OUTER HOUSE, COURT OF SESSION

[2020] CSOH 104

P107/20

OPINION OF LORD WEIR

In the petition

YE HAO YAN or LI BIN YAN

Petitioner

against

THE SCOTTISH MINISTERS

Respondents

Petitioner: Crabb; Drummond Miller LLP
Respondents: Byrne; Scottish Government Legal Directorate

18 December 2020

Introduction

[1] The petitioner is a serving long-term prisoner detained within Her Majesty's Prison, Shotts. The respondents are the Scottish Ministers, who act in part through its executive agency the Scottish Prison Service. It is not disputed that, through the Scottish Prison Service, the respondents are responsible for the detention of the petitioner and the actions which the petitioner seeks to bring under review.

[2] By this petition the petitioner challenges a decision of the Risk Management Team, operating in Shotts Prison, dated 6 November 2019, to refuse his application to progress to less secure conditions, with a view to temporary release into the community ("the

Decision"). The petitioner seeks declarator that the Decision is unlawful, reduction of the Decision, and an order for reconsideration of his application for progression. He also seeks declarator that the provisions of the Prisons and Young Offenders Institutions (Scotland) Rules 2011 and the Risk Management, Progression and Temporary Release Guidance, published by the Scottish Prison Service in August 2018, so far as relevant to his application for progression, are unlawful, together with reduction. Finally, the petitioner seeks an award of damages, in the sum of £1,000, as just satisfaction for the breach of his Convention rights.

The legal framework

[3] Section 1(2A) and (3) of the Prisoners and Criminal Proceedings (Scotland) Act 1993 ("the 1993 Act") governs the duty to release a long-term prisoner. A long-term prisoner is a prisoner who has to serve a sentence of four years or more in prison. Section 1(2A) of the 1993 Act provides that as soon as a long-term prisoner, serving a sentence imposed after 1 February 2016, has only six months of the sentence left to serve, he or she must be released on licence by the respondents unless the prisoner has already been released under another provision.

[4] Section 1(3) of the 1993 Act provides for the release of a long-term prisoner who has served one half of his sentence, on the recommendation of the Parole Board for Scotland. At the time when the Decision was taken, section 1(3)(b) of the 1993 Act conferred on the respondents a discretion as to whether to follow a Parole Board recommendation in favour of releasing such a prisoner, if subject to removal from the United Kingdom, on licence.

[5] Rule 134 of the Prisons and Young Offenders Institutions (Scotland) Rules 2011 ("the 2011 Rules") provides *inter alia* that:

"**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.

(2) In this Part "*eligible prisoner*" means a prisoner who–

(a) is assigned low supervision level; and

(b) is not disqualified from obtaining temporary release for any reason specified in [paragraph (3), (4) or (6)].

[…]

(6) A prisoner is disqualified from obtaining temporary release if the prisoner is subject to a deportation order unless the prisoner has been granted temporary release in the three months prior to the deportation order being made.

(7) For the purposes of paragraph (6), a prisoner is subject to a deportation order where–

(a) a deportation order has been made against the prisoner under section 5(1) of the Immigration Act 1971; and,

(b) that order remains in force."

[6] Rule 136 of the 2011 Rules provides *inter alia* that:

"**136. Forms of temporary release**

For the purposes of the Part–

"*home leave*" means the unescorted temporary release from prison of an eligible prisoner for the purpose of enabling the prisoner to visit his or her home or other approved place for a period not exceeding 7 nights excluding travelling time;

"*unescorted day release*" means the unescorted temporary release from prison of an eligible prisoner for a period not exceeding one day, including travelling time, for the purposes of enabling the prisoner, in preparation for eventual release–

(a) to develop further, or to re-establish, links with his or her family or community, or
(b) to develop education or employment opportunities;

"unescorted day release for compassionate reasons" means the unescorted temporary release from prison of an eligible prisoner for a period not exceeding one day, excluding travelling time, for the purposes of enabling the prisoner —

(a) to visit any relative who it appears to the Governor is dangerously ill;
(b) to attend the funeral of a near relative;
(c) to visit a parent who is either too old or too ill to travel to the prison;
(d) to visit the prisoner's spouse, civil partner or co-habiting partner who, for whatever reason, is unable to travel to the prison;
(e) to visit a child for whom they have parental responsibility and who, for whatever reason, is unable to travel to the prison; or
(f) to attend at any place for any other reason where the Governor is of the opinion that the circumstances warrant it;

"temporary release for work" means the unescorted temporary release from prison of an eligible prisoner for a period not exceeding one day, excluding travelling time, for the purposes of enabling the prisoner —

(a) to undertake a work placement outside prison in terms of rule 84; or
(b) to attend a college, university or other educational establishment in order to participate in vocational training or an educational class;

[…]"

The Progression Guidance

[7] In pursuance of the aim of the Scottish Prison Service ("SPS") to prepare people in custody for eventual release and return to communities as contributing citizens, the Risk Management, Progression and Temporary Release Guidance, published by SPS in August 2018 ("the Progression Guidance"), provides guidance to Risk Management Teams on the progression of offenders to less secure conditions and community access. The Risk Management Team ("RMT") is the decision making body which considers offenders for progression to such conditions/access.

[8] Section 8.6 of the Progression Guidance, under the heading of "Purpose of temporary release", provides:

"The principal purposes of temporary release may be grouped under three main headings:

- To assist in the offender's preparation for release;
- To develop or re-establish contact with family members; and

- To monitor the offender's response to community access."

[9] Section 12.1 of the Progression Guidance provides *inter alia* that:

> "It will be for the RMT to assess whether the offender is suitable for progression and/or community access (having met the standard criteria), taking into consideration: the risk they present; whether that risk can be safely managed in the community and will depend on work placement availability of such opportunities in each establishment.
>
> An offender may be eligible for consideration for progression if they satisfy the following standard criteria:
>
> - offender wishes to be considered for a transfer to less secure conditions and/or unsupervised access to the community;
> - offender has been assigned low supervision status;
> - offender is free of misconduct reports, which resulted in an award greater than a caution, within the preceding 3 months;
> - **offender is not subject to a deportation order or if they are subject to a deportation order have already been granted temporary release within the last 3 months under Rule 134;** [my emphasis]
> - offender has no outstanding criminal charges;
> - offender has had no positive, and at least one negative, drug tests within the last 3 months;
> - offender has served the appropriate period of their sentence in closed conditions as per the Progression Pathway; and
> - [Long Term Prisoners] being considered for unescorted community access are located within less secure conditions."

Background

[10] On 28 September 2008 the petitioner was sentenced to 8 years' imprisonment for various offences, including offences under the Misuse of Drugs Act 1971. On about 20 September 2012 he was served with a Deportation Order dated 22 August 2012 ("the Deportation Order"). The petitioner avers that he sought to appeal the Deportation Order. It is unclear from the petition and answers what happened to that appeal. However, I do not understand it to be disputed that the petitioner was in fact deported and that, in breach of the Deportation Order, he subsequently returned to the United Kingdom. Although not admitted in the pleadings, I also do not understand it to be disputed that the petitioner was

then arrested, bailed on condition that he surrender his passport, absconded to Spain, from whence he was returned upon his arrest to the United Kingdom to face trial for offences under the Misuse of Drugs Act 1971 and failing to appear in court.

[11] On 2 May 2017, following his conviction for those offences, the petitioner received a further custodial sentence of 5 years and 1 month. His parole qualifying date was 5 May 2019. His earliest date of liberation is 18 May 2021, and his sentence expiry date is 18 November 2021. It is averred that the petitioner has regular contact with his wife and family, who live in Scotland. The Deportation Order remains in force. The petitioner avers that he has not so far been successful in challenging it. Given the ambiguity of that averment the court inquired as to whether there were, or could be, any live process to challenge the Deportation Order. From information subsequently made available by parties it would appear that the time limit for any (further) appeal process has long since expired. It matters not. The submissions of both parties proceeded on the basis that the petitioner remains subject to the Deportation Order and would be in fact be deported following his release from prison.

[12] Following a refusal by the Parole Board on 23 July 2019 to release the petitioner on parole, the petitioner's solicitor corresponded with the SPS about the petitioner transferring to open prison conditions with a view to obtaining temporary release in the community (no 6/3 of process). On 19 August 2019 the SPS replied (i) that it did not support the petitioner's progression to the open prison estate and did not consider that his risk was manageable in the community, and (ii) that the Home Office was still considering deportation, which would form part of the risk assessment when considering the petitioner for progression. On 26 August 2019 the RMT conducted an assessment of the petitioner's request to transfer to less secure conditions, with a review on 1 November 2019 (no 6/4 of

process, Annex A, pp5-12). The assessment placed weight on the Deportation Order. It identified five factors relating to the petitioner's circumstances, derived from communications from the UK Border Agency, which it considered increased the petitioner's risk of absconding to such a degree that he could only safely be managed in custody (no 6/4 of process, Annex A, pp11). The Decision of the RMT was to refuse the petitioner's application to progress and to be transferred to less secure conditions (Annex A, pp17). It concluded that the petitioner was such a flight risk that it was not in the public interest that he be afforded the opportunity to progress to less secure conditions. It specifically referenced the fact that the petitioner had had to be extradited (from Spain) to answer the charges which resulted in his present sentence, having previously absconded abroad while on bail, that he had an outstanding confiscation order in the sum of about £125,000, and that he was again subject to consideration for deportation at the termination of his sentence.

[13] Finally, on 22 July 2020 the Parole Board again refused the petitioner parole, stating that the petitioner required "to demonstrate compliance through a period of testing particularly given his history of offending and non-compliance, as well as his assessed continued flight risk if in the community".

Submissions for the petitioner

[14] For the petitioner it was firstly submitted that the RMT had acted unlawfully by refusing his application for progression and excluding temporary release. Its decision rested on the application of the 2011 Rules and the Progression Guidance. The effect of Rule 134(6) and (7) of the 2011 Rules was to exclude the petitioner from obtaining temporary release on the basis of there being a live deportation against him. Similarly, the Progression Guidance, at sections 12.1 and 14.4, had the same effect since the standard criteria for progression

prohibited the petitioner from progressing. Both progression to less secure conditions and temporary release engaged the petitioner's rights under Article 5 (deprivation of liberty) and Article 8 (respect for family and private life) of the ECHR. Any interference in those rights, to be lawful, had to be proportionate. A blanket approach, covering all those subject to a deportation order, did not permit any assessment of the proportionality of the interference (*P* v *Scottish Ministers* [2017] CSOH 33, paragraph 47). It was arbitrary and unlawful (*R (on the application of P)* v *Secretary of State for the Home Department* [2017] 2 Cr App R 12, paragraph 43).

[15] Secondly, the petitioner submitted that the decision to refuse to advance the petitioner's application for progression was vitiated by unlawful discrimination pursuant to Article 14 of ECHR. Other prisoners were entitled to be transferred or released temporarily on the basis of an individualised assessment of their case rather than a blanket policy. That amounted to a difference in treatment which it was for the respondents to justify under reference to the requirements of Article 14 of ECHR. Progression and temporary release fell within the ambit of the petitioner's Article 5 and 8 rights. The difference of treatment was on the ground of one of the listed characteristics in Article 14, namely nationality, since it was by virtue of his nationality that the petitioner was liable for deportation. Alternatively, the petitioner's liability for deportation amounted to an "other status" for the purposes of Article 14, from which significant legal consequences flowed (*R (on the application of Akbar)* v *Secretary of State for Justice* [2019] EWHC 3123 (admin), paragraphs [89] and [90]). Gradual reintroduction into the community served the same purpose for all prisoners, regardless of whether the petitioner was to remain in the United Kingdom or be removed elsewhere. There was no objective justification for the petitioner's different treatment. It did not seek a legitimate aim and was not proportionate. The existence of a deportation order, and the

risks posed, could be considered on a case by case basis. In the petitioner's case that could also include consideration of the benefits he might obtain through opportunities for continued rehabilitation, employment and family life. Such benefits were relevant to reducing any future risk both in the United Kingdom and abroad.

[16] Finally, the petitioner submitted that an award of damages, in the sum of £1,000, was necessary to award him just satisfaction for the distress caused by the restrictions placed on him, and which have prevented him being in conditions of greater freedom in order better to prepare for life outside prison (Human Rights Act 1998, section 8(1) and (3)).

Submissions for the respondents

[17] For the respondents it was submitted that the petitioner's characterisation of the Decision as reflecting a blanket application of Rule 134 of the 2011 Rules and the standard criteria in section 12 of the Progression Guidance was misconceived. It was clear from the terms of the Decision that the RMT had properly addressed itself to the particular circumstances of the petitioner and the evident flight risk which he posed. In those circumstances the Decision was only capable of being impugned on rationality grounds. The Decision was not irrational. It was well within the range of decisions open to the RMT, which was the body charged with considering offenders for progression to less secure conditions and community access. The court should be slow to interfere with a conclusion reached within its particular or specialist field *R* (*on the application of Mabanaft Ltd)* v *Secretary of State for Energy and Climate Change* [2009] EWCA Civ 244, paragraph [48]; *M* v *Scottish Ministers* 2013 SLT 875, paragraph [105]; *Beggs* v *Scottish Ministers* 2018 SLT 199, paragraph [22]). The RMT was entitled to give weight to the Deportation Order, and the communications from the UK Border Agency, in so far as they demonstrated a significant

flight risk. What weight it attached to that material was entirely a matter for the RMT (*City of Edinburgh Council* v *Secretary of State for Scotland* [1997] 1 WLR 1447, p1450G/H). In summary, the RMT did not rely on Rules 134 and 136 of the 2011 Rules and the standard criteria in the Progression Guidance. Rather, it carried out a fact specific assessment of the risk posed by the petitioner of absconding, and concluded that there was such a risk which could not be managed. On that basis alone the petition should be refused.

[18] In any event there was no basis for holding that Rules 134 and 136 of the 2011 Rules, and the standard criteria in the Progression Guidance, were unlawful. The petitioner's reliance on *P* v *Scottish Ministers, supra*, was selective and did not vouch the proposition that they were. The PVG Scheme considered in that case did not bear comparison with the scheme under the 2011 Rules and Progression Guidance where persons liable to deportation were concerned. The petitioner was, in effect, advancing the same argument as had been rejected by the High Court in *R (on the application of Akbar)* v *Secretary of State for Justice, supra*. Consideration required to be given to the purpose which temporary release was intended to achieve. That was the attainment of certain outcomes focussed on living, and developing ties, within the community, in the United Kingdom, into which offenders would be released. That purpose was readily apparent not only from the terms of Rule 136 itself, but section 8 of the Progression Guidance. The respondents were entitled to have regard to the fact and implications of the Deportation Order. There would be no benefit in the integration of someone in the position of the petitioner into the community, or the fostering and rekindling of relations with friends and family in that community, from which he was to be deported. Temporary release would not relevantly assist a deportee in preparing for release or developing or re-establishing ties with family members (cf Progression Guidance, pp17-18), or allow monitoring of his response to community access, when the

deportee would not in fact access that community. In any event, the respondents were entitled, in their rules, to recognise that a person subject to a deportation order presented a greater flight risk, and would lack the same incentive to comply with progression and temporary release in circumstances where they knew they were to be deported.

[19] As to the petitioner's submissions on Article 14, Rule 134 of the 2011 Rules, and the standard criteria in section 12 of the Progression Guidance, did not discriminate unjustifiably. It was accepted that the petitioner's application for progression fell within the ambit of Articles 5 and 8 of the ECHR. It was wrong to characterise the petitioner's liability to deportation as arising from his nationality. It was, however, accepted that the petitioner's immigration status as a deportee conferred "other status" (cf *R (on the application of Akbar)* v *Secretary of State for Justice, supra*, paragraphs [89]-[90]). The question then for the court was whether the difference in treatment could withstand scrutiny (*R (on the application of Carson)* v *Secretary of State for Work and Pensions* [2006] 1 AC 173, paragraph [3]). Since the rules under scrutiny arose from matters of security and penal policy, any difference in treatment could only be impugned where it was manifestly without reasonable foundation (*Carmichael* v *Secretary of State for Work and Pensions* [2016] 1 WLR 4550, [1996] QB 517, paragraphs [28]-[38]), and the court should be slow to find such a policy unjustified (*R* v *Ministry of Defence, ex parte Smith*, [1996] QB 517, p556B/C; *R (RJM)* v *Secretary of State for Work and Pensions* [2009] AC 311, paragraphs [56]-[57]). In the instant case that test was clearly not met. A deportee who would not remain in the community to which he was being released was not in an analogous position to a person who would be expected to enter that community on conclusion of his sentence (*R (on the application of Mormoroc)* v *Ministry of Justice* [2017] EWCA civ 989; *The Queen (on the application of Antonio Serrano)* v *The Secretary of State for Justice* [2012] EWCA 3216 (admin); *Burden* v *United Kingdom* 13378/05 [2008] STC 1305). The

respondents concluded that it was neither useful nor desirable to introduce deportees to the United Kingdom community. Such a conclusion was reasonable. A difference in treatment was justified (*Stott* v *Secretary of State for Justice* [2020] AC 51; *R (on the application of Mormoroc)* v *Ministry of Justice, supra*, paragraph [63]).

[20] Finally, on the matter of damages, it was submitted that there were no relevant averments of sufficiently severe stress or anxiety such as would justify any pecuniary award. If there was any merit in the petitioner's position just satisfaction would be achieved by a finding to that effect.

Analysis and decision

[21] The petitioner contends that the respondents acted unlawfully in refusing him the opportunity for progression, thereby excluding the possibility of temporary release into the community. For that argument to prevail, it was accepted on behalf of the petitioner that the court would require to be satisfied that the decision was founded on the application of an unlawful "blanket policy", derived from Rules 134 and 136 of the 2011 Rules and the relevant provisions of the Progression Guidance, whose effect was to prohibit the progression of those liable to deportation within the prison setting, without consideration of the individual circumstances of the offender concerned. I will come on to consider the lawfulness of the 2011 Rules and Progression Guidance in due course. However, in my opinion, the contents of the document comprising the Decision (no 6/4 of process) demonstrate quite clearly that it was not reached by the RMT simply by application of a policy that the petitioner, as a person subject to a deportation order, was disqualified from obtaining temporary release. Rather, the RMT undertook what I conceive clearly to have

been an individualised assessment of the risk which the petitioner posed were he to be released into the community under the progression provisions.

[22] It is unnecessary to rehearse at length the material to which reference was made in the Decision. Suffice it to say that it recorded consideration having been given to a variety of sources of information detailing the petitioner's criminal justice and immigration history, parole recommendations, family circumstances, his conduct within the prison setting, and the risk management implications of the Deportation Order. The RMT then set out five discrete factors relating to the circumstances of the petitioner's arrival in the United Kingdom, absence of discretionary leave to remain, destabilising effects of deportation on family relationships, and a proceeds of crime background, from which it concluded that "[the petitioner] can only safely be managed from within a closed environment". The fact that it may not have required to undertake such a detailed assessment of the petitioner's circumstances does not detract from the fact that the RMT did so. In these circumstances I am unable to accept the petitioner's characterisation of the decision as one based only on the application of a policy designed to exclude persons subject to a deportation order from progression beyond closed conditions.

[23] During the petitioner's submissions the court posed the question whether, on the material before it, there was any basis for challenging the factual assessment of the RMT that the petitioner presented a flight risk. I understood counsel for the petitioner to accept that, absent the policy considerations underpinning his argument, there could be no real criticism of that assessment. That concession was significant (although, in my view, properly made). Since I do not consider that it was underpinned by the application of a particular (and unlawful) policy relating to deportees, any criticism of the Decision on grounds of rationality, although addressed in the respondents' submissions, falls away. However, had

it been necessary to do so, I would have found no basis for criticising the conclusion which the RMT reached. Given the petitioner's history of serious offending, the intelligence regarding the circumstances of his arrival in the United Kingdom, his return to the United Kingdom in breach of the Deportation Order, subsequent breach of bail by absconding to Spain, and failure to appear in court in answer to the charges which gave rise to his current sentence, there was ample justification for the view taken by the RMT that he was not suitable for progression to open conditions with a view to temporary release.

[24] In the final analysis, the petitioner's challenge to the Decision essentially rested on the proposition that the RMT should have undertaken a fact specific assessment of his suitability to progress to open conditions and temporary release. That counsel for the petitioner then felt unable to criticise the factual assessment actually undertaken by the RMT illustrates the circularity of the petitioner's argument, which I reject. That conclusion is sufficient to dispose of the petition.

[25] It is nonetheless appropriate that I express my opinion on the petitioner's challenge to the lawfulness of the relevant provisions of the 2011 Rules and Progression Guidance, and any alleged discrimination, arising from the treatment of offenders who are subject to deportation, in terms of Article 14 of the ECHR.

[26] It was submitted that the prohibition on the petitioner's progression comprised a bright line rule which was "insufficiently calibrated", and did not permit any assessment of the proportionality of the interference in his Article 8 right to a family and private life. Consequently the respondents acted unlawfully in refusing the petitioner's application for progression, and excluding temporary release. I am unable to accept that submission. I agree with the respondents' submission that it is important to recognise the statutory purpose which temporary release is intended to achieve. I have set out at length the

material provisions of Rule 136 of the 2011 Rules. The focus of the outcomes sought to be achieved is clearly on the development of ties, and achievement of stability, within the community into which the individual offender is to be released. Essentially the same argument as that advanced by the petitioner was presented, and rejected, by the High Court in *R (on the application of Akbar)* v *Secretary of State for Justice, supra*. Giving the judgment of the Divisional Court, Hickinbottom LJ said this:

> "118. [Counsel for the applicant] had a backstop point: even if it might be justified to treat ARE [Appeal Rights Exhausted] prisoners differently – perhaps by introducing a higher threshold before they could achieve a transfer to open conditions – the Secretary of State was not justified in depriving himself entirely of a residual power to consider such transfer, perhaps exceptionally, on a case-by-case basis. We do not agree….ARE prisoners are in a materially different position from national prisoners such that it is generally justified to treat them differently when affording access to open conditions. The material differences (including, primarily, that the policy aim is to secure removal from the UK rather than release and resettlement within the UK) apply as a matter of generality. There are unlikely to be highly fact-sensitive differences between many individual ARE prisoners which impact significantly on this material difference. In our view, the Secretary of State is therefore entitled to exclude them, as a class, from consideration for transfer to open conditions. There is no legal requirement to give individualised consideration to every single ARE prisoner with consequential resourcing requirements, and the raising of a (likely unrealistic) expectation of transfer to open conditions…"

[27] That decision proceeded on an analysis of Rule 7(1A) of the Prison Rules 1999 (SI 1999/728), which removed the power of the Secretary of State for Justice to transfer life prisoners to open conditions if they were subject to a deportation order in respect of which they had no extant right of appeal. But the same underlying policy considerations apply, in my view, to the instant case. The petitioner will be deported. There is no benefit to his integration into a community in which he will not reside on release, but from which he will be deported. As counsel for the respondents expressed it, temporary release will not relevantly assist a deportee in preparing for release, developing or re-establishing contact with family members, or monitoring his response to community access – those being

defined as the principal purposes of temporary release in section 8.6 of the Progression Guidance.

[28] For his submission that a blanket approach to deportees did not allow for an assessment of the proportionality of any interference with his rights under Article 8, the petitioner relied on the case of *P* v *Scottish Ministers*. That case was concerned with the PVG Scheme, operated under the Protection of Vulnerable Groups (Scotland) Act 2007, under which information about individuals who do, or wish to do, regulated work with children and protected adults is collated and disclosed. The court accepted a submission that the PVG Scheme, as it applied to the petitioner, was fundamentally deficient in respect that it automatically generated disclosure of a historic conviction without affording the petitioner any opportunity to challenge that disclosure on the basis that it would be disproportionate in the particular circumstances of his case. It held that the way in which the PVG Scheme operated in the petitioner's case was not "in accordance with the law" in terms of Article 8, and that disclosure of the historic conviction was disproportionate.

[29] In my opinion, the circumstances of *P* v *Scottish Ministers* are readily distinguishable. What appears to have been central to the court's decision was the fact that the underlying aim of the PVG Scheme was the protection of a vulnerable group within which the petitioner sought to be employed. The way it operated, however, meant that account could not be taken of the many cogent factors in favour of non-disclosure which were otherwise found to arise. Accordingly, no consideration was given as to whether the petitioner's conviction had any rational connection to the aim of protecting the vulnerable group concerned. In the present case the circumstances are quite different. As previously narrated, temporary release is concerned with the development of ties, and achievement of stability, within the community into which the individual offender is to be released. It is part of the process by

which SPS seeks to prepare people in custody for eventual release and return to their communities as contributing citizens. But the community into which the petitioner would theoretically be released temporarily, if eligible, is simply not the community where he will remain. He will be deported. There is no rational connection, if you will, between the outcome of any individualised assessment of the petitioner's personal circumstances and the objective which progression is intended to achieve, beyond the fact that he will be deported. I also accept that the respondents are reasonably entitled to reach the view that a person who is the subject of a deportation order presents a greater risk of absconding (a factor which, as it happens, featured in the RMT's assessment of the petitioner; see paragraph [21] above). I therefore conclude, at least on the material before me, that there is no basis for holding that the relevant provisions of the 2011 Rules and Progression Guidance, disqualifying deportees from eligibility for progression and/or temporary release, are not "in accordance with the law" in terms of Article 8, or disproportionate.

[30] I am also unpersuaded by the petitioner's submission that the Decision is vitiated by unlawful discrimination pursuant to Article 14 of the ECHR. There was no dispute between the parties that it is now well established that a complaint of discrimination under Article 14 requires four elements to be established, namely: (i) Does the subject matter of the complaint fall within the ambit of one of the substantive Convention rights? (ii) Is the difference in treatment on the ground of one of the listed characteristics in Article 14 or "other status"? (iii) Are the claimant and the person who has been treated differently in analogous situations? (iv) Is there objective justification for the different treatment? In the latter respect, different treatment will be objectively justified if it pursues a legitimate aim and the means employed bears a reasonable relationship of proportionality to the aims sought to be realised (*R (on the application of Akbar)* v *Secretary of State for Justice, supra.*, paragraph 53).

[31] In respect of the first element, the respondents accepted that the petitioner's application for progression falls within the ambit of Articles 5 and 8 of the ECHR. In addressing the second element, however, I do not accept the submission that the petitioner is only eligible for deportation on the basis of his nationality (that being a "status" for the purposes of Article 14). The difference in treatment between deportees and those who are not liable to be removed is neatly encapsulated in the judgment of Sir Anthony May P in *Brooke* v *Secretary of State for Justice* [2009] EWCA 1396, paragraph [30], and cited with approval in *R (on the application of Mormoroc)* v *Ministry of Justice, supra.*, at paragraph [32]. The difference in treatment, which the applicant in that case sought to bring under review, arose from a presumption under the relevant Prison Service Instruction that, having been sentenced to more than four years' imprisonment, he was unsuitable for release on a home detention curfew. He complained that foreign nationals also sentenced to more than four years' imprisonment, and who were liable to deportation, could be released 270 days before the expiry of their custodial term as part of a scheme intended to effect early removal. His Lordship said this:

> "30. The essential point, in my view, is that the position of, and statutory release arrangements for, prisoners who are liable to be removed from the United Kingdom are not analogous with those for prisoners who are not so liable to be removed. The different regimes are in place not because of differences in nationality, but because the first class of prisoner is liable to be removed and the second is not. The two situations are not comparable. Release on home detention is to be seen as a relaxation of a custodial sanction. Release for the purposes of removal is to enable a different sanction from imprisonment in this country to be brought into effect. Such prisoners are not released into the community."

[32] Although the circumstances are not identical to those which arise in this case, the underlying principle (which touches on the third element listed above) is, in my view, equally relevant. The petitioner's liability for deportation arises by reason of his having

committed very serious criminal offences in the United Kingdom of which eligibility for deportation was, and is, one of the consequences.

[33] I do, however, accept (as do the respondents) that the petitioner, as a deportee, qualifies for "other status" for the purposes of Article 14. Consideration, therefore, requires to be given to the third element, in respect of which I am unable to accept that the petitioner is in a position analogous to prisoners who are not otherwise subject to deportation. As the respondents submitted, a deportee who will not remain in the community into which he is released temporarily is not in an analogous position to someone who is expected to enter that community. It is only the latter who is likely to be someone whose resettlement into the community needs to be managed (cf. *R (on the application of Serrano)* v *Secretary of State for Justice and another* [2012] EWHC 3216 (Admin), paragraph [64]).

[34] Finally, I also agree with the respondents' submission that the different treatment of deportees is objectively justified. It was represented that, in the reasonable view of the respondents, it would be neither useful nor desirable for deportees to be introduced into the United Kingdom community in circumstances where they will be deported from it. I accept that such a view is underpinned by issues of policy in which the court should be slow to interfere, save at least in circumstances where the policy is manifestly without reasonable foundation (*Carmichael* v *Secretary of State for Work and Pensions*, *supra*, paragraphs [28]-[38]). I also hold that no acceptable basis has been put forward for holding that it is.

[35] The petitioner submitted that gradual reintroduction into the community serves the same purpose for all offenders, regardless of whether the petitioner was to remain in the United Kingdom or be removed elsewhere. It is not clear why that should be so. A process of resettlement will almost inevitably require, of those responsible for its management, a familiarity with the community to which the offender is ultimately to be deported. From the

respondents' perspective, that is bound to raise both practical and resourcing issues. In any event, as the court in *R (on the application of Akbar)* v *Secretary of State for Justice, supra* observed (at paragraph [116]), in determining when and how a real opportunity to rehabilitate is provided, the state has a wide margin of appreciation as to both the management of offenders and how a real opportunity to rehabilitate is provided. For those who are not going to be released into a United Kingdom community, but rather removed from prison and the United Kingdom, whilst open conditions and temporary release may have some benefits in terms of increasing the ability to enjoy family and private life, they will not give an offender an opportunity to build links, or develop education or employment opportunities, in the community in which he is likely to resettle (cf. Rule 136 of the 2011 Rules). It is entirely comprehensible that the relevant provisions of the 2011 Rules and also the Progression Guidance are directed towards the promotion of resettlement of offenders within a United Kingdom setting. To the extent that they give rise to a difference in treatment from foreign national offenders who are liable to deportation, that difference is, in my view, clearly justified (cf. *R (on the application of Mormoroc)* v *Ministry of Justice, supra*, paragraph [63]).

[36] Accordingly, I reject the petitioner's challenge to the lawfulness of the 2011 Rules and Progression Guidance.

[37] It follows that the issue of damages does not arise. Neither party developed their submissions on this aspect of the case to any significant extent. I will therefore confine myself to the observation that it was not immediately obvious (to me at least) why just satisfaction would not be achieved by a conclusion, favourable to the petitioner, on the lawfulness of the statutory regulations and guidance challenged.

Postscript

[38] Section 1(3) of the 1993 Act has been the subject of very recent amendment as a consequence of the coming into force, on 1 October 2020, of section 54 of the Management of Offenders (Scotland) Act 2019. The effect of the amendment is to remove from the respondents any discretion in relation to a Parole Board recommendation to release a long-term prisoner, who is subject to removal from the United Kingdom, on licence. Understandably, given the date of the Decision, the relevance (if any) of this amendment to the petitioner's circumstances did not feature in the parties' arguments. Since I have already held that the RMT undertook a fact specific assessment of the petitioner's circumstances, and reached a conclusion which I do not consider to be capable of criticism, it does not impact on the decision I have reached either. Accordingly, beyond observing that such a legislative change has been effected, it is unnecessary for me to express any view on whether there is the potential for tension between a policy which disqualifies long-term prisoners, who are subject to removal from the United Kingdom, from obtaining temporary release, and the removal of the respondents from the decision to release such a category of prisoner on licence under section 1(3) of the 1993 Act.

Conclusion

[39] In the foregoing circumstances I shall sustain the first four pleas-in-law for the respondents and refuse the petition. I shall reserve meantime all questions of expenses.