OUTER HOUSE, COURT OF SESSION

[2019] CSOH 62

P568/19

OPINION OF LORD ERICHT

In the petition of

JOHN PATON

Petitioner

for

JUDICIAL REVIEW

Petitioner: Leighton; Drummond Miller LLP
Respondent: Reid; Scottish Government

2 August 2019

[1] The petitioner, a short term prisoner, applied for early release under Home Detention Curfew under section 3AA of The Prisoners and Criminal Proceedings (Scotland) Act 1993. His application was refused by the respondent's Mr Roberts and his appeal against that decision was refused by the respondent's Mr Peat. The petitioner brought judicial review proceedings. In view of the imminence of the petitioner's original release date, the court expedited the substantive hearing and I gave an oral *ex tempore* opinion on the day of the hearing. The respondents have asked that the *ex tempore* opinion be made available in writing.

[2] The guidance for Home Detention Curfew provides for presumptions against granting Home Detention Curfew in certain circumstances. Paragraph 25 states:

> "There are certain categories of prisoner who are presumed, in normal circumstances, to be unsuitable for HDC – that presumption can only be over-ridden where the individual circumstances of the prisoner gives SPS just cause to do so. Prisoners whose index offence involves an act of violence or the possession of a knife or offensive weapon are presumed, in normal circumstances, to be unsuitable for HDC."

[3] In his application the petitioner stated "I was on bail on a curfew between 8pm and 7am for over a year before being sentenced to 12 months without any problems."

[4] In my opinion the point which the petitioner was making was that as he complied with and did not offend during a period of home curfew for a period of a year, he might reasonably be expected to behave on Home Detention Curfew.

[5] In other words, his point was that his individual circumstances gave just cause to override the presumption, and that although the index offences involved both violence and possession of a knife or offensive weapon, the previous trouble free curfew meant that the circumstances were not such as to require the normal refusal of Home Detention Curfew.

[6] By decision dated 23 April 2019 the respondent's Mr Roberts refused the application. I shall refer to this decision as the first instance decision. The following reasons were given:

> "index offence is of a violent nature namely assault to injury and disfigurement
> Index offence also includes convictions for carrying an offensive weapon
> Index offence also includes a conviction for having in public place article with blade or point."

The decision and reasons made no reference at all to the petitioner's trouble free previous curfew and so did not specifically address the point made in the application. The petitioner appealed.

[7] Despite having appealed, the petitioner seeks reduction of both the first instance and appeal decisions. In my opinion, it is not appropriate for me to reduce the first instance decision. The judicial review jurisdiction of the court is concerned with the final decision of an administrative body. Indeed, it would not have been competent for the petitioner to seek judicial review of the first instance decision immediately after it had been made as he would not have exhausted his appeal remedy.

[8] The appropriate decision for me to consider, and if I think fit reduce, is the appeal decision. The effect of any reduction would be that the respondents would have to reconsider the appeal and make a new decision on the appeal. So it is important that I now turn to and consider the appeal decision.

[9] In so doing I will consider only the written decision and not what is said in Mr Peat's affidavit. There are matters in the affidavit which were not put forward prior to the commencement of proceedings. I agree with Lord Reed and Stanley Burton J that reasons put forward after the commencement of proceedings must be treated especially carefully. (*Chief Constable Lothian and Borders* v *Lothian and Borders Police Board* 2005 SLT 315 at para [65]).

[10] The appeal form contains a box headed "Please tell us why the decision is wrong". The petitioner filled in the box in detail. In particular he wrote:

> "I am appealing this decision on the grounds that I was released on bail and on curfew from 8pm to 7 am by judge [names a judge] from the date of my crime in early Feb 2018 until Feb 27th 2019 which was over a year without any problems. So I feel that since I have already proved that I can and will abide by all the rules [and then goes on to give some other reasons] I don't see how this doesn't place me at the top of the list as a prime candidate to be released on a tag."

So we can see from that that the petitioner is again placing emphasis on the trouble free prior curfew as an individual circumstance to override the presumption. The appeal form also

mentioned other reasons in respect of him being a model prisoner, re-starting counselling and debt for rent.

[11] The respondent's Mr Peat decided the appeal on 9 May 2019 and gave the following reasons:

> "Thank you for the very comprehensive appeal which you have submitted which I have investigated fully. However, in respect of your index offence, it triggers 3 of the presumptions against release on HDC (listed above) [that is a reference to the violent nature of the offence, offensive weapon and article with blade or point in a public place].
>
> These presumptions against release on HDC are in effect used as guidance in the assessment of risk process, and will also include previous offending behaviour and convictions in order to mitigate any risks identified to the lowest level. For these reasons I am of the opinion that Mr Roberts was fair and correct in his decision to refuse your release on HDC. "

Decision

[12] The editors of *De Smith's Judicial review* (8th Edn at para 7.15) give an elegant and pithy summary of the law which both parties agreed was accurate, and in so doing the editors identified two core criteria:

> "In short, the reasons must show that the decision maker successfully came to grips with the main contentions advanced by the parties, and must tell the parties in broad terms why they lost, or, as the case may be, won. Provided the reasons satisfy these core criteria, they need not be lengthy."

[13] In my opinion, both criteria have been satisfied in this case. The decision maker came to grips with the petitioner's point about the trouble free curfew. He refers to the appeal as being "very comprehensive" and that is clearly a reference to the detailed handwritten paragraph in the box on the first page of the appeal form, which includes the point about the trouble free curfew. He states that he has investigated the appeal fully. When the appeal decision is read as a whole, the reason why the petitioner lost is clear. The decision maker has come to the view that the curfew point, and indeed the other points in the handwritten

paragraph, are not of sufficient weight to displace the presumptions. Immediately after referring to his consideration of the comprehensive appeal points the decision maker uses the word "however" and goes on to find that despite the appeal points the presumptions still apply.

[14] In so doing, Mr Peat has come to his own conclusions on the appeal. He has properly considered the matters in the handwritten paragraph, some of which were not before the first instance decision maker, and has not limited his decision to matters which were before the first instance decision maker. Accordingly I reject the petitioner's argument that Mr Peat did not consider the appeal *de novo*.

[15] I sustain the respondent's pleas in law numbers 1 to 4 and repel the petitioner's pleas in law numbers 1 to 4 and refuse the petition.