OUTER HOUSE, COURT OF SESSION

[2021] CSOH 12

P1055/19

OPINION OF LORD HARROWER

In the petition of

WILLIAM BEGGS

Petitioner

for judicial review of acts of prison authorities in respect of the failure to advance progression and request a further Psychiatric Assessment Report.

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

29 January 2021

Introduction

[1] The petitioner is a prisoner in Her Majesty's Prison Edinburgh (HMP Edinburgh) serving a life sentence. The punishment part of his sentence expired on 27 December 2019. The respondents are the Scottish Ministers. As soon as a life prisoner has served the punishment part of his sentence, the Parole Board may direct the respondents to release him on licence. Before making any such direction, the Parole Board must first be satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined. In order to have a realistic chance of satisfying the Parole Board that his confinement is no

longer necessary for the protection of the public, the prisoner requires to progress to less secure prison conditions.

[2] The progression of prisoners within the prison estate falls within the management functions exercised by the Scottish Prison Service ("SPS") on behalf of the respondents. Applications for progression must be made to the Risk Management Team ("RMT") chaired by the prison's Deputy Governor. In appropriate cases, the RMT will commission a psychological risk assessment ("PRA"). While the actual time spent in less secure prison conditions is a matter for the RMT, in practice a life prisoner will spend up to 2 years in the national top end, followed by 2 years in the open estate. The current SPS policy in relation to risk management and progression is set out in some detail in a guidance document published in August 2018.

[3] This petition concerns a complaint made by the petitioner on 30 July 2019, through the prison's internal complaints process. He complained that the SPS had failed to take adequate steps to consider his application for progression submitted in April 2019. In particular, they had not sought to obtain a "valid" PRA, the most recent PRA, completed in April 2015, being no longer "current". In any event, the SPS had failed to consider his application "within a reasonable period".

[4] The Residential First Line Manager ("RFLM") responded to that complaint on 4 August 2019. He confirmed that the respondents regarded the 2015 PRA as "valid and relevant". He further advised the petitioner that the SPS were working their way through all the cases on a waiting list, but that resources dictated their ability to complete these. He advised the petitioner to continue to liaise with his personal officer in relation to his application for progression and the completion of the required paperwork.

[5] Dissatisfied with this response, on 6 August 2019 the petitioner escalated his complaint to the prison's Internal Complaints Committee ("the ICC"). On 15 August 2019, the ICC refused to uphold the complaint, essentially for the same reasons as had already been provided by the RFLM: there was no expiry date for a PRA; and "all requests for progression should be made via the individual's Personal Officer and the relevant... paperwork". It is against this decision of the ICC that the petitioner now seeks judicial review.

The petition and the orders sought

[6] The petition was lodged on 14 November 2019. It sought orders for declarator and reduction of the ICC decision of 15 August 2019, on the ground of irrationality. It sought further orders ordaining the respondents to "consider and rule upon" the petitioner's application for progression, and to commission a fresh PRA. However, at the outset of the substantive hearing in the petition, which did not take place until 8 October 2020, counsel for the petitioner indicated that he no longer sought these latter two orders, but only the remedies of declarator and reduction of the ICC decision.

Risk management and progression of prisoners within the Scottish prison system

[7] In order to explain the content of the petition, it is necessary to set out the SPS's policy in relation to progression in more detail.

[8] In August 2018, the SPS published its updated policy in relation to the risk management, progression and temporary release of prisoners. An application by a prisoner for progression to less secure conditions is referred in the first instance to the RMT, described in the guidance as a multidisciplinary team of professionals, whose primary

purpose is "to consider the assessment, intervention and management needs of those offenders referred to the ICM [ie integrated case management] process". The RMT is chaired by the Deputy Governor, or, in his or her absence, the Governor in charge.

[9] An offender seeking progression to less secure conditions is required to complete an application form providing *inter alia* the following information: the reason for the application; confirmation that they meet certain standard criteria for progression; details of what they have achieved in order to merit consideration for a move to less secure conditions, including evidence of a reduction in risk; reasons why they should be considered by the RMT for progression; and any other supporting factors that should be taken into consideration by the RMT. Officers with case management responsibility should provide assistance to offenders when completing the application, where requested.

[10] The person responsible for the co-ordination of the RMT must then *inter alia*: carry out a review of all available information pertinent to the offender; consider an offender's risks and needs identified *via* the ICM process, steps taken to address risks and needs and any outstanding identified needs which have not yet been addressed; identify and request any necessary further investigations in specialist areas; prioritise referrals to the RMT, considering critical dates, individuals who are currently involved in the tribunal process, offenders who have been recalled/returned to closed conditions, or licence breaches. Certain listed items of information must be requested by the co-ordinator approximately 8 weeks prior to the RMT meeting.

[11] The person responsible for the co-ordination of the RMT must also complete an assessment of risk to be reviewed in full at the RMT meeting and confirmed as an accurate record of all issues and risks discussed with an assessment provided. The draft assessment must then be circulated not less than 7 days prior to the RMT.

[12] The guidance states that, "It is essential that all relevant risk factors are clearly identified, recorded and discussed at the RMT meeting, including evidence of the relevant risk factors which contributed to the offending behaviour and the steps taken to reduce the risk, for example, successful participation on relevant offending behaviour programmes, etc".

[13] Paragraph 11.5 of the guidance deals with PRAs. All referrals for PRA must be actioned by the RMT only. The referral must be approved by the psychologist attending the RMT. Referrals should only be made where it is considered the report would "supplement what is already known about the offender". RMTs should consider a number of matters when deciding whether to refer for a PRA. These include, "Where an individual denies some, or all, of the index offence, and that has inhibited their participation on programmes to address their offending behaviour (See GMA 11A/13)."

[14] Paragraph 11.2 states that an offender "**may** be **eligible"** (emphasis in the original) for consideration for progression, if they meet the standard criteria as outlined in paragraph 12. The standard criteria for progression are said to be an assessment of an offender's "**eligibility** for consideration by a RMT for progression …. It will be for the RMT to assess whether the offender is **suitable** for progression… (having met the standard criteria), taking into consideration: the risk that they present; what the offender has done to reduce risk and whether that risk can be safely managed in the community…" (paragraph 12.1). The same paragraph goes on to state that an offender "may" be eligible for consideration for progression, if they satisfy certain listed criteria, the details of which are not relevant to the present application, but which concern matters such as: being free of misconduct reports, not being subject to a deportation order or outstanding criminal charges; having had no positive drug tests; and so on.

[15] Paragraph 13 is headed "Progression Pathway". The Progression Pathway "defines the criteria and minimum period of sentence that each offender type is expected to serve in a secure establishment **before being eligible for consideration by the RMT for progression** to less secure conditions" (emphasis supplied). Three key areas are said to be relevant when considering progression: time served, risk and behaviour in prison. It adds, "There is a public expectation that an offender will spend a period of time in a closed prison before accessing the opportunities afforded in less secure conditions". Only following these defined timeframes, will someone be "**eligible** to progress" (emphasis supplied). "In terms of risk of re-offending, an offender must demonstrate that they have taken steps to reduce their risk, **and** there must be sufficient evidence that the risk presented can be managed in the community". Decisions regarding progression also take into account the extent to which the offender has "positively engaged" with the prison regime. This includes but is not limited to the "completion of identified offending behaviour programmes". The recommended timescales differ according to the classification of the offender. For life sentence offenders, the SPS seeks to provide a "reasonable opportunity, by the time of the punishment part expiry ..., to demonstrate that they are suitable for release by the [Parole Board]. In the vast majority of cases this is unlikely to require more than two years in the NTE [ie National Top End] followed by two years in the OE [ie open estate]. The actual time required to spend in the NTE and OE will be a matter for the RMT, based on the risks presented; however, the testing phase of the management of life sentence offenders should commence no earlier than 4 years prior to the expiry of their punishment part".

Chronology

[16] On 27 May 2015, the RMT adopted the 2015 PRA. The 2015 PRA concluded that the petitioner presented a "high risk of harm to adult male strangers if he were in the community". For so long as the petitioner refused to engage with treatment the level and nature of his risk would remain unchanged and untreated, and would only be capable of being managed through custody and constant supervision. It was in the petitioner's own best interest "to engage with those professionals who are able to assess and address his treatment needs (a) in order to be able to manage his own risk and to be seen to be managing his own risk, and (b) in order that he does not disadvantage himself in terms of negatively impacting his eligibility for progression to less secure conditions later in his sentence".

[17] On 21 August 2015, the Programmes Case Management Board identified Moving Forward: Making Changes (MFMC) as a programme through which the petitioner's outstanding treatment needs could best be met.

[18] On 24 November 2016, the RMT informed the petitioner that he did not meet the "minimum criteria for consideration for progression", since MFMC could not be provided in less secure conditions.

[19] On 19 July 2017, the petitioner discussed MFMC with his casework manager, and was informed that it was possible to participate in MFMC while maintaining innocence of sexual offending.

[20] On 11 October 2017, the RMT expressed themselves as being "surprised" to receive a progression application from the petitioner, as there appeared to be "no material change in his stance regarding participation of [sic] offence focused work". Until he did change his stance, the RMT advised that they would "not be in a position to consider" his progression.

The petitioner was "again encouraged to engage with his Personal Officer and other professionals to review his stance on Programmes participation".

[21] On the 30 October 2018, the petitioner attended an ICM meeting. He raised the issue of whether he would be eligible for progression without completing offence-focused work, given that he denied the offence of which he had been convicted. Whilst the precise details of what was said at that meeting were not agreed, the petitioner accepts that the ICM co-ordinator informed him that he should take the matter up with the RMT (see the petitioner's Annex H submission dated 10 December 2018). I was not informed of any approach made by the petitioner, at this stage, to the RMT. Rather, the petitioner made a complaint through the internal prison's complaints process, on the basis that his question should have been dealt with through the ICM process. The RFLM responded to that complaint, stating that an offender who met the standard criteria for progression "may" be eligible for consideration for progression by the RMT (see paragraph 14 of the Scottish Public Services Ombudsman's decision letter dated 4 March 2020).

[22] The petitioner escalated his complaint to the ICC. On 19 March 2019, the ICC confirmed that it was possible "for individuals" to progress to less secure conditions without completing offence-focused programmes; however, this was solely at the discretion of the RMT.

[23] On 8 April 2019, the petitioner submitted an application for progression. On 23 April 2019, the SPS confirmed receipt, advising the petitioner that the relevant officer would discuss progression with him to ensure that all requirements were met.

[24] On 23 May 2019, the respondents refused to uphold a complaint made by the petitioner regarding his application for progression, informing him that "the first stage of progression is being discussed by the RMT. This is a prelude to being considered for

progression". I was not provided with details of the complaint, or the RFLM's initial response.

[25] On 26 May 2019, the petitioner submitted a further complaint through the prison's internal complaints process, on the basis that his application had been "discussed", and not considered, that he was not present or represented at any such discussion, and that he had received no indication of any outcome.

[26] On 2 June 2019, the RFLM responded, apologising for the delay, and referring to resource issues. He confirmed that the petitioner's case was discussed at an RMT meeting on 29 May 2019, at which they made the following recommendation: "The RMT are content that the petitioner meets the standard criteria for progression. [He] should continue to work with his Personal Officer to complete the required paperwork". The RFLM reassured the petitioner that his application for progression would be considered by the RMT in due course.

[27] On 4 June 2019, the petitioner escalated his complaint to the ICC, on the basis that it had taken 8 weeks to establish that he met the standard criteria for progression, and that the RMT had still not considered his application or indicated when it would do so. Neither the petition nor the submissions made on his behalf at the substantive hearing contained any information regarding the outcome of this complaint.

[28] The petitioner's counsel stated that there then followed a number of communications back and forth prior to the petitioner's complaint of 30 July 2019, but that he did not intend to refer these to the court. The petition refers at paragraphs 22 to 24 to correspondence between the petitioner's agents and the Governor of HMP Edinburgh, but this correspondence was not produced.

[29] The petition was lodged on 14 November 2019. First orders were granted on 18 November 2019. The petition was served on 29 November 2019. Answers were lodged on 12 December 2019.

[30] A Tribunal of the Parole Board was convened on 8 January 2020. It refused to direct the petitioner's release, being satisfied that his confinement was necessary for the protection of the public. The Tribunal recommended that the next review should take place in 24 months' time, standing its view that the petitioner should complete offence-focused work and then be extensively tested prior to release. The petitioner is reported as having said that "he felt that a further PRA would be sensible", but that he "still had questions" about the offence-focused work, including "the nature of the deniers' assessment".

[31] On 14 January 2020, the court granted the petitioner permission to proceed with his application for judicial review.

[32] On 29 January 2020, the RMT discussed the Parole Board's recommendations. It agreed to commission a PRA, and was advised that the petitioner would be added to the national waiting list for PRAs.

[33] In mid July 2020, the petitioner began a series of interviews with a psychologist with a view to the latter producing a PRA. As at the date of the substantive hearing in October 2020, this series of interviews was close to completion.

Argument for the petitioner

[34] As I have already stated, at the outset of the substantive hearing in October 2020, counsel for the petitioner indicated that he no longer sought to have the respondents ordained to "consider and rule upon" the petitioner's application for progression, or to commission a fresh PRA. That left the ICC decision of 15 August 2019, as being the sole

focus of the orders being sought by the petitioner. However, notwithstanding that apparent restriction of his argument, the petitioner's counsel's submissions at the substantive hearing were more wide-ranging. In his Note of Argument, which counsel adopted, he complained that the SPS acted "irrationally and unreasonably in delaying [his] application for judicial review". In developing that submission at the substantive hearing, counsel relied on three separate periods of alleged unreasonable delay.

[35] Firstly, the SPS delayed providing the petitioner with key information regarding his eligibility to apply for progression. The petitioner had given notice in advance of the ICM meeting on 13 October 2018 that he intended to raise the issue of whether he would be eligible to apply for progression, notwithstanding that he had not completed offence-focused work. The SPS only answered that question on 15 March 2019, when the ICC reached a decision on his complaint. (Separately, the petitioner had complained to the Scottish Public Services Ombudsman regarding this period of delay, and on 4 March 2020, his complaint was upheld.)

[36] Secondly, the SPS delayed between 29 May 2019, when the RMT confirmed that the petitioner met the standard criteria for progression, and 15 August 2019, the date of the ICC decision presently under challenge, and in which the SPS refused to uphold the petitioner's complaint.

[37] Thirdly, the petitioner complained of continuing delay in considering his application for progression since the lodging of the petition in November 2019.

[38] In summary, the petitioner had submitted his application for progression in April 2019. He had made repeated requests, and completed the relevant paperwork. Any delays were not his fault. The petitioner had been told that he met the standard criteria on a number of occasions. He had challenged the delay through the prison's complaints

procedure. His progression application had not advanced. He had lost the opportunity to progress prior to the expiry of the punishment part of his life sentence. He closed his submission by quoting from the petitioner's own affidavit at paragraph 18, where he states, "In their responses the Scottish Ministers appear to be suggesting that my eligibility is meaningless as they have deemed me unsuitable for progression before my application has even been considered."

Argument for the respondents

[39] Counsel for the respondents argued that the petition should be refused. He addressed each of the three periods of delay identified by the petitioner, as follows.

[40] Firstly, the period between October 2018 and March 2019. This period was irrelevant, as it did not involve any delay in considering the petitioner's application for progression. In any event, the petitioner was advised that he should address his question to the RMT, and whether or not the ICM co-ordinator was at fault in failing to answer that question himself, it would appear that the petitioner never actually acted upon the advice he received. Finally, with regard to this period, the respondents' relevant policy was already contained in publicly available information (SPS notice 11A/13, 7 March 2013).

[41] Secondly, the period between the RMT meeting on 29 May 2019 and the ICC decision of 15 August 2019. Counsel for the respondents firstly invited me to disregard the period between the making of the petitioner's complaint on 30 July 2019 and the ICC decision. The net result was a period of approximately 8 weeks beginning with the RMT decision of 19 May 2019, confirming that the petitioner met the standard criteria for progression and recommending that he should continue to work with his personal officer to complete the required paperwork.

[42] Thirdly, the period after the ICC decision of 15 August 2019. Since the only decision under challenge was the ICC's decision of 15 August 2019, any alleged delay occurring after this date was irrelevant.

[43] Counsel for the respondents invited the court to look at the "broader context" of risk management. It would have been clear to the petitioner from the 2015 PRA that he needed to address his own risk. Since that date, the petitioner had been repeatedly told that the 2015 PRA remained valid, and that the onus was on him to engage with the assessment process and treatment programmes.

[44] There was a tension between the petitioner's wish, on the one hand, to have his progression application dealt with as quickly as possible, and, on the other, to obtain a new PRA. If the petitioner wanted a new PRA, he could not obtain a speedy decision. The petitioner's decision to engage with the new PRA process "reset the clock". Whereas previously progress was blocked by the petitioner's failure to accept the validity of the 2015 PRA, the new PRA would require to be completed before the RMT could assess his suitability.

[45] In its 15 August 2019 decision, the SPS said that only "significant changes" would merit a new PRA. The petitioner's decision to engage with a new PRA was one such change. Indeed, now that the petitioner had decided to engage with a new PRA, everything else was merely of historical interest, including the decision in August 2019 under challenge.

[46] In summary, the respondents submitted, there had been no delay, and in any event, no unreasonable delay. There had been no error of law or irrationality in the ICC decision. Lastly, the petition became academic once the petitioner decided to engage with the process of obtaining a new PRA.

Decision

[47] I have decided to refuse the petition, essentially for the reasons provided by the respondents.

[48] The first period of alleged delay relates to when the petitioner's application had yet to be made, that is, the period between October 2018 and March 2019, when the SPS confirmed that a prisoner who had not completed offence-focused work would be eligible for consideration for progression. Conceivably, a public body might, in appropriate circumstances, be held responsible for causing a delay in the making of an application, for example, where it provided incorrect advice on which the applicant justifiably relied. However, no such case has been made out here, the ground of review being confined to an alleged delay in considering or advancing the petitioner's application for progression made in April 2019.

[49] In any event, the petitioner was advised at the ICM meeting in October 2018 to refer his question directly to the RMT. While no doubt the petitioner's question should have been capable of being answered directly by the ICM co-ordinator, rather than being required to be referred to the RMT, the petitioner himself gave no explanation for his apparent failure to follow the advice he was given, or indeed for his failure to make his application for progression earlier than he did.

[50] Had it been necessary to consider it, I would not have upheld the respondents' submission that the information sought by the petitioner was already in the public domain. The respondents relied on the contents of SPS notice 11A/13, dated 7 March 2013. However that notice is addressed specifically to "Governors and Managers". I was not persuaded that there was any particular reason why the petitioner ought to have known of its existence or its relevance to his concerns. In any event, the notice does not specifically deal with the

question of whether prisoners who have not completed offence-focused work may be considered for progression. Rather, it confirms that those who deny the index offence are not automatically excluded from progression.

[51] On 29 May 2019 the RMT confirmed that the petitioner met the standard criteria for progression. No reliance was placed by the petitioner on any delay occurring between the submission of his application in April 2019 and this date. Correspondingly, nor was this particular period addressed in any detail by counsel for the respondents. In these circumstances, it would be wrong to speculate on whether there was any unreasonable delay on the part of the respondents prior to 29 May 2019 in considering the petitioner's application for progression.

[52] The first period of delay relied upon by the petitioner which related specifically to the petitioner's application (rather than any delay occurring prior to the application) began on 29 May 2019 and ended with the ICC's decision on 15 August 2019. However, since the petitioner's challenge was confined to the ICC's decision, and since the ICC's decision related only to the petitioner's complaint, then the period following 30 July 2019, when the petitioner made his complaint, is irrelevant to the only remaining pleaded ground of review. That leaves a maximum period of approximately 2 months between the end of May 2019 and the end of July 2019 as being the window within which the petitioner required to establish unreasonable delay on the part of the respondents.

[53] In considering whether there may have been unreasonable delay during this period, it is relevant to address the reasons given by the SPS in its initial response to the petitioner's 30 July 2019 complaint. As the RFLM made clear, the petitioner had been placed on a waiting list, having regard to the pressure on resources. Limited resources and the demands of other prisoners are, in areas such as this, legitimate factors to be taken into account

(compare *R (Haney)* v *Secretary of State for Justice* [2015] AC 1344). "No system", as was said in *Haney,* "is likely to be able to avoid some periods of waiting and delay" (at paragraph 42). This seems to me particularly the case having regard to the demands which the SPS policy places upon the RMT co-ordinator (summarised at paragraphs 10 to 12 of this opinion). There was no discussion at the substantive hearing of how long an applicant could expect to remain on the waiting list before his application would be considered. Indeed, there was no discussion of any kind of the SPS's waiting list, and whether in drawing it up, the SPS applied a prioritisation policy. In the absence of any such discussion, I am unable to hold that there has been any delay, let alone unreasonable delay, on the part of the respondents.

[54] In any event, in its response to the petitioner's 30 July 2019 complaint, the SPS advised the petitioner to liaise with his personal officer with a view to completing the relevant paperwork. As I outlined in paragraph 9 above, the SPS policy requires a prisoner to provide a number of items of information before any application for progression could be considered by the RMT. These included details of what the prisoner had achieved in order to merit consideration for a move to less secure conditions, including evidence of a reduction in risk. I was not provided with any information regarding what evidence the petitioner had presented to the RMT of a reduction of risk. I note that the petitioner swears in his affidavit that he had completed all items of paperwork. However, at the very least I would have to conclude that there was a disagreement between the parties on this matter, one which was not explored further during the substantive hearing. Had I not been minded to refuse the petition, I would have in any event been unable to grant the orders sought without proof of the parties' averments.

[55] No doubt there will be cases where such a scandalously long period of time has been allowed to elapse that one is bound to conclude, in the absence of any explanation, that there

must have been unreasonable delay (compare *Quinn* v *Scottish Ministers* (No. 2) [2017] SLT 1036, at paragraph 22). However, for the reasons already given, I am unable to conclude that this is such a case. The petitioner provided no yardstick or measure by reference to which it might be said that there had been delay, let alone unreasonable delay, as distinct from the mere passage of time.

[56] The third alleged delay related to the passage of time since the petition was lodged in November 2019. Here, however, the petitioner faced a difficulty, since his pleas-in-law, insofar as not abandoned, were confined to the ICC decision of 15 August 2019. Nothing that occurred after that date (or the date of the complaint: see paragraph 52 above) could be relevant to the reasonableness of the ICC's decision. When this was put to counsel for the petitioner, he sought tentatively to reinstate his plea-in-law ordaining the respondents to consider and rule upon his application, though at no stage did he offer to amend the petition to seek declarator of the alleged continuing wrongful delay on the part of the respondents.

[57] I would not wish to be understood as refusing the petition on a pleading point. Rather, and more fundamentally, I am persuaded by the respondents' submission that the petitioner's decision to engage with a new PRA has "reset the clock". The practical reality is that the RMT will be unable to make any progress in their consideration of the petitioner's application until the PRA has been completed. Counsel for the petitioner accepted, in a brief reply, that the petitioner first communicated his willingness to engage with the PRA when lodging his petition (at paragraph 29 thereof). As at that point, if not earlier, the petitioner should be taken to have accepted that his application could not be dealt with simply on the basis of the information provided by him in April 2019, but would inevitably be required to take account of the conclusions of the PRA. The petitioner makes no complaint that the process of psychological assessment, though protracted, was itself unduly long. Reference

was made to a series of interviews which had been approaching completion as at the date of the substantive hearing. By way of comparison, I note that the previous PRA, dated 28 April 2015, was commissioned by the RMT on 9 April 2014. In these circumstances, I am unable to say that there has been any delay, let alone unreasonable delay, on the part of the respondents during this third period founded upon, namely, since the lodging of the petition.

[58] Indeed, I would go further. Standing the petitioner's decision now to engage with a fresh PRA, there would be no purpose served by pronouncing decrees of declarator and reduction of the ICC decision of 15 August 2019, even had they been otherwise justified. In that regard, counsel for the respondents is well founded, in my opinion, in his submission that the decision to engage with a fresh PRA renders the petition as a whole academic.

[59] I conclude that the petitioner has failed to establish that there has been any relevant delay, let alone unreasonable delay, on the part of the respondents during any of the three periods relied upon. However, in deference to the petitioner, I should briefly mention that part of his affidavit, referred to by counsel at the close of his submissions, where he complains that "the Scottish Ministers appear to be suggesting that my eligibility is meaningless as they have deemed me unsuitable for progression before my application has even been considered."

[60] Although this did not form part of counsel's developed argument, the petitioner's complaint seems to be that, as soon as he was assessed as meeting the standard criteria for progression, he became "eligible" for consideration by the RMT. However, instead of considering his suitability for progression, he complains that the SPS have simply "deemed" him unsuitable, because he has not completed the necessary offence-focused work. In that connection, counsel for the petitioner referred to the respondents' note of argument, at

paragraph 11, where they state, "Importantly, the Respondents have made clear that the Petitioner's progression *cannot be successful* unless and until he completes offence-focused work" (emphasis supplied). In saying that he "cannot be successful" unless necessary work has been completed, the petitioner maintains that the respondents have unlawfully erected an additional eligibility hurdle instead of making a proper assessment of his suitability.

[61] Understood in this way, the petitioner's complaint is not primarily one of unreasonable delay, but one of unlawful misinterpretation of the respondents' own policy, or perhaps a failure to apply that policy. There were no pleadings or argument made in support of that complaint. However, since delay in considering the petitioner's application (which obviously was the petitioner's argument) may conceivably arise secondarily as a consequence of such a misinterpretation or failure, I have given it consideration.

[62] I begin by drawing a distinction between, on the one hand, the standard criteria for progression, which are general eligibility criteria which must be met by all applicants, and, on the other, questions of suitability, which are specific to the individual applicant. In terms of the SPS's 2018 policy, an assessment of whether the offender meets the standard criteria for progression is generally carried out in the first instance by the officer making the referral to the RMT, whereas the assessment of suitability is one for the RMT alone. There is no requirement in the standard criteria for progression for an offender to have carried out appropriate offence-focused work. In this sense, it is quite true to say, as did the ICC on 19 March 2019 when responding to one of the petitioner's earlier complaints, that it was possible "for individuals" to progress to less secure conditions without completing offence-focused programmes. However, it would not necessarily follow that this particular individual, the petitioner, could progress without completing offence-focused work. That would be a matter for the RMT.

[63] On that basis, there would be nothing to prevent the RMT deciding, before they can assess the individual's suitability, that the offender must meet certain requirements in addition to those falling within the standard criteria for progression. These non-standard criteria may be specific to a class of offenders, for example, where the offence contained a sexual element, or perhaps specific to the individual offender. It has been made abundantly clear to the petitioner over the years that he must first complete offence-focused work, specifically the MFMC programme, before he could be considered for progression.

[64] There appears to me to be no inconsistency between this approach and the SPS's stated policy. As paragraph 11.2 of that policy explains, offenders "may" be eligible for consideration for progression, if they meet the standard criteria for progression. It does not state that they *are* thereby eligible for progression. In other words, in order to be assessed as eligible it is necessary but not necessarily sufficient for the offender to meet the standard criteria for progression. I conclude that the respondents have neither misinterpreted nor failed to apply their own policy.

[65] I would reserve my opinion, since I was not addressed on the matter, as to whether the court's supervisory jurisdiction should be exercised where the petitioner has available, and has failed to pursue, the alternative remedy of complaining to the Scottish Public Services Ombudsman: see *Gifford* v *The Governor of HMP Bure* [2014] EWHC 911 (Admin), and *McCue's Guardian* v *Glasgow City Council* [2020] SLT 963.

[66] I will sustain the second plea-in-law for the respondents. The petition is refused. Questions of expenses are reserved.