SECOND DIVISION, INNER HOUSE, COURT OF SESSION

[2021] CSIH 66
P152/19

Lord Justice Clerk
Lord Malcolm
Lord Tyre

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in the Petition

by

CHARLES O'NEILL AND WILLIAM LAUCHLAN

Petitioners

against

THE SCOTTISH MINISTERS

Respondents

Petitioners: Leighton: Drummond Miller LLP
Respondents: Reid: Scottish Government

15 December 2021

[1] In 2010, the petitioners were sentenced to life imprisonment for murder, with minimum terms of 30 years and 26 years respectively. They are also serving concurrent sentences for sexual offences perpetrated against children. They are imprisoned in separate locations. They maintain that at the time of the offences and conviction, they were in a relationship which has continued subsequent to their imprisonment. They seek judicial review of the respondents' decision to prohibit them from making inter-prison telephone

calls to each other, which is challenged as violating their rights under Article 8 ECHR. The scope of the reclaiming motion is limited to the Lord Ordinary's decision dated 3 March 2021 upholding the respondents' plea of time bar and dismissing the petition.

The rules on time limits

[2] Section 27A of the Court of Session Act 1988 stipulates:

> **"27A Time limits**
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> (1) An application to the supervisory jurisdiction of the Court must be made before the end of—
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> (a) the period of 3 months beginning with the date on which the grounds giving rise to the application first arise, or
> (b) such longer period as the Court considers equitable having regard to all the circumstances.
>
> (2) Subsection (1) does not apply to an application to the supervisory jurisdiction of the Court which, by virtue of any enactment, is to be made before the end of a period ending before the period of 3 months mentioned in that subsection (however that first-ending period may be expressed)".

Background

[3] In 2014 the petitioners sought to challenge an earlier decision by the respondents refusing them inter-prison visits, also on the basis that to do so was incompatible with their rights under Article 8 ECHR. That petition was refused. The court's decision (*O'Neill* v *Scottish Ministers (No.1)* 2015 SLT 811) provides an overview of the petitioners' offending and convictions. During the course of those earlier proceedings inter-prison telephone calls were initially permitted between the petitioners. The basis upon which such calls were permitted is in dispute. The respondents' position is that the calls were allowed to facilitate legal preparations in relation to the 2014 petition and, as a result of oversight the facility was not terminated at the conclusion of those proceedings. This is reflected in email

correspondence after it was realised that the calls were continuing despite conclusion of the earlier proceedings. On 17 August 2018 it was noted that the original reason for allowing calls was associated with the legal process, which had concluded and that the arrangement was to cease with immediate effect. The petitioners were advised of the decision the same day. The petitioners aver that calls were allowed because they were treated by the Scottish Prison Service as "near relatives". There seems to be no basis for this averment, other than that SPS has a policy of allowing calls between near relatives, in certain circumstances.

[4] The first petitioner complained to the Scottish Prison Service (SPS) on 11 September 2018, requesting reinstatement of the calls. A further complaint, to the internal complaints committee, was rejected in a decision of 27 September 2018, issued on 4 October 2018. On the same day, the second petitioner submitted a complaint requesting reinstatement of the calls on the basis that 'close family contact by telephone' was permitted under SPS policy, and that he and the first petitioner qualified therefor as long term partners. By decision issued on 26 October 2018, the complaint was rejected on the basis that (i) the relationship between the petitioners was a potentially dangerous one; (ii) access to telephone calls would be to the detriment of the rehabilitation of the petitioners; (iii) there was a risk that the calls would be used as a means of orchestrating offences and (iv) the petitioners' relationship, prior to their imprisonment, had centred on the planning and perpetration of sexual offences. This latter point was a finding made by the court in the previous litigation.

[5] The second petitioner asked the Scottish Public Services Ombudsman (SPSO) to investigate, *inter alia*, the refusal of SPS to permit continued access to inter-prison telephone calls and inter-prison visits. The petition for judicial review was presented on 14 February 2019. On 9 April, the SPSO advised that it would not pursue the complaint because (i) the matter of inter prison visits had previously been decided by the court, and (ii) the issue of

the telephone calls was the subject of active judicial review proceedings. On 12 September 2019, the Lord Ordinary issued an interlocutor granting permission for the petition to proceed only for preliminary determination of the time bar issue. An accompanying note stated as follows: "All other matters, including permission to proceed in relation to the substantive issue in the Petition, to await determination of the time-bar issue". The effect of this approach is addressed below.

Decision of the Lord Ordinary

[6] The Lord Ordinary concluded that the grounds giving rise to the petition first arose on 17 August 2018, when the facility was terminated and the decision communicated to the petitioners. The petitioners were not afforded inter-prison telephone communication after that date. He rejected the arguments advanced on behalf of the petitioners to the effect that the termination was a continuing act, such as prevented the commencement of the time bar provision in section 27A(1)(a). It followed that the petition had not been presented within the relevant time limit. The Lord Ordinary rejected an argument that proceedings by way of judicial review could not be instituted until the second petitioner's complaint to the SPSO was disposed of. He also dismissed an argument as to legitimate expectation which is no longer insisted in.

[7] The Lord Ordinary considered that there was no basis for exercising the court's equitable jurisdiction in terms of section 27A(1)(b). The petitioners were aware of the withdrawal of telephone calls on the same day the decision was taken. They were able to instruct solicitors at that stage, and to enunciate and advance complaints about the matter within the internal SPS complaints process. Both petitioners were aware of the grounds giving rise to the petition almost six months before it was presented.

Decision and analysis

[8] Two broad grounds of challenge were advanced. First, that the petitioners were the subject of a continuing breach of their Article 8 rights, with the effect that the three month period would not commence until that breach ended. Reliance was placed on *Somerville* v *Scottish Ministers* 2008 SC (HL) 45, para 41 *per* Lord Hope; *R(G)* v *Secretary of State for Justice* [2010] EWHC 3407 (Admin); and *Pritchard* v *HM Coroner for Oxfordshire & Anr* [2009] EWCA Civ 893). The first of these cases dealt with the differently worded time bar provision contained in section 7(5) of the Human Rights Act 1998, under which proceedings must be brought before the end of a period of one year beginning with "the date on which the act complained of took place". The context –a discussion of how a continuing act may be reflected in that provision - was thus quite different, and in any event, the observations were not only obiter but do not seem to have been the subject of a unanimous approach (see, for example, Lord Rodger, paras 145-146). Nor does the case of *R(G)* provide the answer. It is true that case dealt with a rule in English procedure similarly to that contained in s 27A(1)(a), but the discussion of the relevance of a continuing state of affairs was made under reference to Human Rights legislation, and cases brought before the ECtHR, rather than in the specific context of judicial review, and access to that specific procedure, and without noting the different wording of the limits contained in s 7(5) of the 1998 Act. *Pritchard* offers no support either. It is merely a permission decision which offers no conclusion on the substance of the argument, save the caustic remark that it might present the applicant with "an uphill struggle".

[9] Notably, no reference was made to the case of *S* v *Scottish Ministers* 2021 SLT 711, where the Lord Ordinary considered (para 16) that it was not sufficient to elide the time

limit merely to aver that there was a continuing act, although whether an act has continuing effect may be relevant to the issue of an equitable extension.

[10] The best guide to the proper interpretation of section 27A lies in the wording of the provision itself, which is quite clear and does not admit of ambiguity. The time runs from "the date on which the grounds giving rise to the application first arise". That date is clearly 17 August 2018. Notwithstanding the arguments as to a continuing breach advanced on behalf of the petitioners, the petition contains the averment that "the date on which the grounds giving rise to the Petition first arose was 15th November, 2018." This was merely the date of a letter from the SPS replying to the petitioners' agents and confirming the decision which had been taken previously. As the court noted in *Wightman* v *Secretary of State for Leaving the European Union* 2018 SLT 356, para 33, the three-month limit cannot be circumvented simply by persuading a person to repeat a decision or other act complained of. There may exist cases where difficulty arises as to the identification of when the grounds first arose, but this is not one of them.

[11] The essence of the petitioners' argument is that in the circumstances of a case such as the present, there is no time limit for bringing judicial review proceedings. He frankly submitted that such proceedings could be brought even if the circumstances in question had persisted for 5, or even 10, years. This is entirely inconsistent with the mischief at which the legislation was directed. Sections 27A-27D were introduced following recommendations within the Report of the Scottish Civil Courts Review, chaired by Lord Gill. In particular, the Review recommended the implementation of a time limit for bringing petitions for judicial review, on the basis that there was a public interest in such challenges being made promptly and resolved quickly. It may be assumed that the wording of the legislation was deliberately chosen with this interest in mind.

[12] It was argued for the petitioners that a strict interpretation of the legislation would lead to adverse consequences, and indeed would excuse lawlessness after three months. This is a misinterpretation of what is involved. The legislation does not prevent an applicant from asserting his rights. It allows a petition to be brought within three months of the relevant date. Even where that timescale has not been met, an applicant may still bring proceedings if the court considers that it will be equitable that he should do so.

[13] As to the argument that the existence of an ongoing complaint to the SPSO prevented the commencement of the time bar provisions, and that, until that complaint was disposed of, it could not safely be assumed that proceedings by way of judicial review would not be premature, that argument is untenable. Even on the petitioners' own note of argument it is acknowledged that the SPSO could not oust the jurisdiction of the court, and that the complaint route did not provide an alternative remedy. In any event, the present proceedings were in fact instituted prior to the disposal of the SPSO complaint. Other arguments advanced on behalf of the petitioners under this first ground of appeal, - such, as, for example, that a discretionary provision such as s 27A(1)(b) was not consistent with the rule of law - appeared to amount to a challenge to the legislation itself, which is beyond the scope of these proceedings.

[14] The remaining argument for the petitioners was that the Lord Ordinary erred in refusing to exercise his discretion under s 27A(1)(b) to allow the petition to proceed out of time. In approaching the discretion available under that section, the court must have regard to all relevant factors. This will include the specific circumstances of the case; the reasons for any delay in bringing proceedings; whether an important issue of public interest arises (see *Wightman*, para 33); and the prospects of ultimate success. The Lord Ordinary addressed the circumstances of the case, the fact that the petitioners have known about the decision from

17 August 2018; that they took steps to challenge it from very shortly thereafter; and the absence of any reason for delay. He might also have noted that no point of general public importance arises, it being specifically advanced on behalf of the petitioners that the case relates only to the two petitioners and that no wider application appears. Moreover, he would have been entitled to bear in mind that similar article 8 arguments, based on the alleged relationship between the petitioners, were advanced but roundly, indeed robustly, rejected by the Lord Ordinary in the proceedings relating to the similar issue of inter-prison visits between the petitioners. In short, none of the factors advanced by the petitioners persuades us that the Lord Ordinary erred in refusing to exercise his discretion.

[15] The reclaiming motion will therefore be refused.

Postscript

[16] As counsel for the respondents submitted, the petition has "taken an unorthodox path" because the Lord Ordinary granted permission at this stage to argue only the respondents' time bar plea. The effect of this is that even if the petitioners had been successful, there would have required to be a further hearing at which the substantive question of permission had to be determined. Rule of Court 58.7, which deals with the permission stage of a petition for judicial review, clearly envisages that the issue of time bar should be dealt with at that stage. The Lord Ordinary must, at that stage, decide whether to grant an extension to the time limit under section 27A of the 1988 Act; and where such an application is refused without an oral hearing, give reasons for the decision. In *S* v *Scottish Ministers* (para 9), the Lord Ordinary commented that:

> "The clear implication of this rule is that any issue of equitable extension should ordinarily be dealt with at or about the same stage as permission. Since the issue of equitable extension under s. 27A(1)(b) only arises if the petition is out of time, a

> further implication of the rule is that the question of whether the three month period in s 27A(1)(a) has been exceeded should also be dealt with at that time."

She went on to say (para 10):

> "As a result, issues of time limits arising in applications for judicial review should be dealt with at an early stage, rather than at later procedural or substantive hearings under Ch.58 of the Rules. I acknowledge there is procedural flexibility in applications for judicial review (rr.58.11(2) and 58.12(2)), and it is possible that in exceptional cases time limits might be dealt with at some other stage… But as a generality, both ss.27A and 27B of the 1988 Act are intended as preconditions for petitions to be allowed to proceed."

[17] This is consistent with the decision of the Inner House in *Philp* v *Highland Council* [2021] CSIH 28, where the issue of time bar, although raised by the respondents, had not been dealt with by the judge at the permission stage. At para 20, the court noted that

> "… the issue of time-bar ought to have been determined one way or another at the permission stage. That is the procedure which Rule 58.7(1) envisages. The respondents had raised the time-bar issue at that stage and it is not their fault that the Lord Ordinary did not deal with it then."

There may, of course, be cases where there are such difficult issues in relation to time bar, intricately tied in with the facts on the substantive issue, that they cannot readily be resolved at the permission stage, and may have to be addressed at the substantive hearing. This was noted in *Avaaz Foundation* v *Scottish Ministers* 2021 SLT 1063, para 26, letters J-K (a case not cited in argument). Such cases will be rare, however, and, as noted in *S*, in most instances a time bar issue will be capable of determination at an early stage on the basis of the pleadings, documentation, authorities and submissions.

[18] There are good reasons why, as the Lord Ordinary in *S* observed, the issue of time bar should as far as possible be dealt with at the permission stage. Judicial Review is a "procedure designed to provide a speedy and effective remedy to challenge the decisions of public bodies. In such cases there is a public interest in challenges being made promptly

and resolved quickly." (Scottish Civil Courts Review, Chapter 12.38). The permission stage of the procedure is designed (Scottish Civil Courts Review, Chapter 12.51) "to assist, at an early stage, in encouraging early concessions by respondents in cases which are well founded and in preventing unmeritorious claims from proceeding. This will create additional capacity in the court programme, enabling those cases in which leave is granted to be dealt with expeditiously." Parties should generally be in a position to make and respond to averments regarding section 27A at the permission stage. It is highly desirable that where the issue can be addressed at the permission stage, it is addressed, so that the full objectives of introducing a permission stage may be met. The importance of certainty about the validity of administrative decisions was addressed in the Scottish Civil Justice review (para 12.32):

> "The case for the imposition of a time limit within which to bring an application for judicial review is based on the principle of legal certainty. This was expressed by Lord Diplock in *O'Reilly* v *Mackman* in the following terms:
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> > 'The public interest in good administration requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision the authority has reached in purported exercise of decision-making powers for any longer period than is absolutely necessary in fairness to the person affected by the decision.'"

The present case is one in which the issue of time bar could easily have been resolved on the pleadings and documentation. There was no need for a preliminary hearing to determine it.