OUTER HOUSE, COURT OF SESSION

[2022] CSOH 45

P117/20

OPINION OF LORD BRAID

In the petition

NEIL ROBERTSON

Petitioner

for

Judicial review of the failure to permit him access to the community by the Scottish Ministers

Petitioner: Leighton, Drummond Miller LLP
Respondent: Byrne, Scottish Government

24 June 2022

The issue

[1] In this petition for judicial review, the petitioner, who is serving a discretionary life sentence of imprisonment, challenges a decision which was made by the respondents' Risk Management Team (RMT) in relation to his management within the prison system, as long ago as 8 November 2019. After a delay in obtaining legal aid, and sundry procedure, the case called before me on 20 May 2022 for a hearing on the respondents' fourth plea in law, that the petition is now academic and without practical purpose[1]. Whether that is so is the sole issue to be decided at this stage.

[1] Technically the hearing was also on the respondents' third plea in law, that the decision in question has been overtaken by subsequent decisions, but counsel for the respondents accepted that plea added nothing.

The law

[2] There is no dispute between the parties as to the law which falls to be applied in deciding that issue. Even where a court is satisfied that an administrative body may have erred in reaching a decision, the jurisdiction to grant reduction is inherently discretionary and the court will not in general grant reduction if to do so would have no practical effect: *King* v *East Ayrshire Council* 1998 SC 182. In considering that question, it is relevant for the court to consider whether the person seeking reduction has a substantial interest in having the decision set aside: *King,* LP Rodger at 194. Two examples are instructive. In *JM* [2011] CSOH 174, an immigration case, Lord Brodie, while dismissing the petition as irrelevant, also held that he would have refused it in any event, since reduction of the decision in issue would have afforded the petitioner no discernible advantage. It would merely have given him the opportunity to have further submissions considered, which the Secretary of State had already invited him to make in light of new case guidance. Thus, the petitioner already had available, at his own hand, the very remedy which he sought to obtain from the court. In *Penman, Petitioner* 2015 SLT 597, Lord Turnbull held that it would be wrong to reduce a disciplinary decision of prison authorities, where the punishment imposed had long since been served and reduction would have no practical benefit.

Parties' respective cases

[3] Where the parties differ is in applying that test to the facts of this case. The respondents' case, stated simply, is that the petitioner's management has moved on since 2019 in that there have been further meetings of the RMT since then, which have taken into account information not available in 2019, and at which the petitioner has made further

representations which have also been taken into account. Reduction of the decision of RMT would therefore have no practical effect, where the petitioner has not challenged the decisions subsequently taken, which would, therefore, survive any reduction of the November 2019 decision or any declarator in relation to it. The petitioner counters that the decision reached on 8 November 2019, and the management plan adopted then, continue to have ongoing effects such that there is real benefit to him in obtaining the remedies sought and that it is nothing to the point that he does not challenge the subsequent decisions. At the heart of the dispute lies a fundamental difference between the parties as to whether or not it is sufficient for the petitioner to challenge the November 2019 decision, or whether in order to have an effective remedy, he would also require to challenge the later decisions. Putting that another way, would reduction of the 2019 decision have the effect of also sweeping away the later ones, even though the petitioner does not seek reduction of those?

[4] In order to decide whether the remedies sought are academic, it is necessary to consider, first, the factual background leading to the decision of 8 November 2019, and what the petitioner's grievance is in relation to that decision; second, the remedies sought by the petitioner to address his grievance; and third, events which have occurred since then, all of which I do in the following sections of this Opinion. I will then consider the remedies sought and the extent, if at all, to which they would benefit the petitioner.

Background

[5] The petitioner suffers from Asperger's Syndrome, an Autistic Spectrum Disorder (ASD), which, as the respondents acknowledge, is a disability in terms of the Equality Act 2010 to which the respondents must have regard in undertaking any function in relation to the petitioner. The punishment part of his discretionary life sentence expired on

31 January 2009. When his case was considered by the Parole Board, on 12 August 2019, the Board was not satisfied that it was no longer necessary for the protection of the public that the petitioner should be confined, and consequently did not direct his release. In reaching that decision the Board expressed the view that before it could conclude that the risk presented by the petitioner could be safely managed upon release, the petitioner would require a period of testing in the community. Ordinarily, that would entail a prisoner such as the petitioner being transferred to less secure conditions, specifically, the National Top End and thereafter to the Open Estate from where community visits could be authorised. Therein lies the rub, since the petitioner contends that by virtue of his disability, he is unable to transfer to the National Top End. He argues that the respondent's policy – together, the Risk Management, Progression and Temporary Release Guidance, and Supplementary Guidance for RMT Decision Makers in Relation to Progression and Community Access – is unlawful in that it makes no provision for community access from closed conditions.

[6] Following the Parole Board hearing in August 2019, the petitioner's case was considered at a meeting of the RMT on 8 November 2019. The outcome of that meeting was that the following five step management plan was formulated:

- "Case manager and Psychologist to explore inconsistencies relating to his experiences elsewhere in the Estate.
- Ongoing regular discussion regarding his release plans with PBSW and CBSW.
- To agree a realistic list of questions to be provided to NTE prior to visiting [the petitioner].
- LLO to engage in discussion with both NTE FLM's.
- Arrange a visit from a member of staff from NTE."

[7] It is the decision to adopt that plan which the petitioner principally challenges. He contends that the respondents should have made an adjustment to account for his disability, by granting him access to the community from closed conditions. He further contends that the failure so to do has had continuing and lasting effects, and that unless he is granted community access, he will never be able to demonstrate to the Parole Board that the risk which he presents can be safely managed in the community.

The remedies sought by the petitioner

[8] The remedies sought by the petitioner are set out in statement 4 of the petition. Although he avers at statement 1 of the petition that the respondents have failed and are failing in their equality duties towards the petitioner, as already noted the only decision in relation to which he seeks remedies is that of 8 November 2019, to adopt a management plan that did not permit him access to the community from closed conditions. In addition to reduction of that decision, the petitioner seeks declarator that in making it, the respondents discriminated unlawfully against him in terms of the Equality Act 2010; declarator that the decision was also a breach of his rights in terms of article 5 taken with article 14 *et separatim* article 8 taken with article 14 of the European Convention of Human Rights; and payment of £10,000 of damages. Additionally he seeks reduction of the respondents' Risk Management, Progression and Temporary Release Guidance, which he avers failed to take account of the respondents' Equality Act obligations.

Subsequent events

[9] Since November 2019, the RMT has met on 6 March 2020, 27 August 2021, 17 November 2021 and 14 April 2022. At these meetings, further plans have been

formulated and adopted, none of which permit access to the community from closed conditions and none of which are challenged by the petitioner.

[10] The meeting of the RMT on 6 March 2021 recorded that all of the actions in the November 2019 plan were complete (other than the second one, which remained ongoing). That meeting agreed that the next step in the petitioner's case was for an overnight stay within HMP Greenock. New actions were agreed and minuted as follows:

- The board agreed an overnight stay to NTE Greenock.
- Ongoing regular discussion regarding [the petitioner's] release plans with PBSW and CBSW.

[11] The RMT next met on 27 August 2021, to review the outcome of two supplementary psychology reports commissioned by the petitioner from Professor Mackay in relation to the petitioner's suitability to access the community from the Closed Estate. It was noted, in particular, that the petitioner had self-reported symptoms of PTSD and that he had, in June 2021, made an application to progress within the prison estate. It was also noted that meetings had taken place with the petitioner in an attempt to allay his concerns about transferring to NTE and that he had undertaken visits to NTE at two prisons, HMP Barlinnie and HMP Greenock. A new action plan was devised:

- Interview to be held with the petitioner, his LLO and Psychology to explore the incidents that the petitioner has self-reported regarding attacks, threats of violence and psychological intimidation.
- MHT to make a referral to psychiatry in relation to the petitioner's self-reported symptoms of PTSD.
- Refer to RMT for progression should he wish to continue with this.

[12] On 17 November 2021 the RMT met again. It noted that risk assessments showed that the petitioner presented a medium risk of sexually reoffending. The RMT further considered that it would be beneficial for a further referral to psychiatry to be made to

formally assess PTSD to determine any possible diagnosis and to identify any recommended treatment and/or strategies to support the petitioner's well-being on a day to day basis within the custodial environment and in conditions of less security. Should the petitioner receive a diagnosis of PTSD the RMT would request an opinion from the psychiatrist regarding the impact of this, along with the petitioner's ASD, on his ability to function and live day to day in environments such as the NTE and the Open Estate.

[13] Most recently, the RMT met on 14 April 2022. On this occasion, it noted that the further psychiatric assessment called for in November 2021 had been carried out, and had concluded that the petitioner did not fulfil the criteria for either a diagnosis of complex PTSD or a specific phobia. In the psychiatrist's view the petitioner's current difficulties were as a result of his Asperger's complicated by aberrant personality traits of a paranoid, suspicious narcissistic nature. The RMT concluded that the petitioner was now in a position to be considered for progression to less secure conditions.

[14] In summary, the current position regarding the petitioner's management in custody is that (a) the Parole Board is not yet satisfied that it is no longer necessary for the protection of the public that the petitioner be confined; (b) representations made by the petitioner since November 2019 have been investigated; (c) the findings of those investigations have been considered; (d) the respondents (as of April 2022) accept that the petitioner is now in a position to be considered for progression; and (e) the petitioner has applied for progression to the NTE.

Decision

[15] The petitioner's grievance is with the management of his life sentence by the respondents, and in particular the manner in which he is to progress within the prison estate

towards eventual release. Although he avers that there has been a continuing failure by the respondents in their equality duties owed to him, by failing to make a reasonable adjustment to avoid the disadvantage caused by his disability, the only decision challenged is that of 8 November 2019. Although he also challenges the respondent's policies which bear upon progression, he does so only insofar as the policies fed into the making of that decision. The petitioner argues that there is no need for him to challenge or seek to reduce subsequent decisions of the RMT, because they are all undermined in some way by the original one, and would all be swept away were it to be reduced. The flaw in that argument is that it fails to recognise that management of his sentence is a fluid, dynamic process which is constantly evolving, and has evolved since November 2019. Since then, a number of different decisions have been taken, based upon different representations and different information, including further reports from the pursuer's psychologist, and new management plans have been adopted. The petitioner himself has changed his position since the meeting of 8 November 2019. He has asserted since then that he suffers from PTSD (which has been investigated and rejected, without challenge). Although he avers that he does not wish to progress to the National Top End, he has as a matter of fact applied for progression to it, which he had not done previously. Decisions have been reached in light of those developments. The pursuer's fundamental premise, that those decisions have been predicated on the decision reached at the meeting of 8 November 2019, does not stand up to scrutiny.

[16] It follows that reduction of the decision to adopt the management plan of that date would not have the effect contended for by the petitioner. It would not have any impact upon the current management plan, adopted on 14 April 2022. Such a result is not only consistent with logic, but with common sense. If reduction of the 8 November 2019 decision

did have the effect contended for by the petitioner, such that all decisions since then were of no effect, the consequence would be that the pursuer's management would require to be considered of new by the RMT. However, what different decision could it be expected to reach than the one reached in April 2022, when the petitioner does not aver that it erred on that occasion? Reduction of a decision is normally a precursor to the matter decided upon being reconsidered, and a new decision made, on a proper basis. That would, as the respondents submit, be pointless in the present case because the matter has already been reconsidered, and new decisions made (several times over), none of which have been challenged.

[17] It follows that the petitioner does not have any substantial interest in having the decision of 8 November 2019 reduced and doing so would confer no practical benefit on him. Reduction of that decision would indeed be pointless and of academic interest only.

[18] Were that the only remedy sought, there would be no need to consider matters further, but the petitioner does seek further remedies, the first of which are declarators that the decision unlawfully discriminated against him and constituted a breach of certain of his human rights. The next question is therefore whether there might be benefit to the petitioner in obtaining decree of declarator in the terms sought. There was some discussion at the hearing as to the extent, if any, to which the court might grant declarator that a decision was unlawful without also reducing it. Counsel for the petitioner submitted that there was no basis upon which the court could grant reduction and not declarator, but the point at issue is whether the court could competently and appropriately grant declarator while refusing reduction. On this issue, I do not accept the submission of counsel for the respondent that to do would be incompetent. The case cited, *Boum* v *Secretary of State for the Home Department* [2006] CSOH 111, does not quite support that proposition. Rather, the

view expressed in that case was that where reduction of a decision was the appropriate remedy, it was neither competent nor appropriate also to grant declarator. While that somewhat cuts the feet from under the submission of counsel for the petitioner that the court could not grant reduction without also granting declarator, it does not follow from that observation, even if correct, that the Court of Session cannot competently grant declarator without also reducing a decision. In *Boum*, reference was made to a dictum of Lord Fraser in *Brown* v *Hamilton District Council* 1983 SC (HL) 1 at 46, where he said that decree of declarator pronounced as a mere *brutum fulmen* (an ineffectual legal judgment) which had no compulsive force was "futile and ought not to be pronounced". However, that was in the context of consideration whether the sheriff court could competently grant a decree of declarator that a decision of a local authority was one which it was not entitled to reach, and the reasoning does not apply with the same force to a decree of declarator granted by the Court of Session in the exercise of its supervisory jurisdiction.

[19] Neither counsel was able to refer to any other authority vouching the proposition that it is incompetent for this court to pronounce a declarator without also granting reduction; and as counsel for the petitioner submitted, it is easy to think of situations where the court might wish to pronounce a declarator without reducing a decision or policy, where to do so might have wider ramifications.

[20] However, the discussion of competency is to some extent an arid one because even if competent, a decree of declarator would be equally pointless as a decree of reduction, and for the same reasons. It would offer no practical benefit to the petitioner in terms of his management. As counsel for the respondent submitted, even if the respondents did take an erroneous approach in November 2019 and breached the pursuer's rights, any error has not been repeated in the subsequent decisions, because they are unchallenged. Finally, where

the reason for refusing decree of reduction is that to do so would be futile, it would be equally futile (in the words of Lord Fraser) to grant decree of declarator in relation to that self-same decision.

[21] Accordingly, decree of declarator would also provide the petitioner with no practical benefit and would be of academic interest only.

[22] The next remedies sought by the petitioner are reduction of (and declarator in relation to) the respondent's policies. These can be dealt with shortly. As already noted, they are challenged only insofar as they fed into the sole decision complained of, that of 8 November 2019. As the respondents submitted, the manner in which the policy may have played a role in the meeting of 8 November 2019 is a historical one, now of no practical relevance for the reasons already given. Further, the attack on the policy is beside the point since as the respondents also submitted, even if the respondents had no policy at all, it would be eminently capable of having due regard to its equality duties in carrying out the function of progressing the petitioner through the prison estate. Putting this another way, even if the policy were unlawful for the reasons advanced by the petitioner, the core question would remain whether in substance the respondents had complied with its duties under section 149 of the 2010 Act, in reaching the decision complained of. Since reduction of that decision is now academic, so too would be any decision of the court in relation to the policy as applied on that occasion, and reduction of it would be of no practical benefit to the petitioner. It follows that the remedies sought in relation to the guidance are equally futile as those in relation to the decision itself.

[23] The sole remaining remedy sought is that of damages. This too can be disposed of shortly, since counsel for the petitioner accepted that if that were the only remedy which the petitioner had an interest in pursuing at this stage, it would not be competent to do so in the

context of a judicial review. His claim in this regard is one which relates to a completed wrong: see *Ruddy* v *Chief Constable Strathclyde Police* 2013 UKSC 126, Lord Hope at 132-133, and *Docherty* v *Scottish Ministers* 2012 SC 150, LP Hamilton at 160. A claim for damages cannot be converted into an invocation of the court's supervisory jurisdiction by the addition of a declarator. Accordingly on the hypothesis that the petitioner had a valid complaint in relation to the decision of 8 November 2019 which might give rise to a claim for damages which he would have an interest in pursuing, he cannot do so in the context of this petition.

[24] Finally and for completeness, counsel for the petitioner submitted, under reference to *Ashingdane* v *The United Kingdom* (1985) 7 EHRR 528 and *Kutic* v *Croatia* 2002 ECHR 297, that the petitioner had an article 6 right, albeit one which could be restricted proportionately, to have his case determined after exercising his right to call witnesses. He submitted that the court should therefore be slow to come to the conclusion that the petition was academic. However, since he also conceded that if the petition were academic, the restriction of the right to call witnesses would be proportionate, that removes any force which the submission might otherwise have had. The correct approach is first to ask whether the petitioner is academic. If it is, then, as counsel conceded, the consequent removal of the ability to call witnesses is a proportionate restriction of the article 6 right. The existence of the right which a litigant might otherwise have to call witnesses cannot influence the court's decision as to whether the litigation is of academic interest only.

Disposal

[25] For all of the foregoing reasons, none of the remedies sought by the petitioner are of anything more than academic interest and the granting of none of them would confer any

substantial benefit upon him (save that of damages, which it is incompetent to pursue as a stand-alone remedy in a judicial review). I intend to sustain the respondents' fourth plea in law but as agreed with counsel at the conclusion of the hearing, I will put the case out by order for further discussion as to the precise terms of the order to be made (and in particular whether it should be dismissal or refusal of the petition).

Postscript

[26] For completeness, I should mention one further matter raised at the hearing by counsel for the petitioner, namely his concern that any future challenge by the petitioner to a future decision of the respondents, on the same or similar grounds as those founded upon in the present petition, would be time-barred by virtue of section 27A of the Court of Session Act 1988. Counsel submitted that such a challenge would, or at least might, be time-barred. *O'Neill* v *Scottish Ministers* [2021] CSIH 66 was authority that any future petition would be time-barred, since the date on which the grounds giving rise to the application first arose on 8 November 2019. There are at least two answers to this. First, the argument is predicated on the premise that decisions since November 2019 (including any future decisions) have in some way been predicated upon that decision, which for the reasons I have given above, they are not. They are separate, stand-alone decisions which if reached unlawfully could undoubtedly be challenged. Second, *O'Neill* can be distinguished. The petitioners in that case had argued that the date on which the grounds giving rise to the petition first arose was the date on which the respondents had written a letter confirming the decision which had been taken previously. That is far removed from the hypothetical situation in contemplation here, where the respondents will have taken a new decision based upon whatever information is then before it. It is further worth bearing in mind that as at 8 November 2019,

the petitioner was not considered to be ready for progression. The most likely time at which any future challenge might be made is when he is offered a place in NTE which he claims to be unable to take due to his disability: that is the point at which he might again assert that the respondents have unlawfully discriminated against him and/or breached his Convention rights. As the respondents submitted, any such challenge would be to the new decision, based upon new facts, and would not be a challenge to the same decision as was reached in November 2019. In such circumstances, the date on which the grounds giving rise to the application first arose would be the date of the new decision. I therefore do not share the petitioner's worry about this, but counsel for the respondents indicated that, to provide further comfort to the petitioner, for what it is worth, they might be willing to provide an undertaking not to take a time-bar point in any future petition. This is a matter which can also be canvassed at the by order hearing.

The by order hearing

[27] The by order hearing envisaged above has taken place since this opinion was first issued to parties. After hearing from counsel, I have refused the petition, having regard to the view expressed by the Inner House in *Tesco Stores Ltd* v *Dundee City Council and Others* [2011] CSIH 9 that the only decrees open to the court in a petition process are to grant or to refuse the petition.