



OUTER HOUSE, COURT OF SESSION

[2025] CSOH 82

P1038/24

OPINION OF LADY ROSS

in Petition of

AB

Petitioner

against

THE SCOTTISH MINISTERS

Respondents

Petitioner: Mr D N Leighton; Drummond Miller LLP

Respondents: Mr D Blair; SGLD

29 August 2025

[1] The petitioner is a prisoner who is subject to an extended sentence, comprising a custodial term of 9 years and an extension period of 3 years. The sentence began on 14 August 2015. He was released on licence on 13 August 2021. Following a breach of his licence conditions and a recommendation of the Parole Board for Scotland, he was recalled to custody on 1 September 2022. The custodial part of the petitioner's sentence expired on 13 August 2024. The extended part of the petitioner's sentence will expire on 13 August 2027. The petitioner contends that the Scottish Ministers, the respondents, have failed to provide him with the rehabilitative opportunities that would give him the prospect of being released on licence, and he argues that, as a result, there is a breach of his rights under

Article 5(1) of the European Convention on Human Rights. The petitioner seeks declarator to that effect as well as an award of damages.

Factual background

[2] The petitioner was convicted of offences under sections 1, 2 and 3 of the Sexual Offences (Scotland) Act 2009. On 30 September 2015, an extended sentence was imposed. It comprised a custodial term of 9 years and an extension period of 3 years and the commencement date was 14 August 2015, that being the date when he was convicted and remanded pending sentence.

[3] Prior to his release on licence on 13 August 2021, the petitioner spent periods of time in custody in England. He was in custody in England for a short period, between 6 January 2016 and 17 February 2016, in order to attend an English court. Later, he applied for a cross-border transfer. This was granted and on 3 April 2019 the petitioner was transferred to HM Prison Service, and was in custody in a number of prisons in the north of England. Before this transfer, the petitioner was on the waiting list for the respondents' "Moving Forward, Making Changes" rehabilitation programme ("MFMC"). On being transferred to England in April 2019, the petitioner was removed from that waiting list. Whilst he was in the custody of HM Prison Service in England, some rehabilitative opportunities were made available to him and he undertook some work in programmes in prisons in England. These were the "Building Futures" programme, as well as attendance at a "Managing Emotions" group and a "Recovery Pathway" intervention with a substance misuse team. The information available to the court about the nature and extent of that work was limited.

[4] The Parole Board for Scotland met on 9 December 2020 to consider whether to recommend the petitioner's release. At that meeting, it was noted that "[programmes]

remain an outstanding need for [the petitioner]. He has completed no risk reduction programmes in custody so far.” At that meeting, it was also noted that COVID-19 had had an impact on the provision of programme work both within prison and in the community. The Parole Board for Scotland did not recommend release. One of the reasons, but not the only reason, was “lack of offence-focused work”.

[5] On 13 August 2021, the petitioner was released on licence from the English prison in which he was then in custody. That was his earliest date of liberation. In advance of that date, the Parole Board for Scotland made recommendations in relation to licence conditions. Whilst he was on licence, the petitioner participated in the Caledonian Programme, a domestic violence rehabilitation programme.

[6] In July and August 2022, the petitioner was in contact via text messages and telephone calls with a vulnerable young woman, and he met up with her. In doing so, and in not disclosing this contact or relationship to his supervising officer, the petitioner was in breach of his licence conditions. When the Parole Board for Scotland considered this breach at a meeting on 31 August 2022, they recommended revocation of the petitioner’s licence and his immediate return to custody. He returned to custody on 1 September 2022.

[7] On 23 June 2023, the petitioner was recommended for the Self Change Programme (“SCP”), run by the respondents, and he was placed on the waiting list.

[8] Angela Holmes, head of psychological services within the Scottish Prison Service, provided affidavit evidence, which sets out an overview of the provision currently made by the respondents and the ways in which it may change in the future. At a point when the petitioner was in custody in England, the MFMC programme was discontinued. It was replaced by two programmes. The first is Moving Forward to Change, a medium intensity programme for those assessed as having medium risks and criminogenic needs. The second

is the SCP, a high intensity programme for those assessed as having high risks and criminogenic needs. When these replacement programmes were brought in, the MFMC waiting list was collapsed. The Scottish Prison Service does not keep records of historical waiting list data and it is not possible to say where the petitioner was on the MFMC waiting list at the point of his transfer to HM Prison Service in England.

[9] There was a delay of almost 10 months between the petitioner being recalled to custody and being placed on the SCP waiting list. Ms Holmes explains that, in general, delays such as these are not unusual, due to resourcing and availability to do programme assessments. In addition, following recall, the respondents await the outcome of the first review by the Parole Board for Scotland before a prisoner is considered for rehabilitative courses.

[10] As at 20 February 2025, the petitioner was 105 on the SCP waiting list. As at 23 May 2025, he was 100 on that list.

[11] In her affidavit dated 27 February 2025, Ms Holmes provided information about the current arrangements for the SCP and the plans to expand capacity. That may be summarised as follows. The programme length for the SCP is between 6 and 9 months. Between 15 and 20 people complete the course annually. The waiting list is dynamic. Increasing numbers of people are subject to orders for lifelong restriction with short custodial periods and they tend to go straight to the top of the waiting list.

[12] Ms Holmes explained that the respondents are actively working to address the problem with delay in accessing the SCP and that programme delivery is now particularly focused on that. It is intended that the existing provision of the SCP in two prisons at present will be expanded by the end of 2025. The SCP is being rolled out in another prison and possibly two further prisons in 2025, and potentially two further prisons in 2026, although

that is dependent on resource arrangements. In total, the aim is to double the capacity to deliver the SCP for offence protection prisoners (such as the petitioner) by the end of 2025. The expansion in SCP delivery capacity will not change the completion figures this year. It will take 6 to 9 months for the changes to filter through. It should make an immediate difference to commencement figures, as soon as there is new provision of the SCP at the end of 2025.

[13] Other factors affect the numbers who complete the SCP and the waiting list. Some prisoners may choose not to transfer to the establishment offering the programme. Quite often, prisoners who are convicted of sexual offences do not wish to take responsibility for their offending and are unable to progress on the programme. Prisoners do not start on the SCP if their sentence end or liberation date comes up within 4 months of the start date. Only those who have at least 12 months of their sentences left are on the waiting list.

[14] Ms Holmes estimated that it might take up to 4 years for the petitioner to reach the top of the waiting list, if everything stayed the same, but also said that it would not stay the same.

[15] The Parole Board for Scotland considered the petitioner's case at a meeting on 4 March 2025, having already heard evidence on 6 February 2025 from a number of social workers and a psychologist. Among other representations, the petitioner asked the Parole Board to take into account the terms of Angela Holmes' affidavit prepared for the present proceedings. The Parole Board for Scotland gave detailed consideration to the full range of matters relevant to the question of release, including the circumstances of the petitioner's breach of licence conditions. In relation to the significance of programme work, the Parole Board for Scotland minute records:

“[The petitioner’s] propensity to offend against intimate partners has not been addressed by any programme work. Although the evidence discloses that there is a high prospect that such work may not be provided during the remainder of his sentence, the panel considers that, without such work, the risk posed by [the petitioner] is unlikely to be reduced to an acceptable level. The panel considers that programme work is essential to the reduction of [the petitioner’s] risk to the public.”

[16] That rehabilitative programme work, such as the SCP, is necessary for parole in the petitioner’s case is not disputed. The extension period of the petitioner’s sentence will expire on 13 August 2027. On the basis of the explanation provided by Ms Holmes, the petitioner would “drop off” the waiting list in August 2026.

Legal principles

[17] There was no substantial disagreement between the parties in relation to the applicable legal principles. These may be summarised very briefly.

[18] Article 5(1) of the European Convention on Human Rights provides, so far as relevant:

“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; [...].”

[19] In order to avoid arbitrariness, during any period of detention which is to be justified solely by reference to public protection, a real opportunity for rehabilitation is necessary:

James v United Kingdom (2013) 56 EHRR 12 at paragraph 209. That principle applies not just where a person is serving an indeterminate sentence, as in *James*, but also where a person is detained during the extension period of an extended sentence: *Brown v Parole Board for Scotland* 2018 SC (UKSC) 49 at [58] to [62].

[20] The threshold for establishing a violation of Article 5(1) on the basis of a failure to provide a real opportunity for rehabilitation is a high one and such cases will be rare: *Brown* at [45].

[21] In assessing whether reasonable rehabilitative opportunities have been afforded and whether a person's detention during the extension period is unjustified for the purposes of Article 5(1), regard must be had to the detention as a whole: *Kaiyam v United Kingdom* (2016) 62 EHRR SE 13 at [69].

Submissions for the petitioner

[22] The petitioner's position is that there has been an obligation under Article 5(1) of the European Convention on Human Rights to provide him with rehabilitative programme work since 14 August 2024, the day after the expiry of the custodial part of his sentence. As at the date of the hearing, which the petitioner accepts is the correct date for the purposes of assessing whether the obligation has been breached, the period for which he has not had the opportunity to undertake relevant work is approximately 9 months. The petitioner contends, in short, that that is too long to wait and that that delay gives rise to a breach of his Article 5(1) rights.

[23] In relation to the explanation provided in Ms Holmes' affidavit about the respondents' efforts to improve the situation, counsel for the petitioner suggested that there was no realistic chance of him getting to the top of the waiting list for appropriate programme opportunities. He did not argue that that anticipated future failure was relevant for the purposes of assessing whether there was a breach as at the date of the hearing.

[24] It was submitted that the petitioner should not be criticised for being too quick to seek judicial review, drawing attention to the 3-month time limit in terms of section 27A of

the Court of Session Act 1988. Counsel described this as presenting the petitioner with a real practical problem.

[25] That the petitioner had spent time in prison in England was a matter of historical fact and was irrelevant. The behaviour resulting in the breach of licence conditions, and the subsequent recall to custody, were also irrelevant. The Article 5(1) obligation only arose at the point that the petitioner began the extension period of his sentence. However, having been put on the SCP waiting list on 23 June 2023, by the time the extension period began, the petitioner had already spent too long on that list and so, the petitioner argued, the respondents were in breach of their obligations on the first day of his extension period.

[26] Counsel for the petitioner invited the court to consider cases which he said were comparable in some respects and would support the finding of a breach of the respondents' Article 5(1) obligations, drawing attention in particular to *BS v Scottish Ministers* [2024] CSOH 47 and to the circumstances of the three individuals considered by the European Court of Human Rights in *James*. However, he also recognised that the analysis would be case-specific and candidly accepted that he could not point to a case which would expressly support the contention that the period presently under consideration is too long.

Submissions for the respondents

[27] The petitioner's detention is not arbitrary, having regard to the rehabilitative opportunities which have been made available and to the petitioner's particular circumstances. These opportunities include work undertaken whilst in the custody of HM Prison Service in England.

[28] The respondents also contend that the court is entitled to have regard to the petitioner's own conduct when determining whether the respondents have offered

reasonable opportunities for rehabilitation. Two matters were mentioned. The first was the decision made by the petitioner to transfer to HM Prison Service in England. It was submitted this had had an inevitable effect on the ability of the respondents to offer rehabilitative programme work. The whole period of custody should be considered and it was relevant that, at an earlier stage, there was a period for which the respondents were not responsible for the provision of courses to the petitioner.

[29] The second matter was the petitioner's misconduct. The respondents rely on the behaviour which gave rise to the breach of the petitioner's licence conditions and his subsequent recall to custody. That brought to an end his ability to engage in rehabilitative work in the community. Further, it was said, although this was characterised as a modest submission, that the conduct entailing the failure to comply with the licence conditions has a bearing on whether the petitioner's detention is arbitrary for the purposes of Article 5(1).

[30] Counsel for the respondents invited the court to consider the efforts which were now being made to improve the availability of rehabilitative programme work for prisoners such as the petitioner and, with reference to the affidavit of Ms Holmes, sought to provide an assurance that issues were being addressed at a systemic level. In light of the information provided about the changes being made, it would not be safe to conclude that no provision would be made for the petitioner within the relevant timescale. There was a recognition that in determining this case, the court must consider the petitioner's individual circumstances, and that he has unmet needs.

[31] Referring to *BS*, it was noted that the delay discussed in that case, which involved a prisoner subject to an order for lifelong restriction, was 20 months beyond the punishment part of the sentence and submitted that, by comparison, the delay experienced by the petitioner is short. Counsel also sought to draw a distinction between the circumstances

in *BS*, where the petitioner had had an unbroken period in custody, and the present case, where there had been breaks in the process, affecting the delivery of programme work.

Analysis and decision

[32] The essential legal principles are relatively clear. In applying them in the present case, it is necessary to address questions relating to (i) the relevance of the time spent by the petitioner in custody in England; and (ii) the relevance of the petitioner's conduct leading to his recall to custody.

Custody in England

[33] The petitioner spent approximately 3 years and 4 months in the custody of HM Prison Service. Some opportunities were made available to him in terms of programme work but, as a result of his transfer to England, he was removed from the respondents' waiting list for MFMC. It was not possible to say whether, had he stayed in Scotland, the petitioner would have been admitted to the MFMC programme; there is no record of historical waiting list data. Neither party suggested that the removal of the petitioner from the MFMC waiting list and the subsequent termination of that programme made a practical difference to the petitioner's present position in relation to him waiting for the SCP.

[34] There is only very limited factual information available to the court about any arrangements, in general terms, that may be made between the Scottish Prison Service and HM Prison Service in relation to the rehabilitation needs of prisoners who are transferred. The minutes recording the decisions of the Parole Board for Scotland show that consideration was given to the petitioner's conduct and progress whilst in custody in England. For example, the minute of the hearing held on 9 December 2020 shows that the

Parole Board for Scotland heard directly, and in some detail, from the offender manager at an English prison who was the petitioner's main point of contact whilst he was in custody in that prison. That record indicates that the petitioner's progress was quite limited, although that was to some extent attributable to COVID-19.

[35] If it were the case that, as a direct result of transferring to England and then returning to Scotland, a prisoner experienced a substantial delay in gaining access to rehabilitative programme work, in contrast to prisoners who had not transferred, that may be a relevant consideration, but the information provided to the court in this case does not suggest that that is an issue for the petitioner. There have been delays, but it is not possible to conclude that these are attributable to the time spent in custody in England. Indeed, the affidavit evidence relating to the collapsed MFMC waiting list and the information about the placing of the petitioner on the SCP waiting list in June 2023, after recall to custody, suggest that the effect of spending time in custody in England was neutral for the petitioner, certainly so far as his present position on the SCP waiting list is concerned.

[36] In looking at the overall period of the sentence, the fact that he was placed on the MFMC waiting list is in principle relevant, the MFMC being an aspect of the respondents' provision, but it has no practical significance, because it was never actually provided. For the period of his custody in England, the respondents could not have placed the petitioner on the MFMC course. During that period, some other courses were provided. These are referred to in paragraph 3. They were not offence-specific.

Conduct leading to recall

[37] The conduct, or misconduct, of a person seeking access to rehabilitative opportunities may be relevant to the assessment of arbitrariness. The petitioner's

circumstances may be contrasted with those of a prisoner whose misbehaviour whilst in custody means that access to rehabilitative programme work is restricted. The appellant in *Brown* was in that category. He served the whole of his sentence as a result of his own misconduct rather than a failure of the prison authorities: *Brown* at [85]. No such obstacle exists for the petitioner in this case.

[38] The respondents draw attention to conduct matters of a different kind and specifically the circumstances leading to the petitioner's recall to custody, arguing that his earlier release itself represented a significant rehabilitative opportunity. The nature of the breach, the respondents contend, inevitably has a bearing on whether his detention is arbitrary. It will have such a bearing, insofar as it helps to show the level of risk that he presents. The Parole Board for Scotland have determined that the petitioner's continued detention is necessary. If anything, the nature of the conduct leading to recall underscores the need for rehabilitative work. Had the petitioner not breached his licence conditions in July and August 2022, or subsequently, he would not now be in custody. The respondents are subject to an obligation in respect of the petitioner, as a person serving an extended sentence, and the strength of that obligation is not diluted by the circumstances of his recall to custody.

[39] However, it is a relevant consideration, when looking at the whole of the petitioner's circumstances, that he was afforded opportunities for reintegration into society when on licence. That is relevant to the overall assessment, across the whole of the sentence, of the opportunity that the petitioner has had to make progress. Being released on licence was an important step forwards. Acting in breach of licence conditions was a serious step backwards. When assessing arbitrariness, it is legitimate to take into account that opportunity and the petitioner's response to it.

Is the petitioner's continuing detention arbitrary?

[40] Ultimately, the question comes to be whether a delay of 9 months is too long, taking account of the petitioner's particular circumstances. Cases in which the courts generally have found a failure to comply with the requirements of Article 5(1) on account of a delay in access to rehabilitative courses will be rare. The Supreme Court has emphasised the high threshold which has to be surmounted in order to establish a violation of the Article 5(1) obligation: *Brown* at [45].

[41] The respondents are responsible for resource allocation, the management of waiting lists, the prioritisation of prisoners by category or otherwise and the duration and content of courses. Those in custody have complex and changing needs and the respondents must manage public funds efficiently. It is not realistic to expect immediate provision: *James* at paragraph 194. The affidavit evidence of Ms Holmes acknowledges frankly the scale of the respondents' task and provides some explanation of what is being done to improve provision. That is expressed at a level of general policy. It is impossible to say what direct consequences it will have for the petitioner's specific circumstances. That is a question for the future and the assessment of whether there is a breach relates to the present. The petitioner does not yet have access to the SCP and he is on the waiting list at present.

[42] The petitioner has been provided with some rehabilitative opportunities. It is not possible to draw any conclusions about the rehabilitative value of the work carried out in England. The Parole Board for Scotland were aware of it, but, for their purposes, the focus in terms of risk management is on offence-specific work.

[43] Prior to the transfer to England, the petitioner was on the respondents' MFMC waiting list. That would be relevant in the overall assessment, but, after his transfer, the

respondents could not provide it, and it is not possible to say whether it would have been delivered if the petitioner had stayed in Scotland. Given those qualifications, however, no real weight can be placed on the hypothetical provision of the MFMC course.

[44] The petitioner was released on licence. That, in itself, offered a rehabilitative opportunity, as well as scope to undertake rehabilitative work in the community, including participation in the Caledonian Programme. At their hearing on 6 February 2025, the Parole Board for Scotland noted the potential benefits of the petitioner participating in the Caledonian Programme in the future, which indicates that past participation is of some relevance in the overall assessment. The petitioner failed to make the best of that opportunity, breaching his licence conditions and being returned to custody. When looking at the entirety of the sentence and the overall provision made for the petitioner, that is a relevant consideration. However, it is not the same thing as provision of offence-specific work and so it only weighs in the balance to a limited extent.

[45] Taken together, the provision made to the petitioner whilst in custody of useful rehabilitative opportunities is fairly slight, and in that sense he is in a comparable position to the petitioner in *BS*, who had not had any offence-focused rehabilitative courses made available to him. A distinguishing feature is the fact of the petitioner's release on licence and his taking the opportunity to participate in the Caledonian Programme. Those opportunities were given to him and were curtailed as a result of the petitioner's own conduct. However, the rehabilitative opportunities over the duration of the sentence, in custody and on licence, have not been substantial and it remains the case that no offence-focused work has been offered.

[46] The main issue is the length of delay. The petitioner in *BS* was a prisoner subject to an order for lifelong restriction in whose case the delay ran to 20 months. By contrast,

the period of 9 months from the start of the extension period of the petitioner's sentence, is short, although that is not to diminish the importance of this matter to the petitioner.

[47] The existence of procedural time constraints in terms of section 27A of the Court of Session Act 1988 does not reduce the threshold for arbitrariness.

[48] Having regard in particular to the duration of the delay, and also taking into account the availability, albeit limited, to the petitioner of other opportunities over the whole period of his sentence, the high threshold for a violation of Article 5(1) is not met. This is not an exceptional case. There is no right to immediate provision of rehabilitative opportunities. This is not a case in which absolutely nothing has been done. That is not to say that the petitioner's circumstances are satisfactory. The respondents recognise that it is unfortunate that the petitioner is in his present position. Delays have occurred as a result of capacity problems and the respondents have explained that necessary remedial actions are being put in place. However, that does not mean that the point at which detention becomes arbitrary has been reached. That will occur only in exceptional cases and this is not such a case.

Order

[49] I uphold the respondents' second plea-in-law, repel the petitioner's pleas-in-law and dismiss the petition.