OUTER HOUSE, COURT OF SESSION

[2024] CSOH 30

P512/23

OPINION OF LORD LAKE

In the Petition

AB

Petitioner

for

Judicial Review of the imposition of certain conditions upon his release

by the Scottish Ministers

Petitioner: D Leighton, advocate; Drummond Miller LLP
First Respondent: C O'Neill KC, D Scullion, advocate; Scottish Government Legal Directorate
Second Respondent: M Lindsay KC; Anderson Strathern LLP

14 March 2024

[1] AB was formerly a prisoner in HMP Edinburgh. He was convicted of two charges of rape at common law and two charges of contravention of the Criminal Law (Consolidation) (Scotland) Act 1995, section 6 (lewd, indecent or libidinous conduct to a girl between the ages of 12 and 16). His victims were his daughter and a friend of hers. The offending went on for an extended period. The victims were aged 13 to 15 at the time.

[2] He was sentenced to imprisonment for a term of 16 years but, on appeal, this was reduced to 12 years. In terms of the sentencing regime that applied to him, he was entitled to automatic release on licence on 22 March 2023. In releasing him on licence, in accordance

with the Prisoners and Criminal Proceedings (Scotland) Act 1993, section 12, the Scottish Ministers imposed conditions. Those conditions had been recommended by the Parole Board for Scotland. In this action, AB challenges the imposition of five of these conditions on a number of different bases. The grounds of challenge are not the same for all conditions. To reflect the way in which the submissions were presented to me, I will first consider the challenges under domestic law presented to each of the conditions and then consider challenges made by reference to the ECHR.

[3] Before considering the challenges brought by AB, it is relevant to note that he continued to deny his guilt throughout his prison sentence and continues to do so. This meant that while he was in prison, he did not engage in work to address the risk of him committing further sexual offences and prior to his release it had not been possible for him to engage in unescorted community testing. It is relevant also that prior to his release, a report was prepared on the petitioner by the prison based social worker (PBSW). This was considered by the Parole Board when recommending conditions to the Scottish Ministers. At that time, they also considered a document prepared by solicitors on behalf of the petitioner commenting on the contents of the PBSW report.

[4] All parties had prepared notes of arguments which they adopted in their submissions. In their answers and in submissions, the Scottish Ministers focussed on the response to the allegations of infringement of the ECHR. The Parole Board concentrated on the response to the domestic challenges. Helpfully from the standpoint of avoiding duplication, the respondents adopted what had been said by the other. In view of that, in this opinion I refer simply to the submissions for the respondents without differentiating which one. Because there were five conditions challenged and multiple grounds of

challenge, none of the individual challenges was developed to any great degree in submissions.

Licence Condition 12

[5] Licence Condition 12 states:

> "**Mental health**
>
> 12. You shall undertake an assessment by community mental health services, and cooperate with services after this, all as directed by your supervising officer;"

The petitioner challenges this on the bases that there was no rational basis for imposing it, that no reasons are provided for imposing it, that it does not have the function of mitigating risk and is therefore unlawful and that licence conditions are not the correct statutory route to subject an individual to compulsory mental health care. In relation to the first issue, the petitioner relied on the recent broader statement of the *Wednesbury* principle in *R (Keyu)* v *Secretary of State* ([2016] AC 1335, at paragraph 273) although, as presented, the argument was that the risk factors identified in relation to the petitioner in the prison based social worker's report did not include mental disorder and on that basis there was no justification for imposing it.

[6] As I note above, throughout his sentence the petitioner has denied his guilt and as a result, he had not engaged in any offence-focussed work during his sentence. The PBSW report noted that as a result, there was limited insight into the triggers and motivations that caused him to offend and noted that his ability to desist from further offending was untested. The decision of the Parole Board in relation to the petitioner repeated the comments from the PBSW and also noted that he had not engaged in unescorted community testing during his sentence. It considered that the circumstances were such that the risks of

him re-offending were higher than indicated by the results of standard risk assessment tools. The parole report identified risk factors for the petitioner that included significant social influences, capacity for relationship stability, lack of concern for others, deviant sexual preference, and cooperation with supervision. Their decision notes that he admitted having misused alcohol previously. It considered that as alcohol is a disinhibitor, when his previous misuse was taken with the absence of both offence-focussed work and community testing, this was a potential risk factor that should be assessed and monitored on his release.

[7] The underlying rationale for licence conditions is, as is recognised in the petitioner's submissions, the mitigation of risk. Having regard to his offending, his denial and the limited assessment that could be carried out, it is apparent that there was a need for imposition of conditions to manage the obvious risk presented by the petitioner and there is therefore a rational basis for imposing Condition 12. The Parole Board decision which was part of the process of imposition of the conditions discloses the reasons for it and that it seeks to mitigate risk. The first three points made by the petitioner are not supported by the evidence of the decision making and I reject them.

[8] The final challenge is to the effect that the Condition subjects the petitioner to compulsory mental health care and that this is something that should be done only under the powers contained in the Mental Health (Care and Treatment) (Scotland) Act 2003. It is contended that it is improper to use the provisions of the Prisoners and Criminal Proceedings (Scotland) Act 1993 as to imposition of conditions in respect of release of prisoners on licence to achieve the same result. It was submitted that proceeding in this way denies the petitioner the safeguards contained in the 2003 Act. The respondents, on the other hand, claimed that the condition did not impose compulsory mental health care.

[9] Although this argument turns to a large extent on whether there is an overlap between the care which may be ordered compulsorily under the 2003 Act and what is required by the licence conditions, I was not addressed in any detail as to what treatment can be ordered in terms of a compulsory treatment order made under the Act. It is, however, necessary to consider this at least briefly. As the first element of Condition 12 requires assessment, the starting point is to consider whether the assessment is something that might be imposed in a compulsory treatment order.

[10] Compulsory treatment orders are addressed in part 7 of the 2003 Act. Within that part, section 64(4) specifies the orders that may be made by the Mental Health Tribunal for Scotland on an application made to it. These include among other things "medical treatment, community care services, relevant services, [and] other treatment, care or service[s]". Each of the terms "medical treatment", "community care services", "relevant services" is defined in the Act. It does not appear that any of the definitions extend to "assessment" of a person's needs. That "assessment" is not included within the categories of what may be ordered is consistent with the closing reference in the passage quote above to "other treatment, care or service[s]". All three of those terms connote some active step to address an identified difficulty. "Assessment" on the other hand is concerned with a process of evaluation or judgment. This means that in requiring "assessment", Condition 12 is not requiring something that could otherwise be made mandatory under the 2003 Act.

[11] The other part of Condition 12 requires co-operation with community mental health services. Again, co-operation does not replicate anything that may be mandated in a compulsory treatment order. I do not consider that this requirement can reasonably be interpreted so that the "co-operation" required of the petitioner is that he should submit to medical treatment as defined in the 2003 Act in a situation where he could otherwise refuse.

If a court was required to interpret "cooperate" in Licence Condition 12, it would have to consider the relevant background. This would include the existence of the 2003 Act with the controls and safeguards that it contains and that would mean that such a broad interpretation of the Condition was inappropriate. The result is that as neither part of Licence Condition 12 imposes compulsory care such as might be required under the 2003 Act, the initial premise of the petitioner's argument is not established. I consider that the challenge on this basis fails.

Conditions 12, 14 and 18

[12] There is a further challenge that applies to Condition 12 which applies also to Conditions 14 and 18. Condition 14 imposes requirements in relation to assessment for an undertaking alcohol misuse counselling. Condition 18 relates to information technology and places restrictions on the petitioner as to devices he may own or possess and what information must be given to his supervising officer in relation to them. The challenge is that the petitioner was not given notice of the intention to impose such conditions and that such notice was a requirement of procedural fairness. It is said that had such notice been given, he would have advanced the arguments in the petition and that without such notification he could not influence the result. The respondents, on the other hand, noted that Conditions 12, 14 and 18 are standard conditions routinely recommended for child sex offenders with a history of alcohol abuse. They rely on the decision in *R (Gul)* v *Secretary of State for Justice* [2014] EWHC 373 (Admin), in which Beatson LJ said that what was required to achieve fairness is that the person affected need be involved in the decision-making process as a whole to a degree sufficient to provide the requisite protection of his interests.

The respondents note that the petitioner was aware of the PBSW report and made submissions to the Parole Board.

[13] As noted above, the PBSW report recorded the petitioner's misuse of alcohol in the past and that his ability to desist from offending had not been tested in the community. It also suggested that a condition should be imposed that would prevent him from communicating with or approaching any person under the age of 18. No submission was made by Mr Aitken in relation to these points. In view of the intensive use by younger persons of social media and electronic communications, the respondents submitted that Condition 18 is a means of enforcing restrictions on communication suggested by the Parole Board. In these circumstances, I consider that the petitioner was in a position to participate so as to protect his interests and I reject this ground of challenge.

Conditions 17 and 20a

[14] The challenge to these conditions is on the basis that they are both insufficiently certain. The conditions are in the following terms:

> 17 You shall not enter parks, playgrounds or any other places where children who you know to be, or should have reasonable cause to believe to be under the age of 18 years are likely to be, or might reasonably expect them to be, without the prior approval of your supervising officer and subject to any restrictions that officer may impose, and shall immediately report any unavoidable or inadvertent entry to that officer;
>
> 20 You shall:
>
> a) immediately inform your supervising officer of any friendships, associations, or intimate or domestic relationships that you enter into, with anyone;"

In Condition 17, objection is taken to the word "park"' as being too imprecise. In the submissions made to the Parole Board on behalf of the petitioner the question was posed as

to whether he would be prohibited from football parks, retail parks or car parks and whether it was necessary that it have the word "park" in the title or was it enough that it was a place with a lot of grass. In the latter Condition, the objection is focussed on the inclusion of the work "associations" as it is said to be too vague. The respondents contend that the words are not uncertain as they are everyday words with everyday meanings. They submit also that if there really was ambiguity, the petitioner could seek clarification from his supervising officer.

[15] There was disagreement between the parties as to the test to be applied to determine if a condition was too uncertain. The petitioner submits that the test that should be followed is that in *Kruse* v *Johnson* [1898] 2 QB 91, where it was said that, to be enforceable, a byelaw "must contain adequate information as to the duties of those that are to obey". The respondents referred me to *B* v *Parole Board for Scotland* 2020 SLT 975, where the test in *Kruse* was rejected by Lord Pentland in favour of the test in *Percy* v *Hall* [1997] QB 924. In *Percy*, Simon Brown LJ said:

> "A provision should only be struck down on the ground of uncertainty in the rare case where it can be given no sensible and practicable meaning in the particular circumstances of the case."

Lord Pentland considered that the test in *Kruse* did not identify any criteria by which adequacy was to be assessed and that it was the task of the court to seek to give effect to a condition if it can.

[16] For the reasons given by Lord Pentland, I accept that the test in *Percy* is to be preferred. Otherwise, the test for uncertainty is itself lacking in certainty. Adopting this approach, I conclude that Conditions 17 and 20a are not invalid. As the respondents contend, these are ordinary words and they have a meaning which is readily understood. I do not consider that this issue is to be tested by hypothetical situations which may be said to

lie on the border and, in relation to the word "parks", I find the petitioner's claimed areas of ambiguity stretched and artificial.

European Convention on Human Rights

[17] The second group of challenges were made by reference to the European Convention on Human Rights, articles 5, 8 and 14.

Article 5

[18] In relation to article 5, the Right to Liberty and Security, as I understood the submission made, it was not contended by the petitioner that there was a breach of the article *per se*. Instead, it was contended that licence conditions fell within the ambit or scope of the article and that this was relevant when considering article 14 (Non-discrimination). By reference to the case of *Etute* v *Luxembourg* [2018] ECHR 113 paragraph 25, the petitioner contends that the rights accorded by article 5(4), apply not only at the time of conviction but also where new issues emerge after the judgement which originally justified detention. Such new issues arise when a decision must be made as to the conditions to be imposed on release on licence as those conditions will determine the circumstances in which the individual may be recalled to custody. It was submitted that as article 5(4) applied to a decision to recall a prisoner who was on licence, it should also apply to the terms of the licence. If the procedure requires to be certain and fair at the stage of recall, it was contended that it will require to be certain and fair throughout. Rights under article 5 are therefore engaged not only in the situation in which a prisoner on licence is recalled to prison but also at the time that the conditions are imposed.

[19] The respondents submitted that article was not engaged and the facts were not within its ambit. They accepted that the conditions might amount to restrictions on the petitioner but contended that they fell well short of deprivation of liberty as that expression was understood for the purposes of article 5. I was referred to *Secretary of State for the Home Department* v *JJ and others* [2008] 1 AC 385, where case law of the European Court of Human Rights on this issue was reviewed and, in particular, to the statement by Lord Bingham of Cornhill in paragraph 15 that what was required was, "To assess the impact of the measures in question on a person in the situation of the person subject to them." By way of examples of quite onerous conditions that had been found not to amount to deprivation of liberty I was referred to *Secretary of State for the Home Department* v *MB and AF* [2008] 1 AC 400, and *Secretary of State for the Home Department* v *E* [2008] 1 AC 499. In both cases extensive curfews were found not to deprive the subject of his liberty. I was also referred to the decision in *R (Latif)* v *Secretary of State for Justice* [2021] 4 WLR 61 at paragraphs 26 and 27 where it was concluded that setting licence conditions did not fall within the ambit of article 5. In relation to the argument based on *Etute*, it was submitted that the decision was concerned only with the decision to require a return to prison in the event of breach of conditions. More fundamentally, by reference to *R (Whiston)* v *Secretary of State for Justice* 2015 AC 176, and *R (Youngsam)* v *Parole Board* [2020] QB 387, the respondents noted that article 5(4) does not apply to recall during a determinate sentence as the lawfulness of the detention had already been determined in the original sentence.

[20] As to whether the restrictions in the licence conditions engage article 5, applying the test from *JJ*, I am of the view that they do not. The matter was put succinctly by Swift J in *Latif* at paragraph 26 when he said:

> "The core value protected by article 5 is the right not to be arbitrarily detained. The setting of conditions when a prisoner is released on licence is some distance from that core value."

The level of freedom the petitioner retains as to how he wishes to conduct his daily life cannot be seen as a deprivation of liberty. In relation to *Etute*, the petitioner's in effect seeks to identify a later stage in the prisoner's detention where article 5 applies and then to argue that, if it applies at the later stage, it is logically consistent that it should apply earlier. Although there are attractions to such an approach, it cannot withstand the clear statement to the contrary in *Whiston*. The effect of the decision there is, as the respondents contend, that article 5(4) does not apply to a decision to recall a prisoner on a determinate sentence. If article 5(4) does not apply to that decision, the rationale for its application to the decision as to the conditions to be imposed in a licence disappears.

Article 8

[21] In relation to the challenge under article 8 - Respect for family life, with a caveat in relation to Condition 14, it was accepted by the respondents that the article was engaged by the conditions. The focus of the arguments was whether the interference with family life was "in accordance with the law". It was common ground that to meet this requirement, the following criteria must be made

- The interference must be sufficiently precise, accessible and foreseeable and
- It must be proportionate.

In relation to the issue of whether the measure was proportionate, I was referred to *Christian Institute* v *Lord Advocate*, 2016 SLT 805, in which paragraph 90 of the judgment included the following:

> It is now the standard approach of this court to address the following four questions when it considers the question of proportionality: (i) whether the objective is sufficiently important to justify the limitation of a protected right; (ii) whether the measure is rationally connected to the objective; (iii) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective; and (iv) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter.

[22] The only conditions in respect of which an issue was raised as to whether they met the requirements of being sufficiently precise, accessible and foreseeable were conditions 17 and 20a. I have considered these above and I consider that they meet these requirements. By reference to *Khliafia* v *Italy*, [2016] ECHR 1124, the petitioner submitted that where deprivation of liberty is concerned, it is of particular importance that the requirement of certainty is met. While that is so, for the reasons considered above, the imposition of conditions does not amount to deprivation of liberty so this consideration does not apply.

[23] In relation to proportionality the first part of the test can be answered quite readily. The petitioner acknowledged that if the objective was public protection, the first part of the test was met. In their decision letter, the Parole Board note that they consider whether conditions are required in order to manage safely such risk as the prisoner may present in the community and this is sufficient to mean that the first part of the test is met. I have considered above the connection of Condition 12 to the risk presented and in the circumstances of the petitioner and, in view of the PBSW Report and Parole Board Decision, I consider that each of the conditions has a rational connection with that objective.

Condition 14 arises out of the petitioner's previous admission of alcohol misuse and the concern as to the disinhibiting effect it might have on his behaviour. The link between the condition excluding him from places where young children may congregate unsupervised is obvious as is the need for him to report relationships with young people. Controls on IT devices are connected to the concerns as to communications with young people. All are measures to mitigate the risk that he might present on his release.

[24] As to whether a less intrusive measure could be used without compromising attainment of the objective, I accept the submission for the respondents that the article were relatively minor intrusions into the petitioner's article 8 rights and that this is particularly so having regard to his entrenched denial. The fact that they are minor intrusions also means that when the balancing exercise is carried out, the restriction is not disproportionate to the objective pursued.

Article 14

[25] Article 14 states,

> "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."

I was referred to the decision in *R (Stott)* v *Secretary of State for Justice* 2020 AC 51, and the following passage in the judgment of Lady Black which sets out the four requirements for application of this article:

> "In order to establish that different treatment amounts to a violation of article 14, it is necessary to establish four elements. First, the circumstances must fall within the ambit of a Convention right. Secondly, the difference in treatment must have been on the ground of one of the characteristics listed in article 14 or other status. Thirdly, the claimant and the person who has been treated differently must be in analogous situations. Fourthly, objective justification for the different treatment will be lacking.

> It is not always easy to keep the third and the fourth elements entirely separate, and it is not uncommon to see judgments concentrate upon the question of justification, rather than upon whether the people in question are in analogous situations."

[26] The petitioner contends that the article at least fall within the ambit of article 5 and or article 8. The respondents accepted that article 8 was engaged. I have considered article 5 above. Having regard to the decision in *Latif* referred to above, I do not consider that the imposition of licence conditions comes within the ambit of that article which leaves only article 8.

[27] The petitioner argues that the difference in treatment he suffered is on the basis of "other status". By reference to the decisions in *Stott* and the decision of the European Court of Human Rights in *Clift* v *United Kingdom* referred to in it, he contends that this expression must be given a wide meaning and need not relate to personal characteristics. Those cases support that approach. They also indicate that the characteristics which define the "other status" need not exist independently of the treatment in relation to which the complaint is made. That is relevant for the third criteria as to differential treatment.

[28] The group with which the comparison is to be made must be identified having regard to the nature of the complaint made (*Clift*, paragraph 66). Here the complaint is made by reference to the issues of medical treatment said to be required by Licence Condition 12 and 14. The petitioner contends that the group with which he should be compared to identify the difference in treatment for the third criteria is prisoners who had their mental health needs addressed and met under the 2003 Act. Adopting the approach that the "other status" need not predate the decision complained of, he identified his status as arising from the mechanism used to monitor ill-health and enforce compliance with compulsory care. He contends in his case this is by means of Licence Conditions whereas for other prisoners or persons outside the prison system it is the 2003 Act. The respondents

accepted for the purposes of the debate that the petitioner has other status as described in article 14. They claim, however, that the other groups which the petitioner has identified as comparators and not analogous and that to the extent that they are, the difference in treatment is justified.

[29] The authorities indicate that it is not a requirement that the comparator group be identical (*Clift*, paragraph 66) but in the present situation, there is a very material difference identified by the respondents. This is that prisoners released on licence require to be managed to mitigate the risk that they may present to the public at large that they will reoffend. That consideration does not apply to the comparator group. That means not only that the comparator group are not truly analogous to the petitioner but also fully justifies the difference in approach in relation to the petitioner and his comparators. I accordingly reject this ground of challenge.

Disposal

[30] In view of the above, I sustain the second and third pleas in law for each of the respondents, repel the pleas for the petitioner and refuse the petition.