OUTER HOUSE, COURT OF SESSION

[2024] CSOH 47

P1014/22

OPINION OF LADY POOLE

In the application for judicial review by

BS

Petitioner

against

THE SCOTTISH MINISTERS

Respondent

Petitioner: D Leighton; Drummond Miller LLP
Respondent: D Ross KC, R Macpherson; Scottish Government Legal Directorate

2 May 2024

Background

[1] The petitioner is a prisoner sentenced to an order for lifelong restriction ("OLR"). His sentence started on 2 September 2016, and the punishment part of the OLR expired on 1 September 2022. The petitioner has not been given access to a rehabilitative course called the Self Change Programme ("SCP"). Without completing the SCP, the petitioner does not consider he will be able to persuade the Parole Board for Scotland that he should be released from prison.

[2] The petitioner argues that his human rights under Article 5(1) of the European Convention on Human Rights have been violated. The Scottish Ministers, the respondents,

say that it is regrettable the SCP has not yet been made available, but argue there has been no breach of the petitioner's human rights. Both parties provided helpful pleadings, notes of argument and oral submissions, as well as other documents, all of which have been taken into account.

[3] Below, the governing law is set out, then the factual background. Reasons are then given why, on the facts of this particular case, the high threshold for a finding of a violation of Article 5(1) is reached.

Governing law

[4] Under section 6 of the Human Rights Act 1998 (the "1998 Act"), it is unlawful for a public authority to act in a way which is incompatible with a Convention right. Article 5 is a Convention right which provides, insofar as relevant:

> "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….".

The essential aim of Article 5 is to confer protection against arbitrary or unjustified deprivation of liberty.

[5] Article 5(1) has been found by the European Court of Human Rights ("ECtHR") to have potential application to imprisonment following expiry of a tariff or punishment part, until steps are taken to progress the prisoner through the prison system and provide access to rehabilitative courses (*James* v *UK* (2013) 56 EHRR 12 at para [194], *Kaiyam* v *UK* (2016) 62 EHRR SE13). The *James* case concerned the situations of three different prisoners; *James*,

Wells and *Lee*. Likewise, the *Kaiyam* case also covered three prisoners; *Kaiyam*, *Robinson* and *Massey*.

[6] The prisoners in the *James* and *Kaiyam* cases were imprisoned under a particular type of sentence then available in England and Wales, imprisonment for public protection ("IPP"). However, the underlying principles of *James* and *Kaiyam* have been found to have application to indeterminate parts of other types of sentence, such as the extension period of an extended sentence *(Brown* v *Parole Board for Scotland* (2018) SC (UKSC) 49 (paras [56]-[59]), or the period after expiry of the punishment part of a life sentence (*Ansari* v *Aberdeen City Council* 2017 SC 274 para [2]). In the present case parties were in agreement it was consistent with authority that the *James* principles also apply to imprisonment after expiry of the punishment part in OLRs. This case proceeds on that basis.

[7] As a result of the development of the law in the *Brown* case in the UK Supreme Court, the reasoning in cases predating *Brown* (eg *Beattie* v *Scottish Ministers* [2016] CSOH 57) now has to be approached with caution. Following *Brown*, the principles of application of Article 5(1) in the context of access to rehabilitative courses in prison may be summarised as follows.

1. A requirement of Article 5(1) is that, to avoid detention being arbitrary, the conditions of detention must reflect its purpose (*Brown*, paras [11]-[12]). If the purpose of detention is protection of the public, the conditions of detention should include rehabilitative measures aiming to reduce risk, so that detention lasts only as long as strictly necessary.
2. As a result, if a prisoner is detained after expiry of a punishment part or custodial term, prisoners should be provided with a real opportunity of rehabilitation (*Brown*, paras [44] and [81]).

3. In assessing whether any part of detention after expiry of the punishment part is compatible with Article 5(1), rehabilitative opportunities afforded during the whole period of detention can be considered. The court will have regard to whether, and to what extent, opportunities were provided prior to and after expiry of the punishment part (*Kaiyam*, para [69]).

4. There is a high threshold before a violation of Article 5(1) can be found in cases involving access to rehabilitative courses. The principle that conditions of detention should reflect its purpose must be applied realistically and flexibly, and with a reasonable balance being struck between competing interests. Article 5(1) does not create an obligation to maximise coursework, or entitle the court to substitute its own view because it considers the progression of a single prisoner could have been better managed. The underlying standard is arbitrariness or unjustified deprivations of liberty (*Brown* paras [11]-[12], [21], [29], [40]-[41], [45], [85]). Courts may find there have been real opportunities for rehabilitation even if there have been significant delays accessing particular courses, in situations where there has been access to other courses enabling prisoners to present evidence of risk reduction, or the prisoner's own behaviour has impeded access to rehabilitative courses (para [21]).

5. In the rare cases where a violation is found, detention is unlawful under Article 5(1) only until steps are taken to progress a prisoner through the prison system and provide them with appropriate rehabilitative courses (*Brown*, para [16]).

6. The consequence of a finding of a violation of Article 5(1) in this context is not, generally speaking, immediate release from detention (*Brown*, paras [4] and [17]).

The courts have powers under section 8 of the Human Rights Act 1998 to grant remedies they consider "just and appropriate". The just and appropriate remedy may be the finding of a violation (*Anufrijeva* v *Southwark LBC* [2004] QB 1124, paras [60] to [66]). Or a court may award damages under section 8 of the Human Rights Act 1998 if, having regard to any other remedy granted and the consequences of the decision, an award of damages is necessary to afford just satisfaction to the petitioner. Ordinarily damages awards in this context will be aimed at compensating for the feelings of frustration, uncertainty and anxiety the prisoner may have suffered, because it cannot be assumed that if courses had been available prisoners would not have been deprived of their liberty (*James*, para [244], *Brown*, paras [4] and [17]). Damages should be on a modest scale (*R (Sturnham)* v *Parole Board* [2013] 2 AC 254 at paragraph 13(14)). Awards in the ECtHR in *James* were in the low thousands of pounds, and in domestic cases tend to be expressed in hundreds of pounds (eg £300 in *R (Sturnham)* v *Parole Board* [2013] 2 AC 254, and £500 and £600 for breaches of public law duty in *R (Kaiyam)* v *Secretary of State for Justice* [2015] AC 1344 at 1345G).

Facts of the case

[8] The petitioner was convicted in the High Court of 27 charges of violent, domestic and sexual offending, committed against six different women during a period in excess of 12 years. On 6 June 2017 he was sentenced to an OLR with a punishment part of 6 years. The sentence was backdated to 2 September 2016 when the petitioner was first remanded in custody. His punishment part therefore ended on 1 September 2022. (The starting point for the OLR was a determinate sentence of 15 years. Had that determinate sentence been

imposed, the halfway point after which the Parole Board could first have considered release was 1 February 2024, and automatic release would have been on 1 September 2026, under the Prisoners and Criminal Proceedings (Scotland) Act 1993 section 1(2) and (3)). The petitioner was initially held in HMP Barlinnie, but moved to HMP Glenochil on 11 October 2017, where he has been imprisoned since.

[9] On 9 November 2017 the petitioner was assessed by the prison risk management team. He was put on the waiting list for a rehabilitative course called "Moving Forward: Making Changes" ("MFMC"). The MFMC course involved offence focused work. The petitioner never made it far enough up the waiting list to get on that course before it was discontinued in 2021. On 14 December 2021, at an annual integrated case management conference, the petitioner was advised new recommendations would be made and he would be listed for a different programme. MFMC was replaced by two different programmes, one of which is the SCP. The petitioner was recommended for the SCP on 11 May 2022.

[10] The SCP is a programme for people identified as presenting a high risk of harm. It is a substantial course, taking about a year to complete. The waiting list for SCP (and other offender behaviour programmes and progression) is dynamic, and based on prioritisation dates. As other prisoners enter the waiting list after being assessed and recommended for the SCP, a prisoner's placing on the waiting list can shift adversely. Prioritisation dates vary according to the type and length of sentence, under a policy currently specified in a Scottish Prison Service notice dated 29 December 2023. So, for example, for long term prisoners, the prioritisation date is their parole qualifying date minus 2 years. For OLR and other indeterminate sentence prisoners, it is the punishment part expiry date minus a certain number of years. Since the end of 2023, and following the case of *Brown* v *Scottish Ministers* [2022] CSIH 48, for OLR prisoners the programme prioritisation date is the

punishment part expiry date minus 4 years. The petitioner's programme prioritisation date is therefore 1 September 2018 (changed at the end of 2023 from 1 September 2020).

[11] On 1 September 2022, at the expiry of the punishment part of the OLR, the Parole Board for Scotland considered the petitioner's case. The petitioner could not present evidence of completion of offence focussed rehabilitative courses, but was noted among other things to have spent his time in closed conditions very positively, and to be engaging with education and attending AA. The petitioner did not seek release and was keen to complete the SCP. The Parole Board was satisfied that it was necessary for the protection of the public that the petitioner remained confined (section 2 of the Prisoners and Criminal Proceedings (Scotland) Act 1993). It ordered an 18 month review, saying "It is hoped that [the petitioner] will have completed the SCP by then and the [Programme Progress Report] will be available to the Board."

[12] An affidavit of Angela Holmes, Head of Psychological Services within the Scottish Prison Service, explains that after the changes to prioritisation dates for course waiting lists in December 2023, the petitioner had moved up the SCP waiting list. He was, as at 6 March 2024, sixth on the list. If there were no changes on the waiting list from this point forward, the petitioner could expect to access the programme in approximately 12 months from then (March 2025). On 18 April 2024 I was informed the petitioner was now third on the list, but no revisal was made to the 12 month estimate, other than to say access might be sooner.

[13] The petitioner incurred one misconduct report on 17 March 2023 when he was found in possession of an illicit SIM card. On 18 December 2023 he was sentenced by a court to a further 2 months imprisonment in respect of this conduct. This court's attention was not drawn to any other misconduct on the part of the petitioner while in prison.

[14] Apart from that misconduct report, as noted by the Parole Board, the petitioner has used his time in prison productively. He has engaged in a number of activities, for example passing exams in numeracy and English, completing a nutrition and wellbeing course, going to the gym, being a peer mentor, and chaplaincy services. He has accessed the NHS services in prison, for example undergoing 10-12 sessions of cognitive behaviour therapy (CBT) in response to feelings of depression due to perceived lack of progress, and some formulation work alongside that.

[15] The petitioner's progress has been reviewed at annual integrated case management conferences and by the risk management team. He is subject to a risk management plan. He has engaged in rehabilitative courses and activities as follows:

1. Self Management and Recovery Training ("SMART") was made available to the petitioner between 2019 and 2021 (although the Covid-19 pandemic caused the course to stop for some of that period). The course was aimed at helping recovery from addictive behaviour, because alcohol and drugs had been a factor in some of the petitioner's offending behaviour. The petitioner attended approximately two sessions, but withdrew from the course because he considered it more relevant to people misusing substances in custody than to him (his mandatory drug tests while in prison have all been negative).
2. Recovery coaching course ("RCC"). This was a 10 week course that the petitioner attended weekly on Tuesdays between the end of November 2022 into 2023. The course aimed to help find ways to stop addiction or reduce harm associated with addictive behaviours, and through life coaching enable the client to come up with a life plan.

3. AA. The petitioner formerly attended a support group weekly, facilitated by SPS with community AA volunteers, but has not been for some time.
4. 1:1 motivational work. The petitioner had three sessions between October 2020 and 2021 in preparation for MFMC. He was then assessed as ready to engage in MFMC, so the work stopped. However, as set out above, the MFMC course was cancelled and replaced with the SCP.
5. A mental health and wellbeing award. On the petitioner's own initiative, he completed three modules of a distance learning course provided by SPS's education providers, Fife College, between January and June 2023. From minutes of integrated case management conferences, this appears to be related to a prison project called the "Locker Room" project. The petitioner was selected to run and manage a course for mental health for other prisoners, involving mindfulness, yoga, and mental health classes. The modules he completed were understanding mental health issues, influences on mental health and wellbeing, and coping strategies and building resilience. This was not rehabilitative work recommended by the risk management team.
6. Monthly sessions with the petitioner's prison social worker. These have included input on domestic violence, but they are not focussed intervention.
7. Quarterly sessions with his psychology OLR manager, which again is not a focussed intervention, but to encourage engagement with his risk management plan.

[16] HMP Glenochil, where the petitioner is imprisoned since 2017, is one of the locations where the SCP can be delivered, as is HMP Edinburgh. The petitioner has indicated he would be prepared to move prison if it speeded up access to the SCP.

Discussion

[17] The Scottish Ministers are a public authority with responsibility for the Scottish Prison Service. In this case the court has to decide whether they have behaved unlawfully by acting incompatibly with the petitioner's Article 5(1) rights. The court must strike a reasonable balance between competing interests when deciding if the petitioner has been afforded a real opportunity for rehabilitation, with the threshold for a breach of duty being high. Before striking this balance it is necessary to consider the competing interests in this particular case.

The petitioner's interests

[18] Particular weight has to be given to the petitioner's right to liberty, bearing in mind that a significant delay in access to courses may result in a prolongation of detention (*James*, para [194]). Given that the punishment part of the petitioner's OLR expired on 1 September 2022, it is now a matter for the Parole Board to decide the stage at which it is no longer necessary for the protection of the public that the petitioner be confined. Successful completion of offence focussed work is likely to be highly significant in demonstrating reduced risk to the Parole Board; as it was put by the petitioner in argument, "If there was a realistic chance of the Board releasing the petitioner without the SCP then we wouldn't be here". The Parole Board, in its decision of 1 September 2022, referred to the SCP in terms which underline the importance of its completion on the pathway to the petitioner eventually being released.

[19] The petitioner's frustration in not having been given an opportunity to participate in offence focussed courses is readily understandable. He has been on a waiting list for such

courses since 2017, has not been provided with any such course so far, and is being told the SCP is unlikely to be available to him until 2025. However, in assessing whether there has been a real opportunity of rehabilitation, it is important to bear in mind that Article 5(1) is only engaged after the expiry of the punishment part, which was 1 September 2022. The length of the delay in accessing appropriate rehabilitative work since then is relevant, but also whether that delay is counterbalanced by access to other rehabilitative opportunities enabling the petitioner to present evidence of risk reduction, or whether the prisoner's own behaviour has impeded access to rehabilitative courses. It is helpful to consider these three matters in turn, in the light of the outcomes in decided cases.

The length of the delay since expiry of the punishment part

[20] The petitioner is now at the stage of his sentence where approximately 20 months have elapsed since his punishment part expired on 1 September 2022, and the SCP has not been made available to him. The affidavit of Angela Holmes suggests that it will be approximately 32 months after the OLR punishment part expired before he is able to access the SCP course, in about March 2025. The SCP course will take a further 12-14 months to complete, which would mean a projected end date of between March and May 2026.

[21] The 20 month delay in accessing the SCP since expiry of the punishment part so far is a cause for concern. Decided cases have found violations of Article 5(1) in respect of shorter periods of delay in accessing appropriate rehabilitative opportunities, for example of 8 months detention post-tariff (*James*, para [211]). In *Wells*, a similar period to this case of 21 months post-tariff waiting for courses (*James*, para [213]) was found to violate Convention rights. A longer period of delay of 38 months post-tariff waiting for work for a necessary course has also been found to be a breach (*James*, para [214]).

[22] By contrast, cases where there has been no violation often involve shorter delays than the petitioner's case. For example, the length of Convention-compliant delays between the start of detention for public protection and the start of further coursework necessary to give a real opportunity of rehabilitation was about 5 months in *Brown* (paras [74] and [76]), and 3 months in *Robinson* (para [79]). Other examples given in *Brown* where there was no violation are 9 months (Dillon), 6 months (Thomas), and approximately a year (Hall) (para [21]).

[23] The Scottish Ministers sought to argue that the successful challenges reported in *James* could be distinguished, raising four separate points of distinction. It is convenient to explain now why the court is not satisfied those points result in there being compatibility with Article 5(1) in this particular case, although only the third and fourth points relate to sentence length. The first point of differentiation was that *James* involved IPP sentences. This is not of itself a relevant point of distinction, because it has been accepted the underlying Article 5(1) principles apply to post-punishment part periods of sentence, which exist not only in IPP sentences but also in OLRs. The second suggested point of distinction was that no breach of public law duty has been found in this case, as it had been in *James*. But the *Brown* case makes it clear there has been a change in the law since the older public law duty cases, and that domestic law is now in alignment with Strasbourg caselaw. It is therefore unsurprising that the challenge has been brought under Article 5(1) and the principles in *Brown*, as opposed to the old law, and that there is no ground based on breach of public law duty. It does not follow that it can be assumed there would be no breach of the public law duty mentioned in pre-*Brown* cases in the present case.

[24] The third and fourth suggested points of distinction are about length of sentence. The third point was that the tariffs in *James* were shorter than the petitioner's punishment

part. The fourth point was a submission that, in contrast to *James,* the petitioner probably would not be released even if he had carried out the SCP course, because of the nature of an OLR sentence (unlike the IPP prisoners). The problem with these suggestions is that that they do not properly take into account the rationale for the application of Article 5(1) to the petitioner's case. He has reached the stage of his sentence at which he has served the punishment part and could, in theory, be released if it was no longer necessary to detain him for the protection of the public. After the punishment part expired, his conditions of detention ought to include rehabilitative measures so that continued imprisonment is no longer than necessary. The critical period for the application of Article 5(1) is the length of delay after the punishment has expired, not the length of the punishment part itself. The consequence of the relatively short punishment parts in OLRs (set under application of statutory rules) is that the obligation of the state to provide real opportunities of rehabilitation kicks in relatively early. This can initially seem surprising, because OLRs are ordinarily intended as severe sentences. Nevertheless, it is a consequence of the importance attached to liberty under Article 5(1), and the underlying principle that conditions of detention must reflect its purpose. Periods after the punishment part are imprisonment for public protection, which should therefore involve conditions including access to appropriate rehabilitative measures. Another way of looking at it is that the most serious offenders may need the most rehabilitation. It is for the Parole Board to decide when imprisonment under the OLR is no longer necessary for public protection. The severity of the sentence to an OLR, and the reasons for that, will no doubt be taken into account by the Parole Board.

[25] The focus of Article 5(1) in challenges about access to rehabilitative courses is on length of delay in access after expiry of the punishment part, not on length of the punishment part. As set out above, the 20 month delay so far in accessing the SCP since the

petitioner's punishment part expired in this case is of concern, when compared with periods in decided cases.

The petitioner's access to rehabilitative opportunities

[26] Substantial periods of delay in accessing a particular course after the punishment part has expired may be found Convention compliant where there has been sufficient access to other rehabilitative courses. In *Massey*, a period of about 30 months accessing the ESOTP course was justified because in 5 years of prison, four rehabilitative courses (including the core SOTP) had been completed. In *Alexander* a 32 month delay was excusable because of the wide range of rehabilitative courses to which the prisoner had been given access (the precise courses are not specified (*Brown* at para [21])).

[27] It is therefore necessary to examine the rehabilitative opportunities afforded to the petitioner during the whole period of his detention. There was a dispute between the parties about which prison activities could form part of the Article 5(1) assessment. Decided cases give guidance (*Brown* paras [65] to [79], *Kaiyam* paras [73] to [77], *Robinson* paras [78] to [80], *Massey* paras [81] to [83]). In examining the sufficiency of rehabilitative opportunities afforded to prisoners, they refer to the following courses: Constructs (problem solving skills), alcohol awareness, First Steps drug awareness, violence prevention, Goals course (pro-social behaviour), control of anger related emotions (CARE), Enhanced Thinking (ETS), victim awareness, Controlling Anger and Learning to Manage it (CALM), Prisoners Addressing Substance Related Offending (PASRO), Core Sex Offenders Treatment Programme (SOTP), extended Core Sex Offenders Treatment Programme (ESOTP), Cognitive Skills Booster Programme (CBS), as well as the SCP course

[28] From what is said in those cases, although some activities carried out by the petitioner in prison might be rehabilitative in a general sense (such as going to the gym, passing a numeracy exam, or being a peer mentor), in an Article 5(1) assessment about real opportunities of rehabilitation, they tend not to be taken into account. Courts have focussed more on prison courses which have a more direct bearing on the petitioner's risk of reoffending on release. There is no significant mention of health interventions, or general education opportunities such as taking national examinations.

[29] The Scottish Ministers submitted that the CBT provided to the petitioner in prison by the NHS should be taken into account by the court in assessing the adequacy of rehabilitative opportunities afforded to the petitioner. The details available to the court about that treatment are that it was a mental health intervention due to the petitioner becoming depressed. In those circumstances, and having regard to the cases referred to above, the CBT provided to the petitioner was not a rehabilitative opportunity for the purposes of Article 5(1), but a medical intervention.

[30] The petitioner suggested that all rehabilitative work not directly provided by the prison service should also be left out of account (for example the Fife College course or AA), relying on *Ansari* v *Aberdeen City Council* 2017 SC 274. *Ansari* found that duties to provide rehabilitative opportunities for a prisoner were not incumbent on a local authority, because those duties were incumbent on the Scottish Ministers. *Ansari* does not directly consider the question whether rehabilitative work carried out by third parties, but facilitated by the Scottish Prison Service, can be taken into account when determining if the Scottish Ministers have fulfilled their Article 5(1) duties. Given that it has often been said that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective (eg *Airey* v *Ireland* (1979) A 32, 2 EHRR 305 para [24]), it is appropriate to look

at the reality of the situation. The assessment below takes the approach that if rehabilitative activities are facilitated through the Scottish Prison Service (for which the Scottish Ministers are responsible), that is sufficient for those activities to be taken into account, even if third party providers are involved.

[31] In this particular case, paras [14] and [15] above set out a number of activities undertaken by the petitioner in prison. Following the approach set out in the previous paragraphs, those in para [14] are not taken into account for the purposes of assessing compliance with Article 5(1) following expiry of the punishment part in this case, but those in para [15] are.

[32] What is striking about the list in para [15] above is that during the 7½ years the petitioner has spent in prison, nearly 7 of which post-date sentence, the petitioner has only been afforded two prison-based rehabilitative courses. One, the SMART course, an abstinence oriented recovery programme, he elected not to complete. He has now, following expiry of his punishment part, completed the RCC, covering similar ground of addictive behaviours. The petitioner has had some other minor rehabilitative input, such as monthly sessions with his prison social worker, quarterly sessions with his psychology OLR case manager to encourage compliance with his risk management plan, AA meetings, and three motivational sessions for MFMC (abortive because the course was cancelled). The petitioner's case has been reviewed by the risk management team and at integrated case management meetings, and he is subject to a risk management plan. On his own initiative he has completed mental health work through Fife College courses, including coping strategies and building resilience. The RCC and the Fife College courses have been completed after the end of the petitioner's punishment part.

[33] There have been no offence focussed rehabilitative courses. The courses offered to the petitioner have not addressed sexual and violent domestic offending. Given the offences of which the petitioner was convicted, that type of coursework will be central to persuading the Parole Board of risk reduction. The other offence focussed rehabilitative opportunities afforded to the petitioner have been very limited; principally meetings with his prison social worker which may include general (but not offence focussed) domestic offending work, the three motivational sessions for MFMC before it was cancelled, and the quarterly sessions with his psychology OLR cases manager may have some rehabilitative effect. But he has not had access to either the MFMC or SCP courses which would provide offence focussed work, despite being on waiting lists for one or the other since 9 November 2017.

[34] The petitioner's opportunities contrast unfavourably with cases where delayed access to courses was found Convention compliant due to other rehabilitative opportunities. For example:

- In *Brown*, over an initial period of imprisonment of about 4 years, the prisoner had completed an anger management programme, a Constructs course, an alcohol awareness course, and a First Steps drug awareness course. After recall to prison he was imprisoned for a further 5 years, during which he completed an alcohol awareness course, a Goals course (pro-social behaviour), a repeat of the Constructs course, and the CARE programme, as well as being transferred to open conditions (paras [65] to [79]). The repeat Constructs and CARE courses were completed in the extension period, although there was a delay of 5 months after the extension period started before he commenced Constructs.
- In *Kaiyam*, in between sentence and 2014 (about 8 years), the prisoner had completed the ETS programme, a drug awareness course, a victim awareness

course, one to one anger management consultations delivered over a 2 year period, and begun the BSR programme (substance abuse). He had been assessed for other courses (CALM and PASRO) but his bad behaviour resulted in him being unable to transfer to prisons where he could access these (paras [73] to [77]).

- In *Robinson* (reported under the *Kaiyam* case), over a period in prison of 7 years, the prisoner completed the ETS programme, and also two offence focussed programmes, a 6 month Core Sex Offenders Treatment Programme (SOTP), and the extended SOTP (ESOTP). He started the ESOTP 4 months after his tariff expired, finishing it a few months later (paras [78] to [80]).
- In *Massey* (also reported under the *Kaiyam* case), Mr Massey completed an alcohol awareness course, the ETS programme, and the Core SOTP in the 2½ years before his tariff expired. After his tariff he completed the CSB Programme, and then the ESOTP. Although access to ESOTP was delayed for about 2½ years after his tariff, the court found that this period of inactivity had to be put in context:

> "In the space of five years' detention, Mr Massey had completed no fewer than 4 courses aimed at tackling the reasons for his offending. He had made significant progress in his sentence and had been afforded multiple opportunities to present to the Parole Board evidence of his work in reducing his risk" (paras [81] to [83]).

[35] When set against the lengthy period of the petitioner's detention so far, the courses made available to him appear modest in comparison with the cases in the previous paragraph. It may also be added that in the *James* case the prisoner had undertaken a short alcohol awareness course, and a Think First course (as well as an IT course and a first aid course, which are not so relevant to rehabilitation) (para [12]), but these were insufficient to

render lawful his 8 month period of post-tariff detention without access to other courses for which he had been recommended. Similarly Mr Wells had undertaken an alcohol course (*James* para [59]), but his post-tariff detention was still a violation of Convention rights. The rehabilitative opportunities provided to the petitioner to date are not at the level in cases where post-tariff delays in access to particular courses have been justified by access to other appropriate rehabilitative work.

Access to courses and the petitioner's conduct

[36] Substantial delays have also been found Convention compliant where access to courses has been impeded by bad behaviour of the prisoner in prison (eg *Brown* (paras [81] to [85])), *Kaiyam*). The petitioner has one episode of misconduct which led to a sentence of 2 months imprisonment, with the result that he is one place further down on the waiting list for the SCP (the mechanics of this recalibration of the list were not explained to the court). But that cannot explain the whole 20 month wait post-punishment part in accessing the SCP so far. The type of behaviour in decided cases which has justified delays has been, for example, violent incidents in prison which have necessitated prisoner transfers to prisons which do not offer courses, or preventing transfer to prisons which do. The petitioner has not exhibited behaviour of that nature. He has remained in HMP Glenochil for most of the time he has served, which is a prison in which SCP is delivered.

Other interests

[37] As well as the petitioner's interests, analysed above, other interests have to be taken into account. They include the public interest in punishment of crime and rehabilitation of offenders, the interests of other prisoners who also need access to the SCP, the public health

need to respond to the Covid-19 pandemic appropriately, and the public purse in resourcing prisons. These are addressed in turn.

[38] An OLR is one of the most serious sentences which can be imposed by the Scottish courts. The petitioner committed despicable offences against 6 different women. However, by statute, an OLR has a punishment part for retribution and deterrence, which in the petitioner's case has now been served. After expiry of the punishment part, continued detention is for public protection. As already observed, the other side of the coin of detention for public protection is that prisoners should be given rehabilitative opportunities to assist them in seeking to demonstrate to the Parole Board that they are no longer a danger to the public. An important purpose of sentencing people convicted of crimes is rehabilitation (Sentencing Guideline "Principles and purposes of sentencing" para [5]). Rehabilitation requires prisoners such as the petitioner to be given opportunities to change and move away from past offending behaviour, among other things through delivery of appropriate courses in prison.

[39] Other prisoners have needs for rehabilitative work, not just the petitioner, so there is competing demand for courses. The competing interests of prisoners are primarily addressed by operating a national waiting list. The Scottish Ministers cannot be faulted for the Scottish Prison Service operating a waiting list compiled using consistent criteria, based on length and type of sentence, meaning that some prisoners have been prioritised over the petitioner (*Brown*, para [83]). However, operating a rational waiting list is not a complete answer to a challenge under Article 5(1) to an OLR, once the punishment part for retribution and deterrence has expired, and the purpose of detention is the protection of the public. Places on courses must ultimately be available within an appropriate timeframe under operation of that list for there to be a real opportunity of rehabilitation.

[40] A problem which underlies the length of the waiting list for the SCP is the increased demand from other prisoners for places. The court was informed that there is an increasing population of OLR and serious sexual crime prisoners, meaning more places on the SCP are required. This also leads to delays in places being available. In the *James* case, like the English courts before it, the ECtHR was unimpressed by the introduction of new IPP sentences in England and Wales without accompanying resources to deal with their consequences on the prison population. In particular, criticism was levelled at the lack of resourcing for courses and surrounding circumstances so prisoners could demonstrate rehabilitation to the Parole Board (paras [211]-[219]). This case is not about IPP sentences, which were particularly problematic and had to be abolished. Nevertheless, the underlying reasoning of the ECtHR is relevant. It is open to the Scottish Ministers to promulgate, and the Scottish Parliament to pass, legislation providing for sentences such as OLRs (and offences which lead to their imposition). But if such legislation is passed without proper planning for prisoners likely to be incarcerated under it, including provision of appropriate courses for rehabilitation, the consequences may include human rights being violated.

[41] The next competing interest is the public health interest in responding appropriately to the Covid-19 pandemic. The pandemic resulted in courses such as the MFMC initially being suspended for 6 months in 2020, and when they restarted in September 2020, being delivered in smaller groups for social distancing for about 18 months. The overall result was a delay in the provision of courses to some prisoners. Despite a contrary submission (on the basis that the UK did not derogate from Article 5(1) during the period of the pandemic), the effect of the Covid-19 pandemic on delivery of courses is a relevant factor in the balance of interests. The application of Convention rights to any given situation is fact sensitive. It would be wrong to ignore the potential risks of harm to staff delivering courses, and

prisoners undertaking them, which ultimately resulted in some of the delay in delivering courses. However, it is important not to overstate this factor. It has now been some time since the UK ceased operating under Covid-19 related regulation which restricted courses. Covid-19 is not a factor which can excuse all delays in access to courses. Covid-19 limitations on courses had ended some time before 1 September 2022, when the petitioner's punishment part expired.

[42] The final other important interest to be balanced is resources. Public finances are finite. Courses are an expense to the public purse. Against this is the cost to the public purse of imprisonment if prisoners are detained longer than they need to be, because of the lack of appropriate rehabilitative courses. This case highlights that the necessary courses are so scarce that even being put on a waiting list in 2017 for offence focussed work, with a prioritisation date of 1 September 2018 (changed from 1 September 2020), and a punishment part expiry of 1 September 2022, is unlikely to result in a place on the SCP until 2025. Staff shortages and the need for training of staff are reasons given for some of the delay. But proper planning and resourcing of rehabilitative courses ought to include staffing considerations. While it is unrealistic to expect authorities to ensure relevant courses are available immediately (*Brown*, para [28]), it does not follow that excessive delays in providing courses, because of inadequate staffing, will be Convention compliant.

Decision

[43] To decide whether there has been a real opportunity of rehabilitation for the purposes of Article 5(1), the court must strike a reasonable balance between the various interests set out above.

[44] On one side of the balance, there is a general public interest in prisoners being rehabilitated. There are also the petitioner's interests. Particular weight should be given to the petitioner's liberty. The petitioner completed the part of his sentence attributed to retribution and deterrence on 1 September 2022. The time since the punishment part expired is now approximately 20 months. He has still not been able to access the SCP, the one course that the risk management team identified he should do, even though he is held in a prison where it is available, and he was first put on a waiting list for offence focussed work in 2017. Without that offence focussed work, he is in difficulty demonstrating reduced risk to the Parole Board and eventually securing his liberty. The length of delay since the punishment part expired is of concern when viewed alongside decided cases. It is longer than the delay in *James* which was found to be incompatible with Convention rights, and is a similar duration to that in *Wells*, also found incompatible. Delays in Convention compatible cases have tended to be shorter than 20 months, unless accompanied by wide access to other appropriate rehabilitative courses, or delays have been caused by the prisoner's own bad behaviour. The level of rehabilitative opportunities afforded to the petitioner is modest compared to cases where substantial delays have been excused because of access to other rehabilitative work. There is a gap in provision to him of offence focussed coursework such as the SCP, despite the existence of a risk management plan and regular review of his situation by the risk management team. The petitioner's place on the waiting list for the SCP has been adversely affected by a subsequent 2 month prison sentence, but other than that his behaviour in prison has not been such as to prevent access to courses. There is no strong history of the petitioner having access to other rehabilitative opportunities, or delays in access to courses being due to the petitioner's bad behaviour.

[45] On the other side of the balance, public health considerations as a result of Covid-19 had an impact on access to courses. However, that was for 6 months until September 2020, and then a further period of reduced delivery of 18 months. That is no longer a sufficient excuse for a 20 month delay following expiry of an OLR punishment part on 1 September 2022, a delay which on the Scottish Prison Service's current estimate is likely to extend to April 2025. Another factor on this side of the balance is the need for other prisoners to access courses. It is acceptable to have a waiting list so that courses are fairly allocated. Nevertheless, the adoption and operation of a rational waiting list is not a justification for an underlying system which overall fails to deliver rehabilitative programmes within a reasonable timescale. Finally, resource considerations are an important consideration. Ensuring sufficient staff are available to provide courses, and they are properly trained, requires resources. But resourcing considerations cut both ways. There is also an expense if prisoners have to spend longer in prison because they have not been able to access rehabilitative coursework necessary to demonstrate to the Parole Board their risk has reduced.

[46] Balancing all considerations, and taking into account the outcomes in decided cases, the 20 month period of delay in accessing the SCP since the punishment part of the petitioner's sentence is not excusable. Without access to that course, and without the wide range of access to other rehabilitative coursework seen in decided cases, the petitioner's ability to demonstrate reduced risk to the Parole Board is so severely compromised that he has not been provided with a real opportunity of rehabilitation. The circumstances of this particular case are sufficiently exceptional that the high threshold for a violation of Article 5(1) is met. The petitioner's rights under Article 5(1) of the European Convention on Human Rights have been breached. The stage has been reached at which his detention has

become arbitrary in an Article 5(1) sense, until real opportunities for rehabilitation are provided to him.

Remedy

[47] I therefore grant declarator that the Scottish Ministers are in breach of the petitioner's rights under Article 5(1) of the European Convention on Human Rights.

[48] The petitioner also sought damages under section 8 of the Human Rights Act 1998. In this case, the just and appropriate remedy is the declarator granted, and damages are not necessary for just satisfaction. Given the realistic and flexible manner in which interests are to be balanced, and the caselaw discussed above, the high threshold necessary for a violation of Article 5(1) has only recently been reached. It is to be expected that the Scottish Ministers will take appropriate steps as a result of the declarator. The court has to consider what is "just" both for the petitioner but also the wider public who have an interest in the funding of prisons and courses delivered to prisoners (*Anufrijeva* v *Southwark LBC* [2004] 1155 para [56]). In the light of the declarator granted and the short period of breach, it is not necessary at this point to award the petitioner damages for just satisfaction.

[49] That might change if the position remains that the petitioner is not provided with the SCP until approximately March 2025, as currently suggested on behalf of the Scottish Prison Service, and nothing else is done in the interim to provide him real opportunities of rehabilitation. Had that stage been reached, the court is likely to have been persuaded that damages should have been awarded, based on the petitioner's feelings of frustration and anxiety, along the lines of the levels in the cases of *Sturnham* and *Kaiyam* set out in para [7]6 above.

[50] The question of expenses is reserved, as requested by parties.