which can be regarded as irrational. He referred to the case of *R(O)* v *Secretary of State for the Home Department* in which Garnham J considered the authorities on unlawful delay in the context of claims made in respect of victims of human trafficking. The court drew from those authorities the following principles:

> "[89]…
>
> (i) Delay may be unlawful when the right in question arises as a matter of established status and the delay causes hardship (*Phansopkar*).
>
> (ii) An authority acts unlawfully if it fails to have regard to the fact that what is in issue is an established right rather than the claim to a right (*Mersin*).
>
> (iii) Delay is also unlawful if it is shown to result from actions or inactions which can be regarded as irrational. However, a failure merely to reach the best standards is not unlawful (*FH*).
>
> (iv) The court will not generally involve itself in questions concerning the internal management of a government department *(Inland Revenue Commissioners* v *National Federation of Self-Employed and Small Businesses* and *Arbab*).
>
> (v) The provision of inadequate resources by Government may be relevant to a charge of systematically unlawful delay, but the Courts will be wary of deciding questions that turn on the allocation of scarce resources (*Arbab*)."

[18] In the instant case the petitioner does not have a settled or established right to be granted FGTR. As is apparent from the terms of the affidavits submitted on behalf of the respondents, whether an application for FGTR is granted to a prisoner in the position of the petitioner will depend on variety of considerations arising from an assessment of the risk still posed by him were he to be released into the community. The relevant Minister might grant an application, or refuse one. The DSSE may (as here) decline to place an application before the Minister without further consideration being given to that risk by the RMT, and

both PBSW and CBSW, and how it could be properly be managed. In these circumstances, as with the applicant for asylum in *AS* v *Advocate General for Scotland,* the test to be applied to determine if the delay in determining the application relating to the petitioner for FGTR is unlawful is one of irrationality (cf. *AS,* paragraphs [12]-[13]).

[19] Counsel for the petitioner contended for what he characterised as a broader approach to the question of delay in respect that it was an element of procedural unfairness. In considering the domestic principles of procedural unfairness in the context of decisions by the Parole Board, the Supreme Court did not mention delay as an aspect of procedural fairness (*R(Osborn)* v *Parole Board*, paragraphs [68]-[84]). It is not, in any event, clear to me in the particular circumstances of this case, what an argument based on procedural fairness, would add to the test which I find to apply based on irrationality – especially if any delay in the application process is capable of rational explanation. I did not understand the petitioner to argue that the procedure by which FGTR applications were determined was systemically flawed. Indeed, given the risk management issues involved, it is difficult to decern any basis for such criticism even if it were made. Rather the petitioner's complaint is that the respondents are taking too long to work through the procedure which is in place (with FGTR as the petitioner's next step).

[20] I turn then to consider whether it can properly be said that the passage of time in considering the application for FGTR is "irrational". In addressing that question it is again important to bear in mind that the petitioner's complaint lies with the respondents' processing of the application. The legality of the Parole Board's determination in 12 January 2022 that the petitioner remains an "unacceptable risk", and its conclusion that it could not be satisfied that it was no longer necessary for the protection of the public that the petitioner should be confined, are not challenged. I have also taken into account the contents of the

affidavits by (i) Angela Holmes, Head of Psychology for SPS; (ii) Greig Knox, Head of Risk for SPS, and (iii) Gerry Watt, Deputy Governor of Greenock Prison.

[21] Ms Holmes explained how the details of the petitioner's offence presented highly disturbing features which meant that there was even now a lack of understanding for the motivation underlying it. The petitioner had very complex and enduring personality functioning problems and there remained an inconsistent understanding of what risks he presented. SPS could not honestly and justifiably say that his risk could currently be managed at lesser levels of security. These difficulties fed into the reasons why the petitioner's application was taking longer than would ordinarily be expected. At a practical level, Ms Holmes also commented that the impact of the Covid-19 pandemic had caused delays in routine SPS work, and this included FGTR applications.

[22] Mr Knox explained that the petitioner's risk of serious harm assessment was evaluated as high in June 2021, as was his MAPPA risk level. In practical terms that meant that there were identifiable indicators of a risk of serious harm; a potential event could happen at any time and the impact could be serious. There were a number of factors which may have elongated the application for FGTR in the petitioner's case, and which were also picked up on in Mr Watt's affidavit. These included (i) the complexity of his case; (ii) the introduction of quality assurance standards to the assessment process in January 2021; (iii) the requirement that any application be reviewed by a review panel, comprising senior SPS managers, before it is signed off for submission to the DSSE; this would commonly involve – and, in the petitioner's case, has involved - the application being sent back to the prison establishment for further information or clarification, and (iv) the practical impact on a backlog of applications of the pandemic. The re-assessment of the petitioner's risk of

serious harm in June 2021 had resulted in delay because of the consequential requirement for PBSW, in collaboration with CBSW, to prepare a RMP for the RMT.

[23] Counsel for the petitioner fairly acknowledged, even before further detail was provided in the respondents' reply, that the period of delay which was contended to be unlawful could not be measured by the whole period from August 2020 to date. He recognised that there was evidence of progress having been made with the application after May 2021. However, the absence of any apparent activity prior to May 2021 remained unexplained and was, in the circumstances in which it arose, unlawful. As will be apparent from the narrative presented by the respondents that contention is disputed. It appears that, after initial consideration at SPS HQ, the application was returned to HMP Greenock in January 2021 and resubmitted in March of that year.

[24] In these circumstances it is difficult to identify with precision the period or periods of time over which it is contended that there was unlawful delay. Neither party scrutinised in detail the precise factual circumstances of the application's submission to SPS HQ and return to prison on the occasions when that occurred. I do not criticise the absence of such scrutiny. It was common ground that the respondents' internal procedure was a matter entirely for them (*R(O)* v *SSHD, supra*.). The respondents acknowledged that there was a period of time between August 2020 and January 2021 where it was not apparent that the petitioner's application for FGTR was being progressed. Standing the length of time in which he has been incarcerated that is not to be taken lightly. However, measured against the well-known context of a global pandemic whose impact has been felt in so many different contexts (not least in the prosecution of serious crime), and recognising that the petitioner's application is not the only application for which the respondents have ultimate

responsibility, the period of time concerned might be regarded as regrettable in a general sense, but I am unable to characterise the delay as irrational.

[25] Equally, I am satisfied that the complexity of the petitioner's presentation can largely be seen as responsible for the passage of time that has elapsed since early 2021. In that respect, counsel for the petitioner criticised the affidavits relied on by the respondents as being short on detail. However, the common theme arising from them is that the circumstances of the original offence, and the petitioner's attitude to it and the risk he presents, are such that it is difficult to measure the extent of the risk he would present in a community setting. The point of the process now under criticism is to ensure that the relevant Minister reaches a properly informed decision of FGTR. The fact that the Parole Board, as recently as January 2022, concluded that the petitioner continued to present an unacceptable risk may be thought to add weight to the contention that the petitioner's application presents difficulties which have not yet been resolved in favour of a positive recommendation by the DSSE to the Minister.

[26] In summary, I do not consider that the petitioner has established, on any of the common law grounds advanced, that there has been unlawful delay in progressing the application made on his behalf, for FGTR.

[27] In relation to the petitioner's contention that the delay in determining the application for FGTR breached his rights under ECHR, I did not understand counsel for the respondents to dispute that the opportunity for rehabilitation was an aspect of Article 5. However, the key purpose of Article 5 is the prevention of arbitrary or unjustified deprivations of liberty (*McKay* v *United Kingdom*, paragraph [30]; *Brown* v *Parole Board for Scotland*, paragraph [2]). Moreover, in *Brown*, the Supreme Court emphasised the "high threshold" which has to be surmounted in order to establish a violation of an Article 5 obligation, in this case to provide

such an opportunity for rehabilitation. In the present case I do not consider that it can sensibly be contended that the petitioner has been deprived of a real opportunity to rehabilitate. Indeed, it is telling that, in *Kaiyam and others* v *United Kingdom* [2016] ECHR 1151, the ECHR, in providing a summary of its reasoning in the earlier case of *James* v *United Kingdom* and in subsequent case law observed:

> "…[70] It is clear from the court's case-law in this area that cases in which it is prepared to find that a period of post-tariff detention has failed to comply with the requirements of Article 5(1)(a) on account of a delay in access to rehabilitative courses will be rare. In particular, it is not for this court to second-guess the decisions of the qualified national authorities as regards the appropriate sentence plan…Any delays encountered in the provision of specific courses must be assessed in the context of the gravity of the offence and the amount of offending-behaviour work therefore required, and against the backdrop of the range of rehabilitative courses already accessed by the applicant."

[28] That passage seems to me to be most apposite to the circumstances of the petitioner's application for FGTR. I have already explained why I do not consider the delay in this case to have been unlawful at common law. The right to progression is not absolute and, in circumstances where the Parole Board did not direct release in January 2022, nothing in the process by which the petitioner's application for FGTR has been considered seems to me to constitute a denial of the opportunity to rehabilitate.

[29] There being no breach of Article 5, no issue of payment of damages for just satisfaction arises.

Conclusion

[30] In the foregoing circumstances I shall sustain the respondents' fourth, fifth and sixth pleas-in-law and refuse the petition. I shall reserve meantime all questions of expenses.