OUTER HOUSE, COURT OF SESSION

[2021] CSOH 123

P23/20

OPINION OF LADY WISE

In the petition of

ANDREW BROWN

Petitioner

against

THE SCOTTISH MINISTERS

Respondents

for

Judicial Review of a failure to provide sufficient resources for rehabilitation and the policy of prioritisation for rehabilitative coursework

Petitioner: Leighton; Drummond Miller LLP
Respondents: P Reid; SGLD

14 December 2021

Introduction

[1] The petitioner ("Mr Brown") was convicted of certain sexual offences and is subject to an order for lifelong restriction (an "OLR"). The punishment part of his sentence was fixed at 4½ years commencing on about 11 October 2016. That punishment part expired on 11 April 2021 and so he is eligible for consideration for release by the Parole Board for Scotland. It is accepted by both sides to this case that before directing the release of a prisoner serving an OLR sentence the parole board will invariably expect him to have

served a period of time in less secure conditions. Progress from closed conditions can be to the national top end ("the NTE") and/or the Open Estate before release is recommended. The NTE is a less secure facility than closed conditions and can be used as an interim step between closed conditions and the Open Estate. As an OLR prisoner Mr Brown is subject to a risk management plan ("RMP") in terms of the Criminal Justice (Scotland) Act 2003. That legislation imposes an obligation on the Scottish Ministers to prepare the relevant RMP. In practice a risk management team ("RMT") fulfils that function. RMPs often require that prisoners undertake rehabilitation coursework.

[2] Mr Brown has been assessed as requiring to undergo and complete a course called Moving Forward: Making Changes ("MF:MC"), a course designed for prisoners convicted of sexual violence. He has been on the waiting list for that course for some time, including during a period following the outbreak of COVID-19 when rehabilitation courses were suspended in the absence of a Covid secure method of delivery. In broad terms Mr Brown makes two complaints in this petition. First he alleges that the Scottish Ministers have not provided the requisite systems and resources that they are obliged to provide for his rehabilitation, which I will call the systems challenge. Secondly, he complains that the policy that the Scottish Ministers operate in relation to prioritisation for access to rehabilitative coursework is flawed - this is the prioritisation policy challenge.

The systems challenge

[3] Mr Brown seeks a declarator that the Scottish Ministers as respondents are in breach of their obligations to provide the systems and resources 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 is no longer necessary for the protection of

the public that they should remain detained. Relying on *James* v *Secretary of State for Justice* [2010] 1 AC 553, Mr Brown seeks a similar declarator that there has been a failure to fulfil a duty to put in place the requisite systems and resources to deal with prisoners like him. In that case there had been a failure to introduce systems to deal with prisoners given indeterminate sentences for public protection in England and Wales. Mr Brown contends that the respondents are under a comparable duty in respect of OLR prisoners in Scotland. Mr Leighton on his behalf pointed to documentation illustrating that there has been a 49.7% increase in qualifying prisoners with no corresponding increase in the resources devoted to the MF:MC course. He referred in particular to an email dated 17 September 2019 relating to Mr Brown and indicating that he was on the waiting list for MF:MC and was at position 189 out of 257 for group work and 15 positions lower for 2:1 work. The correspondence explains that when MF:MC was introduced there were 917 sex offenders in custody who might qualify. In 2019 this had risen to 1,373.

[4] The Scottish Prison Service ("SPS") had recognised the difficulties in providing equal access to all prisoners including the sex offender population which at that time was about 1,200. In a letter from the Scottish Public Services Ombudsman ("SPSO") dated 11 October 2019 (number 6/1 of process), Mr Brown was informed that the SPS acknowledged that no additional funding had been made available to match resources to the increasing demand for MF:MC. The SPS is only resourced to complete on average 60 successful completions or outcomes for such a course in each financial year. The correspondence also indicated that there was a delay in Mr Brown being subject to a general programmes assessment until the outcome of an appeal he had taken was concluded which was not until February 2018. Thereafter his assessment was commenced in August 2018. In the parole board's decision of 12 April 2021 (number 6/8 of process) it is narrated (at

paragraph 22) that by then Mr Brown was placed at 145 on the national waiting list for MF:MC and that no date was yet available for his access to the programme. The documentation showed an increase of 456 prisoners in those who might qualify for the MF:MC course. At least some of that increased number would be indeterminate sentence prisoners (including life and OLR prisoners). As indeterminate sentence prisoners are required to be detained until their risk in the community is acceptable there is no prospect of a release until they have undertaken the coursework that they are assessed as requiring. It was irrational to delay provision of any course to that cohort of prisoners and unlawful in that it would delay possible progress through the Open Estate to release. While the respondents sought to highlight changes in training and staffing and so on that, it would be contended, could make a difference, there was nothing to illustrate that any adequate provision was being made that would have an impact. The affidavit from a prison psychologist (number 20 of process) explained that the MF:MC programme is to cease during 2021 and be replaced by two pilot programmes one shorter and one longer with the latter being of higher intensity and to be undertaken by those considered a high risk of causing harm. Mr Leighton's position was that this explanation failed to deal with any of the points made on behalf of Mr Brown. It would be for the respondents to produce evidence to satisfy this complaint. The correspondence from the Scottish Prison Service illustrated the absence of adequate resources to introduce a better system through an increase in resources.

[5] The respondents' position in relation to the first challenge was that an alleged failure to respond adequately to an increase in OLR prisoners was not justiciable. It was accepted that the respondents have a general duty to properly resource the system, something that required consideration of how to recruit, retain and train suitably qualified professionals

to deliver rehabilitation coursework. Issues also arose as to how available resources are allocated. Mr Reid contended that the situation here was not comparable to that in *James* v *Secretary of State for Justice*. In that case the statutory provisions in England and Wales for indeterminate public protection ("IPP") sentences had been brought into force without adequately resourcing the system from the outset. In the present case, at its highest, the complaint is that the respondents have failed to react appropriately to an increase in demand for certain courses within the system, something that was largely a consequence of sentencing decisions of the court. The complaint was effectively one of how the respondents reacted to an emerging trend of an increase in relevant prisoner numbers. Indisputably that would have called for the recruitment and training of additional specialist resources something that was a significant commitment both financially and in terms of available personnel. A decisions about if and when to make such a commitment was the type of polycentric decision that is unsuitable for judicial determination - De Smith's *Judicial Review, 8th edition* at paragraphs 1-044 and 1-049 and paragraphs 5-154 and 5-155; Fordham's *Judicial Review Handbook* (7th edition) was to the same effect at paragraphs 31.2.6 and 31.2.7. It has been recognised that some element of delay within the system for progressing prisoners is both tolerable and lawful. It was for the respondents to decide when and how more resources might be directed at MF:MC which would involve consequences somewhere else in the budget.

[6] In Mr Reid's submission the affidavit of the prison psychologist was helpful in that it illustrated decisions that had been made about adequate resourcing and the introduction of a new system whereby all of those waiting for MF:MC were to be streamed into one of two programmes. This was the response to the increase in numbers as the alternative shorter programme would have the capacity to process more prisoners and reduce the

number of prisoners waiting for the higher risk programme. This was exactly the sort of decision-making with which the court should be very slow to interfere even if it was a justiciable issue. There had been an increase in the number of prisoners waiting for the course but the situation fell far short of the response to that increase being unlawful. The decision to be made was whether the response made to date was adequate.

Prioritisation policy challenge

[7] The respondents have a policy in relation to the prioritisation of rehabilitative work. That policy was originally framed in relation to the date on which a prisoner might first have an opportunity for release but it now reflects the timeframes in the respondents' progression guidance. Different types of prisoners have different "critical dates". The critical date for a prisoner might be the date on which they can qualify for parole or the punishment part expiry date and the policy acknowledges the need to access programmes where possible in advance of a prisoner's critical date. The following table illustrates the way in which prisoners are prioritised in terms of rehabilitative programme attendance:

Sentence	Critical date
Short-term prisoner (less than 4 years)	Earliest date of liberation (EDL)
Long-term prisoner (4 years or more)	Parole qualifying date (PQD) minus 2 years
Order for lifelong restriction (OLR) prisoner	Punishment part expiry date (PPED) minus 2 years
Life sentence prisoner	Punishment part expiry date (PPED) minus 4 years
Extended sentence prisoner (short-term)	Earliest date of liberation (EDL)
Extended sentence prisoner (long-term)	Parole qualifying date (PQD) minus 2 years
All recalled prisoners	The first review date following recall

[8] In terms of the waiting lists for courses, these are dynamic in the sense that a prisoner can move down the list if other prisoners come into the system and have an earlier critical date and are assessed as needing the same course. A long-term prisoner will have a later critical date than a short-term prisoner and so the latter is likely to be further up the list due to his earlier critical date. Mr Brown's critical date (11 April 2019, being the end of his punishment part minus 2 years) is in the past and so he should move up the waiting list but the potential for him to be "leapfrogged" by new short-term prisoners is still there. The table illustrating the relationship between the type of prisoner and the critical date policy is the revised policy. The challenge was in essence that a policy that gives a critical date of the expiry of the punishment part minus 2 years is unfair to OLR prisoners because in practice they go first to the NTE before progressing to the Open Estate and so the whole process will take more than 2 years such that their rehabilitation is inappropriately delayed. A prioritisation system should take account of the particular progression of OLR prisoners. An internal Scottish Prison Service memo (number 6/5 of process) dated 4 May 2017 set out the revised critical date calculation enforced at the material time as set out in the table above. As 13 out of 14 OLR prisoners go to the NTE before the Open Estate the prioritisation policy should have taken account of that. If the NTE was being used to test risky prisoners then that should have flowed through to the policy. This was an apparent disconnect between the stated policy and practice.

[9] Mr Brown's contention is that the current policy, proceeding as it does on the basis of punishment part expiry minus 2 years rather than punishment part expiry minus 4 years for OLR prisoners, is irrational. In the large majority of cases the rehabilitative process will take 4 years because of the need to progress first to the NTE and then the Open Estate. There was no rational basis to distinguish between life prisoners on indeterminate sentences and OLR

prisoners. Irrationality was now accepted to be a flexible standard depending on the particular case - *Keyu* v *Secretary of State for Foreign and Commonwealth Affairs* [2016] AC 1355 per Lord Kerr at paragraphs 271-283. As the issue of access to rehabilitative coursework relates to Mr Brown's ECHR rights a higher level of scrutiny is merited.

[10] Mr Leighton argued also that the respondents' policy on the prioritisation of access to rehabilitative work was unlawful as it is in breach of Mr Brown's convention rights in terms of Article 5 read with Article 14 of ECHR. Under reference to *R (Steinfeld and another)* v *Secretary of State for International Development* [2020] AC 1 the elements required for a breach of Article 14 to be established are 1) that the issue falls within the ambit of an article of ECHR; 2) that there is a difference in treatment; 3) that the difference in treatment is on a ground falling within Article 14 of ECHR; 4) that others are in an analogous situation and 5) that there is no proper justification for that. In the present case there is no dispute that Article 5 of ECHR is engaged. The programme prioritisation policy table illustrates the difference in treatment between OLR prisoners and other indeterminate sentence prisoners. In *Clift* v *United Kingdom* [2010] ECHR 1106 the court (at paragraph 60) reiterated that the general purpose of Article 14 of ECHR was to ensure that where a state provides for rights that go beyond the minimum ECHR guarantees those supplementary rights are to be applied fairly and consistently to all those within the state's jurisdiction unless a difference of treatment is objectively justified. In this context the length of time a prisoner might spend in NTE was irrelevant; what mattered was the difference between life prisoners and OLR prisoners and whether the difference could be justified. In *Clift* the difference was between the length of different sentences and not between determinate and indeterminate sentences, but the analysis was the same. If, as in *Clift*, a longer sentence can fall within the "other status" element of Article 14 then so can an OLR fall within that when compared with a

life sentence. There was no justification for treating OLR prisoners differently from life prisoners given the practice of OLR prisoners having to go through NTE. The policy should cater for the majority of OLR prisoners, and the information suggested that the vast majority did go through that longer route. On that basis the critical date for OLR prisoners should be the date of expiry of the punishment part of their sentence minus 4 years.

[11] Mr Reid identified that the nub of the petitioner's challenge to the prioritisation policy appeared to be that OLR prisoners should be treated the same as life sentence prisoners. He noted that whilst both are indeterminate sentence prisoners, life sentence prisoners are invariably sentenced to significantly longer punishment parts and the time taken to prepare them for release is likely to be longer. Further, whilst all life sentence prisoners will spend some time in the NTE, the same is not true of OLR prisoners. Any prioritisation policy required to balance a range of competing interests, including the interests of determinate sentence prisoners. Those prisoners would be released whether rehabilitative coursework has been undertaken or not. OLR prisoners required a risk management plan and then the undertaking of all relevant coursework. If Mr Brown's argument was accepted the necessary consequence would be that most OLR prisoners would immediately be placed ahead of all long-term prisoners on the national waiting list, thus reducing significantly the prospect of those long-term determinate sentence prisoners gaining access to rehabilitative coursework prior to their release. The respondents require to assess how best to balance these competing interests. What Mr Brown appears to seek is preferential treatment at the expense of other prisoners who have also been assessed as likely to benefit from the same coursework.

[12] While it had been asserted by Mr Leighton that OLR prisoners would require to spend time in the NTE, in fact this was not mandatory and an OLR prisoner can be released

from closed conditions. The practice was to give riskier prisoners time in the NTE and that would explain why so many OLR prisoners went through the three types of prison conditions. However the decision-making was not linear such that a prisoner whose risk cannot be managed would automatically be moved back to closed conditions. The real difference was that the tailored management of OLR prisoners which included the requirement for risk assessment resulted in their critical date being different to that of life prisoners. There was nothing irrational about reflecting that difference in the critical date analysis which included seven categories of prisoner. While the court might disagree with the way in which the respondents had decided to prioritise, such criticism would fall far short of the test of irrationality. It was also noteworthy that Mr Leighton had emphasised the differences between OLR prisoners and life sentence prisoners in one part of his argument but then relied on their similarities for his convention rights argument.

[13] Turning to the convention rights challenge itself, it was acknowledged that the case of *Clift* v *United Kingdom* [2010] ECHR 1106 supported an argument that a difference in treatment between those serving long-term determinate sentences of less than 15 years and those serving indeterminate sentences lacked objective justification. While the decision was of a chamber of the Strasbourg Court and not a Grand Chamber decision counsel accepted that the petitioner in this case was entitled to ask the same question as arose in *Clift*, namely whether there is a difference of treatment based on a personal or identifiable characteristic, something that had to be assessed taking into consideration all of the circumstances of the case and bearing in mind that the aim of the convention is to guarantee not rights that are theoretical or illusory but rights that are practical and effective (at paragraph 60). Any difference in treatment based on the length of sentences required to be objectively justified

or it would run the risk of falling foul of the purpose of protecting an individual from arbitrary detention.

[14] Mr Reid drew attention also to an authority that neither party had cited previously, namely that of *R (Stott)* v *Secretary of State for Justice* [2020] AC 51. The circumstances of that case were that the claimant had been sentenced to an extended determinate sentence of imprisonment with a custodial term of 21 years and an extended licence period of 4 years. Such a prisoner only became eligible for release on parole after serving two third of the appropriate custodial term while other prisoners serving determinate sentences became eligible after serving half their sentence. The UK Supreme Court held that, having regard to the ECHR jurisprudence, the difference in treatment between extended determinate sentence prisoners in relation to early release was a difference on the grounds of "other status" within the scope of Article 14 of the convention. However, the claimant's attack on the regime failed on the basis that the various domestic sentencing regimes had to be considered holistically and that each sentencing regime had its own set of rules governing when it could be imposed and how it operated in practice. The early release provisions were part of those rules and each sentence was tailored to a particular category of offender and addressed a particular combination of offending and risk to the public. In the circumstances, an ordinary determinate sentence was not comparable with an extended determinate sentence and the two were accordingly not analogous. Even if they were analogous, the difference in treatment was proportionate and justified in the circumstances. On the authority of *Stott*, Mr Reid accepted that it was more difficult to contend that Article 14 was not engaged. The difference in treatment between OLR prisoners and life sentence prisoners might well fall within consideration of the "other status" scope of Article 14. However, it was contended that the two types of prisoners involved in this case

were not analogous and that any difference in treatment was objectively justifiable as it had been in *Stott*. At paragraph 141 of *Stott*, Lady Black had rejected the contention that *Mr Stott's* case was on all fours with *Clift* v *United Kingdom*. The complexity and detail of the provisions governing the various sentences that English courts can impose was then examined and (at paragraph 147) the differences relevant in that case between an extended determinate sentence and a discretionary life sentence were summarised. Ultimately, Lady Black concluded (at paragraph 155) that the two types of prisoners under discussion in that case were not analogous. Mr Reid accepted that the parts of the judgment on which he relied were obiter for the purposes of this petition but he urged acceptance of the reasoning. There were dissenting opinions in the *Stott* case both on the "other status" issue and on whether the situations of the prisoner types were analogous. It was a majority decision. Lady Hale had dissented from the decision on whether the prisoners were in an analogous situation (at paragraphs 214), opining that one had to look at the essence of the right in question to ask whether different prisoners were in a relevantly similar situation. Lord Hodge (at paragraph 195) concluded that there were obvious and relevant differences between the sentencing regimes for extended determinate sentences on the one hand and other determinate sentences and life sentences on the other. Those differences were sufficient to prevent prisoners serving sentences under these different sentencing regimes from being in an analogous situation. The majority view supported the respondents' position in Mr Brown's case.

[15] In the event that it did fall to the respondents to justify any difference in treatment a conventional four stage proportionality assessment in respect of the discriminatory effect rather than the scheme as a whole was required. The relevant proportionality assessment would require to follow the four steps set down by Lord Reed in *Bank Mellat* v *HM Treasury*

(No 2) [2014] AC 700 at paragraph 74. Those steps are (1): that the objective is sufficiently important to justify limitation of the right, (2) whether the measure is rationally connected to the objective, (3) whether a less intrusive measure could have been used and (4) consideration of the overall balance between the severity of interference and the overall objective. While the respondents submitted that there was no discrimination between life sentence prisoners and OLR prisoners if the *Bank Mellat* test required to be engaged with, the objective was to ensure fair access to rehabilitative coursework as between all categories of prisoners assessed as requiring it. In general terms the length of time that will be spent in custody has been used as the base point from which the "critical date" is calculated. That was rationally connected with the objective particularly when determinate sentence prisoners are taken into account and no less intrusive means had been suggested for the petitioner. Once the petitioner's obvious interest in wanting to prioritise himself is put to one side there was nothing to suggest how better the competing interests could be balanced. In considering fairness to all prisoners those serving determinative sentences would still be affected by any delay in undertaking necessary courses notwithstanding that they have a finite date for release. It was difficult to separate the arguments on whether the cases are truly analogous from the matter of justification but the overall balance struck by the respondents on prioritisation was acceptable. In relation to the statistics on which Mr Leighton had relied, illustrating that only 1 out of 14 OLR prisoners had not progressed to the NTE before the Open Estate, Mr Reid contended that was no more than a snapshot on a particular day. There are two pathways for OLR prisoners in contrast with the situation for life sentence prisoners.

Decision

[16] Mr Brown's first challenge asserts that there has been a failure by the respondents to provide the requisite systems and resources for his rehabilitation. It is now well established that a systemic failure to resource rehabilitation programmes that prevents the parole board from determining effectively whether a prisoner remains a risk (in the absence of other sufficient evidence of continuing risk), will amount to a breach of public law duty. The circumstances before the court in *James* v *Secretary of State for Justice* [2010] 1 AC 553 were that there had been a wholesale failure to introduce the systems and resources required to complement a new type of sentence introduced in England and Wales known as an indeterminate sentence for public protection ("IPP"). The material before the court illustrated that at the material time there were 4,500 IPP prisoners of whom 82% had tariffs (punishment parts) of 2 years or less. The situation led Lord Hope to record that there was no doubt that the Secretary of State had "failed deplorably in the public law duty that he must be taken to have accepted when he persuaded Parliament to introduce …IPP's..". In the present case, the highpoint of Mr Brown's systems complaint is the acknowledgement in the letter from the SPSO (number 6/1 of process) that " … there has been an increase in the number of prisoners subject to OLR and there has been no additional funding made available to meet this increasing demand." The issue, then, is whether or not that statement indicates the type of systemic failure identified in *James*.

[17] There was no suggestion in argument before me that the new OLR sentence was not resourced appropriately when it was introduced as an available High Court sentence in 2006 on implementation of the Criminal Justice (Scotland) Act 2003. What seems to have occurred since then is that there has been an increased demand for certain courses, such as that for which the petitioner has been assessed as suitable. The respondents have now

devised a plan to address at least some of the delays to those on the waiting list for the MF:MC programme. In her affidavit (number 20 of process), the principal prison psychologist explains that this programme is being replaced by two separate pilot programmes for those convicted of sexual violence, one for high risk prisoners and one for those considered to pose less risk of harm. The former was due to commence in October 2021 and the latter is designed as a shorter, less intense programme to which those suitable for it will be diverted from the current single waiting list. The shorter programme is being developed collaboratively between SPS and community partners and will accommodate higher numbers. There has undoubtedly been some delay in this response to the increased numbers being devised and implemented, but it is not in my view resonant of the type of systemic failure to introduce and resource suitable programmes for a new sentencing option that were uncovered in *James.*

[18] The respondents contend that the decision making process that has led to the proposed change in programme work was the type of allocation of available resources that was wholly within the respondents' sphere and with which this court should not interfere. The relevant distinction is between a polycentric decision, which would include one about how to distribute a pot of limited resources and a failure to discharge a public law duty, such as a failure to introduce and resource a system proposed or introduced by the relevant public authority. It is difficult for the court to interfere with decisions on the allocation of a limited pot of public funds where there are competing claims on it. As Singh LJ emphasised in *R (Drexler)* v *Leicestershire County Council* [2020] EWCA Civ 502 (at paragraph 57) the

> "allocation of scarce or finite public resources is inherently a matter which calls for political judgement. This does not mean that the courts have no role to play but it does mean that they must tread with caution, affording appropriate weight and respect to the judgement formed by the executive or the legislature"

It will be evident from the discussion to follow on the prioritisation policy that a decision to allocate more resources to OLR prisoners such as the petitioner would have consequences for those who then drop down the priority list. This is not a situation in which the respondents have simply 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. Resources have been allocated to the programme but the increased numbers of those assessed as requiring it have led to delays that required to be addressed. The delay in the increased numbers assessed as suitable for the course being addressed has taken place at least in part against the backdrop of the COVID-19 pandemic.

[19] The respondents' task in this context is to address the increased numbers of prisoners requiring to undertake the MF:MC course and solve it. One option might have been to allocate additional resources to it, which would involve recruiting and training relevant personnel with consequences for other budgetary commitments. It cannot be said that this was the only rational or reasonable option. Another option, that ultimately chosen, was to reorganise the system to create different programme pathways so that lower risk prisoners undertake a shorter course and so devote the greater resources required to deploy the more intense programme to a smaller number of prisoners. No doubt other options were considered, but the decision made falls, in my view, squarely within the type of decision making with which the court should not interfere. In no sense did the respondents take a decision to deny OLR prisoners the opportunity to undertake the relevant rehabilitative course. Delays of the type complained of are unsatisfactory, but I am not persuaded that the petitioner has shown a failure to provide the requisite systems and resources to address the problem.

[20] The prioritisation policy challenge is a little more complex. The table set out at para [7] above summarises the current policy, GMA30A/17. That policy was devised to take some account of a prisoner's "pre-release phase", to give an opportunity for progression through the prison estate. This means, for example, that prisoners who require some time in the Open Estate have a period during which they have the opportunity to do that, all things being equal, before their first possible release date. Different categories of sentence have different critical dates. OLR prisoners have a critical date of punishment part expiry date (PPED) minus 2 years, as do long-term prisoners serving a determinate sentence of 4 years or more and those serving long extended sentences, whose critical date is their Parole Qualifying Date (PQD) minus 2 years. Life sentence prisoners, however, have a critical date of PPED minus 4 years. The crux of the issue in this part of the challenge is whether OLR prisoners and life prisoners are serving analogous sentences for this purpose.

[21] A factor said to be relevant to the petitioner's argument is that coursework of the type he will have to carry out requires to be undertaken in closed conditions and that most OLR prisoners appear to spend a period in the NTE before moving to the Open Estate. It should be noted, however, that there is no requirement for an OLR prisoner to spend time in the NTE, a prisoner's advancement through the system being dependent on his individual circumstances, including the level of risk he presents. It is also important to acknowledge that the prioritisation policy lists all sentence types and represents the respondents' attempt to balance the competing interests of the prisoners involved. Mr Brown asserts that the policy irrationally treats OLR prisoners differently to life sentence prisoners due to the practice of OLR prisoners being tested first in the NTE and subsequently in the Open Estate before release. If that process takes well over 2 years, it is said to make no sense for OLR prisoners to have a critical date of PPED minus 2 years as a rational policy would treat OLR

prisoners in the same way as life prisoners who are also expected to go through the NTE. Separately, the current difference in treatment of these two prisoner types is said to breach Articles 5 and 14 of ECHR.

[22] While the case of *Clift* v *United Kingdom* was prayed in aid of the petitioner's position initially, it became apparent during Mr Reid's submissions that the most recent discussion of the relationship between different types of prisoners for the purposes of an alleged discrimination claim is that in the UKSC judgment in *R (Stott)* v *Secretary of State for Justice* [2020] AC 51 ("*Stott*"). While the sentences under analysis in that case were those imposed under the criminal law of England and Wales, the issue of differing treatment between prisoners in the context of a claim based on Articles 5 and 14 of ECHR is addressed in some detail. In essence, a majority of the UKSC decided that, having regard to the jurisprudence of the European Court of Human Rights, the difference in the treatment of extended determinate sentence prisoners in relation to early release was a difference on the ground of "other status" within the scope of Article 14 of ECHR. In light of that, the earlier decision in *R (Clift)* v *Secretary of State* [2007] 1 AC 484 was not followed. However, the court went on (by a majority of 3:2) to dismiss the appeal on the basis that the particular sentences under analysis were not sufficiently analogous to make the difference in treatment complained about disproportionate or unjustified. A question arises about the assistance that may be derived from that decision in determining Mr Brown's challenge in this case.

[23] In *Stott,* Lady Black undertook a detailed analysis of the courts' previous approach to the scope of "other status" within Article 14 with particular reference to the case of *Clift* both domestically and in Strasbourg. Her conclusion (at paragraph 81) was that although not open-ended, as the grounds within Article 14 are to be given a generous meaning and there was a need for careful scrutiny of differential schemes to check their compatibility with

Article 5 of ECHR, a difference in treatment between extended determinate sentence prisoners and other determinate sentence prisoners fell within the scope of the "other status" description. A strict "eiusdem generis" interpretation of "other status" such that it had to be of a similar kind to the characteristics listed before it is inappropriate. In Mr Brown's case, comparing for the moment the different categories of OLR prisoners and life sentence prisoners respectively, I consider that, as the "other status" part of the Article 14 definition must be read generously and inclusively, the difference in treatment that arises in this case in principle falls within the scope of Article 14. Accordingly, as the group of people classified as OLR prisoners are distinguishable from another easily identifiable group, that of life prisoners, the difference in treatment between them complained of gives rise to Article 14 considerations, as it is on the face of it based on the ground of "other status".

[24] The next question is whether the sentencing regimes to which Mr Brown as an OLR prisoner and life sentence prisoners are subject, are sufficiently analogous to render the difference in treatment unlawful. This involves consideration of the nature of the relevant sentencing regimes. In *Stott,* the sentencing framework for each of the sentences under discussion there was considered in detail but there is no direct read across to the sentences involved in the present case. There was less discussion in this case of the nature of the relevant sentences but the salient features of each are known to the court and can be summarised briefly. Part XI of the Criminal Procedure (Scotland) Act 1995 contains the relevant current provisions in this jurisdiction for the sentences relevant to the petitioner's complaint. In terms of section 205 of the Act, a sentence for life imprisonment is effectively mandatory following a murder conviction. Thus a life sentence is in those circumstances imposed regardless of the level of perceived risk to the public at the time of sentencing.

Both an OLR and a sentence for life imprisonment can be described as indeterminate sentences. In both, the court fixes a punishment part representing the punishment and deterrent component and it comprises the minimum period that must be spent in custody before the prisoner may apply to the Parole Board for release. Whether or not an indeterminate sentence prisoner will be released following the expiry of the punishment part of their sentence depends on the risk they present to the public at the relevant time.

[25] The statutory provisions relating to the OLR regime are contained in a part of the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act") that also makes provision for extended (determinate) sentences for those convicted on indictment of a sexual, violent or terrorism offence. Section 210A of the 1995 Act sets out the test for an extended sentence, which is that the court considers that the period during which an offender would otherwise be subject to a licence would not be adequate for the purpose of protecting the public from serious harm from the offender. An extension period additional to the custodial period is fixed to address that concern. An OLR is a risk based sentence, imposed only where strict legislative criteria are met following the making of a Risk Assessment Order and the preparation of a detailed Risk Assessment Report (RAR) in terms of section 210B and 210C of the 1995 Act. Where ordered, an RAR will assist the court in determining whether the risk criteria are met. The risk criteria are defined in section 210E and are 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."

[26] The treatment of different categories of prisoner having regard to the type of sentence being served is a complex policy matter involving a number of considerations that are within the respondents' remit. A decision to treat OLR prisoners in one particular

respect (identification of their critical date) the same way as other prisoners subject to a risk based element of sentence rather than other indeterminate sentence prisoners is not on the face of it irrational. Nor does it seem to me to fall foul of the requirement not to mete out different treatment to those in the same group. By definition OLR prisoners and life sentence prisoners are easily distinguishable categories of prisoner subject to different sentencing regimes. I am not persuaded that OLR prisoners are analogous to life prisoners in relation to the issue of their critical date such that the difference in treatment would be unlawful. There are similarities between the sentences of OLR prisoners and long extended sentence prisoners on the one hand and similarities between OLR prisoners and life sentence prisoners on the other but that does not, in my view, render the latter two prisoner types analogous for the purposes of Articles 5 and 14 of ECHR when it comes to a specific aspect of the policy on critical dates. In any event, as there is no rule that OLR prisoners spend time in the NTE before progressing to the Open Estate, there is no requirement or policy that would prevent such prisoners making the progression envisaged towards possible release. The progression of an individual prisoner will always depend on a number of factors and not on the implementation of the policy alone.

[27] Further, while I have rejected the proposition that the policy amounts to discriminatory treatment between OLR prisoners and life sentence prisoners, had I required to consider objective justification adopting the *Bank Mellat* approach, I 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, whether serving determinate or indeterminate sentences. Identifying in broad terms the length of the minimum time required to be spent in custody

is unobjectionable as a starting point for fixing a critical date. It was not disputed that OLR prisoners had shorter punishment part tariffs than life sentence prisoners.

[28] For the reasons given, I have concluded that the petitioner has failed to establish either that the respondent's prioritisation policy was irrational and so not open to them to adopt, or that it amounts to a breach of Articles 5 and 14 of ECHR. Accordingly, neither challenge succeeds and I will dismiss the petition, reserving meantime all questions of expenses.