OUTER HOUSE, COURT OF SESSION

[2020] CSOH 69

P935/19

OPINION OF LORD PENTLAND

In the petition of

AB

Petitioner

for Judicial Review

of the conditions imposed in his licence for release by the Parole Board for Scotland

Petitioner: Leighton; Drummond Miller LLP
Respondents (Parole Board for Scotland): Dunlop QC; Anderson Strathern LLP
Interested Parties (Scottish Ministers): Jajdelski; Scottish Government

8 July 2020

Introduction

[1] This petition for judicial review has been brought by a convicted sex offender, who was released from prison on licence in September 2019, as he was entitled to be, having served two-thirds of the custodial part of his extended sentence. The petitioner, who now lives in England, was born on 28 September 1966. The case came before me for a substantive hearing, permission to proceed having been granted in respect of one ground of challenge only.

[2] The petitioner's challenge is to the legality under the common law and under article 8 of the European Convention on Human Rights ("the ECHR") of a condition

(condition 18 a)) contained in his release licence. The condition requires the petitioner immediately to inform his supervising officer of any friendships, associations, or intimate or domestic relationships that he enters into with anyone. The petitioner claims that the condition frustrates the purpose of the legislation governing the release of convicted prisoners (the Prisoners and Criminal Proceedings (Scotland) Act 1993 ("the 1993 Act")); that its terms are insufficiently clear, precise, accessible and foreseeable; and that it is disproportionate to the aim that it seeks to achieve. Accordingly, he seeks declarator that the condition is unlawful at common law and that it is in breach of his article 8 rights. He also seeks reduction of the condition.

[3] Answers to the petition were lodged by the Parole Board for Scotland ("the Board"), who were averred by the petitioner to be the appropriate respondents. The petition was also served on the Scottish Ministers ("the Ministers"), whom the petitioner cited as interested parties. They too lodged Answers. There is an issue between the Board and the Ministers as to which of them is the appropriate respondent in the context of the present proceedings.

Background

[4] The background to the petition may be summarised as follows.

[5] At Aberdeen High Court on 21 January 2011 the petitioner was found guilty after trial of six charges reflecting a sustained pattern of serious sexual abuse of two stepchildren when they were between the ages of 12 and 14. The children were a girl and a boy. In his post-trial report to the Board the trial judge, Lord Brodie, explained that the jury had convicted the petitioner of what were very serious offences indeed. They involved repeated instances of sexual abuse of the children between about September 2008 and May 2009. The children regarded the petitioner as their father, essentially the only father that they had had.

The abuse was systematic and planned. The female child described having been induced to pretend to be ill in order that she would be at home while her mother was at work and the petitioner could have access to her. There was a background of violence in that the petitioner offered sexual abuse as an alternative to physical punishment with a belt or slipper. The abuse, involving oral, anal and attempted vaginal penetration, was particularly grave, as was the element of compelling each child to handle and lick the private parts of the other. The oral penetration was very frequent. The trial judge said that the evidence of the children and the victim impact statements provided to the court pointed to how damaging sexual abuse could be. He observed that such abuse is selfish and cruel. Often, as in the petitioner's case, it involved a gross breach of trust. In Lord Brodie's opinion, abuse of this nature called for a frankly punitive sentence when established in a criminal court.

[6] In a pre-sentence report dated 8 February 2011 a probation officer of the National Probation Service for England and Wales recorded that the petitioner completely denied the offences. He was therefore said to be unable to show any remorse for the victims. The report's author assessed the petitioner as posing a medium risk of harm to children. She continued as follows:

> "The context of this harm is by way of further sexual offending against male or female children. In my assessment (the petitioner) has potential to cause further harm, however is unlikely to do so unless circumstances change. The circumstances which would need to change for the potential harm to be raised to high would be access to future victims. Should he form a relationship whereby he would have the opportunity to gain trust of potential victims I would reassess this risk as raising to high."

[7] The pre-sentence report went on to consider the possibility of an extended sentence being imposed on the petitioner. The author observed that such a sentence would allow for the petitioner to be monitored on release. This would enable his offender manager to monitor ongoing relationships and possible risk to children. It was noted that whilst serving

a custodial term the petitioner's attitudes towards the offences might change, in which case he could begin to address his offending behaviour by way of prison programmes.

[8] On the basis of the evidence led at the trial, which also suggested that the petitioner has a strong and controlling personality, and in light of the pre-sentence report, Lord Brodie concluded that the petitioner presented a risk of serious harm to the public, against which the licence period associated with a determinate sentence would not provide adequate protection. Accordingly, the trial judge was satisfied that the test for the imposition of an extended sentence set out in section 210A of the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act") was satisfied. He imposed the following concurrent sentences: in respect of the single statutory charge, charge (4) (where the maximum sentence was one of 10 years imprisonment), a term of imprisonment of 9 years; and in respect of the common law charges, charges (5) to (9), a cumulative extended sentence in terms of section 210A of the 1995 Act with a custodial term of 13 years, and an extension period of 3 years. The sentences were both backdated to 21 January 2011 when the petitioner had been first remanded in custody.

[9] Between February and July 2011, the petitioner was detained in HMP Edinburgh. From July 2011 until his release on licence in September 2019 he was a prisoner at HMP Glenochil.

[10] The petitioner's parole dossier contains a substantial volume of information describing his attitude and progress whilst he was in custody following the imposition of the extended sentence. It does not present an encouraging picture with regard to the petitioner's attitude towards his offending and his rehabilitation.

[11] In a report prepared by a prison social worker in May 2018 for a Board hearing to consider possible release on parole licence it was noted that the petitioner continued to deny

his offences and had refused to engage in any of the assessments required for offence focused programmes and/or risk management. He had also refused to attend his integrated case management meetings since the start of his sentence. He refused to engage with the social worker for the purpose of compiling the report and to discuss overall sentence management. He had self-rejected from the parole process in January 2017. As the petitioner had not participated in any form of offence focused work and/or sentence management with prison based social workers or psychology staff since the commencement of his sentence in 2011, it was not possible to complete risk assessments for him. Accordingly, the prison social worker was unable to provide any positive recommendation for parole due to the lack of engagement on the petitioner's part and his absolute denial of his offences. At that stage, he appeared to be involved in ongoing appeals against his convictions.

[12] A home circumstances report prepared at the same time recommended additional licence conditions, including one requiring the petitioner to notify his supervising officer of any developing personal relationships, whether intimate or not, with any person resident in a household containing children under the age of 18.

[13] On 12 July 2018, a panel of the Board met to consider the petitioner's case, which had been referred to the Board by the Ministers for a decision about his possible release on parole licence. The test for release was that the Board had to be satisfied that such risk as the petitioner posed could be safely managed in the community. The Board was not satisfied on this matter and therefore did not recommend the petitioner's release. The decision was a unanimous one. The panel noted that due to the petitioner's lack of engagement with social workers and psychologists, they had been unable to provide an accurate assessment of his

risks and needs. Appropriate and specific conditions to manage the petitioner's risks and needs could not, therefore, be set.

[14] In May 2019, the prison social worker at HMP Glenochil reported on the issue of the petitioner's release on non-parole licence. She noted that the petitioner was due for release (at the two-thirds point of his sentence) on 20 September 2019. The report explained that the petitioner continued to maintain his innocence of his sexually harmful behaviour and that he had not engaged in offence-focused work in custody. The petitioner's attitude therefore limited the social worker's ability as an assessor of risk to analyse the emotional, social and psychological influences motivating and shaping his behaviour and sexual functioning. Accordingly, a positive recommendation for parole before the petitioner's earliest date of liberation in September 2019 could not be made. Once again, a home circumstances report recommended additional licence conditions, including one in similar terms to the condition proposed a year earlier in regard to notification of developing personal relationships, this time with residents of a household containing children under the age of 16.

[15] The petitioner's dossier also contains a response in custody report prepared in May 2019. In this it was noted that the petitioner mixed with a small group of prisoners and that he could be argumentative, challenging, and aggressive with staff when he believed that he was not getting what he perceived he was due. He continued to deny his offences and had not completed any interventions in custody.

[16] The petitioner's case was considered by a panel of the Board on 11 July 2019. His release at that time was not recommended as the Board was not satisfied that the risk he presented could be safely managed in the community. Again, the decision was a unanimous one. The Board was satisfied that licence conditions, which it attached to its decision, were lawful, necessary and appropriate in order to manage the risk that the petitioner presented

in the community. The attached conditions included, amongst others, a condition in the same terms as condition 18 a) in the licence under which the petitioner came to be released in September 2019. This extended beyond notification of relationships with members of a household containing children under the age of 16; it was now to cover any friendships, associations, or intimate or domestic relationships that the petitioner entered into with anyone. The condition, therefore, amounted to a significant strengthening of the proposed notification obligation to be imposed on the petitioner.

[17] As they were obliged to do under and in terms of section 1(2) of the 1993 Act, the Ministers released the petitioner on licence with effect from 20 September 2019. As I have mentioned, this was at the two-thirds point in his sentence. The licence expires on 20 January 2027 unless previously revoked. Condition 18 ("the condition") of the petitioner's licence provides inter alia as follows:

> "You shall:
>
> a) immediately inform your supervising officer of any friendships, associations, or intimate or domestic relationships that you enter into, with anyone;
>
> …"

[18] As I have mentioned, the petitioner is now resident in England. He is categorised as a restricted transfer prisoner with the result that supervision of him under his Scottish licence conditions is carried out by HM Prison and Probation Service. He has a probation officer who fulfils the same duties as his supervising officer would if he was resident in Scotland.

The petitioner's arguments

[19] On behalf of the petitioner, Mr Leighton submitted that the Board were the correct respondents to the petition. In reality it was the Board which had decided on the terms of

the condition. The Ministers had not exercised any independent rôle in that connection. Counsel adopted the Ministers' submissions on this issue.

[20] In any event, it did not matter if the position was that the proper respondents were the Ministers and that the Board should merely have been convened as interested parties. The question as to which of them was properly to be characterised as a respondent and which as an interested party was technical and of no practical significance in the context of the real issues in the case. They were both potentially proper contradictors and each of them had participated in the case for the purpose of defending the condition on its merits.

[21] The focus of the petitioner's challenge was on the validity of the condition rather than on identifying the particular public authority responsible for devising and implementing it. In that connection, it was important to recall that the challenge was brought by way of a petition for judicial review in which relief was sought from the court on public law grounds. A petition was a means of applying to the court for the granting of relief and, unlike an action, did not require to be directed against a particular party. In reality it did not matter which of the Board and the Ministers was designated as a respondent and which as an interested party. It would be perverse to dismiss the petition on the ground that the wrong party had been identified as a respondent in circumstances where both the Board and the Ministers had been served with the petition and had each chosen to lodge Answers. Reference was made to the well-known comment by the Lord Justice Clerk (Grant) in *Donaghy* v *Rollo* 1964 SC 278, 288 that litigation should not be turned into a game of snakes and ladders. Although the petition referred to a challenge to the decision of the respondents, that was merely a formal averment; the challenge was to what Mr Leighton described as a state of affairs rather than to any particular decision.

[22] On the substance of the petitioner's case, Mr Leighton submitted that the condition was invalid under the common law. Its terms were so lacking in clarity and precision that the petitioner did not know what it meant. It appeared to be too strict.

[23] Where compliance with the condition was effectively impossible, as was submitted to be the position in the present case, the policy and purpose of the 1993 Act, insofar as it required prisoners to be released at a certain stage of their sentences, would be frustrated.

[24] Mr Leighton sought to draw a parallel between the terms of the condition and the terms of a decree for interdict. Breach of both carried potentially penal consequences and they each, therefore, required to be framed in such a way as to leave the person to whom they were directed in no real doubt about what conduct was permitted and what was prohibited. Seen through that lens, the terms of the condition were insufficiently clear and precise. They gave rise to practical difficulties for the petitioner and his wife. Reference was made to the petitioner's affidavit, in which he sought to explain some of the difficulties. He said that his probation officer worked part-time so he could not always inform her "immediately" about the matters covered by the condition. Moreover, it was difficult to know what amounted to a "friendship" or an "association" and to say at what point either of these relationships started. Would the term "association" extend, for example, to a bus driver in the event that the petitioner was to speak to him when travelling from his home into town? Since being released the petitioner had had three probation officers; they had taken different views as to what information they required to be given about the petitioner's contacts, for example with his adult son. The uncertainty created by the vagueness of the condition was said to give rise to real practical difficulties for the petitioner in his daily life. The petitioner said that his current probation officer had told him that he had to report to

her on anyone he talks to "beyond a hello" and about anyone he is likely ever to have a coffee with.

[25] Mr Leighton submitted that the proper approach to the concept of uncertainty at common law in the present case was to be found in the dictum of Mathew J in *Kruse* v *Johnson* [1898] 2 QB 91 at p 108 rather than in *Fawcett Properties Ltd* v *Buckingham County Council* [1961] AC 636. *Kruse* had concerned the validity of a byelaw, but the same principle applied in the case of a licence condition since it was directed to a particular person, namely the petitioner, and failure to comply with the condition could result in penal consequences, extending to the loss of liberty. In *Fawcett Properties* it had been held that a planning condition would only be void for uncertainty if it could be given no meaning or no sensible or ascertainable meaning, and not merely because it was ambiguous or led to absurd results (Lord Denning at pp 677 – 678). Mr Leighton sought to distinguish *Fawcett Properties* on the ground that a planning condition had a wider public dimension than a licence condition, which was addressed to the petitioner alone. Mr Leighton relied especially on what Mathew J said in *Kruse* at p 108:

> "a byelaw to be valid must, among other conditions, have two properties – it must be certain, that is, it must contain adequate information as to the duties of those who are to obey, and it must be reasonable …"

The condition failed that test. It lacked certainty because it did not contain adequate information to allow the petitioner to understand what it meant.

[26] As to the ECHR claim, Mr Leighton submitted that the condition engaged the petitioner's rights under article 8 of the Convention because it required him to provide information concerning his personal relationships, established or nascent. In the modern age, the collection of data about a person amounted to an interference with their article 8 rights without anything further being done with the data. Reference was made to *R(T)* v

Chief Constable of Greater Manchester Police [2015] AC 49 at paragraph 105. Article 8 also protected a right to personal development and the right to establish and develop relationships with other human beings and with the outside world (*Pretty* v *United Kingdom* (2002) 35 EHRR 1 at para 61).

[27] Mr Leighton accepted that as the condition had been imposed under domestic legislation it was in accordance with the law and that insofar as it pursued the protection of public safety it had a legitimate aim. Nonetheless, under the ECHR the condition had to have a necessary quality that made it law. It had to be sufficiently precise, accessible, and foreseeable. Reliance was placed on *O'Neill* v *Scottish Ministers* 2015 SLT 820, paragraphs 25 and 26. It was submitted that the condition lacked these essential qualities. The citizen had to have an indication that was adequate in the circumstances of the legal rules applicable to a given case; a provision could not be regarded as "law" unless it was formulated with sufficient precision to enable the citizen to regulate his or her conduct, if necessary with appropriate advice, and to foresee the consequences of a given action (*Sunday Times* v *United Kingdom* (1979) 2 EHRR 245 at [49]).

[28] On the issue of whether the condition was proportionate, Mr Leighton referred to the standard approach to assessing proportionality as set out by Lord Reed in *Christian Institute* v *Lord Advocate* 2016 SLT 805 at paragraph 90. It was accepted that since its purpose was public protection, the condition was sufficiently important to justify the limitation of a protected right. It was also accepted that a requirement to inform the petitioner's supervising officer about social contacts was rationally connected to that aim. Mr Leighton submitted, however, that a less intrusive measure could have been adopted, such as delayed notification and/or notification in respect of a more limited range of contacts, for example persons with care or control of children and not merely associations and friendships. The

petitioner was now older than at the time when the offences occurred; he lived in sheltered accommodation. Overall, the terms of the condition went too far and did not strike an appropriate balance. Requiring immediate notification was said to be extreme and unreasonable. A lesser interference would adequately protect the public.

Arguments for the Board

[29] On behalf of the Board, Mr Dunlop QC submitted that the petitioner had convened the wrong party as the respondents to the petition. The correct respondents would have been the Ministers. It was the Ministers who had released the petitioner on licence, not the Board (1993 Act, section 1(2)). He was released on the basis that he required "to comply with such conditions as may be specified in (the) licence by the (Ministers)": section 12(1) of the 1993 Act. The Ministers are empowered to vary or cancel a condition in a licence: section 12(3). The Board's rôle is not to make decisions as to the content of release licences; that is for the Ministers. Rather the rôle of the Board is to make recommendations: section 12(3)(b).

[30] Mr Dunlop acknowledged that section 12(3)(b) provided that no licence condition shall be included on release or subsequently inserted, varied or cancelled except in accordance with the recommendations of the Board. This could not, he submitted, be equiparated with a statutory duty placed on the Ministers to follow such recommendations. On the contrary, the Ministers were obliged to consider such recommendations and decide whether or not to impose them. The statutory discretion, implied by the use of the word "may" in section 12(3), to impose licence conditions lay with and fell to be exercised by the Ministers. There could not be a statutory duty to act unlawfully and accordingly if, as the petitioner contended, the condition was unlawful then the Ministers were obliged not to

accept the Board's recommendation to insert it in the petitioner's licence. In the circumstances, the petition should be refused on the ground that it was directed against the wrong party. The issue was not purely technical. It was important that the Board and the Ministers should have a clear understanding as to which of them was the right respondent in a case such as the present one. Whereas a respondent might be found liable to the petitioner in expenses or entitled to recover expenses, the same did not necessarily apply in the case of an interested party.

[31] As to the challenge brought against the terms of the condition, Mr Dunlop submitted that under the common law the test for uncertainty was correctly set out in *Fawcett Properties*, as approved by Simon Brown LJ (as he then was) in *Percy and anr* v *Hall and others* [1997] QB 924 at pp 941 – 943. The same test had been adopted and applied in *R (Gul)* v *Secretary of State for Justice* [2014] EWHC 373 (Admin) at [58]. Here there was no difficulty with a requirement "immediately" to inform the petitioner's supervising officer. The law was perfectly familiar with such a requirement. It meant "with all reasonable speed" in the circumstances of the case (*per* Fletcher Moulton LJ in *Re Coleman's Depositaries and the Life and Health Association* [1907] 2KB 798 at 807). The same word was used in other conditions contained in the petitioner's licence (conditions 2, 4, 12, 14, 15, 17 and 25). He had not taken exception to most of these; his challenge to condition 17 had failed at the permission stage.

[32] Nor was there any difficulty in understanding what was connoted by the expression "friendships, associations, or intimate or domestic relationships". The condition was imposed in order that the supervising officer could undertake his or her duties of supervision, as part of the regime to protect the public against repeat offending by the petitioner. He had been accurately described by the trial judge as having committed a gross breach of trust in the clandestine abuse of his stepchildren. He had been assessed as

presenting a risk of causing serious harm to the public. Additional licence conditions similar to the condition had been proposed when the petitioner was assessed in custody. He had twice been refused discretionary release on the basis of the risk he posed.

[33] The condition is one that is regularly imposed for offenders like the petitioner. The Board considered that the terms of the condition were reasonable and necessary for the purposes of proper supervision and of public protection. The courts should be slow to interfere with the Board's judgment on such issues. Absolute precision was not required in the case of a licence condition.

[34] The ECHR claim added nothing of substance to the petitioner's case. In view of the gravity of the petitioner's offending and the seriousness of the risk he presented to public safety, there could be no doubt that the condition was proportionate. It was enough that the petitioner, with the benefit of appropriate advice, could foresee to a reasonable extent the consequences which a given action might entail.

The Ministers' arguments

[35] For the Ministers, Mr Jajdelski submitted that the Board were the correct respondents to the petition. The Ministers could not include a condition in a licence which the Board had not recommended. In his written argument Mr Jajdelski submitted that on a proper construction of the 1993 Act, the Ministers could not refuse to include in a licence a condition which the Board had recommended. In the course of his oral submissions, he accepted, however, that the Ministers would require to decline to include in a licence a condition recommended by the Board if the condition was patently unlawful or irrational. That acceptance did not, according to Mr Jajdelski, undermine the substance of the

Minister's argument since in reality it was the Board that was responsible for determining the content of the proposed condition.

[36] Mr Jajdelski contended that the Ministers required to seek the Board's recommendations as to the content of licence conditions. The rôle of the Board in relation to conditions to be specified in a licence for a long-term or extended sentence prisoner was not merely advisory. The Ministers' duty was not a duty simply to take into account the Board's recommendations or a mere duty to consult with the Board. Their duty was not to act, in specifying licence conditions, except in accordance with the Board's recommendations. The Ministers should not be seen as the respondents to the petition by default. They should not be potentially liable in expenses where they had not designed the condition. The Ministers should not have to answer to the courts for conditions whose contents they had no responsibility for determining.

[37] It would be an anomalous outcome if the Ministers could not vary or cancel a condition in a licence other than in accordance with the Board's recommendations, which they expressly are not empowered to do in terms of section 12(3)(b), but could nevertheless decide not to insert in a licence on release a condition which the Board had recommended.

[38] Mr Jajdelski submitted that the word "may" in section 12(1) of the 1993 Act should be regarded as permissive in the sense that it referred to the fact that there were certain types of conditions that might or might not be included in a licence. This was in contrast to the use of the word "shall" in section 12(2) in relation to conditions which always had to be included in a licence. Moreover, the absence of any statutory power conferred on the Ministers to amend or modify a condition recommended to them pointed away from their having been vested with a broad discretionary power. It would make no sense if the

Ministers had to include a condition with which they were not satisfied or simply leave it out of the licence altogether.

[39] It would also be anomalous if the Minsters had discretion to refuse to include a recommended condition where they had no discretion subsequently to insert, vary or cancel a condition at their own hands and could only do so in accordance with the Board's recommendations.

[40] Mr Jajdelski submitted that the content of conditions contained in a licence is effectively recommended by the Board even though it is the Ministers who specify such conditions. The petition was in substance directed against the contents of the condition. It followed that the Board were the correct respondent to the petition as they were the party which had recommended that the condition should be included in the licence. The petitioner's complaint was not properly directed at the Ministers. Effectively, it was the Board which fixed the terms of the condition and decided that the petitioner should be subject to it. The Ministers put that decision into effect by specifying the condition in the petitioner's licence as they were required to do, but they were not responsible for the decision itself. Reference was made to *R (on the application of Rowe)* v *The Parole Board and others* [2010] EWHC 524 (Admin) per Silber J at paragraph 8. The Board correctly stated on its website that it was responsible for setting licence conditions in cases such as that of the petitioner.

[41] If the condition is unlawful, as alleged by the petitioner, it was unlawful for the Board to recommend its inclusion in the licence in the first place. It was also unlawful for the Ministers to specify it in accordance with the recommendations of the Board. Insofar as the legality of the condition was challenged the Board would accordingly be the correct

respondent, irrespective of whether the Ministers had discretion not to accept the Board's recommendation.

[42] In any event, if it was correct that the Ministers were not bound to accept the Board's recommendation to include the condition in the licence, the Ministers had no reasonable basis for not accepting the Board's recommendation. The Ministers were not in a position to second-guess the Board's recommendation, which was made on the basis of their assessment of the petitioner's case and having regard to their expertise.

[43] Further, if the Ministers' submissions thus far were not well-founded, then the petition ought to have been directed against the Ministers as responsible for specifying the condition in the exercise of their discretion to accept the Board's recommendation and accordingly the petition was not accurately directed against the Board. It should, therefore, be refused as being incompetent.

[44] So far as the substance of the petitioner's challenge was concerned, there was no ambiguity in the expression "any friendships, associations, or intimate or domestic relationships that you enter into, with anyone". The words used were intelligible and ordinary words with ascertainable meaning. They did not extend to any casual contact the petitioner might happen to have with anyone at all. The petitioner ought to have been able to ascertain with reasonable certainty when he has entered into the relevant type of relations as set out in the condition.

[45] The requirement to inform his supervising officer "immediately" was not difficult or impossible to comply with. Such a requirement had been recognised by the law as valid and enforceable in a variety of contexts for many years. The petitioner could contact his supervising officer with reasonable speed in any particular circumstances in which he has entered into the kind of relations specified in the condition.

[46] The condition was lawful and proportionate to the aim of protecting the public against serious sexual offending. No less intrusive measure could be used without compromising that aim. Restricting the range of relations requiring to be reported would result in less effective supervision and leave the supervising officer uninformed about some social interactions of the petitioner in which he may have an increased opportunity to reoffend.

Analysis and decision

Condition 18 a)

[47] It is convenient to consider first the petitioner's challenge to the validity of the condition.

The common law challenge

[48] In my opinion, the correct approach under the common law where a provision in a legal instrument, such as a condition in a release licence, is challenged on the ground of uncertainty was set out by Simon Brown LJ (as he then was) in *Percy and anr* v *Hall and ors* [1997] QB 924 at p 941A to E and pp 942F to 943B. His Lordship observed that a literal application of the *Kruse* test would of itself involve great uncertainty since it provided no criteria or principles by which to judge whether the impugned provision contained inadequate information or was uncertain. The better approach was the one set out in *Fawcett Properties*. This was to the effect that the instrument should be treated as valid unless it was so uncertain in its language as to have no ascertainable meaning, or so unclear in its effect as to be incapable of certain application in any case.

[49] I note also that in *R (on the application of Gul)* v *Secretary of State for Justice, National Probation Servic*e [2014] EWHC 373 (Admin), Beatson LJ at paragraph 58 adopted the approach approved by Simon Brown LJ in considering whether conditions in a release licence were void for uncertainty at common law. His Lordship also observed that the decisions on the equivalent requirements under the ECHR did not mean that any re-evaluation of the common law was required or suggest a different result.

[50] I respectfully agree with the views expressed on the appropriate formulation of the test for invalidity on the ground of uncertainty by Simon Brown LJ and by Beatson LJ. Where there appears to be ambiguity in the language used in a provision contained in a legal instrument the task for the courts is to resolve the ambiguity wherever this can reasonably be achieved. A provision should only be struck down on the ground of uncertainty in the rare case where it can be given no sensible and practicable meaning in the particular circumstances of the case. It is thus clear that the test at common law presents a high hurdle for a party challenging the terms of a provision on the basis of a lack of certainty. In my opinion, the terms of the condition in the present case are not void for lack of certainty. The language used in the condition has ascertainable meaning and is not so unclear in effect as to be incapable of certain application.

[51] So far as the requirement of immediacy is concerned, I do not consider that this is impossible for the petitioner to comply with or that the word "immediately" is so lacking in clarity as to be unenforceable and hence invalid. The law has long recognised, in various contexts, that a requirement for some action or step to be taken immediately is capable of being given practical effect. For example, in *R* v *Justices of Berkshire* (1878) 4 QBD 469 at 471, Cockburn CJ interpreted the word "immediately" where it appeared in a statutory provision contained in the Licensing Act 1872 as implying prompt, vigorous action, without any delay.

Whether there had been such action would, in his view, be a question of fact, having regard to the circumstances of the particular case.

[52] In *In re Coleman's Depositaries Limited and the Life and Health Assurance Association* [1907] 2 KB 798 at 807, Fletcher Moulton LJ while recognising that the word "immediate" was no doubt a strong epithet, considered that in the context of an employer's liability insurance policy it might be fairly construed as meaning with all reasonable speed considering the circumstances of the case.

[53] It seems to me that the passages from these two judgments capture what the word "immediately" must be taken to mean in the context of the condition. It requires the petitioner to take prompt steps without any delay and with all reasonable speed to inform his supervising officer of the matters covered by the condition. That is not an unduly onerous requirement for the petitioner to comply with; the meaning and the effect of the requirement are clear.

[54] Nor do I consider that there is any real uncertainty in the other parts of the condition to which the petitioner takes exception. The words "friendships" and "associations" are ordinary words of the English language; each has a perfectly intelligible meaning. In the Oxford English Dictionary "friendship" is defined as meaning the state or relation of being a friend, an association of persons as friends, and a close relationship between friends. I cannot see that there should be any practical difficulty for the petitioner in recognising when he has entered into a new friendship. In the same dictionary "association" is defined to mean a union in companionship on terms of social equality, fellowship, and intimacy. Again, there should be no practical problem for the petitioner to identify when he has formed a new association. The petitioner's current probation officer seems to me to have summarised these requirements of the condition succinctly and accurately when, according

to the petitioner's evidence in his affidavit, she explained that he should report to her on anyone with whom he was likely to have a coffee. That neatly encapsulates the notion of an emerging association or friendship. I acknowledge that it would be going too far to say, as the petitioner claims he has been told, that he must notify any kind of contact "beyond a hello"; the language used in the condition does not extend to any casual contact that the petitioner may have. Of course, the view allegedly expressed by the probation officer has no impact on the validity of the condition as a matter of law.

[55] I cannot identify any uncertainty in the phrase "intimate or domestic relationships" and I did not understand Mr Leighton to suggest that there was.

[56] The petitioner submitted that due to the condition being impossible to comply with, the purpose of the 1993 Act had been frustrated. For the reasons I have given, I am not persuaded that it is impossible for the petitioner to comply with the condition. It follows that the argument based on frustration of statutory purpose falls to be rejected. I am satisfied that the arrangements for the petitioner's release on a licence containing *inter alia* the condition are in accordance with the provisions of the 1993 Act.

The ECHR challenge

[57] Turning to the ECHR challenge, article 8 of the convention provides, amongst other matters, that any interference with the right to private and family life must be "in accordance with the law". The expression requires that sufficient precision must be brought to the interference. In *Sunday Times* v *United Kingdom* (1979) 2 EHRR 245, the European Court explained that the requirement for there to be sufficient precision did not mean that there had to be certainty. The Court recognised that inevitably many laws were expressed in terms which were, to a lesser or greater degree, vague; their interpretation and application

were questions of practice. Sufficient precision might require the citizen to obtain advice in order to foresee, to a degree that was reasonable in the circumstances, what the consequences of a particular action might entail. I refer also to, and respectfully agree with, what Stephens J (as he then was) said on the point in *Re McConville's application for judicial review*, [2014] NIQB 109 per at paragraph 23; absolute certainty is not required; nor is absolute foresight of the consequences of a particular action.

[58] Applying the approach developed in the ECHR jurisprudence, I do not consider that the condition lacks sufficient precision. The language it employs is straightforward and intelligible, as I have already explained. If the petitioner is in any doubt about how the condition applies in a particular set of circumstances he can easily seek guidance and advice from his supervising officer with regard to the type of relationships which he requires to disclose in order to comply with the condition. The petitioner explains in his affidavit that he is in regular contact with her. In addition to his supervising officer, the petitioner also has access to expert legal advice.

[59] It is of vital importance that the petitioner's supervising officer should be immediately informed by him about friendships, associations or intimate or domestic relationships he enters into with anyone. This is so that the serious risk which the petitioner presents to the safety of children can be effectively managed, monitored and controlled. It is notorious that paedophiles, such as the petitioner, often go to substantial lengths to gain clandestine access to children for the purpose of sexually abusing them. It is with this unfortunate reality in mind that the condition has been put in place. It should also be recalled that the petitioner's offences involved serious sexual abuse of his stepchildren in the context of an intimate and domestic relationship he had formed with their mother. The importance of having an effective system for protecting the public against the possibility of

further child abuse on the part of the petitioner can hardly be over-emphasised. In the circumstances, I have no difficulty in finding that the condition is lawful and proportionate under the ECHR. The aim of the condition is undoubtedly of sufficient importance to justify a limitation on the petitioner's article 8 rights; Mr Leighton did not submit otherwise. The condition is, in my opinion, rationally connected to that aim because its purpose is to ensure that the petitioner's supervising officer is kept promptly informed about any of the kind of relationships entered into by the petitioner which might provide him with an increased opportunity to re-offend. This is so that she can satisfy herself that no risk arises from such relationships.

[60] In my view, there is no less intrusive measure that could be devised without unacceptably compromising the legitimate aim behind the condition. Restricting the range of relationships requiring to be reported would result in less effective supervision of the petitioner and risk his supervising officer being left in the dark about some of the petitioner's social interactions which might create enhanced opportunities for him to re-offend. Delayed rather than immediate notification would run the risk of leaving a temporal gap in supervision.

[61] A further factor in assessing the proportionality of the condition is that it does not preclude the petitioner from forming new friendships, associations, or intimate or domestic relationships. It merely obliges him to notify such developments to his supervising officer.

[62] In the circumstances, I am satisfied that the ECHR challenge is not well-founded on either of its branches: lawfulness or proportionality.

Concluding observations on the condition's validity

[63] Stepping back finally from the detail of the petitioner's legal arguments and looking more broadly at the whole picture, I would add the following observations.

[64] In *R(X)* v *Secretary of State for Justice* [2017] 4 WLR 106 at paragraph 46 the Court of Appeal endorsed the comments of Moses J (as he then was) in the case of *R (Carman)* v *Secretary of State for the Home Department* [2004] EWHC 2400; [2005] 2 Prison LR 172. At paragraphs 33 of his judgment Moses J said:

> "The licence conditions and assessment of risks to the public, on which they are based, are matters of fine judgment for those in the prison and the probation service experienced in such matters not for the courts. The courts must be steadfastly astute not to interfere save in the most exceptional case."

[65] To my mind these are crucial points for the court to keep at the forefront of its mind in the context of a challenge such as the present one. The petitioner's claims have a heavily legalistic flavour. They seek to subject the language used in the condition to the sort of highly analytical approach that might perhaps be appropriate when a court is asked to construe a real burden in a conveyancing deed or a tightly framed provision in a commercial contract. A condition imposed on a sex offender in a release licence should not, in my opinion, be read in that way. Such a provision has to be understood and applied in its real-world setting. Stretching the language to create strained and artificial examples of how the condition might create theoretical uncertainty is not helpful.

[66] In my opinion, this is clearly not a case in which it would be appropriate for the court to interfere with the judgment of the Board in recommending the condition or with the decision of the Ministers to include it in the petitioner's licence. Given the troubling circumstances of the petitioner's conviction and the concerning assessments of the risk he presents to the safety of children, the condition was amply justified. I consider that the meaning and effect of the condition are clear; they give rise to no significant ambiguity. The

terms of the condition are capable of being readily and easily understood and applied in practice. The condition is entirely proportionate to the aim of protecting public safety, which it is devised to promote.

[67] I conclude that the petitioner's challenge to the validity of the condition fails and the petition must be refused.

Who are the appropriate respondents to the petition?

[68] Since I have held that the substance of the petitioner's challenge to the validity of the condition must fail, the question as to whether the Board or the Ministers are the correct respondents to the petition is not one that I need to determine in order to dispose of the petition. In deference to the arguments presented to me, I would nonetheless add the following brief observations.

[69] So far as relevant for present purposes, section 1(2) of the 1993 Act provides as follows:

> "As soon as a … prisoner has served two-thirds of (the custodial term of) his (extended) sentence, the Scottish Ministers shall release him on licence…"

Section 12(1) provides as follows:

> "A person released on licence under this part of this Act shall… comply with such conditions as may be specified in that licence by the Scottish Ministers."

Section 12(3) provides *inter alia* as follows:

> "The Scottish Ministers may under subsection (1) above include on release and from time to time insert, vary or cancel a condition in a licence granted under this Part of this Act; but –
>
> …
>
> (b) in the case of (an extended sentence) prisoner, no licence condition shall be included on release, or subsequently inserted, varied or cancelled except in accordance with such recommendations."

[70] It may be noted that in the petition the petitioner avers in statement 1 that the respondents (ie the Board) have imposed unlawful conditions on his release. In statement 2 he avers that the date on which the grounds giving rise to the petition first arose was 11 July 2019; that was the date on which a panel of the Board met to consider the possibility of the petitioner's early release. He then avers in statement 3 that on that date the respondents (ie the Board) imposed the objectionable conditions on him. In statement 5 the petitioner avers that he challenges the decision of the respondents on grounds which he then proceeds to set out in the following statements.

[71] It seems to me that these averments betray a misconceived approach on the petitioner's part. Contrary to what the petitioner avers, the Board did not impose any conditions on him on 11 July 2019 or on any other date. What the Board did was to recommend to the Ministers the terms of the conditions which the Board considered should be included in the petitioner's licence. The Ministers then proceeded, in terms of section 1(2) of the 1993 Act, to release the petitioner on licence and, under section 12(1), to specify the conditions in the licence. Since the gravamen of the petitioner's complaint is that it was unlawful to include the condition in his licence, it seems to me that his complaint should properly be directed against the party who was responsible in law for releasing him on a licence which contained the allegedly unlawful condition, namely the Ministers. It is true, of course, that the condition was recommended to the Ministers by the Board and that the Ministers cannot include a condition in a licence if it is not recommended by the Board, but it was nonetheless the Ministers who, under the powers conferred on them by the 1993 Act, released the petitioner on licence and specified the conditions which the licence contained. In other words, the steps necessary as a matter of law to bring about the petitioner's release from custody and to set the terms on which he should be released were steps that only the

Ministers had the legal authority to take. It seems to me to follow that the respondents to the petition should have been the Ministers, with the Board merely being interested parties. Had the petitioner elected to challenge the making of the recommendation rather than what he refers to in the petition as the imposition of unlawful conditions on him then the correct respondents would have been the Board.

[72] Mr Jajdelski submitted that the structure of and language used in the statutory scheme contained in sections 1 and 12 of the 1993 Act provided only slender foundations on which to construct the proposition that the Ministers were the appropriate respondents to a challenge to the legality of a licence condition. Instead the court should, he argued, take a more pragmatic approach, and reflect the *realpolitik* that it was the Board who formulated the condition, which the Ministers simply adopted without any independent investigation or input on their part. I am unable to accede to this line of argument. Far from being a slender foundation, it seems to me that the terms of sections 1 and 12 of the 1993 Act provide a solid statutory basis for the conclusion that the Ministers are the right respondents. As I have already explained, it was they who released the petitioner on licence, and it was they who specified the impugned condition in the licence. It is their decision to include condition 18 a) in the licence that the petitioner attacks and seeks to strike down in the present proceedings. These factors strongly indicate, in my opinion, that it is the Ministers who have title and interest to resist the petition in the capacity of respondents to it. As is explained in Thomson and Middleton, *Manual of Court of Session Procedure* (1937, p 50) title in the context of court procedure means the formal relationship of a party to the cause. For the reasons I have outlined, it is the Ministers who have a formal relationship with the subject matter of the petition because they are the parties who, by statute, are legally responsible for taking the pertinent decisions in relation to the petitioner's release on licence and as to the

contents of the licence. As Thomson and Middleton go on to say (on p 52), it is difficult to conceive of title existing without interest. In my view, the Ministers clearly have an interest in the present proceedings because it is their decisions that are being challenged.

[73] Mr Jajdelski was driven to accept, in the course of oral argument, that the Ministers would be bound to decline to include in a licence a condition recommended by the Board in the event that the condition was patently unlawful or irrational. There cannot be a statutory duty to act unlawfully. It is thus clear that the Ministers do not always have to follow the Board's recommendations. The fact that in practice the Ministers, for reasons that are entirely sound and understandable, routinely accept the Board's recommendations does not detract from the principle that the decisions to release on licence and to include conditions in the licence are, under the statutory scheme, decisions taken by the Ministers. It follows, in my opinion, that they are the appropriate respondents to the petition. The Board should be interested parties only.

Disposal

[74] I shall give effect to the decisions explained in this Opinion by sustaining the third and fifth pleas-in-law for the Board; these are to the effect that the petition was directed at the wrong respondents and that the condition was lawful. I shall also sustain the fourth plea for the Ministers, to the effect that the condition is lawful. I shall repel the Ministers' second plea, reflecting the proposition that the Ministers would not have been the correct respondents. I shall also repel the petitioner's pleas and refuse the petition. I shall reserve all questions as to expenses.