OUTER HOUSE, COURT OF SESSION

[2021] CSOH 23

P96/21

OPINION OF LADY POOLE

In the cause

JS (AP)

Petitioner

against

SCOTTISH MINISTERS

Respondents

Petitioner: Bain QC, Sutherland; Balfour + Manson LLP
Respondents: Crawford QC, Irvine; Scottish Government Legal Directorate

4 March 2021

Introduction

[1] The petitioner reported being a victim of rape to the police in April 2017. Her report was investigated and a decision taken to prosecute. The accused first appeared on petition in December 2018. A preliminary hearing took place in November 2019. A trial diet had been fixed for 6 April 2020 but it did not proceed. A further trial diet has been fixed and is due to proceed on 29 March 2021. In this petition, the petitioner seeks judicial review of acts and omissions of the Scottish Ministers in relation to the prosecution of serious sexual offences, and an order under section 45(b) of the Court of Session Act 1988 (the "**1988 Act**")

in relation to the public sector equality duty under Section 149 of the Equality Act 2010 ("**PSED**").

[2] The background to this application for judicial review is the Covid-19 pandemic. After 17 March 2020, no new criminal trials, including the trial involving the complainer, were commenced for some time due to the pandemic and the consequent need for social distancing. Emergency legislation was introduced into the Scottish Parliament on 31 March 2020 to address some of the issues arising from the pandemic in the form of the Coronavirus (Scotland) Bill. An Equality Impact Assessment ("**EqIA**") dated 31 March 2020 was also published. Among other things, it stated at page 13 that:

> "current operational decisions by the Scottish Courts and Tribunal Service to avoid, where possible, deprioritising of cases involving domestic abuse, sexual offences and violence, combined with those provisions which suspend impediments to social distancing, will help to ensure that the particular impacts of gender based violence on women and children will continue to be addressed."

The passage quoted referred to "provisions which suspend impediments to social distancing". For example, in the bill there were provisions for dispensation with physical presence at court and attendance by electronic means. On introduction, the bill also contained a provision that the Scottish Ministers might by regulations provide that trials on indictment are to be conducted by the court sitting without a jury. That regulation making power was contingent on the Scottish Ministers being satisfied that the making of the regulations was necessary and proportionate, in response to the effects of coronavirus, for the purpose of ensuring that the criminal justice system continued to operate effectively. During the passage of the bill an amendment was moved deleting the provisions enabling judge only trials on indictment. The Coronavirus (Scotland) Act 2020 (the "**2020 Act**") as passed contained no provisions authorising trials without a jury in solemn procedure. A discussion document was published by the Scottish Ministers on 13 April 2020 setting out

nine options for the recommencement of solemn trials. Option four was having jurors in remote locations video-linked to court, and option seven was judge only solemn trials. There were discussions with interested parties, including victim support organisations. A Working Group was set up in May 2020 to consider the practicalities of restarting solemn cases.

[3] On 2 June 2020 the Cabinet Secretary for Justice stated in his evidence to the Justice Committee of the Scottish Parliament that the Scottish Ministers were not exploring the option of judge-only trials, no work was going into that option, and he could not feasibly see it being brought back for consideration at all. No further formal EqIA had been published before that statement.

[4] Ultimately the recommendation of the Working Group was to create remote jury centres to enable juries to participate in trials from venues other than court buildings (in effect, a modified version of option four of the discussion document of 13 April 2020). That recommendation was accepted, and remote jury centres were set up in cinema complexes. The provisions enacted in paragraph 2 of part 1 of schedule 4 of the 2020 Act enable courts to make orders that jurors in trials on indictment attend court by electronic means, by video link from remote jury centres. While socially distanced in jury centres, jurors hear and watch the trial as it proceeds in the court room on the screen in front of them, and deliberate and deliver their verdicts. "Cinema trials" have been taking place for many months, first in the High Court and now also in the Sheriff Court. As a result, the High Court returned to pre-pandemic levels of business some time ago, and at times pre-pandemic levels have been exceeded. However, there remains a backlog of criminal trials which built up during the months when no new trials were being commenced due to the pandemic. There are

significant numbers of outstanding trials, including trials involving serious sexual offences. The waiting time for trials has also increased significantly.

[5] The petitioner has been adversely affected, in that she is one of the people who have had to wait longer for the trial in which she is the complainer to commence. The petition is brought to challenge acts and omissions of the Scottish Ministers in relation to the prosecution of serious sexual offences such as her case. The petitioner's application for judicial review was granted urgent consideration when first orders were made. It came before me for an oral hearing on time limits and permission. The petitioner argued that the petition had been brought timeously, or if not the court should exercise its equitable discretion to extend the three month period in Section 27A(1) of the 1988 Act. She also argued that permission to proceed should be granted on all grounds in the petition. The Scottish Ministers argued that the petition should not be allowed to proceed. It was not timeous and there were no averments or grounds to permit the court to exercise its equitable discretion to allow the petition to proceed. Nor did it meet the tests for permission.

Time limits - governing provisions

[6] In 2009, the Report of the Civil Courts Review recommended changes to judicial review procedure. Two of those changes were new time limits for bringing an application (coupled with a discretion for the court to allow a late petition to proceed if injustice would otherwise result), and a requirement of permission to proceed (to sift out unmeritorious applications for judicial review). The recommendations were accepted, and the 1988 Act was amended by the insertion of sections 27A-D. Time limits are the subject of section 27A, and permission the subject primarily of section 27B-D. Those provisions came into force in 2015. Chapter 58 of the Rules of the Court of Session governing applications for judicial

review was revised to reflect the new law. As a result, this petition for judicial review must surmount two hurdles before it can proceed any further; time limits and permission.

[7] Section 27A(1) of the 1988 Act governs time limits and provides:

> "(1) An application to the supervisory jurisdiction of the Court must be made before the end of—
>
> (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".

[8] The Rules of the Court of Session direct petitioners to address the issue of time limits at an early stage. Rule 58.3(3) provides that a petition for judicial review is made in form 58.3. Form 58.3 sets out averments to be made in a petition. Paragraph 2 of form 58.3 requires the petitioner to complete the following statement: "That the date on which the grounds giving rise to the petition first arose was (date)". That wording reflects section 27A(1)(a) of the 1988 Act. Form 58.3 also contains drafts of statements 8A and 8B of a petition, with suggested wording if an extension of a time limit is sought, to reflect section 27A(1)(b) of the 1988 Act. There are provisions in rule 58.3(4) making it mandatory for a petition to identify which documents are necessary to determine, among other things, whether to extend the time limit under section 27A of the Act of 1988. Rule 58.3(5) provides that "(5) Where the petitioner seeks an extension to the time limit under section 27A of the Act of 1988, this must be stated in the petition". Where petitions observe the requirements of the rules and court form, answers in response will be able to focus the respondent's position on section 27A(1) of the 1988 Act.

[9] The rules of court also contain procedural provisions directed at ensuring that the issue of time limits is determined at a preliminary stage, ordinarily at the same time as determining the separate issue of permission. Rule 58.7(1) provides:

> "Within 14 days from the end of the period for lodging answers the Lord Ordinary must—
>
> (a) decide whether to—
>
> (i) grant permission (including permission subject to conditions or only on particular grounds);
>
> (ii) grant an extension to the time limit under section 27A of the 1988 Act; or
>
> (b) order an oral hearing (for the purpose of making those decisions) to take place within 14 days."

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 section 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 section 27A(1)(a) has been exceeded should also be dealt with at that time. The scheme of the rules is that the petition will only proceed further if it has passed both the time limit and permission filters.

[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 chapter 58 of the rules. I acknowledge there is procedural flexibility in applications for judicial review (rules 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 (eg *O'Neill and Lauchlan, Petitioners* [2020] CSOH 28). But as a generality, both sections 27A and 27B of the 1988 Act are intended as preconditions for petitions to be allowed to proceed. In the ordinary course, under rule 58.7(1), both issues should be determined within 14 days of the lodging of answers, or after

an oral hearing taking place within 14 days of it being ordered. The test to be applied by the court when deciding if the petition meets the statutory time limits is set out in section 27A(1). I note that in *(First) Ineos Upstream Limited (Second) Reach Coal Seam Gas Limited* [2018] CSOH 15 at paragraph 16, the court applied a different and less stringent test to decide if a petition was out of time, when also considering permission, which was whether the petitioners' position on the time-bar aspect of the case is fanciful, speculative or unrealistic. However, that is not the test set out by the legislature in section 27A. In my opinion, to comply with rule 58.7(1), the court should simply decide whether or not the section 27A test is met or not in the circumstances of the particular case.

[11] If the requirements of the rules of court and form 58.3 have been complied with, the issue of time limits should be focussed in the pleadings, and documents necessary to determine time limits will have been identified. The court will then be in a position to decide if the petition is timeous under section 27A(1) of the 1988 Act at or about the same time as permission. Any issue of time limits which arises is likely to be determined on the basis of pleadings, documents lodged with the petition or answers (which may include affidavits), any authorities lodged with the court, and submissions (although detailed and elaborate submissions are not encouraged (*Wightman* v *Advocate General for Scotland* 2018 SC 388 paragraph 8)). The rules allow decisions about time limits to be taken on the papers, but (as in this case) if a judge is considering not allowing a petition to proceed under section 27A(1), it is likely an oral hearing will be granted. Where issues of both time limits and permission have to be determined by the court, there may be cause shown under rule 58.9 to permit any oral hearing ordered by the court to last longer than 30 minutes (as also happened in this case).

[12] The first stage for the court when applying section 27A(1) of the 1988 Act is to consider whether the petition has been brought after the period of 3 months beginning with the date on which the grounds giving rise to the application first arise. The wording is specific, and the focus of the court is on when the grounds first arose. That will entail consideration by the court of what the grounds set out in the petition are, the date on which they arose, and the date the application was brought.

[13] The second stage arises if the petition has been brought after the three month period has expired. The court then goes on to consider whether a longer period for the petition to be brought is equitable having regard to all of the circumstances. Case law on the application of an identically worded equitable extension provision (save for its reference to tribunals) in section 7(5)(b) of the Human Rights Act 1998 (the "**1998 Act**") may be of assistance, although it has to be borne in mind that the specified period under section 27A of the 1988 Act is three months, rather than the one year period in the 1998 Act. The reasons for the three month time limit are "good governance and public policy" (*O'Neill and Lauchlan, Petitioners* [2020] CSOH 28 paragraph [26]). In the words of the Civil Justice Review, the purpose of the equitable extension is to allow a late petition to proceed if injustice would otherwise result. The court may enter into an open ended examination of the factors on both sides of the argument and decide which to prefer (*A* v *Essex County Council* [2011] 1 AC 280 at paragraph 167). Essentially the court is given a broad discretion and may take into account any matters relevant to whether it is equitable to extend the time period. Which factors are relevant in the exercise of the discretion will depend on the circumstances of a particular case. Relevant factors may include the length of the delay, the reasons for the delay, the reasonableness of not having proceeded earlier, the prejudice to each side, the conduct of both sides, the extent to which evidence has become less cogent, the importance

of the issues raised, and the strength of the challenge. The state of knowledge of the petitioner may also be relevant (*Odubajo* v *Secretary of State for the Home Department* 2020 SLT 103 at paragraph [18]; 2020 SLT 999), and the extent to which challenged measures have continuing effect. For example, in *Wightman* v *Advocate General* 2018 SC 388 the court said at paragraph 33:

> "the issues raised in the petition concern the effects of what is said to be an ongoing 'position' which has the potential to influence future government and parliamentary action. In such circumstances, there is a substantial argument that the three-month period should be extended under Section 27A(1)(b)".

The three month period

[14] The petition in this case does not follow all of the relevant provisions of chapter 58 of the rules of court or form 58.3. It does not set out the date when the grounds giving rise to the petition first arose. Instead, it states that the petitioner challenges ongoing acts and omissions of the respondents. Nor does the petition address the issue of equitable extension, even on an alternative basis, or identify any documents necessary to determine that matter. The answers raised the issue of section 27A(1) of the 1988 Act, contending both that the petition was brought after the three month period and that there was no basis for equitable extension. Given the issues raised by this petition, I considered it inappropriate to determine time limits on a technical pleading point, so invited submissions on section 27A among other matters at an oral hearing.

[15] The petitioner argued that the time limits did not apply to ongoing acts and omissions. She also argued that because the petition sought an order under section 45(b) of the 1988 Act the three month period did not apply, under reference to *Vince* v *Prime Minister* 2020 SC 78 at paragraphs 47-50 and *McCall's Ltd* v *Aberdeen City Council* 2020 CSIH 41 at paragraphs 36-38. She further argued that if the three month time limit did apply, it may

have started on 14 August 2020. This was the date when the petitioner had read an article in the Glasgow Herald in which a director of a rights organisation had identified a basis for a possible challenge in the courts. Alternatively the three month period commenced on 2 June 2020 when the change in the policy of the Scottish Ministers became obvious. This was the day of the statement made by the Cabinet Secretary for Justice that the Scottish Government was not exploring further the option of judge-only trials. The Scottish Ministers argued that on the averments made in the petition, the latest date the three month period could have started was 2 June 2020. The reference to ongoing acts and omissions in the petition did not mean that grounds arose at some later date. It could not be the case that in challenges to legislation, administrative conduct or policy with continuing effect the commencement of time limits rolled forward for as long as those matters continued to apply, otherwise there would effectively be no time limit at all. Grounds of challenge arose when a person was first affected by the challenged policy (*R(Delve)* v *Work and Pensions Secretary* [2020] EWCA Civ 1119 paragraphs 125-127). In this case, the relevant date was at the latest 2 June 2020 when it was made public that judge only trials were no longer being considered. The petition should have been brought by 1 September 2020 but was not lodged until 9 February 2021. It was therefore outwith the three month period.

[16] I do not consider that the petitioner's arguments are well founded. It is not sufficient to overcome the time limits in section 27A(1)(a) of the 1988 Act to aver there were continuing acts and omissions. Section 27A is of general application, and does not exempt petitions based on continuing acts and omissions from its scope. The language of section 27A(1)(a) requires the court to decide when the grounds giving rise to the application first arose. If what is being challenged has a continuing effect, that may be relevant to the issue of equitable extension under Section 27A(1)(b), but the three month period will apply from

when the grounds for the challenge first arose (*O'Neill and Lauchlan, Petitioners* [2020] CSOH 28). Nor is it correct to suggest the period in Section 27A(1)(a) runs only from the date of the petitioner's awareness that she might be able to mount a legal challenge. The statutory wording is clear and requires consideration of when the grounds giving rise to the application first arose, which is a different matter. Further, this petition is not exempt from the time limits in section 27A of the 1988 Act because it seeks an order under section 45(b) of the 1988 Act. Section 45(b) provides:

> "The Court may, on application by summary petition—
>
> …. (b) order the specific performance of any statutory duty, under such conditions and penalties (including fine and imprisonment, where consistent with the enactment concerned) in the event of the order not being implemented, as to the Court seem proper".

The effect of *Vince* v *Prime Minister* 2020 SC 78 is that a section 45(b) order can be sought either in ordinary petition procedure or in an application for judicial review (because of the wording of section 45 itself allowing application by "summary petition", and rule 58.2 of the rules of court providing that an application to the supervisory jurisdiction of the court includes an application made under section 45(b) of the 1988 Act). The procedural rules which will apply will depend on which form of petition procedure is chosen by the applicant. If the application is by way of judicial review, section 27A and chapter 58 of the rules of court will apply; neither exempt petitions seeking a section 45(b) order from the statutory time limits. The case of *McCalls Ltd* v *Aberdeen City Council* 2020 CSIH 41 referred to by the petitioner reaffirms the uncontroversial proposition that decisions, acts and other omissions can be the subject of judicial review, and the focus is on the legality of the matter under scrutiny (paragraph 37). The test of when the grounds set out in a petition first arose in section 27A(1) is capable of application to acts and omissions, and there is no good reason

to confine it only to challenges to decisions. In my opinion, if a petitioner chooses to proceed by application for judicial review, the time limits applicable to applications for judicial review apply, including in cases in which an order under Section 45(b) of the 1988 Act is sought.

[17] The date on which the grounds giving rise to the application first arose for the purposes of Section 27A(1) of the 1988 Act is to be determined in this case by having regard to what is said in the pleadings. I summarise as follows. The petition seeks review of acts and omissions of the Scottish Ministers, in their role in providing a system for the prosecution of serious sexual offences (statement 1). The case is not, for example, brought against the police in relation to the investigation of crime, or the Lord Advocate or the Scottish Courts and Tribunals Service in relation to the prosecution of a particular case in the courts. The petition criticises the removal by the Scottish Ministers of judge only trials as a means of tackling the backlog of solemn trials caused by the pandemic, setting out the statements of the Cabinet Secretary establishing this on 2 June 2020 (statement 3). Removal of judge-only trials as a means of tackling the backlog of criminal trials is said to be unlawful because:

(i) it violates Articles 3 and 8 of the European Convention on Human Rights (the "**Convention**"), as the Scottish Ministers have failed to comply with their positive obligations to maintain and operate an adequate legal framework for the prosecution of serious sexual crime, which is capable of determining the complainer's case within a reasonable time (statement 7.2)

(ii) it violates article 14, because the vast majority of gender based violence such as rape is directed against women, so they are in a relevantly different situation; women are therefore disproportionately affected by delays in

serious criminal cases being heard; gender based violence should therefore be treated distinctly by the criminal justice system and the failure to do so is unjustifiable indirect discrimination (statement 7.4)

(iii) it is contrary to PSED under Section 149 of the Equality Act 2010, because abandoning judge-only trials was a new policy and should not have happened without a revised EqIA (statement 7.12).

(I have left to one side the grounds in the petition based on the Convention on the Elimination of All Forms of Discrimination against Women ("**CEDAW**"). CEDAW is an international treaty which has not been incorporated into domestic law. In this particular action, in my opinion, references to CEDAW are relevant only to the grounds based on Convention rights already set out above, for reasons I return to later).

[18] All of these bases of challenge are linked to the removal by the Scottish Ministers of the option of judge only trials as a way of meeting their obligations to provide an adequate system for the prosecution of rape cases. Read fairly, the last date in the petition on which that can be said to have occurred is 2 June 2020, when the position of the Scottish Ministers was made clear publicly by the Cabinet Secretary. It follows that the last date on which it can be said that the grounds on which the petition proceeds first arose is 2 June 2020. The petition was not brought until 9 February 2021. It was brought after the three month limit in section 27A(1)(a) of the 1988 Act.

Equitable extension

[19] The petitioner argued that an equitable extension should be granted under Section 27A(1)(b) of the 1988 Act so the petition could proceed. She had only found out about the possibility of an action on 14 August 2020 when she saw a newspaper article by a director of

a rights organisation suggesting a challenge could be taken. She got in touch with Rape Crisis, and an opinion was instructed. On 24 September 2020 an application was made for legal aid, which was initially granted on 9 December 2020. The Scottish Ministers then objected to legal aid being granted on 10 December 2020. The objections were not posted on the website of the Scottish Legal Aid Board ("**SLAB**") until 22 December 2020, or a copy received by the petitioner until 24 December 2020. A response was then prepared and submitted on 18 January 2021, and on 26 January 2021 SLAB confirmed the grant of legal aid. When asked why a petition was not lodged using emergency legal aid in August or September, it was submitted there might be adverse cost consequences if full legal aid was not subsequently granted. The petitioner's case was strongly arguable. There was already another case proceeding on the same grounds. The petition raised important matters, of significance to the petitioner and other women given the statistical information before the court about the number of outstanding cases. It was a strong case. There had been no delay on the petitioner's part and her lawyers had acted as quickly as they could. The Scottish Ministers on the other hand argued that, if there was any basis for the court to extend time, it was not equitable for it to do so. The petition served no practical purpose as the trial in which the complainer was involved was due to proceed on 29 March 2021. Prospects of success were low. The issues raised may be important, but important issues should be raised timeously. Raising a challenge to a policy choice made some time ago not to pursue an option of judge only trials, but instead another option, caused prejudice to the Scottish Ministers. By now they had invested £50 million pounds in the provision of remote jury trials, having undergone extensive consultation and taken the advice of the Working Group. There was no good reason for the petitioner not to have used emergency legal aid to raise the action timeously then sist it, as the type of situation in this case was what emergency

provisions were there for, and SLAB was aware of that. The delay was long. The fact that there was another petition on the same grounds being brought was neither here nor there because Convention rights challenges were inherently fact sensitive.

[20] There were a number of factors which in my view weighed on the side of the court granting an equitable extension. The petitioner had not been aware of potential grounds of challenge for a period of a little over two months after they arose. The decision not to proceed with judge only trials had a continuing effect, in that there had been a period before remote jury centres were used when no cases had continued, creating a backlog which might be lessened with judge only trials. Some of the period of delay since the grounds first arose was during periods when SLAB was considering an application for legal aid, which was not in the control of the petitioner. A further weighty factor was the importance of the issues raised in the petition, both generally and to the petitioner herself. The existence of an effective system to prosecute serious sexual crime in Scotland, and whether the Scottish Ministers had failed to provide and operate a system in a way which breached Convention rights and PSED, are clearly matters of public importance. There are a number of outstanding prosecutions for serious sexual offences. There is a further petition being raised based on the same grounds, showing that the issues raised do not affect only this case. Delays in trials have adverse effects on complainers such as the petitioner. A report from the Scottish Centre for Crime and Justice Research, July 2020 "Delays in Trials: the implications for victim-survivors of rape and serious sexual assault" by Burman and Brooks-Hay was before the court, documenting the adverse impacts of delays. The adverse effects of delay have the potential to impact on all aspects of lives of complainers such as the petitioner. In some cases delays may precipitate physical and mental health problems, including anxiety, suicidal thoughts, night terrors, confusion, trauma and depression. Long

delays may prevent complainers moving into a therapeutic recovery phase, and postpone their psychological recovery. Delays may also impact on the quality of evidence due to the passage of time.

[21] However, there are also weighty factors against it being equitable to grant an extension in this particular case. There is a public interest in good administration, and administrative choices being challenged promptly. The delay in this case was significant. The petition was brought over 8 months after the grounds for it first arose. It was therefore over 5 months after the 3 month period in section 27A(1)(a), not merely a few days or weeks. The petition could have been brought timeously, since the petitioner knew of potential grounds from 14 August 2020. That left two weeks before the three month time period expired. Lawyers can and do work urgently. Emergency legal aid was in principle available to enable a petition to be brought at an early stage. The risk of expense of drafting a petition, should legal aid not be granted, was not a good reason for non-compliance with the three month time period set out by the legislature. Although parts of the subsequent delay occurred when SLAB was considering the petitioner's application, it is not clear in the context of time limits for petitions for judicial review why there was gap of over 5 weeks after 14 August 2020 before legal aid was applied for, or why there was another gap of quite so long between receipt of the objections of the Scottish Ministers and 18 January 2021 when a response was submitted. Those periods were in the control of the petitioner. I do not in all of the circumstances consider the delay was reasonable. Further, while the matters raised in the petition are undoubtedly of importance, they have limited practical effect on the petitioner. In this action she seeks declarator that her rights have been breached and an order of specific performance in relation to PSED. The trial in which she is a complainer is due to commence on 29 March 2021. Given how late this petition is brought, it is not

realistic that any finding of the court that the Scottish Ministers had erred in removing judge only trials would reduce the delay before that trial commences. I also accept that there would be some prejudice to the Scottish Ministers and others if this challenge was allowed to proceed late. There was clearly a process of consultation before remote jury centres were adopted to continue criminal justice, and considerable investment has been made by the Scottish Ministers in the solution that was identified. That has been up and running for some time, but is only now being challenged as inadequate on grounds which have existed since at least 2 June 2020. Finally, although I attach limited weight to this factor given the stage of the case, I did not consider the case was a strong one.

[22] As far as the last factor of the strength of the case is concerned, the petition contained four separate grounds based on (i) CEDAW (ii) Articles 3 and 8 of the Convention (iii) Article 14 of the Convention and (iv) PSED. Although I would have been minded to grant permission on (ii) to (iv) of these grounds, that would have been on the basis that the permission test is not a high one (*MIAB* v *SSHD* 2016 CSIH 64 at 66) and was not intended to be an insurmountable barrier preventing weak cases being fully argued in due course (*Wightman* v *Advocate General for Scotland* 2018 SC 388 paragraph 9). Only real prospects are required for permission, not strong prospects. Nevertheless, in the equitable balance required by Section 27A(1)(b) on whether the petition is timeous, it is legitimate to consider the strength of the case. The orders sought based on CEDAW (statements 4b, 5b and plea in law 2) would not have proceeded any further as they do not pass the permission test. CEDAW is an unincorporated international convention and is not part of domestic law (*R(JS)* v *SSWP* 2015 1 WLR 1449 at paragraphs 82, 115-116 and 137). The fact that there was a dissent in *R(JS)* (Lord Kerr at paragraph 254) on the basis there should be a departure from long established dualist theory, so that direct enforcement of some international conventions

should be allowed, is not a good reason to grant permission. It is not the current law binding on the court. The petitioner would have been permitted to proceed with the references in CEDAW elsewhere in the petition only to the extent that it cast light on the interpretation of the Convention rights relied on in the petition (*R(JS)* at paragraph 137, *Eremia* v *Moldova* (2014) 58 EHRR 2 at paragraph 84-85, *Opuz* v *Turkey* (2010) 50 EHRR 28 at paragraphs 74, 187-189). In relation to the challenges under Articles 3 and 8 of the Convention, the Scottish Ministers have positive obligations in relation to provision of a criminal justice system in which serious sexual crime can be prosecuted effectively within a reasonable time (*MC* v *Bulgaria* (2005) 40 EHRR 20 paragraphs 148-153). However, it is not the court's role to replace the Scottish Ministers and choose from among the wide range of possible measures that could be taken to secure compliance with these positive obligations (*VC* v *Italy* (2019) 69 EHRR 13 54227/14 at paragraph 92). There is no dispute that the Scottish Ministers consulted on a range of measures to address the prosecution of serious crime during the pandemic. The choice not to proceed with judge only trials (and various other options), but proceed with remote jury centres, is in my view likely to fall within the margin of appreciation of the Scottish Ministers. Although a backlog has built up between the start of the pandemic and remote jury centres coming into operation, there is a balance of rights inherent in the Convention. While the complainer's rights are important, consideration of other interests such as public health, justice, and the rights of other people involved in trials in the time of a pandemic, are also highly relevant in determining whether any delay is unreasonable. In relation to the challenge under Article 14 of the Convention, the discrimination relied on by the petitioner is the need to treat differently persons who are significantly different (statement 7.5). She argues that gender based violence is significantly different and should be treated distinctly. However, in the system provided by the Scottish

Ministers, there is an element of distinct treatment of such offences. Rape trials, such as that involving the complainer, are automatically in the High Court, which is where remote juries were introduced first. Sexual offences continue to be given a degree of priority under the remote jury option selected by the Scottish Ministers. Even if, despite these significant difficulties, discrimination could be made out, the petitioner could only succeed if any discrimination found could not be justified by the Scottish Ministers. That matter would have to be determined against the balance of rights inherent in the Convention already discussed. Finally in relation to PSED, it is not in dispute that there was an EqIA at the time of introduction of measures in the 2020 Act, which among other things enabled remote jury centres as a result of provisions about electronic attendance. While PSED is a continuing duty, its application differs from case to case depending upon the function being exercised and the facts of the case (*R (3 Million Ltd)* v *Minister for the Cabinet Office* [2021] EWHC 245 (Admin) paragraph 122-124). The Scottish Ministers argue that the relevant function being exercised was ensuring criminal trials could proceed while addressing impediments to social distancing. PSED had in substance rather than form (as was required) been met throughout in the planning for criminal trials involving serious sexual offences in the pandemic, given the prioritisation of the prosecution of those types of trial. In all the circumstances it appeared to me that there were formidable hurdles facing the petitioner even on the grounds upon which I would have been minded to grant permission. I did not consider the case was a strong one.

[23] In all the circumstances, after balancing these relevant factors, in my opinion the factors favouring equitable extension are outweighed by those against it. I do not consider that it is equitable to extend the three month period by over five months to allow this petition to proceed.

Decision

[24] For reasons set out above, the petition is out of time under section 27A(1)(a) of the 1988 Act. I decline to exercise my discretion to allow the petition to proceed under section 27A(1)(b) of the 1988 Act. The petition must be dismissed. The question of permission under Section 27B of the 1988 Act does not therefore arise.

Postscript

[25] Two days after the oral hearing in this case, after a draft of this opinion had been produced, the petitioner sought to lodge a report detailing particular psychological effects of delay on her. I did not take its contents into account because it came too late. In any event I had already taken into account the factor of psychological and other effects of delays on complainers in the equitable balance in paragraph [20] above.