OUTER HOUSE, COURT OF SESSION

[2024] CSOH 6

P738/24

OPINION OF LORD SANDISON

in the petition of

GORDON BURNS

Petitioner

for

Judicial Review of the system operated by the Scottish Ministers to grant him his first grant of temporary release

Petitioner: Leighton; Drummond Miller LLP
Respondent (Scottish Ministers): D. Ross, KC, Scullion; SGLD

25 January 2024

Introduction

[1] Gordon Burns is a convicted prisoner serving a discretionary life sentence dating from 31 October 2000. The punishment part of that sentence was nine years. He has remained in custody since his conviction. Since March 2023 he has been confined at HMP Greenock in what is called the National Top End section of the Scottish Prison Service estate. He has been afforded occasions of special escorted leave and is awaiting the outcome of consideration of his suitability for a community work placement. If he is assessed as suitable for such a placement, he will require to obtain from the Scottish Ministers something known as a First Grant of Temporary Release. He wishes to have unescorted

access to the community because he believes that that will be necessary to demonstrate to the Parole Board for Scotland, the body which will ultimately determine whether he can be released from custody on licence, that it is no longer necessary for the protection of the public that he be required to remain in confinement. Having observed what has happened to other prisoners of his acquaintance, and having obtained certain statistical information, he is apprehensive that a ministerial decision on whether to approve any application for First Grant of Temporary Release to him is likely to be inordinately delayed, particularly in comparison with the process which another group of prisoners serving sentences of indeterminate duration – namely those subject to orders for lifelong restriction – go through. He also contends that it is unlawful for the decision on applications for First Grant of Temporary Release to be made by Ministers (in practice, the Minister for Victims and Community Safety) rather than by a non-political agent.

[2] By way of this petition for judicial review, Mr Burns seeks declarator that the scheme for the approval of First Grant of Temporary Release breaches his rights in terms of Article 5, or else Article 14 with Article 5, or in any event Article 14 with Article 8 of the European Convention of Human Rights; declarator that Rule 134 of the Prisons and Young Offenders Institutions (Scotland) Rules 2011 (as amended) insofar as it requires approval of the Scottish Ministers to a First Grant of Temporary Release is unlawful; and reduction of Rule 134 insofar as it requires approval of the Scottish Ministers to a First Grant of Temporary Release.

Background

Relevant Provisions

[3] The European Convention on Human Rights provides inter alia as follows:

"ARTICLE 5 Right to liberty and security

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: (a) the lawful detention of a person after conviction by a competent court;

…

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

…

ARTICLE 8 Right to respect for private and family life

[1] Everyone has the right to respect for his private and family life, his home and his correspondence.

[2] There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

…

ARTICLE 14 Prohibition of discrimination

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."

[4] Rule 134 of the Prisons and Young Offenders Institutions (Scotland) Rules 2011/331, so far as material, is in the following terms:

"134.— Eligibility of prisoners for temporary release

(1) In this Part *"temporary release"* means any of the forms of temporary release defined in Rule 136.

…

(4) Subject to paragraph (5), a life prisoner is disqualified from obtaining temporary release unless the Governor has obtained the prior consent of the Scottish Ministers.

(5) Any consent granted by the Scottish Ministers under paragraph (4)—

(a) will apply to the first grant of temporary release and any further grants of temporary release; but

(b) will cease to have effect if the prisoner is subsequently assigned a supervision level other than low supervision level."

Petitioner's submissions

[5] On behalf of the petitioner, counsel submitted that discretionary life prisoners in the petitioner's position would ordinarily require to progress in a certain manner through the prison estate in order to have any realistic chance of being released. The standard progression route was that a prisoner would complete any necessary rehabilitative coursework and then transfer to the National Top End. There, he would be expected to take Special Escorted Leaves for the first year and then obtain an external work placement in the second year. It would ordinarily be anticipated that a prisoner would spend about two years in the National Top End before transferring to the Open Estate where he would continue with his work placement and might be granted further unescorted leave. Before undertaking a work placement or any other form of unescorted leave he would require to obtain a First Grant of Temporary Release. This would typically be about a year into the prisoner being at the National Top End. Before transferring a prisoner from the National Top End to the Open Estate the Scottish Ministers would consider the prisoner's case. There required to be ministerial approval at the stage of First Grant of Temporary Release and when a life prisoner went to the Open Estate.

[6] Prisoners subject to orders for lifelong restriction would have the same general progression pathway as discretionary life sentence prisoners, but did not require to obtain a First Grant of Temporary Release from the Ministers. Instead, they required the approval of the Risk Management Authority before any significant change to their Risk Management Plan. They did not require ministerial approval for any transfer to the Open Estate, but that (or community access) might require a change to their plan.

[7] It was not clear to the petitioner what the relevant timeframes were. As a discretionary life sentence prisoner, he had an understanding that prisoners subject to orders for lifelong restriction seemed to be processed far more quickly than prisoners in his position. There appeared to be a substantial time difference in the processing of the two groups. Statistics had been obtained but were difficult to interpret meaningfully. The petitioner was in a position to seek a First Grant of Temporary Release in November 2023. His case had been considered by local prison staff, but it was unclear whether he would be deemed suitable to apply, or be recommended for, such release.

[8] In those circumstances, the petitioner complained of violation of his rights under the European Convention on Human Rights. A prisoner subject to an order for lifelong restriction who sought community access would probably require an amendment to his Risk Management Plan. The task undertaken by the Risk Management Authority in considering a revised or amended Plan was the same as that undertaken by the Scottish Ministers when an application for First Grant of Temporary Release was considered. There was no good reason for the task to be undertaken by a politician in respect of discretionary life prisoners. There was no good reason for it to take a longer time in respect of such prisoners.

[9] There were two elements to the petitioner's complaint: firstly, in comparison to prisoners subject to orders for lifelong restriction, it was likely that consideration of his case

would take a disproportionately long period of time (this complaint was made under Article 14 taken with 5 and 8), and secondly, consideration of his case would be undertaken by a politician rather than by professional risk assessors and managers alone (this complaint was made on the basis of Article 5 and separately Article 14 taken with 5 and 8).

[10] In relation to Article 5, it required that deprivation of liberty should not be arbitrary. An inherent part of the Article was the provision of a real opportunity for rehabilitation (as in *Brown* v *Parole Board for Scotland* [2017] UKSC 69, 2018 SC (UKSC) 49). That might concern only a certain class of prisoner, but the petitioner was within that class as a post-tariff indeterminate sentence prisoner.

[11] Decisions to allow a First Grant of Temporary Release were made by a politician. Most if not all other decisions were made by civil servants on a non-political basis. There was no proper justification for the involvement of a politician in the decision to grant or refuse a First Grant of Temporary Release. The involvement of a politician did not provide an adequate protection against arbitrariness. The only reason for involving a politician in the decision-making process was in order that there could be some political content to that decision. The decision should be an assessment of the risks posed by the petitioner and the management of that risk. It should not have any political content. Temporary release of a life prisoner would bear upon his prospects for release. Article 5 required a real opportunity for rehabilitation, and making the provision of that opportunity dependent upon the will of a politician did not provide a sufficient safeguard against arbitrary decision-making.

[12] In relation to Article 14, an applicant required to show that the facts of the case fell within the scope or ambit of another substantive Article, that he had status in terms of Article 14, and that there was an absence of justification. The scope or ambit of a right for the purposes of the potential application of Article 14 was wider than the substance of that

Article (e.g. *Akbar* v *Secretary of State for Justice* [2019] EWHC 3123 (Admin), [2020] HRLR 3 at [72(i)]). Article 14 of the Convention was pertinent if "the subject matter of the disadvantage ... constitutes one of the modalities of the exercise of a right guaranteed ...", or if the contested measures were "linked to the exercise of a right guaranteed ...": *Markin* v *Russia* (2013) 56 EHRR 8, [2012] Eq LR 489 at [129]. The Scottish Ministers accepted that consideration for First Grant of Temporary Release fell within the ambit of Article 5. It also fell within the ambit of Article 8, which related to conditions of detention over and above the minimum restriction implicitly permitted by Article 5: *Munjaz* v *United Kingdom* 2012 MHLR 351 at [79] and [80]. Temporary release related to the temporary suspension of those conditions on the prisoner and so fell within the ambit of Article 8.

[13] Status was similarly given a wide interpretation, as in *R (Stott)* v *Secretary of State for Justice* [2018] UKSC 59, 2020 AC 51 at [81], [185], [212] and [236] and *Clift* v *United Kingdom* (7205/07) at [56] and [62]. Sentence types were held to constitute an "other status" in *Stott*.

[14] The petitioner further contended that he was in an analogous position to prisoners subject to orders for lifelong restriction for these purposes. The particular nature of the complaint was important and the comparison did not require to be exact; the cases merely had to be relevantly similar: *Clift* at [66]. There was no logical difference in the assessment of the risks posed by members of the compared groups, so the mechanisms used to consider the risks that an indeterminate sentence prisoner posed when he was first released into the community were relevantly similar: cf *Clift* at [67]. Once a prisoner was granted First Grant of Temporary Release or his risk management plan was agreed, there was no distinction made between the different types of sentence. The Inner House had held that prisoners subject to orders for lifelong restriction were in an analogous position to discretionary life prisoners for the purposes of the availability and timing of rehabilitative opportunities:

Brown v *Scottish Ministers* [2022] CSIH 48, 2023 SC 27 at [29]. The petitioner was discriminated against in terms of Article 14 compared with other prisoners who were subject to an order for lifelong restriction.

[15] It was for the Scottish Ministers, if they wished, to prove that there was reasonable and objective justification for the relevant difference in treatment. None existed. The petitioner did not require to prove that he was particularly disadvantaged – *Clift* at [66] – and lacked the information to do so.

[16] If the court concluded that the petitioner ought to succeed to any extent, it should put the case out by order to discuss the nature of any eventual remedy to be granted.

Respondents' submissions

[17] On behalf of the respondents, senior counsel observed that the petitioner had become eligible to be released on parole licence from 27 August 2017 but that the Parole Board had not, as matters stood, ordered his release. He was thus a post-tariff discretionary life sentence prisoner. In order to achieve his release, he would require to demonstrate to the Parole Board that it was no longer necessary for the protection of the public that he should be confined. While the Parole Board could in theory direct release from closed prison conditions, there was an expectation that (both mandatory and discretionary) life sentence prisoners, and prisoners detained pursuant to an order for lifelong restriction, would first be tested through unsupervised access to the community, by way of "temporary release". The first time a discretionary life sentence prisoner was given temporary release was known as First Grant of Temporary Release.

[18] This petitioner complained that it took such a prisoner longer to obtain temporary release than it took for a prisoner subject to an order for lifelong restriction to obtain it. This

was said to be unlawful discrimination in terms of Article 14 of the European Convention on Human Rights, read with Articles 5 and 8, because discretionary life prisoners and order for lifelong restriction prisoners were in an analogous position and there was no objective justification for the two cohorts being treated differently. The less favourable treatment complained of was said to arise from the fact that the Risk Management Authority, which was responsible for approving temporary release for prisoners subject to an order for lifelong restriction, reached its decision faster than the Scottish Ministers, who were responsible for approving temporary release for discretionary life sentence prisoners. The petitioner also challenged the fact that in terms of Rules 134 of the Prisons and Young Offenders Institutions (Scotland) Rules 2011 it was the Scottish Ministers who determined whether to grant temporary release for the first time, and sought reduction of that Rule.

[19] Those complaints were unfounded for three reasons. First, when looked at in the round, and making appropriate allowances for differing individual circumstances, discretionary life sentence prisoners were not as a matter of fact treated any less favourably than prisoners subject to orders for lifelong restriction. There was no relevant delay or discrimination. In particular, the ministerial stage of the decision-making process for discretionary life prisoners only took, on average, four days. Both categories of prisoner were subject to a rigorous risk assessment before being considered for temporary release, and the processes for such assessment were parallel but different. That gave rise to the second reason why the complaint was ill-founded: the difference in how the two categories of prisoner were treated for the purpose of obtaining temporary release arose from the legislation which created the order for lifelong restriction sentence and the attendant responsibility of the Risk Management Authority for determining the temporary release of prisoners subject to such orders. No objectionable discrimination could arise in such

circumstances. Thirdly, there was nothing objectionable in law about a Minister taking the decision as to whether to grant temporary release, subject to the safeguards presented by the ability to subject any such decision to judicial review. The court should therefore dismiss the petition.

[20] A discretionary life sentence could be imposed on conviction for any common law crime other than murder, or for a statutory offence which carried a sentence of up to life imprisonment. It was a sentence imposed because there was a need to protect the public against offending by the prisoner which would not be adequately met by the imposition of a determinate sentence; it was directed to ensuring that the prisoner would be kept in custody until it was thought safe for him to be released: *Murray* v *HM Advocate* 2000 JC 102 at p 108. At sentencing, the judge imposed a punishment part, calculated in accordance with section 2A of the Prisoners and Criminal Proceedings (Scotland) Act 1993. After expiry of the punishment part, the Scottish Ministers were required to release a discretionary life sentence prisoner on licence if directed to do so by the Parole Board (section 2(4) of the 1993 Act). The Parole Board could not direct the Ministers to release such a prisoner on licence unless it was satisfied that it was no longer necessary for the protection of the public that the prisoner should be confined (section 2(5)(b) of the 1993 Act).

[21] Orders for lifelong restriction were recommended as a new sentence in the Report of the Committee on Serious Violent and Sexual Offenders (June 2000) and were designed largely to replace the use of discretionary life sentences. The Risk Management Authority had been created to establish, promulgate and continuously update best practice in risk assessment and risk management. The relative legislative changes were introduced by the Criminal Justice (Scotland) Act 2003, section 1 of which inserted sections 210B to 210H into the Criminal Procedure (Scotland) Act 1995. Sections 3 to 10 of the 2003 Act established the

Risk Management Authority. Section 210F(2) of the 1995 Act provided that an order for lifelong restriction constituted a sentence of imprisonment, or as the case may be detention, for an indeterminate period. The High Court had to make an order for lifelong restriction where, on the balance of probabilities, the risk criteria were met: section 210F(1). The risk criteria were defined in section 210E as being that the nature or the circumstances of the commission of the offence of which the convicted person had been found guilty, either in themselves or as part of a pattern of behaviour, were such as to demonstrate that there was a likelihood that he, if at liberty, would seriously endanger the lives, or physical or psychological well-being, of members of the public at large.

[22] Where a prisoner was subject to an order for lifelong restriction, various other provisions of the 2003 Act applied. In particular, the prisoner had to be the subject of a Risk Management Plan, which set out an assessment of risk and the measures to be taken for its minimisation, and how such measures were to be co-ordinated (section 6(3) of the 2003 Act). The Risk Management Authority was established under section 3 of the 2003 Act for the purpose of ensuring the effective assessment and minimisation of risk in terms of section 6(3). The preparation of a Risk Management Plan, where an offender was serving a sentence of imprisonment, was carried out by the Scottish Ministers as 'lead authority' in accordance with section 7(1) of the 2003 Act. The Risk Management Plan had to be submitted to the Risk Management Authority under section 8(4) of the 2003 Act for its approval or rejection. If rejected, the Ministers had to revise the Plan and resubmit it to the Authority. Where there had been, or there was likely to be, a significant change in the circumstances of an offender, the Ministers had to review the Plan, amend it if necessary and submit it to the Authority for its approval or rejection (section 9(5)-(7) of the 2003 Act). A significant change in the circumstances of a prisoner would include a proposed transfer

from one prison to another or a proposed progression to less secure conditions, including being granted temporary release.

[23] Orders for lifelong restriction became available sentences on 20 June 2006. The same provisions of the 1993 Act as regards calculating the punishment part and parole applied to prisoners subject to orders for lifelong restriction as applied to discretionary life sentence prisoners. As was noted in *Brown* v *Scottish Ministers* at [3]:

> "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. A discretionary life sentence may be imposed, for example, in respect of offences committed before [20 June 2006]. There are prisoners who are currently serving discretionary life sentences. Some of those sentences were imposed before [20 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."

[24] The substantive right which the petitioner claimed to have been infringed was that protected by Article 14 of the European Convention on Human Rights, read with Articles 5 and 8. Article 5 secured the right to liberty and security of persons. Article 5(1)(a) provided that a person should not lose his liberty save by being lawfully detained following a conviction by a tribunal which is judicial in character. It was principally concerned with the question of whether the detention of an individual was permissible, and its object and purpose was to ensure that no one was dispossessed of his liberty in an arbitrary fashion: *R (Giles)* v *Parole Board for England and Wales* [2003] UKHL 42, [2004] 1 AC 1 at [26]. Article 5(4) conferred an associated right and was the *habeas corpus* provision. It provided indeterminate sentence prisoners with a right to a periodic review of the lawfulness of their continued detention by a body of judicial character which was independent of both the executive and of the parties to the case, and which had the power to order release: *Weeks* v *United Kingdom* (1988) 10 EHRR 293 at [61]-[63]. The Parole Board for Scotland was that

judicial body for the purposes of Article 5(4): *Brown* v *Parole Board for Scotland* at [61]. What Article 5 required by way of an ancillary duty to provide rehabilitative opportunities for prisoners was described by Lord Reed in *Brown* at [29] as follows:

> "…an opportunity must be afforded to the prisoner which is reasonable in all the circumstances, taking into account, among all of those circumstances, his history and prognosis, the risk he presents, the competing needs of other prisoners, the resources available and the use which has been made of such rehabilitative opportunity there has been."

However, the threshold for establishing a violation of Article 5(1) on the basis of a failure to provide a real opportunity for rehabilitation was a high one: *Brown* at [27].

[25] Article 14 provided that 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 order to establish that different treatment amounted to a violation of Article 14, it was necessary to establish four elements, as summarised in the UK Supreme Court stage of *Stott* at [8]. Firstly, the circumstances had to fall within the ambit of a Convention right; secondly, the difference in treatment must have been on the ground of one of the characteristics listed in Article 14 or "other status"; thirdly, the claimant and the person who had been treated differently must be in analogous situations; and fourthly, objective justification for the different treatment had to be lacking.

[26] The ambit of a Convention right was a matter of assessment. The issue was whether the disadvantage asserted "comprises one of the ways a state gives effect to a Convention right"; and a "tenuous link" with a Convention right was not enough: *M* v *Secretary of State for Work and Pensions* [2006] UKHL 11, [2006] 2 AC 91 at [16] and [60]. The Ministers accepted that the subject matter of the case came within the ambit of Article 5, although not of Article 8. If, contrary to that position, the petitioner's complaint did fall within the ambit

of Article 8, that Article required that any interference with the core right to respect for private and family life must be "in accordance with the law". For the interference to be lawful, the interference had to be sufficiently precise, accessible, and foreseeable. The interference also required to be proportionate to the aim pursued, and the measure had to be rationally connected to that aim. For present purposes, any interference would require to be proportionate to the aim of protecting the public by managing the risk presented by the petitioner. These tests were satisfied in the present case.

[27] The Ministers further accepted that any difference in the treatment in relation to the temporary release of discretionary life sentence prisoners as compared with those subject to orders for lifelong restriction fell within the scope of Article 14 on the ground of "other status".

[28] It was for the person alleging discrimination to identify others in a relevantly similar situation and for him to demonstrate that they had been treated differently and, in particular, less favourably. In *Gauci* v *Malta* (2011) 52 EHRR 25 the European Court of Human Rights reiterated at [67] that:

> "…discrimination means treating differently, without an objective and reasonable justification, persons in relevantly similar situations. However, not every difference in treatment will amount to a violation of art.14. It must be established that other persons in an analogous or relevantly similar situation enjoy preferential treatment and that this distinction is discriminatory."

It was not, therefore, enough to show merely that the person in a relatively similar situation had been treated differently; he must have been treated more favourably than the person alleging the discrimination. In any event, a mere difference in treatment unaccompanied by detriment might be relatively easy to justify.

[29] As for determining whether persons were in an analogous situation, regard had to be had to the particular nature of the complaint that was being made: *Stott* in the UK Supreme

Court at [98]. Just because it had been held that discretionary life sentence prisoners and those subject to orders for lifelong restriction were in an analogous situation for one purpose (*Brown* v *Scottish Ministers*), that did not mean that they were in an analogous situation for other purposes. The position of the Ministers was that the petitioner did not satisfy the third *Stott* requirement, namely that he and a prisoner subject to an order for lifelong restriction were in analogous situations. If that was the case, there was no need to consider the fourth element, viz. objective justification for the difference in treatment: see *Stott*, per Lord Hodge at [182] and [196].

[30] Based on Freedom of Information requests, firstly to the Risk Management Authority asking about the average length of time it took for an amended Risk Management Plan to be accepted, and secondly to the Scottish Prison Service asking about the average length of time it took for First Grant of Temporary Release to be approved, the petitioner averred that it took the Authority only five weeks, on average, to accept an amendment to a Plan, whereas it took the Ministers 255 days to approve First Grants of Temporary Release in terms of Rule 134 of the 2011 Rules. Those averments were correctly based on the responses received, but did not reflect truly comparable situations. For both discretionary life sentence prisoners and those subject to orders for lifelong restriction, it was for the relevant prison's Risk Management Team to consider progression to less secure conditions or temporary release, but there was no automatic entitlement to either expedient. Progression generally depended upon an individual prisoner meeting set criteria and the Risk Management Team being satisfied in relation to risk. The progression policy was described in the Scottish Prison Service's document "Risk Management, Progression and Temporary Release Guidance", read with its other publications "Progression Pathway for Indeterminate

Sentence Prisoners" and "Allocation of Prisoner Spaces and Offending Behaviour Treatment Programmes Policy and Timing of Progression Pathways".

[31] For both prisoner categories, a rigorous process of risk assessment was conducted by the multi-disciplinary Risk Management Team before temporary release could be recommended. If the Team was content, in principle, to recommend temporary release or progression which would allow for temporary release, a further process of evaluation and risk assessment was undertaken. For prisoners subject to orders for lifelong restriction, that involved *inter alia* an amended Risk Management Plan being prepared for acceptance by the Authority. For discretionary life sentence prisoners, it involved a process of quality assurance undertaken by the Governor and Scottish Prison Service HQ before any application for approval was submitted to the Ministers. The timescales sought from and provided by the Authority pertained only to the final stage in the process for prisoners subject to orders for lifelong restriction, namely the Authority's consideration of the amended Plan, and did not include the process involved in preparing that Plan. The timescales sought from and provided by the Scottish Prison Service, on the other hand, pertained to the whole process of considering whether or not to grant temporary release, which included the stages leading up to the submission to the Ministers and the time taken for the Ministers to determine the application made to them. In the round, it took no longer for the average discretionary life sentence prisoner to obtain First Grant of Temporary Release than it took for the average prisoner subject to an order for lifelong restriction to be granted temporary release pursuant to an amended Plan as accepted by the Authority. Each category of prisoner was ultimately treated equally. The differences arose only in terms of when and how the risk assessments and the assurance thereof were carried out, and who it was who considered the recommendation as to temporary release. No policy or practice

adopted by the Ministers was less favourable to discretionary life sentence prisoners than to prisoners subject to orders for lifelong restriction. There was no less favourable or preferential treatment and so there was no relevant discrimination.

[32] If, contrary to that submission, it was considered that there had been less favourable treatment, discretionary life sentence prisoners were not in a relevantly analogous position with prisoners subject to orders for lifelong restriction. In considering whether two groups were in an analogous or relatively similar position, the focus had to be on the particular nature of the complaint. This complaint was not about progression criteria or about prioritisation for access to offending-related coursework. In such matters, namely the manner in which the Scottish Prison Service's internal policies generally treated the two groups of prisoners as regards progression in the generality, it was accepted that the Ministers were obliged to treat them as being in an analogous situation. That followed from the decision in the Inner House in *Brown* v *Parole Board*. However, that did not mean that the two groups had to be being treated the same, or viewed as analogous, for all purposes. The particular nature of the petitioner's complaint was that the Authority decided whether a prisoner subject to an order for lifelong restriction could obtain temporary release faster than the Ministers decided the same in respect of discretionary life sentence prisoners. His complaint, therefore, was that he was discriminated against when compared to prisoners who were subject to a different sentencing regime and approval for whose temporary release was granted by a different body in a process which was outwith the control of the Ministers. The imposition of an order for lifelong restriction came with statutory consequences which did not apply to discretionary life sentence prisoners. Unlike in the *Brown* v *Scottish Ministers* case, where prioritisation for coursework was the complaint, and was a matter within the control of the Ministers, the involvement of the Authority in

managing, assessing, and minimising the risks posed by prisoners subject to orders for lifelong restriction had been prescribed by the Scottish Parliament in the 2003 Act. Any difference in treatment was mandated by the different sentencing regime and the relevant statutory provisions regulating how the risks presented by prisoners were to be managed by the Ministers and the Authority respectively. The petitioner's complaint was akin to that in *Stott*, where the Supreme Court held at [195] that the differences between the sentencing regimes were sufficient to prevent prisoners serving sentences under those different regimes from being in an analogous position, a decision upheld by the ECtHR.

[33] What the petitioner was really saying was that if he were a prisoner subject to an order for lifelong restriction, he would be in a better position. That complaint was irrelevant. Had the petitioner committed and been convicted of the same offences after order for lifelong restriction sentences had become available, he might have received such a sentence rather than a discretionary life one. However, at the time he was convicted, an order for lifelong restriction was not an available sentence.

[34] Various judicial decisions, all discussed in the judgments of Lady Black and Lord Hodge in *Stott*, addressed the situation where a prisoner alleged discrimination under Article 14 where he would have received a different sentence had he been convicted and sentenced later:

[35] *R (Massey)* v *Secretary of State for Justice* [2013] EWHC 1950 (Admin) concerned a prisoner serving a sentence of imprisonment for public protection alleging that he had been discriminated against in comparison to a prisoner who had been sentenced to an extended discretionary sentence, after the latter sentence had been introduced, because he was subject to an indeterminate period of imprisonment while the other prisoner was not. Moses LJ rejected that argument at [25]:

> "…however he cloaks his application, the real complaint he advances is a challenge to his original sentence. … The reality of his argument is that he was sentenced under a different regime. It is not coherent then to allege discrimination when compared to other offenders sentenced under a different regime. They are not in an analogous situation precisely because they were sentenced under a different regime …"

[36] *R* v *Docherty* [2016] UKSC 62, [2017] 1 WLR 181 concerned a prisoner who was sentenced on 20 December 2012 to imprisonment for public protection for offences to which he had pleaded guilty in November 2012. Imprisonment for public protection had been abolished prior to him being sentenced, but not for those convicted before 3 December 2012. The prisoner claimed that the differentiation between him and a person convicted of an identical offence on 4 December 2012 was unlawful under Article 14. The Supreme Court rejected his complaint and held at [63]:

> "…even if it be assumed in the appellant's favour that the mere date of conviction can amount to a sufficient status, which is doubtful, the differential in treatment is clearly justified. All changes in sentencing law have to start somewhere. It will inevitably be possible in every case of such a change to find a difference in treatment as between a defendant sentenced on the day before the change is effective and a defendant sentenced on the day after it. The difference of treatment is inherent in the change in the law. If it were to be objectionable discrimination, it would be impossible to change the law."

[37] In *Minter* v *United Kingdom* (2017) 65 EHRR SE6, the applicant was sentenced to an extended sentence for sexual offences. This meant that he was subject to an extended licence period and to indefinite notification requirements. He argued that, by virtue of a change in the law, if he had been sentenced later, he would not have received an extended sentence and would not therefore have been subject to the indefinite notification period at all, and that that amounted to an unjustified difference in treatment and a violation of Article 14. The ECtHR rejected the Article 14 complaint as manifestly ill-founded at [68]:

> "…the different treatment complained of did not concern the length of the applicant's sentence but rather the different sentencing regime applied to him as a

> consequence of a new legislation…no discrimination [is] disclosed by the selection of a particular date for the commencement of a new legislative regime."

[38] The Supreme Court's conclusion at [144] in *Stott*, after considering these authorities, was that in complaints derived from a change in the sentencing legislation, any differential treatment caused purely by the commencement of that new legislative regime did not constitute discrimination.

[39] The petitioner's complaint ought properly to be characterised as deriving from the change in the sentencing regime. Different statutory provisions determined who was responsible for considering and approving a recommendation for temporary release; the 2003 Act for a prisoner subject to an order for lifelong restriction, and the 2011 Rules for the discretionary life sentence prisoner. The petitioner's complaint was about the statutory operation of these different types of sentences in the context of obtaining temporary release, rather than about the internal workings of the prison service in managing prisoners who had committed relatively similar types of offences. The two categories of prisoner were not in that context in an analogous situation, which was fatal to an Article 14 challenge.

[40] The further challenge was to the role of the Ministers in approving First Grant of Temporary Release in terms of Rule 134(4) of the 2011 Rules. As a matter of practice, the decision required by that Rule (along with a very limited other range of decisions affecting prisoners) was taken by the relevant Minister rather than by civil servants. That practice reflected the importance of the matter from the point of view of community safety. The petitioner averred that there was no good reason for such a decision to be taken at the political level rather than, as in most other cases, by an apolitical civil servant. However, despite a vague reference to Article 5, there was no averred basis in law which underpinned that complaint.

[41] In any event, there was nothing intrinsically objectionable in Convention terms in allowing the executive, subject to judicial review, to take the decision as to temporary release. The decision in question was not the decision to release on parole licence, which was a matter for the Parole Board as an independent quasi-judicial body, in satisfaction of the requirements of Article 5(4). Rather, it was a decision several stages before the parole decision. The nature and timing of a decision of the Ministers in relation to First Grant of Temporary Release was susceptible to review by this court. That was a sufficient safeguard against arbitrariness. The Ministers were considering a submission from the Scottish Prison Service following several weeks of consideration by different individuals, from different disciplines, experienced in the assessment of risk, and familiar with the circumstances of the individual prisoner. The decision was not being taken in a vacuum. The last time a Minister had declined to accept the Scottish Prison Service's recommendation in relation to First Grant of Temporary Release for any applicant prisoner had been over six years ago. The court should refuse to grant the orders sought in this regard.

[42] In summary, the petitioner's challenge was misconceived. The court had no evidence before it that there was any policy or practice that was less favourable to discretionary life sentence prisoners than to those subject to orders for lifelong restriction, and there was nothing at all in the complaint about the Ministers approving First Grant of Temporary Release. The petitioner had no settled or established right to be granted First Grant of Temporary Release: *Morrice* v *Scottish Ministers* [2022] CSOH 77 at [18]; and the petitioner's individual circumstances, his management in custody, his progression within the prison estate and the risks he presented, were all matters of judgment for the Scottish Prison Service. If he was recommended for First Grant of Temporary Release in the future,

and either that was refused or there was unlawful delay in the question being determined, it would be open to him to bring a fresh complaint.

Decision

[43] The petitioner maintains firstly that, as a discretionary life prisoner, he is as a matter of fact treated materially differently from prisoners subject to orders for lifelong restriction in relation to the time likely to be taken for assessment of his suitability for community release, and thus in relation to the total length of his journey towards release on parole. The Ministers dispute that factual claim and that dispute cannot be resolved on the basis of the material available to the court at this first substantive hearing in the petition. I proceed for present purposes on the assumption that, if required to do so, the petitioner would be able to prove such differential treatment. Although the parties dispute whether any difference in treatment requires for the purposes of Article 14 also to be to the detriment of the petitioner's group, I proceed for the purposes of this opinion on the basis that if the petitioner was indeed to succeed in proving that that group was subject to delay in the determination of its suitability for community release, that would (or at the very least might) amount to a detriment to it. These assumptions would, however, only require to be tested by some further form of procedure if the other elements of the petitioner's claim are determined to be sound in law.

[44] In assessing the merits of the petitioner's claim in law, the most recent and helpful guidance in relation to the application of Article 14 of the ECHR is to be found in the judgment of the Fourth Section of the European Court of Human Rights in *Stott* v *United Kingdom* (Application No. 26104/19), The Times, January 3, 2024.

[45] The first question is whether the matters of which the petitioner complains fall within the ambit of Article 5, and additionally or alternatively of Article 8, of the Convention. It was not disputed by the Ministers that they fall within the ambit of Article 5, and I accept that they do: see *Clift* at [42] and *Stott* at [63]. The petitioner further maintains that they fall within the ambit of Article 8. I do not accept that submission. Although the ECtHR in *Munjaz* v *United Kingdom* made it clear under reference to *Hirst* v *United Kingdom* (2006) 42 EHRR 41 at [69] and *Dickson* v *United Kingdom* (2008) 46 EHRR 41 at [68] that the rights guaranteed by Article 8 continue to apply to those in lawful custody save insofar as necessarily curtailed by that custody, this element of the petitioner's case, properly analysed, is not that his personal autonomy is adversely affected in any way by the delay of which he complains other than that that delay is liable to extend the period during which he will lawfully be deprived of his liberty. Even allowing for the broad approach to questions of the ambit of Convention rights traditionally taken for the purposes of Article 14, that is a complaint falling within the ambit of Article 5 (i.e. one concerned with the circumstances pertaining to the duration of the deprivation of his liberty) rather than of Article 8 (i.e. one concerned with the conditions to which he is subject while so deprived).

[46] The next question (although it may be artificial and potentially misleading to regard it as quite separate from other aspects of Article 14) is whether the fact that the petitioner is a discretionary life prisoner confers upon him an "other status" within the meaning of Article 14. Such status must amount to an identifiable characteristic – though not necessarily an innate or inherent characteristic – which is the (or at least a) basis of the treatment complained of. The ECtHR has generally given a wide meaning to "other status" (scarcely surprising given that such other status is referred to in the French text of the Article as "*toute autre situation*"), but the question divided the Supreme Court in *Stott* and, in the face of fierce

resistance on the part of the UK Government to the conclusion that such status existed on the facts of that case, the ECtHR did not find it necessary finally to resolve the matter, preferring at [97] to proceed merely on the assumption that a relevant status existed. While the same approach could be taken in this case, I prefer to find, on the basis of the extensive discussion of the matter by the ECtHR in the context of prisoners serving different types of sentence in *Clift* at [55] to [63], that the status requirement is met in the present case; discretionary life prisoners and prisoners subject to orders for lifelong restriction form categories of prisoner distinct from each other on a wider basis than simply the different treatment complained of in the present case, and that treatment of the petitioner is based on the category assigned to him.

[47] It is next necessary to consider whether the difference in treatment complained of is applied to persons in analogous or relevantly similar (though not necessarily fully analogous or identical) situations. The relevant analogy is to be drawn or repelled by reference to the particular nature of the complaint: *Clift* at [66] and the cases cited therein.

[48] The petitioner was given a discretionary life sentence because the sentencing judge must have considered that there was a need to protect the public against offending by him which would not adequately be met by the imposition of a determinate sentence. By contrast (at least in point of form), an order for lifelong restriction is made where the High Court is persuaded on a balance of probabilities, and after having considered specialist advice on the matter, that the nature 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 was a likelihood that he, if at liberty, would seriously endanger the lives, or physical or psychological well-being, of members of the public at large. Each of the two forms of sentence has its own discrete set of

rules, determining both when it may be imposed and its practical operation (the latter including provisions detailing the form of process to be adopted for determining eligibility for community release). It may properly be said in general terms that each deals with a particular type of offender identified by law at one or other points in time and, in particular, caters for the perceived risk posed by each type in different ways.

[49] The complaint made by the petitioner concerns the process by which he may be deemed eligible for community release, and in particular the length of time which he maintains that that process may take in comparison with the process to which prisoners subject to orders for lifelong restriction are required to go through to the same end. The ECtHR in *Stott* observed at [102] that, in determining eligibility for early release, the nature of the conviction and the sentence imposed may be relevant considerations, and that it could not be said that the criteria for determining eligibility for early release are, or should be, in principle the same for all categories of prisoner. It preferred the view that such eligibility should be tailored to the dangerousness of particular offenders and the seriousness of their offences. It went on to reject the suggestion that all offenders convicted of the same or comparable offences must always be considered to be in an analogous situation in respect of any complaint they may make, and reiterated that the similarity of situations must be assessed from the perspective of the nature of the complaint made.

[50] The court concluded at [104] that Mr Stott's status as a particular kind of prisoner (i.e. one serving an extended determinate sentence in terms of the applicable English legislation) was closely connected to his complaint about eligibility for early release and that that type of sentence had been imposed upon him because he had committed serious offences and was deemed to be dangerous, both of which factors it considered to be plainly relevant to considerations of eligibility for early release and which might well be different in

the cases of prisoners subject to other types of sentence. That potential difference resulted in the conclusion that prisoners subject to other types of sentence were not sufficiently similar to prisoners in Mr Stott's type, and that it was inappropriate, given the wide differences between the supposedly analogous sentence types in various ways, to single out in particular the respective early release provisions as providing the requisite degree of similarity.

[51] On the other hand, in *Clift* the ECtHR noted at [67], in the context of another complaint concerning early release provisions, that insofar as the assessment of the risk posed by a prisoner eligible for early release was concerned, there was no distinction to be drawn between various categories of prisoner, and that the methods of assessing risk and the means of addressing any risk identified fell to be regarded in principle as being the same for all categories of prisoners, accordingly finding the applicant to be in an analogous position to the other groups of prisoners identified in that case. Likewise, in *Brown* v *Scottish Ministers*, which concerned the availability of rehabilitation opportunities afforded to discretionary life prisoners and those subject to orders for lifelong restriction respectively, this court held that those two groups were in an analogous situation for that purpose, noting at [29] that:

> "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. While 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."

[52] In the present case, the petitioner's complaint is neither about early release *per se* nor (at least directly) about rehabilitation opportunities; as already noted, it is instead about the process by which he may be deemed eligible for community release in comparison with the process to the same end undergone by prisoners subject to orders for lifelong restriction. While it is not necessary for present purposes to hold that the two groups of prisoners should *prima facie* be treated in exactly the same manner for the purposes of "progression pathways" or that the methods of assessing, and the means of addressing, risk should be the same or very similar for each, their respective positions and interest in relation to being permitted community release and thus access to the prospect of eventual release on parole are sufficiently similar to qualify as analogous for the purposes of Article 14, for essentially the same reasons as were canvassed by the respective courts in *Clift* and *Brown* v *Scottish Ministers*.

[53] It thus becomes necessary to consider the question of whether there exists objective and reasonable justification for the difference in treatment between the two groups of prisoners. Although the Ministers maintained in submission, under reference to *Gauci* v *Malta*, that Article 14 was not engaged merely by differential treatment, and required demonstration that an analogous group had been treated more favourably, I observe that the ECtHR in *Stott* at [96] stated that "Once a difference in treatment has been demonstrated, the burden is on the Government to show that there was an objective and reasonable justification for it such that it was not incompatible with Article 14." Subject to the observation that the difference in treatment must be based in whole or in part on the status of the claimant rather than on anything else, I accept and adopt that approach. I also note that, as already explained, I am in any event proceeding on the assumptions that the petitioner is offering to prove a difference in treatment in comparison with prisoners subject

to orders for lifelong restriction and, implicitly, that that treatment is less favourable given the additional delay which he maintains it entails.

[54] In *Stott*, the ECtHR went on to observe at [96] and [106] to [109] that justification would be lacking where the different treatment did not pursue a legitimate aim or if there was not a reasonable relationship of proportionality between the means employed and the aim sought to be realised, that in principle the contracting states enjoyed a wide margin of appreciation in questions of prisoner and penal policy, and in particular in assessing whether and to what extent differences in otherwise similar situations justified different treatment, but that close scrutiny would be exercised where it was complained that domestic measures had resulted in arbitrary detention.

[55] In the present case, as in *Stott*, the aim pursued by the different sentencing regimes applicable to the groups identified as analogous is to cater for different combinations of offending and risk in ways deemed appropriate by law from time to time. That was accepted as a legitimate aim in *Stott*, both in the ECtHR and in the UK Supreme Court – see, for example, Lady Black at [152] – and it is not possible to see why the same view should not apply to the circumstances presently under consideration.

[56] The extent of the margin of appreciation enjoyed by the State in this field makes it very difficult to maintain any argument that there is not a reasonable relationship of proportionality between the aim pursued and the legislative measures put in place to realise it – *Stott*, per Lady Black at [153], Lord Hodge at [198]. The petitioner does not complain about the circumstances in which he may be deemed eligible to apply for First Grant of Temporary Release, or about the substantive assessment of the conditions upon which the decision to afford it to him are based. Rather, his complaint is about a detail of the timing taken to arrive at a decision within the specific regime to which he is subject, in comparison

to a corresponding detail of a subsequently-introduced statutory scheme to which others are subject. A complaint based on differential treatment caused purely by the commencement of a new legislative regime is, to put it mildly, an unpromising basis on which to allege breach of Article 14: *R* v *Docherty*; *Minter* v *United Kingdom*. The task of the court is to examine the different regimes as whole and ask whether the policy considerations underlying those regimes reasonably correspond to their way of functioning overall, rather than focussing on the particular operational minutiae which, by accident or design, differentiate them – *Stott*, per Lady Black at [154], Lord Carnwath at [181], Lord Hodge at [202].

[57] Looking at matters in that light, I conclude that the difference in treatment between discretionary life prisoners and those subject to orders for lifelong restriction is reasonably and objectively justified, and that there has accordingly been no breach of Article 14 in conjunction with Article 5 of the ECHR. Although I have already held that the petitioner's complaint does not fall within the ambit of Article 8, any case based on that Article in conjunction with Article 14 would equally have failed, on essentially similar grounds.

[58] The petitioner's second head of complaint is that the involvement of the Scottish Ministers in the process of assessing him as suitable for community release constitutes a breach of Article 5, or else of Article 14 taken with Articles 5 or 8. At the outset, I further observe that, for the same reasons as have already been stated, Article 8 is not truly engaged by this head of complaint.

[59] In relation to Article 5, the ECtHR in *Stott* acknowledged at [102] that the question of whether and when a person ought to be eligible for early release was not merely a factual one, but might legitimately also depend on policy considerations. I consider that that observation must equally, if not *a fortiori*, apply to decisions as to whether to afford a

discretionary life prisoner a First Grant of Temporary Release. There is nothing in the authorities cited to me which might support the suggestion that in the context of a decision potentially involving the exposure of the public to the risk presented by the first temporary release of discretionary life prisoners (and remote from any final decision on permanent release on licence) it would be impermissible for such policy considerations as may be thought to touch upon the matter to be assessed by a member of the executive branch of government in a democratic society, with political responsibility for the decision made inexorably flowing from that. The primary aspect of the package of rights afforded by Article 5 is undoubtedly protection against arbitrary detention, but any decision taken by a Minister in relation to First Grant of Temporary Release is in principle subject to the supervisory jurisdiction of this court, a primary element of which is the provision of protection against arbitrary decisions by members of the executive. That is not to suggest that recourse to judicial review will always in practice be easy or entirely satisfactory in outcome, but its availability as a means of independent review of the propriety in public law terms of a relative decision of a Minister provides a sufficient safeguard against arbitrariness as to show that the petitioner's complaint based on breach of Article 5 alone lacks proper foundation.

[60] Turning to the suggestion that Article 14, taken with Article 5, provides the petitioner with a valid ground of complaint, it is in this context unnecessary for the petitioner to demonstrate any actual or reasonably apprehended breach of his Article 5 rights in order to advance such a claim; he simply requires to demonstrate relevantly differential treatment based on a "status" in relation to a matter within the ambit of a Convention right, in order to advance a *prima facie* relevant case. Essentially for the reasons already stated, I consider that the petitioner has put forward under this head of complaint a case that, in a matter falling

within the ambit of Article 5 suitably widely drawn for these purposes, he is treated differently from an analogous group, namely prisoners subject to orders for lifelong restriction, based on his status as a discretionary life prisoner.

[61] Consideration must turn again, then, to the question of reasonable and objective justification for that different treatment. The development and maintenance of different sentencing regimes to cater for different combinations of offending and risk in what are seen, over time, as appropriate ways is, as already noted, a legitimate State aim. The margin of appreciation is equally wide in this context and, given the relatively minor matter of which the petitioner complains against the background of the sentencing regime applicable to him as a whole, the relationship between the aims being pursued by the existing sentencing regimes and the differing measures put in place to realise them cannot be described as unreasonably disproportionate.

[62] I therefore again conclude that the difference in treatment between discretionary life prisoners and those subject to orders for lifelong restriction on which this second head of complaint focusses is reasonably and objectively justified, and that there has accordingly been no breach of Article 14 in conjunction with Article 5 of the ECHR in this connection. If, contrary to my view, a *prima facie* case based on Article 8 in conjunction with Article 14 might validly have been made in this connection, it would have fallen at the same hurdle.

Conclusion

[63] It is not difficult to understand why the petitioner, deprived of his liberty and much of the agency enjoyed by those who have not been imprisoned for the commission of serious crimes, should readily conceive genuinely-held grievances in consequence of perceived advantages enjoyed by others in similar situations. For the reasons stated, however, even if

those grievances are factually well-founded (which it has not been necessary for present purposes to decide), they do not found a valid case for infringement of his Convention rights. I shall accordingly sustain the respondents' first plea-in-law, repel the petitioner's pleas, and dismiss the petition.