SECOND DIVISION, INNER HOUSE, COURT OF SESSION

[2022] CSIH 48
P23/20

Lord Justice Clerk
Lord Turnbull
Lord Doherty

OPINION OF THE COURT

delivered by LORD TURNBULL

in the Reclaiming Motion

by

ANDREW BROWN

Petitioner and Reclaimer

against

THE SCOTTISH MINISTERS

Respondents

Petitioner and Reclaimer: Mackintosh KC, Leighton; Drummond Miller LLP
Respondents: Irvine; Scottish Government Legal Directorate

14 October 2022

Introduction

[1] This a reclaiming motion (appeal) by Andrew Brown, a 62-year-old serving prisoner. On 25 July 2017 he was convicted of sexual offences involving three complainers. In respect of two of those complainers the offences included the crime of rape. He was sentenced to an order for lifelong restriction ("OLR") with a punishment part of four years and six months which was to commence from 12 October 2016. He presented a petition for judicial review

which had two limbs. The first sought declarator that the Scottish Ministers were in breach of their obligation to provide the systems and resources necessary to allow prisoners serving OLRs for sexual offences to demonstrate to the parole board, by the time of the expiry of their punishment part or shortly thereafter, that it was no longer necessary for the protection of the public that they should remain detained. The second limb sought declarator that the Scottish Ministers' policy on the prioritisation of access to rehabilitative work was unlawful, both in terms of the European Convention on Human Rights ("ECHR") and at common law. By interlocutor dated 14 December 2021 the Lord Ordinary dismissed the petition and Mr Brown now seeks to challenge part of that decision before this court.

Background

[2] An OLR is a sentence of imprisonment for an indeterminate period made available by the amendments to the Criminal Procedure (Scotland) Act 1995 which were introduced by section 1 of the Criminal Justice (Scotland) Act 2003. An OLR may be imposed by the High Court where, having considered a risk assessment report prepared by a person accredited by the Risk Management Authority ("RMA"), it is satisfied that the nature of, or the circumstances of the commission of, the offence of which the convicted person has been found guilty either in themselves or as part of a pattern of behaviour are such as to demonstrate that there is a likelihood that he, if at liberty, will seriously endanger the lives, or physical or psychological well-being, of members of the public at large.

[3] On the other hand, a sentence for life imprisonment may be imposed in two situations. On conviction for the crime of murder the imposition of a life sentence is mandatory in terms of section 205 of the 1995 Act. A discretionary life sentence may be imposed on conviction for any other common law crime or on conviction of a statutory

offence which carries a sentence of up to life imprisonment. OLRs were made available for offences committed on or after 26 June 2006. Since their introduction it is unlikely that any discretionary life sentences will have been imposed where OLRs were available but a discretionary life sentence remains a competent sentence. An OLR may be imposed, for example, in respect of offences committed before 26 June 2006. There are prisoners who are currently serving discretionary life sentences. Some of those sentences were imposed before 26 June 2006. Some such sentences may have been imposed on or after that date for offences committed before it, and discretionary life sentences may be imposed in the future where the offences pre-date that date.

[4] The effect of section 2 of the Prisoners and Criminal Proceedings (Scotland) Act 1993 is that in imposing either an OLR or a sentence of imprisonment for life, the court requires to fix a part of the sentence ("the punishment part") which must be served before the prisoner's case is referred to the Parole Board for Scotland in order that it may determine whether or not to direct the prisoner's release. The Parole Board shall not give such a direction unless it is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined. Should the Parole Board be so satisfied the prisoner will then be released on licence and monitoring conditions which will remain in force throughout the remainder of his life.

[5] Within the prison regime an offender's progress through his sentence is managed by the Risk Management Team ("RMT"), which will determine whether the offender may progress to less secure conditions and/or community access. For a prisoner serving an OLR, progress from the closed estate may be to the National Top End ("NTE"), a facility which is less secure and provides the opportunity for offenders to prepare for release and to be gradually tested in the community, or to the Open Estate ("OE") which allows increased

freedoms in the community and permits the offender to further evidence reduction in their risk and demonstrate to the Parole Board that they are suitable for release. It is also possible for the Parole Board to order such a prisoner's release direct from the closed estate.

[6] A prisoner serving an OLR must be the subject of a Risk Management Plan ("RMP") which requires to be approved by the independent RMA. In September 2018 Mr Brown was assessed as meeting the criteria for undertaking the Moving Forward: Making Changes ("MF:MC") intervention programme and the requirement to complete that course was included within his RMP. That course was only provided within the closed estate. The effect of that requirement was that he was expected to complete that course before transfer to less secure conditions could be considered.

[7] The Scottish Prison Service policy on the allocation of places on any offending behaviour programme was set out in the Governors and Managers Action notice 30A/17 dated 4 May 2017 ("GMA30A/17"). That policy involved identifying what was known as a "critical date" and placing the prisoner on a waiting list according to that date. As spaces on a programme became available they were to be allocated on the basis of the individual's place on that list. The critical date for a prisoner serving an order for lifelong restriction was to be the punishment part expiry date minus two years. The critical date for a prisoner serving a determinate sentence of four years or more, or a prisoner serving an extended sentence of four years or more, was to be the parole qualifying date minus two years. However, the critical date for a life sentence prisoner was to be the punishment part expiry date minus four years. Since the MF:MC programme was a national programme and undertaken by prisoners serving various different types and lengths of sentences, a prisoner's place in the queue was dynamic. He might move either nearer to the front of the

queue or further away from it according to the critical date of others waiting to be allocated a place on the programme.

[8] On 12 April 2021, at the expiry of his punishment part, Mr Brown's case was considered by the Parole Board. By that time he had not been allocated a place on the MF:MC programme. The Parole Board noted that he had a record of sexual offending which included previous sentences of imprisonment, that he presented a high level of risk and needs in terms of general offending using the LSCMI risk assessment tool, that he presented a moderate risk of sexual re-conviction using the Risk Matrix 2000 risk assessment tool and that he presented a high risk of sexual re-offending using the Stable and Acute 2000 risk assessment tool. It also noted that he had not yet engaged in any offence focused interventions during his sentence in order to address his risk of sexual re-offending and that he was placed at number 145 on the national waiting list for MF:MC, with no date as yet available for him to be able to access the programme. It decided that it remained necessary for the protection of the public that Mr Brown should be confined and fixed a further review to take place in December 2022.

[9] In early 2021 a decision was taken to replace MF:MC with two new programmes, one of a more intensive nature and longer duration than the other. Prisoners were to be allocated to these programmes according to whether they were identified as presenting a high risk of causing harm or a lesser risk of causing harm. By the date of the hearing before this court Mr Brown was placed at number 14 on the waiting list for the more intensive course.

The Lord Ordinary's decision

[10] In determining the first limb of the petition for judicial review, the systems challenge, the Lord Ordinary accepted that the respondents had not ignored their public law duty to resource rehabilitation for OLR prisoners as one type of prisoner likely to be recommended for the MF:MC programme. She recognised that there had been an increase in the number of those prisoners assessed as requiring to complete that course and that delays had occurred as a consequence. The respondents had addressed this issue and had decided to reorganise the system to create different programme pathways with lower risk prisoners undertaking a shorter course. As a result the greater resources required to deploy the more intensive programme could be devoted to a smaller number of prisoners. She concluded that a decision of that sort was of a poly-centric nature and fell squarely within the Scottish Ministers' sphere of decision-making with which the court should not interfere. It could not be said that a decision had been taken to deny OLR prisoners the opportunity to undertake the relevant rehabilitative course.

[11] In determining the second limb of the petition for judicial review, the prioritisation policy challenge, the Lord Ordinary accepted that the difference in identifying the critical date as between prisoners serving an OLR and life sentence prisoners engaged the provisions of article 14 ECHR, when read along with article 5. However, she rejected the proposition that the sentencing regimes which such prisoners were subject to were sufficiently analogous to render the difference in treatment unlawful. She also rejected the proposition that the policy for identifying critical dates for OLR prisoners was irrational. She held that had she required to consider objective justification for the differential treatment she would have regarded it as reasonable and proportionate that the critical date

for various different types of prisoners was formulated with the objective of providing fair access to rehabilitative coursework for all prisoners.

The reclaimer's submissions

[12] No criticism was made of the Lord Ordinary's decision on the systems challenge. The reclaiming motion was directed to her decision on the prioritisation policy. Mr Mackintosh submitted that the Lord Ordinary had been correct to follow the analysis of the majority in the decision of the Supreme Court in *R (Stott)* v *Secretary of State for Justice* [2020] AC 51 and to conclude that the difference in fixing the critical dates, as between prisoners serving an OLR and those serving a life sentence, was based on the ground of "other status". As she correctly held, that difference fell within the ambit of article 14 ECHR. Where the Lord Ordinary had erred was in failing to recognise that prisoners serving an OLR and those serving a life sentence were in an analogous position and that there was no objective justification for the difference in treatment between them. Accordingly, the respondents' policy constituted a violation of Mr Brown's convention rights and was unlawful.

[13] Correctly viewed, the two groups of prisoners were analogous. The starting point was the policy which the respondents applied up until the change brought about by GMA30A/17. Prior to that change the policy was set out in GMA21A/13, which provided that the critical date for all life and OLR prisoners was to be identified as the punishment part expiry date. Accordingly, all prisoners serving indeterminate sentences were treated alike in this respect. The discrimination had been introduced by GMA30A/17 which separated OLR prisoners out of this common group.

[14] Mr Brown was required to complete the MF:MC course before the RMT would consider moving him from closed conditions. The respondents' policy was designed to

ensure that, where possible, relevant courses could be undertaken during the punishment part of the sentence. The result of the policy change introduced by GMA30A/17 was that OLR prisoners were now being held back, or discriminated against, as compared to life sentence prisoners. In the allocation of a place on the waiting list Mr Brown was now placed two years behind a life sentence prisoner with the same punishment part expiry date as him. The importance of this was that his fundamental right to liberty re-emerged as at the punishment part expiry date. More than a year after the expiry of his punishment part Mr Brown had still not accessed the course which he was required to complete before having any prospect of demonstrating absence of risk to the Parole Board. For an issue to arise under article 14 there required to be a difference in the treatment of persons in analogous situations but the comparator groups did not require to be identical. To succeed in his claim Mr Brown required to demonstrate that having regard to the particular nature of his complaint he was in a relatively similar situation to others treated differently – *Clift* v *UK* 2010 ECtHR Application no. 720507 paragraph 66.

[15] Mr Mackintosh submitted that applying this test Mr Brown was plainly in an analogous situation to a discretionary life sentence prisoner. An OLR was a sentence imposed in light of the risk which the offender posed. The same rationale applied in the case of discretionary life sentences – *Murray* v *HM Advocate* 2000 JC 102. The definition of life prisoner in section 2 of the 1993 Act brought all indeterminate sentence prisoners into the same group. Whilst it was recognised that the relevant punishment part was calculated differently as between mandatory life sentence prisoners and OLR prisoners, and that the former generally received far longer punishment parts, sections 2A and 2B of the 1993 Act provided for the calculation of the relevant punishment part for discretionary life sentence

prisoners and OLR prisoners in an identical manner. The punishment parts to be served by discretionary life sentence prisoners and OLR prisoners ought to be broadly similar.

[16] All indeterminate sentence prisoners required to meet the same test at the Parole Board and the purpose of the rehabilitative courses was to assist them in demonstrating that this test had been met. The respondents did not store data for OLR prisoners separately from life sentence prisoners and this tended to suggest that they were being treated as analogous. Whilst it was correct to state that an OLR prisoner was required by statute to have a RMP which was approved by the RMA, the progression policy as determined by the respondents was similar as between each category of indeterminate sentence prisoner. Attention was drawn to the Risk Management Progression and Temporary Release Guidance document published by the Scottish Prison Service dated August 2018. Part 13.1 of that document set out the progression pathway for life sentence offenders and Part 13.2 set out the pathway for OLR offenders. Each was similar, in that for both categories it was for the RMT to decide on progression, which might be to NTE or the open estate. The data produced by the respondents demonstrated that the majority of OLR prisoners who had progressed had moved first into the NTE.

[17] The complaint which was made in the present case was about the difference in treatment between two classes of offenders in progressing to show that they no longer presented such a risk as required their continuing detention. The issue which was brought into focus was about looking forward to what they needed to achieve rather than looking backwards to see why they had been sentenced. The circumstances relied upon in the present case were quite different from those which were addressed by the Supreme Court in the case of *R(Stott)* v *Secretary of State for Justice,* where the court had held that the sentencing regimes under discussion were not analogous.

[18] In all of these circumstances the Lord Ordinary had erred in failing to recognise that Mr Brown was in an analogous situation to a life sentence prisoner. His situation was particularly analogous to that of a discretionary life sentence prisoner. The Lord Ordinary had failed to recognise this by focussing on the comparison with a mandatory life sentence prisoner.

[19] On the assumption that the position of an OLR prisoner was analogous at least to that of a discretionary life sentence prisoner, the question which fell to be determined was whether there was an objective justification for the difference in treatment which satisfied the four stage test set out by Lord Reed in the case of *Bank Mellat* v *HM Treasury (No 2)* [2013] UKSC 39 at paragraph 74. The respondents' intention in bringing about the change of policy in GMA30A/17 appeared to be nothing more than an attempt to spread a limited resource and in the process to protect the position of determinate sentence prisoners. The exercise failed all four stages of the *Bank Mellat* test. It amounted to nothing more than disadvantaging the position of OLR prisoners.

[20] Mr Mackintosh also submitted that the respondents' policy failed the test of rationality when viewed through the heightened level of scrutiny mentioned by Lord Kerr in the case of *R(Keyu)* v *Secretary of State for Foreign and Commonwealth Affairs* [2016] AC 1355 at paragraph 273. Fair access to rehabilitative courses would involve treating OLR prisoners and discretionary life sentence prisoners the same in their final journey to liberty. The role of the critical date was the same for each. Different treatment of prisoners who were all attempting to meet the same test was irrational.

The respondents' submissions

[21] On behalf of the respondents it was accepted that OLR prisoners fell within the scope

of "other status" for the purposes of article 14. The question of whether the position of prisoners serving OLRs and those serving life sentences should be considered to be analogous was to be answered by looking to the guidance given by the Supreme Court in the case of *R(Stott)* v *Secretary of State for Justice,* and in particular to the analysis undertaken by Lady Black and Lord Hodge. The Lord Ordinary had correctly applied that guidance. She had correctly identified that the imposition of extended sentences, OLRs and life sentences was governed by different sections of Part XI of the Criminal Procedure (Scotland) Act 1995. She had set out the statutory framework governing the various types of sentences available and the criteria for the imposition of each. She had correctly concluded, at paragraph [26] of her opinion, that OLR prisoners and life sentence prisoners were easily distinguishable categories of prisoners subject to different sentencing regimes. She was therefore correct to conclude that they were not analogous in relation to the issue of their critical date and that the difference in treatment between them in this regard was not unlawful.

[22] Whilst the Lord Ordinary's consideration of this issue had focused on the differences between mandatory life sentence prisoners and OLR prisoners, there was also a difference between discretionary life sentence prisoners and OLR prisoners. Those in the former category inevitably required to progress through NTE before reaching the open estate, which was not necessarily the case for OLR prisoners. In addition, OLR prisoners were subject to a specific statutory risk management regime which was distinct from that which applied to both mandatory and discretionary life sentence prisoners.

[23] The Lord Ordinary had also been correct to conclude that there was in any event an objective justification for the difference in treatment. Although her reasoning on this matter had been set out briefly in paragraph [27] of her opinion, what she stated had to be read

alongside the submissions on behalf of the Scottish Ministers which she recorded at paragraphs [11] and [15] and which she had given effect to. The respondents' prioritisation policy attempted to balance a range of competing interests, including those of determinate sentence prisoners. Many determinate sentence prisoners also required to undertake rehabilitative course programmes. However those prisoners would be released at their sentence expiry date whether any such programmes had been undertaken or not. If OLR prisoners were allocated to the waiting list on the same basis as life sentence prisoners then the necessary consequence would be that most would immediately be placed ahead of all long-term prisoners on the list, thus reducing significantly the prospect of those long-term determinate sentence prisoners gaining access to rehabilitative coursework prior to their release.

[24] The objective of the policy was to ensure fair access to all prisoners having regard to the length and type of sentence imposed and the respondents' progression policies. For there to be a rational connection between the measure taken and the objective all that was required was that it furthered the goal to some extent. In using the length of time that will be spent in custody as the base point from which the critical date is calculated the policy achieved a rational connection with the objective stated. No less intrusive means had been suggested and the overall balance struck by the respondents was acceptable. In considering the margin of appreciation to be permitted to the respondents in determining their policy it was relevant to bear in mind that the type of status in question is one of the factors to be taken into account, and that in the present case it was discrimination based on "other status" which was relied upon by Mr Brown rather than any of the other characteristics identified in article 14.

[25] On the question of the rationality of the respondents' policy, Ms Irvine submitted that the context which required to be borne in mind was that the decision as to how to allocate places to the waiting list was part of a complex policy matter. It was recognised between the parties that the nature of judicial review depended on context. The respondents had engaged in a policy choice about how to regulate resources. That policy sought to take account of the needs of all other prisoners and to balance competing interests based on sentencing lengths. It was a decision which fell within the range available to the respondents. It was rational and could not be said to be unlawful.

Discussion

[26] Article 14 ECHR complements the other substantive provisions of the Convention and provides as follows:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

In the present case it is accepted that the respondents' policy on allocation of places on the waiting list for rehabilitative programmes involves differential treatment as between OLR prisoners and other indeterminate sentence prisoners. Before any such difference of treatment could be seen as amounting to a violation of article 14 four elements require to be established. First, the circumstances must fall within the ambit of a Convention right. Secondly, the difference of treatment must have been based on the ground of one of the characteristics listed in article 14. Thirdly, the claimant and the person who has been treated differently must be in analogous situations. Fourthly, objective justification for the different treatment must be lacking (see *R(Stott)* v *Secretary of State for Justice* at paragraph 8).

[27] Where procedures relating to the release of prisoners appear to operate in a discriminatory manner this may raise issues under article 5 of the Convention when taken together with article 14 (*Clift* v *UK* paragraph 42). In the present case the respondents accept that the complaint made falls within the scope of article 5 and that article 14 is applicable. They accept that the differential treatment under their policy falls within the scope of "other status" for the purposes of article 14.

[28] The respondents seek to draw support for their submission that the comparator groups in the present case are not analogous by looking to the decision of the majority of the Supreme Court in the case of *R(Stott)* v *Secretary of State for Justice*. In *Stott* the justices engaged in a detailed analysis of the complex statutory regimes under which a number of different sentencing options were available to courts in England and Wales. The court's conclusion was that each of those sentencing regimes had its own detailed set of rules dictating when the relevant sentence could be imposed and how it operated in practice and that the claimant was not in an analogous position to that of other prisoners who were treated differently in terms of eligibility for release on parole. The rational for the court's decision is illustrated concisely in the opinion of Lord Hodge JSC at paragraph 195 where he explained:

> "In my view, the obvious and relevant differences between the sentencing regimes are sufficient to prevent prisoners serving sentences under these different sentencing regimes from being in an analogous situation."

[29] The decision in *Stott* was therefore one which was specific to the particular complaint which it was addressing. In the view of this court, that decision affords no assistance to the respondents in the present case. OLR prisoners and discretionary life sentence prisoners are plainly in an analogous situation. An OLR is a sentence which can only be passed on conviction for an offence other than murder, which is a sexual offence, a violent offence or

an offence which endangers life. It will be imposed where the court is satisfied on the basis of a risk assessment report and any other relevant evidence placed before it, that the prisoner, if at liberty, will seriously endanger the lives or physical or psychological well-being of members of the public. A discretionary life sentence is a sentence which can be imposed on conviction for a common law offence other than murder, or for a statutory offence where the maximum sentence includes life imprisonment. The nature of a discretionary life sentence was explained by the Lord Justice Clerk (Cullen) in the case of *Murray* v *HM Advocate* as being a sentence imposed because there is a need to protect the public against offending by the prisoner which would not be adequately met by the imposition of a determinate sentence and that such a sentence was directed to ensuring that the prisoner would be kept in custody until it was thought safe for him to be released. Sections 2(2), 2A and 2B of the Prisoners and Criminal Proceedings (Scotland) Act 1993 provide that the relevant punishment part for an OLR prisoner and for a discretionary life sentence prisoner is to be calculated in precisely the same manner and in a different manner from the relevant punishment part for a mandatory life sentence prisoner. Whilst it is correct that only an OLR prisoner will be the subject of a statutory RMP, the progression pathways for all indeterminate sentence prisoners as set out in respondents' Risk Management Progression and Temporary Release Guidance document are indistinguishable for practical purposes. In the opinion of the court these features are sufficient to demonstrate that the position of OLR prisoners and discretionary life sentence prisoners do fall to be viewed as analogous. In the end Ms Irvine did not seriously seek to resist this conclusion. It follows that the decision of the Lord Ordinary on this issue cannot be supported.

[30] The debate before this court came to be focused on the comparison between OLR prisoners and discretionary life sentence prisoners. It seems clear from the terms of the Lord Ordinary's opinion that the issue as argued before her (when Mr Macintosh did not appear) was focused on a comparison with mandatory life sentence prisoners, to the extent that the position of a discretionary life sentence prisoner is not mentioned in her opinion at all.

[31] A further consequence of this focus is that when the Lord Ordinary came to consider whether the differential treatment would in any event fall to be justified, she did not direct her attention to the crucial matter. There is no objective justification identified in the Lord Ordinary's opinion for treating OLR prisoners and discretionary life sentence prisoners differently in terms of waiting list allocation. Accordingly this question now requires to be addressed.

[32] The objective of the policy as identified by Ms Irvine was that of ensuring fair access having regard to the length and type of sentences imposed. Looked at another way, it was about distributing resources in a fair manner. In the view of the court the measure identified, of moving the critical date for OLR prisoners by two years, fails to meet the proportionality assessment test set out by Lord Reed in the case of *Bank Mellat*. The measure does not introduce a policy based on sentence length and type. OLR prisoners and discretionary life sentence prisoners have the same type of sentence and in many cases will have similar punishment part lengths yet they are treated quite differently. Indeed, in some cases they may have been convicted of very similar offences, but the sentence imposed may have been determined by whether or not the offences were committed before 26 June 2006. The measure is therefore not rationally connected to the objective. A less intrusive and more proportionate method of distributing resources as between discretionary life sentence prisoners and OLR prisoners would have been to incorporate a common critical date for

those within these two groups. The court therefore rejects the respondents' contention that the differential testament of OLR and discretionary life prisoners can be seen to be objectively justified.

[33] These conclusions are sufficient to permit the reclaiming motion to succeed. The question of whether there remains unjustifiable discrimination between OLR prisoners and mandatory life sentence prisoners may depend upon what steps the respondents decide to take in light of the court's decision. Because that is as yet unknown, and because the submissions to the court as to whether there was unjustified discrimination as between OLR prisoners and mandatory life sentence prisoners were sketched rather than fully developed, the court prefers to reserve its opinion on that issue.

[34] Parties were agreed that in the event of the court deciding in favour of Mr Brown the case should be put out by order for a discussion as to the appropriate order or orders to be pronounced. That is the course which shall be taken.