OUTER HOUSE, COURT OF SESSION

[2026] CSOH 21

P347/25

OPINION OF LORD COLBECK

in the Petition of

CRAIG McINALLY

Petitioner

for

Judicial Review of a decision of a failure by the Scottish Ministers to plan his sentence, progress him through the prison system, and provide him with rehabilitative opportunities

Petitioner: Lord Stewart of Dirleton KC; McPhee, advocate; Drummond Miller LLP
Respondent (Scottish Ministers): C.O'Neill KC, sol-ad; D.Blair, advocate; Scottish Government Legal Directorate

6 March 2026

Introduction

[1] On 29 November 2021, at the High Court of Justiciary at Glasgow, the petitioner pled guilty to a charge of culpable and reckless conduct to the danger of life. On 22 December 2022 a judge sentenced the petitioner to an order for lifelong restriction ("OLR") with a punishment part of 2 years 3 months. The sentence was backdated to 16 December 2019, that being the date on which the petitioner was first remanded. The punishment part of the

petitioner's sentence expired on 15 March 2022. The petitioner remains in prison. He will shortly be 4 years post-tariff.

[2] The petitioner wishes to be released from prison. To be released, he needs to undertake rehabilitation programmes. He contends that the Scottish Prison Service ("SPS"), for whom the respondent is responsible, have failed to plan his sentence, progress him through the prison system, and afford him reasonable access to rehabilitation programmes. Thus far, he has not been provided with access to any rehabilitation opportunity during his sentence.

[3] The decision challenged in these proceedings is that made on 28 January 2025. On that date the SPS's Programmes Case Management Board ("PCMB") decided to remove the petitioner from the waiting list for a rehabilitative programme known as the Self Change Programme ("SCP") and to recommend a bespoke individual intervention instead.

The circumstances of the offence

[4] The circumstances of the offence the petitioner pled guilty to are relevant to the issue of rehabilitation programmes, that which is central to the petition. As noted above, the petitioner pled guilty to culpable and reckless conduct to the danger of life. In November 2019, the complainer in those proceedings experienced worsening low mood and anxiety and contemplated ending her own life. On the internet she found a website where members could post about suicide and seek information on the subject. The petitioner made contact with her, initially through the website and then by WhatsApp message. He engaged in conversation with her, then met with her and encouraged her to come to his house, for what he described as "practice" for her suicide. In the petitioner's house, on two separate occasions, he repeatedly choked her with his hands, suspended her by the neck from a

pulley in his kitchen, to the point where she lost consciousness. The petitioner derived sexual gratification from this. Material found on his computer included sketched and animated sexual images of naked women being hanged and having sex acts performed on them. Following his arrest, during a medical examination, the petitioner stated that he became sexually aroused at the thought of his death and the death of others.

Risk assessment report

[5] In a case such as the petitioner's, it comprising both a violent offence which endangered life and an offence where there was a significant sexual aspect to the offender's behaviour, where the court considers that the risk criteria set out in section 210E of the Criminal Procedure (Scotland) Act 1995 may be met, subject to certain exceptions which did not apply in the petitioner's case, it is required to make a risk assessment order.

[6] The sentencing judge being so satisfied, a risk assessment order was made in relation to the petitioner on 29 November 2021. The risk assessment report ("RAR") instructed by the court was available in May 2022, in advance of the adjourned diet for sentence. In the context of rehabilitation and the risk posed by the petitioner, certain of the observations made by the risk assessor in the RAR are worthy of mention.

[7] The risk assessor described the petitioner's harmful and sexually violent behaviour as a chronic, escalating and persistent pattern of sexually violent fantasy, interest and latterly behaviour, which had encompassed developmental periods of his life and had continued until his detection and imprisonment.

[8] The sexually deviant behaviour encompasses sexual arousal to all aspects of the preparation, the act and the aftermath of the death of an adult female, through sexual asphyxiation, restraint and strangulation through hanging. The risk assessor described the

petitioner as having very meticulously and carefully groomed adult females, vulnerable by their own mental health problems and suicidal ideation, into giving consent to dying through this method, they being duped into this, to gratify his own deeply entrenched paraphilic interest.

[9] The risk assessor noted that the petitioner had given an account of his childhood and sexual development, which lacked coherence in the development of his sexual interests. She observed that the presence of severe and enduring problems in the petitioner's personality functioning, coupled with a sexually deviant behaviour, which is comparable to a necrophilia, means that the petitioner's lifestyle was preoccupied with achieving sexual gratification through the act and plan surrounding the death of, and sexual intercourse with, a female who is either dead or on the periphery of death.

[10] The risk assessor concluded that the level of impaired functioning in the petitioner's personality and rare violent sexual deviance was indicative of behaviour that would be non-responsive to treatment interventions and would be difficult to supervise and manage, where the petitioner had difficulties responding to authority and restrictions placed upon him. The risk assessor also opined that the petitioner would have difficulty engaging, if at all, in treatment interventions which targeted sexual violence, commenting that it was unlikely that treatment options that could mitigate or minimise his sexual deviance were available.

[11] The conclusion of the risk assessor was that, on balance of this being the petitioner's first offence and his first opportunity to engage with interventions, the petitioner would require multiagency management for the rest of his life and that a legal basis for constraining his activities will be required for the rest of his life.

[12] The risk assessor's opinion as to the risk the petitioner being at liberty presented to the safety of the public at large, having regard to the standards and guidelines issued by the Risk Management Authority (required by section 210C(3) of the 1995 Act), was that he presented as a high risk.

[13] These conclusions and observations of the risk assessor are of considerable significance in relation to the consideration and disposal of the petition.

Initial consideration of rehabilitative programmes

[14] The petitioner's case was considered by the PCMB on 13 February 2024. The PCMB minute noted that he was presented to the board following completion of a generic programmes assessment; board members discussed his case at length and due to the unique type of offending decided that they would need to seek guidance from SPS before making a decision on the petitioner's intervention needs.

[15] SPS records set out the internal discussions that followed the PCMB of 13 February 2024. The conclusion reached by SPS was that the petitioner would meet the criteria for the SCP, with the protection strand providing the opportunity to explore the sexual elements of his offending. The petitioner was added to the national waiting list for SCP.

[16] That the petitioner's case was considered by a panel of the Parole Board on 25 October 2024. At that time he remained on the waiting list for SCP. Social workers did not support the petitioner being released. He did not seek release. As he had not undertaken rehabilitative programmes, he could not demonstrate a reduction in risk. The petitioner sought a review in 12 months.

[17] The panel was not satisfied that it was no longer necessary for the protection of the public that the petitioner should be confined. To have any realistic prospect of persuading

the Parole Board that it was no longer necessary for the protection of the public that he should be confined, the petitioner recognised that he required to undertake appropriate rehabilitative work. The panel noted that it was "undoubtedly frustrating for [the petitioner] that his case appears to be "stagnating" and that he appears to have moved no closer to commencing the first stage of his rehabilitation than when his case was last reviewed by a panel of the Board [on 20 April 2023]". The panel did not direct the petitioner's release and ordered that the next review should take place in 12 months' time.

Earlier challenge by the petitioner

[18] By January 2025 the petitioner had not started the SCP. He challenged the delay by way of a petition for judicial review ("the first petition"). The Lord Ordinary fixed an oral hearing for 26 March 2025 to address whether he should grant permission for the petition to proceed. The circumstances outlined in paras [21] – [22] below were explained to the Lord Ordinary at the oral hearing. The Lord Ordinary held that the petition had not been raised within 3 months of when the grounds for the application first arose (as required by section 27A(1)(a) of the Court of Session Act 1988); declined to exercise his discretion to extend the time bar (under section s.27A(1)(b) of the 1988 Act); and refused permission to proceed in respect of the first petition.

[19] For completeness, the petitioner reclaimed (appealed) the Lord Ordinary's decision. The present petition was lodged on 10 April 2025, whilst the appeal proceedings in respect of the first petition were sisted for legal aid. The appeal was heard two days after the substantive hearing in this petition. On 13 January 2026 (see *McInally* v *The Scottish Ministers* [2026] CSIH 2), an Extra Division of the Inner House determined that the first petition no longer served any practical purpose and refused the reclaiming motion on the basis that it

was academic. The Extra Division indicated that if the first petition had not been superseded by the events described at paras [21] – [22] below, it would have concluded that it was equitable to extend the time bar.

Further consideration of rehabilitative programmes

[20] The petitioner's case was again considered by the PCMB on 28 January 2025. In the Treatment Interventions section of the minutes, the board stated that the discussions held noted that the nature of the petitioner's offending was unique, where his deviant sexual interests were specific and coupled with his personality characteristics, it was unlikely that groupwork intervention would be sufficient in addressing his offence focused needs. It was recognised that while the SCP aimed to address sexual offending, the board were of the view that the petitioner would require bespoke, individualised treatment to ensure that his offending was suitably explored with him prior to addressing areas of risk and need. Recommendations from the RAR were reviewed, it was agreed that it would likely require a combination of approaches such as Schema Therapy to effectively address the petitioner's treatment needs.

[21] The outcome of the PCMB on 28 January 2025 was that the petitioner was decided to be unsuitable for the SCP and was removed from the national waiting list for it. The PCMB recommendation was for bespoke intervention, and the petitioner was added to the individual national waiting list for that.

[22] The petitioner's case was again considered by the PCMB on 22 August 2025. The outcome noted was that the board were content that, due to the complex nature of the index offence, the petitioner should remain on the national waiting list for a bespoke intervention. They noted that the person facilitating the intervention would require to be highly

experienced, particularly in sex offender treatment, and in working with sexual deviance / healthy sexual functioning.

[23] At the substantive hearing on the petition, which took place on 9 December 2025, senior counsel for the respondent advised the court of the up to date position. A referral had been made to Psychological Services UK Ltd ("PSUK") on 22 October 2025. One of PSUK's directors was completing an assessment of the petitioner. That was in two stages. First, based on the petitioner's risks, what treatment pathway or approach should be taken to address his offending behaviour; what needed to be in place to begin treatment; and what would treatment involve. Second, to consider whether treatment exists as a service in Scotland or elsewhere and who would be able to provide that service. An initial meeting had taken place between PSUK and the petitioner less than a week before the substantive hearing. That was the first date when such a meeting could proceed. A further meeting was scheduled to take place three days after the substantive hearing. The purpose of those meetings was to allow assessment of the petitioner. The court was advised that PSUK intended to complete the first stage of the assessment process by 16 December 2025.

The issues

[24] The are three issues for determination by the court. First, whether the respondent is in breach of the petitioner's rights in terms of article 5 of the European Convention on Human Rights ("ECHR"), by failing to make reasonable offers for rehabilitative opportunities since the expiry of the punishment part of his sentence. Second, if the respondent is in breach of article 5, whether an award of damages is necessary to afford just satisfaction, and if so in what sum. Third, what remedy, if any, should be pronounced?

Submissions for the petitioner

[25] The petitioner invited the court to sustain his pleas in law, repel the respondent's pleas, and to grant the orders sought in the petition, namely, a declarator to the effect that the respondent has been and are acting unlawfully in terms of article 5 of the European Convention on Human Rights by failing to properly plan the petitioner's sentence and to afford the petitioner reasonable access to rehabilitative opportunities; and an order for payment by the respondent to the petitioner. The petitioner had been sentenced to an OLR on 22 December 2021. Such was the time that he had spent on remand, his punishment part expired on 16 March 2022, before his sentence was imposed. He is now more than 3 years post tariff. His sentence is indefinite and indeterminate.

[26] The circumstances of the petitioner's offending are unusual, and the complexity of the rehabilitative intervention he requires is well established. The RAR had made clear the challenges and what was required. The need for certain therapies or other specialised individualised work that can be adapted to the petitioner's specific needs were identified by the risk assessor in the RAR of May 2022. The risk assessor had identified that this would require a suitably trained individual to undertake such work, preferably someone that is well versed in the deviant nature of his offending.

[27] The petitioner had not had access to any rehabilitative courses during his sentence. Senior counsel referred to the assessments of the PCMB on 24 October 2023 and 13 February 2024; the determination that the petitioner was suitable for the SCP and then the reassessment of 28 January 2025, which concluded that he was not suitable for SCP and added him to the waiting list for a "bespoke intervention". He referred also to the 22 August 2025 assessment by the PCMB which reached the same conclusion. The petitioner has no realistic prospect of progressing or being released from prison without access to

courses. His case has been considered by the Parole Board for Scotland, but it has declined to recommend release due to the outstanding need for rehabilitative courses.

[28] Article 5(1)(a) of the ECHR permits lawful detention after conviction by a competent court. For detention to be lawful (not arbitrary), the conditions of detention must reflect the purpose, see *James* v *United Kingdom* (2013) 56 EHRR 12, paragraph 194. Where, as here, the purpose of detention is protection of the public, a prisoner must be afforded a real opportunity for rehabilitation (*James* at paragraph 209). That includes a reasonable opportunity to undertake courses aimed at helping them demonstrate a reduction in risk (*James* at paragraph 218). Reasonableness is assessed holistically. The court should focus on the post-tariff part because the duty to provide rehabilitation opportunities does not arise in-tariff, see *Kaiyam* v *United Kingdom* (2016) 62 EHRR SE13, paragraphs 67 and 69.

[29] Decided cases give some guidance. In *Kaiyam*, the European Court of Human Rights ("ECtHR") found that a failure to provide access to courses between eight- and 18-months post-tariff did not violate article 5 (see paragraphs 73-75, 78-80, and 81-83). In *James*, the ECtHR found delays of between eight- and 21-months post-tariff did violate article 5 (see paragraphs 211-214). In *BS* v *Scottish Ministers* 2024 SLT 579, the court found a delay in access to the SCP of 20 months post-tariff violated article 5 (see paragraph [46]).

[30] The purpose of the petitioner's detention as an OLR prisoner in the post-tariff period is public protection, as was the case in *James* and as was accepted by parties and the court in *BS* (see paragraph 6). He must therefore be afforded a real opportunity for rehabilitation, including reasonable access to courses aimed at helping him show a reduction in risk, in the post-tariff part of his sentence (see *James* at paragraph 218). He has not had a real opportunity for rehabilitation. He is more than 3 years post-tariff. He has not had access to

any rehabilitative course during his sentence. He has not had access to any means of meaningfully demonstrating a reduction in the risk he is assessed to pose.

[31] As a post-tariff OLR prisoner, it is now for the Parole Board to decide whether it is necessary for the protection of the public that the petitioner remain confined. Completion of rehabilitative courses is a highly significant factor in that assessment. On 25 October 2024, the Parole Board refused to direct the petitioner's release on license and expressly referred to the petitioner's need for rehabilitative courses. Its observations are apposite (the relevant observations are set out above at paragraph [17]). A year on, the petitioner had not been afforded any opportunity to commence participation in the necessary offence focused work to allow progress to be achieved, the need for which has been clearly identified since May 2022. It remains unknown what the bespoke intervention will involve, who will deliver it, or when it can start. The petitioner's rehabilitative needs are unusual, but they have been clearly identified since May 2022, and no meaningful progress has been made towards meeting them. The petitioner was assessed as suitable and on the waiting list for SCP from 13 February 2024, only to be reassessed on 28 January 2025 and found to be unsuitable. It was identified in May 2022 that group provision such as SCP was unlikely to meet the petitioner's needs. There has been a failure to plan the petitioner's sentence and to devise an effective programme of rehabilitation.

[32] The causal link between the purpose and conditions of the petitioner's detention has been severed. He is detained because of the risk he is assessed to pose to the public. He has not had any access to rehabilitative courses which aim to reduce the danger he is assessed to present, or which will help him demonstrate a meaningful reduction in risk. There is nothing aimed at limiting the duration of his detention to what is strictly necessary. The present position, more than 3 years post-tariff, is that a bespoke intervention will, at a time

unknown, be delivered by someone as yet unidentified. That is not a real opportunity for rehabilitation. It breaches the petitioner's article 5 rights.

[33] If the court finds the respondent has breached the petitioner's article 5 rights, an award of damages is necessary to afford just satisfaction in terms of section 8(4) of the Human Rights Act 1998. In *James*, the ECtHR awarded €3,000 in respect of a period of 5 months (James), €6,200 in respect of a period of 21 months (Wells) and €8,000 in respect of a period of 30 months (Lee) (see paragraph 244).

[34] An award of £6,000 is appropriate. The petitioner's case is closest to Mr Lee's, and a commensurate award is appropriate. The petitioner is more than 3 years post-tariff. It is unclear what rehabilitative opportunity may be available to him or when. He is distressed by the respondent's failures to plan his sentence and afford him reasonable access to courses, and the prolongation of his imprisonment which flows from them.

Submissions for the respondent

[35] The respondent invited the court to sustain their first and second pleas-in-law and refuse the petition. If the court concluded that a declarator ought to be made, the respondent invited the court to refuse to make any award of damages, which failing to make an award in a lower sum than that sought by the petitioner.

[36] The respondent submitted that the petitioner's detention was not arbitrary within the meaning of article 5, having regard to the unique difficulties presented by his offending behaviour, the rehabilitative opportunities which have been made available (in respect of which, see below), and the particular circumstances of the petitioner's case.

[37] The petitioner spent around two years on remand prior to his sentencing. As a result, the punishment part of his OLR expired prior to the sentence having been passed.

The respondent accepted that, since the sentence was imposed, the petitioner has not been afforded access to any rehabilitative programme work.

[38] The respondent also made submissions in relation to the history of the petitioner's case, including its consideration by the PCMB, the conclusion that the petitioner was suitable for enrolment on the SCP and he being added to the national waiting list for that programme; before a further consideration by the PCMB concluded that the SCP was not an appropriate intervention for the petitioner and he was removed from the national waiting list for the SCP and placed on the national waiting list for a bespoke intervention.

[39] The respondent's psychology staff were concerned that the petitioner would not benefit from group work (given the nature of his offending) and that any one-to-one therapy would have to be carefully planned and individualised. The respondent considers that the petitioner's presentation is unique. He has exhibited interests in necrophilia, cannibalism and extreme violence in a sexual context. As a result, they do not have the necessary resources or expertise to design and deliver an appropriate intervention to the petitioner "in-house". As a result, the respondent explored what might be offered to the petitioner by way of outsourced resources. On 1 October 2025, the respondent referred the petitioner's case to the NHS Serious Offender Liaison Service ("SOLS"). This NHS unit provides specialist support for the assessment and management of complex and / or high risk sexual offenders, such as the petitioner. SOLS have not agreed to take the petitioner's case. The respondent has also referred the petitioner to Psychological Services UK Ltd ("PSUK") (see paragraph [23] above).

[40] Article 5(1)(a) of the ECHR permits the lawful detention of a person after conviction before a competent court. Compliance with national law is not sufficient alone to ensure that a deprivation of liberty is "lawful" within the meaning of the Convention. In addition,

the deprivation of liberty should be in keeping with the purpose of protecting the detained person from arbitrariness, see *James* at paragraph 191. In order to avoid arbitrariness, both the order to detain and the execution of the detention must genuinely conform with the purposes of the restriction permitted by article 5(1); there must be some relationship between the grounds of deprivation relied upon and the place and conditions of detention; and there must also be a relationship of proportionality between the grounds relied upon and the detention in question, see *James* at paragraph 193 -195.

[41] It is legitimate (and not arbitrary) for prisoners to be detained not only for punitive purposes but also in order to protect the public from reoffending. However, to avoid arbitrariness, during any period of detention where the sole purpose is protection of the public, the state must offer a real opportunity for rehabilitation, see *James* at paragraph 209. In assessing whether reasonable opportunities have been afforded in respect of rehabilitation, the court should have regard to the whole period of the individual's sentence, not just what has happened during the extended part of the sentence, see *Kaiyam* at paragraph 69.

[42] The assessment must be a realistic one and have due regard to the efficient management of public funds and the availability of relevant resources, see *James* at paragraph 194. The duty is not to maximise the coursework or provision made to the prisoner, see *Glancy* v *Scottish Ministers* [2020] CSOH 1 at paragraph [42], quoting *Haney* v *Secretary of State for Justice* [2015] AC 1344. In selecting participants for any particular course, the respondent is entitled to balance the needs of one prisoner against those of another, for example by taking into account prospective release dates, see *Glancy* at paragraph 46. The threshold for a finding of a breach of article 5(1) is high in cases involving access to

rehabilitative courses and a finding to that effect is only likely to be justified in a rare case, see *BS* at paragraph [7].

[43] Where the court does make such a finding, it must consider what the just and appropriate remedy would be. That may simply be a declarator that there has been a breach. An award of damages may only be made when 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 and not for the deprivation of liberty itself, see *BS* at paragraph [7].

[44] It is not for the court to second-guess the views of qualified clinical professionals when considering what the appropriate intervention might be, or whether any individual is suited to undergoing such an intervention, see *Dillon* v *United Kingdom* (app no 32621/11, 4 February 2015) at paragraph 50; and *Alexander* v *United Kingdom* (app no 54119/10, 30 June 2015) at paragraph 47.

[45] The assessment of whether detention has become arbitrary is necessarily multi-factorial. Any assessment is likely to include consideration of (i) the length of delay since the expiry of the punishment part of the sentence; (ii) the petitioner's access to rehabilitative opportunities across his sentence; (iii) the petitioner's own conduct; (iv) the public interest in rehabilitation and the petitioner's specific interest in rehabilitation; and (v) the competing needs of other prisoners and public resources, see *BS*.

[46] Having regard to that factual and legal framework, the petitioner's ongoing detention has not become arbitrary. The petitioner's presentation gives rise to significant difficulties in respect of the delivery of a suitable rehabilitative intervention. The consistent thread throughout all clinical discussion of the petitioner is that his deviant sexual interests are highly unusual. They cannot be easily treated. The respondent has concluded that the

petitioner is not suitable for enrolment on the SCP for that reason. It is not for this court to second-guess that assessment (cf. *Dillon* and *Alexander*). In that context, removal from the SCP national waiting list in January 2025 was a lawful, rational and proportionate decision for the respondent to take.

[47] There is no "off the shelf" intervention in respect of the petitioner's risk profile, either in-house or from an external provider. Any intervention will require a careful assessment of (i) the petitioner's specific risk profile; (ii) his insight into those risks; (iii) his responsivity or engagement with any treatment; and (iv) the resources that might be made available to address those risks. The respondent has taken meaningful steps forward in that respect. The petitioner has been assessed. He has been referred for specialist intervention. There is no more that the respondent can reasonably do at this juncture. They cannot deliver any intervention in-house. The respondent sought assistance from SOLS. PSUK will assess the petitioner (see paragraph [23] above). In such circumstances, the steps taken by the respondent are reasonable. They are progressing the petitioner towards a meaningful rehabilitative programme in extremely difficult circumstances.

[48] If the court considered that there is an ongoing breach of article 5, the respondent invited the court to make a declarator to that effect. Damages were not necessary to afford just satisfaction in respect of any breach, see section 8(3) of the Human Rights Act 1998. If the court considered that an award of damages award was necessary, the sum sued for is excessive and beyond the awards which have been made in comparable cases, see *BS* at paragraph [7]. Should any award of damages be made, it should be limited to, at most, £500.

Decision

[49] The petitioner's case is far from straightforward. In addition to the submissions of parties, the court also had the benefit of affidavits by Sarah Angus (the Director of Policy at SPS) and Kirsty Bremner (the Head of Psychology at SPS). These provide *inter alia* useful insight into the petitioner's circumstances and the steps that have been taken by SPS.

[50] In *James*, at paragraph 209, the ECtHR held that in cases concerning indeterminate sentences of imprisonment for the protection of the public ("IPP sentences"), a real opportunity for rehabilitation is a necessary element of any part of the detention which is to be justified solely by reference to public protection.

[51] The ECtHR in *James* were concerned with IPP sentences, which were of indeterminate length and required a direction from the Parole Board for the prisoner to be released. The sentencing judge fixed a minimum term which had to be served before the prisoner became eligible for release. The similarities between IPP sentences and OLRs are obvious.

[52] The petitioner is now almost 4 years post-tariff. In their note of argument and in oral submissions, the respondent maintained that rehabilitative opportunities had been made available to the petitioner (whilst also conceding that they had not – see paragraph [37] above). Asked what these opportunities were, senior counsel maintained that the process of assessment formed part of the rehabilitative opportunities. I reject that proposition. I accept that part of the assessment process could be the identification of rehabilitative opportunities. That, however, is something quite different from providing the opportunities identified. No rehabilitative opportunities have been afforded to the petitioner.

[53] Of the 4 year period I refer to, it is important to stress that the respondent cannot bear any responsibility for the period between the expiry of the punishment part and the

date of the imposition of OLR, standing the fact that the former preceded the latter. In this case, the obligation incumbent upon the respondent to provide a real opportunity for rehabilitation only arose upon the imposition of the OLR, on 22 December 2022.

[54] I recognise that it is not for the court to second-guess the views of qualified clinical professionals when considering what the appropriate intervention might be, or whether any individual is suited to undergoing such an intervention, (see *Dillon* and *Alexander)*. That issue does not arise in the present case. Had the petitioner remained on the waiting list for the SCP differing considerations might have applied, however, no issue is taken with the decision to remove the petitioner from that waiting list and to recommend a bespoke individual intervention instead. The somewhat perplexing issue is that of the decision by SPS to admit the petitioner the SCP waiting list in the first place.

[55] The terms of the RAR would have been known to SPS. The views of the risk assessor (for example, those expressed at paragraphs [7] – [10] above) would have put any reader of the RAR on notice that the petitioner's case was problematic. With the benefit of that report, in February 2024, SPS reached the conclusion (see paragraph [15] above) that the petitioner would meet the criteria for the SCP, with the protection strand providing the opportunity to explore the sexual elements of his offending.

[56] In her affidavit, Kirsty Bremner stated, "I can confidently say Mr McInally wouldn't get past skill step 1 of SCP because he doesn't have insight into his offending behaviour". The fact that SPS reached the conclusion it did in 2024 is concerning. The effect of that decision was to send the petitioner down a cul-de-sac, which took him almost a year to come out of. The undisputed facts of the present case are that it took the respondent until October 2025 to proceed with the type of assessment one might suggest was contemplated by the risk assessor as far back as May 2022.

[57] Whilst neither the issue of the efficient management of public funds nor that of balancing the needs of one prisoner against another has yet arisen in the petitioner's case, the availability of relevant resources is, to a degree, a material consideration in the present proceedings (see *James* at paragraph 194) in that SPS do not have the necessary resources or expertise to design and deliver an appropriate intervention to the petitioner "in-house". It is not suggested that that position has changed since the OLR was made. The absence of such expertise ought to have been apparent to SPS from the outset. It has only, belatedly, been addressed by the engagement of PSUK. Whilst it is unrealistic, and too rigid an approach, to expect the authorities to ensure that relevant rehabilitative opportunities be available immediately, the time taken to commence the journey towards identifying suitable treatment in the present case is inexcusable.

[58] A high threshold has to be surmounted in order to establish a violation of the obligation prohibiting arbitrary detention that is contained within article 5(1) (see *Brown* v *Parole Board for Scotland* 2018 SC (UKSC) 49). Cases in which such a violation is established will be rare (see *Kaiyam* at paragraph 70). This is one such case. Almost 4 years post-tariff, the petitioner has been provided with no rehabilitative opportunities, whatsoever, and steps have only recently been taken to identify what those opportunities might be. Almost a year of the post-tariff period was wasted whilst the petitioner was on a waiting list for a course which the SPS Head of Psychology believes he could not have progressed beyond the first skill step of.

[59] Accordingly, I sustain the first plea-in-law for the petitioner and grant declarator that the respondent has been and are acting unlawfully in terms of article 5 of the European Convention on Human Rights by failing to properly plan the petitioner's sentence and to afford the petitioner reasonable access to rehabilitative opportunities.

[60] The petitioner also seeks damages under section 8 of the Human Rights Act 1998. The respondent invited the court to refuse to make any award of damages, which failing to make an award in a lower sum than sought.

[61] The length of the delay in this case is such that an award of damages is appropriate. In assessing the amount to be awarded, I have regard to the post-tariff period the petitioner has continued to be imprisoned for (discounting therefrom the period between the expiry of the tariff and the imposition of the OLR), and the nature of the petitioner's offending and circumstances. The circumstances here are quite different from, for example, those which applied in *BS*. Identifying and providing bespoke interventions for the petitioner would inevitably take longer than providing to him a rehabilitative programme that SPS already provide. I will sustain the second plea-in-law for the petitioner and award the petitioner damages in the sum of £1,000. I will repel the pleas-in-law for the respondent.

[62] Parties were agreed that expenses should follow success. I will make an award of expenses in favour of the petitioner.