



EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2026] CSIH 2  
P20/25

Lord Malcolm  
Lord Doherty  
Lord Armstrong

OPINION OF THE COURT

delivered by LORD MALCOLM

in the reclaiming motion

in the cause

CRAIG McINALLY

Petitioner and Reclaimer

against

THE SCOTTISH MINISTERS

Respondents

**Petitioner and Reclaimer: Lord Stewart of Dirleton, K.C.; S. McPhee; Drummond Miller LLP**  
**Respondents: Non-participating party**

13 January 2026

[1] In November 2021 the petitioner pled guilty to culpable and reckless conduct to the danger of life. In December 2022 a judge imposed an order for lifelong restriction with a punishment part of 2 years 3 months backdated to the petitioner's remand in December 2019. He remains in prison and in March 2026 will be 4 years post-tariff.

[2] In early 2025 the petitioner brought proceedings for judicial review, primarily to obtain an order declaring that because he had not been offered access to rehabilitative

programmes and opportunities, his rights under Article 5 of ECHR had been breached. In February 2022 the petitioner was assessed as needing to undertake the Self Change Programme. It is averred that unless and until he undertakes offence-focussed work from which he can demonstrate a meaningful reduction in risk, there is no realistic prospect of the parole board sanctioning his release. In October 2024 a panel of the board described the petitioner's case as "stagnating". The petition made reference to *James v United Kingdom* (2013) 56 EHRR 12 and *Brown v Parole Board for Scotland* [2017] UKSC 69, 2018 SC (UKSC) 49.

[3] The Lord Ordinary fixed an oral hearing for 26 March 2025 to address whether he should grant permission for the petition to proceed. The Scottish Ministers (the respondents) indicated that they would not be present but would contest the petition should permission be granted. At the hearing senior counsel stated that on 26 February the petitioner was removed from the waiting list for the said programme in anticipation of a bespoke intervention designed to address his particular needs and circumstances. It was acknowledged that the petitioner may have had grounds for bringing the petition as long ago as December 2022. The petitioner had for some time accepted that limited resources created uncertainty as to when he would obtain a place on the course, but the continuing failure had become intolerable and was causing him great anxiety. He was no longer prepared to just wait.

[4] The judge held that the petition failed at the first hurdle, namely the need to raise proceedings within 3 months of when the grounds for the application first arose, as per section 27A(1)(a) of the Court of Session Act 1988. The petition was lodged in January 2025 more than 2 years after the earliest date when it could have been brought. The argument that there was a continuing breach failed to have regard to the decision in *Lauchlan and O'Neill v Scottish Ministers* [2021] CSIH 66, 2022 SC 125. The reasons for the lengthy delay

were unconvincing. The dynamic nature of the waiting list was well known, especially to a petitioner with the benefit of an agent specialising in prison law and practice. It had always been apparent that a bespoke intervention might be required. No issue of public importance arose. From the papers the judge took the view that the prospects of ultimate success were poor. It appeared that the bespoke intervention should commence “in short order”. The judge declined to exercise his discretion to extend the time bar under section 27A(1)(b). He issued an interlocutor refusing permission to proceed.

[5] The petitioner reclaimed (appealed) that decision. While this was sisted for legal aid, he raised another petition focussed on the decision to remove him from the waiting list and the subsequent failure to provide the promised bespoke intervention. Permission was granted in that matter and a substantive hearing was heard by a different judge just two days before the hearing in this reclaiming motion. Judgment is awaited.

[6] Counsel recognised that the second proceedings raise a question as to the purpose of insisting in the current petition. The court takes the view that these proceedings have been superseded by the more up to date petition. The question of whether the petition should be allowed to proceed is now academic.

[7] Nonetheless we recognise that the reclaiming motion raises a question of general importance, namely the proper approach to the time bar provisions in section 27A(1) in cases of this kind. We feel constrained in our remarks by the absence of a contradictor, but will say that we are not persuaded that the decision in *Lauchlan* is directly applicable to the different circumstances here. That case involved a specific and easily identifiable decision not to allow telephone contact between two prisoners, whereas in essence this petition complains that each day the prison service is breaching the petitioner’s Article 5 rights by failing to comply with the state’s duty to provide reasonable access to rehabilitative

opportunities. In cases of this nature there can be no prospective certainty as to when the state has delayed for too long. The judge's approach risks prompting repeated petitions in an attempt to avoid the three months window being missed.

[8] We also see force in the submission that the petitioner's patience should not be punished. Had the petition not been superseded by the events already described, we would have concluded that it was equitable to extend the time bar. The factors favouring such a course would have included the gravity of the interests at stake, the important public interest involved, and the existence of a real prospect of success. However, given that this petition no longer serves any practical purpose, we shall refuse the reclaiming motion on the basis that it is academic.