



FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2020] CSIH 15
P209/17

Lord President
Lord Malcolm
Lord Turnbull

OPINION OF THE COURT

delivered by LORD TURNBULL

in the Petition of

by

JORDAN QUEEN

Petitioner and Reclaimer

against

(1) THE LORD ADVOCATE as representing the Scottish Ministers; (2) THE ADVOCATE GENERAL FOR SCOTLAND; and (3) THE CHIEF CONSTABLE OF POLICE SCOTLAND

Respondents

Appellant: Mason; Thorley Stephenson SSC
First Respondent: O'Neill (sol adv); Scottish Government Legal Directorate

22 April 2020

Introduction

[1] On 12 August 2016, the petitioner, then aged 16, was issued with a fixed penalty notice in the sum of £40 by a police constable exercising the powers available to him in terms of section 129 of the Antisocial Behaviour etc. (Scotland) Act 2004 (“the 2004 Act”). He did not pay the fixed penalty notice within the time period specified in the Act and, by virtue of

section 131(5), he then became liable to pay the sum of £60. By virtue of section 131(6) that sum fell to be treated as if it were a fine imposed by the justice of the peace court to whom the penalty was due to be paid.

[2] In due course the petitioner brought a petition for judicial review in which he sought declarator that Part 11 of the 2004 Act was incompatible with his rights under articles 6 and 13 of the European Convention on Human Rights (“ECHR”) and was therefore not law by virtue of section 29(1) and (2)(b) of the Scotland Act 1998. In this reclaiming motion the petitioner seeks to bring under review the decision of the Lord Ordinary refusing the prayer of the petition. The argument on appeal was restricted to the issues concerning article 6 as focussed in the grounds of appeal.

Background

[3] The 2004 Act was preceded by the Antisocial Behaviour etc. (Scotland) Bill which was introduced to the Scottish Parliament on 29 October 2003. The Policy Memorandum associated with the Bill explained the purposes of the measures proposed. These included: “to tackle antisocial behaviour more effectively” (para. 2). The Memorandum explained that the power to issue fixed penalty notices would only be appropriate in relation to “low-level offences” (para. 167) with the intention that the provisions should “help free up police time and reduce some of the burden on the courts of dealing with minor cases” (para. 167). The fixed penalty notice was described as providing “another option open to police when dealing with minor offenders” (para. 173).

[4] As enacted, Part 11 of the 2004 Act comprises sections 128 to 134. Section 128 defines the meaning of a “fixed penalty offence” for the purposes of the Act and defines the offences to which it applies. Section 129 provides;

“(1) A constable who has reason to believe that a person aged 16 or over has committed a fixed penalty offence in a prescribed area may give the person a fixed penalty notice in respect of the offence.

(2) In subsection (1)—

‘fixed penalty notice’ means a notice offering the opportunity, by paying a fixed penalty in accordance with this Part, to discharge any liability to be convicted of the offence to which the notice relates; and

‘prescribed area’ means an area prescribed by the Scottish Ministers by regulations.”

[5] Section 130 stipulates the levels of fixed penalty notices and makes provision for the form of such notices. Section 131 makes provision for the effect of fixed penalty notices as follows:

“(1) This section applies if a fixed penalty notice is given to a person (‘A’) under section 129.

(2) Subject to subsection (3), proceedings may not be brought against A.

(3) If A asks to be tried for the alleged offence, proceedings may be brought against A.

(4) Such a request shall be made by a notice given by A—

(a) in the manner specified in the fixed penalty notice; and

(b) before the end of the period of 28 days beginning with the day on which the notice is given.

(5) If, by the end of the period mentioned in paragraph (b) of subsection (4)—

(a) the fixed penalty has not been paid in accordance with this Part; and

(b) A has not made a request in accordance with that subsection,

then A is liable to pay to the clerk of the justice of the peace court specified in the fixed penalty notice a sum equal to one and a half times the amount of the fixed penalty.

- (6) A sum for which A is liable by virtue of subsection (5) shall be treated as if it were a fine imposed by the justice of the peace court specified in the fixed penalty notice.”

[6] In an affidavit dated 9 March 2018, lodged in the petition proceedings, the petitioner deponed that originally he was scared to tell his parents about receiving the fixed penalty notice and intended to pay it in the hope that they would not find out. Around two weeks after receiving the notice his father found out about it and the petitioner explained to him that he had not done anything wrong. Although his father was angry with him he believed the petitioner and said that he would deal with the matter for him. His father in fact failed to do anything. In the petition it was averred that he placed the notice in his toolbox and forgot about it.

[7] On 18 September 2016, the petitioner received a letter from the clerk at the Justice of the Peace Court at Paisley informing him that the payment due had now escalated to £60 and that the fixed penalty notice had been registered as a fine. After correspondence between the petitioner’s solicitor, the Central Ticket Office and the clerk of the court, the petitioner was informed that it was not possible to extend the 28 day period within which a court hearing required to be requested, and that the petitioner would be cited to attend a Fines Enquiry Court at which a Justice of the Peace would consider the matter.

[8] In his affidavit the petitioner went on to explain that the letter from the clerk at the Justice of the Peace Court informed him that the £60 registered as a fine would feature on his criminal record. He also explained that he was concerned that the notice may feature on any enhanced disclosure which might be required. In any event, he asserted that he wished an opportunity to establish his innocence in connection with the incident as he had done nothing wrong.

The Lord Ordinary's decision

[9] The Lord Ordinary was satisfied that the framework of Part 11 of the 2004 Act was compliant with the provisions of article 6 of ECHR. The petitioner was entitled to ask to be tried and was guaranteed a right to a fair trial before an independent and impartial tribunal. The only qualification was that the right to elect must be exercised within a stipulated time period. The petitioner's discrete argument based on article 13 of ECHR was also rejected.

Submissions

Reclaimer

[10] In challenging the Lord Ordinary's decision it was submitted that article 6 of ECHR was engaged in the fixed penalty notice procedure. The petitioner was charged with a criminal offence. The payment required was a penalty and was punitive in nature, rather than welfare based or preventative. This distinguished the procedure from that under discussion in the cases of *S v Miller* 2001 SC 977 and *R v Durham Constabulary ex parte R* [2005] HRLR 18.

[11] Article 6 remained engaged in the proceedings before the Fines Enquiry Court, since the petitioner's sentence was not definitively fixed. He might be subject to further penalty or imprisonment in terms of the procedure for enforcement under the Criminal Procedure (Scotland) Act 1995 which became engaged. The Justice of the Peace Court would proceed upon the basis that he had committed the offence. There would be a public pronouncement of guilt at each hearing of the Justice of the Peace Court to which he was cited. He was therefore denied the presumption of innocence. *Janosevic v Sweden* (2004) 38 EHRR 22 applied.

[12] The Lord Ordinary had been wrong to conclude that the petitioner no longer faced the possibility of any proceedings resulting in a penalty. A proper understanding of the decision in *S v Miller*, particularly the opinion of the Lord President (Rodger), made it clear that since the appellant remained subject to the possibility of a penalty being imposed article 6 remained engaged. For all of these reasons the petitioner remained charged for the purposes of article 6 but the procedure provided for by the statute failed to provide him with the rights required by that article.

[13] The essential complaint advanced on the petitioner's behalf was that the inability of someone in his position to demand a right to a hearing after the expiry of the 28 day period stipulated in section 131(4)(b) of the 2004 Act meant that he was denied the right to a review before a court exercising all of the component features of article 6. The only power available to be exercised under the 2004 Act after the 28 day period had expired was to be found in section 133. That section permitted a constable to revoke a fixed penalty notice if satisfied that the offence to which the notice relates was not committed or that the notice ought not to have been issued to the person named as the person to whom it was issued. This was not the equivalent of a review before an article 6 compliant court. If the imposition of the fixed penalty by virtue of the statutory provisions fell to be viewed as the imposition of a penalty by an administrative authority then such a review was required.

[14] The submission that the statutory procedure was not article 6 compliant could be demonstrated by taking the imaginary case of a person issued with a fixed penalty notice who then fell into a coma before having a chance to request a hearing. If that person did not recover from the coma until after the expiry of the 28 day period stipulated, then there would be no method available to them of challenging the imposition of the penalty and its enforcement as a fine through the provisions of the 1995 Act.

[15] Counsel for the petitioner also drew attention to the cases of *McDonald v HM Advocate* 2007 HCJAC 36, *Gradinger v Austria* (1995) A 15963/90, *Schmautzer v Austria* (1995) A328-A, *Adolf v Austria* A49, 4EHRR 313 and *Ozturk v Germany* (1984) 6 EHRR 409.

Respondent

[16] The respondent's submission was that although the issuing of a fixed penalty notice involved the bringing of a criminal charge, the provision of a right to trial as specified in section 131 meant that the procedure was article 6 compliant. The criminal charge ceased to exist when there was no possibility of prosecution. This was the position where the 28 day period stipulated in section 131 of the 2004 Act expired without a request for trial being made by the recipient of the notice. Thus, from this point onwards article 6 had no application. In the alternative, if the recipient continued to be subject to a criminal charge then the regime established was convention compliant.

[17] It was artificial to test the scheme by the circumstances of the imaginary coma patient. There are many situations in which a person is incapable of exercising legal rights. In certain circumstances the court might take account of this. Many circumstances could be imagined in which legislation takes no account of a person's inability to exercise legal rights.

[18] The solicitor advocate for the respondent relied on *S v Miller, R v Durham Constabulary*, *Ozturk v Germany* and *Malige v France* (1999) 28 EHRR 578.

Discussion

[19] As foreshadowed in the Policy Memorandum, the purpose of the fixed notice penalty scheme is to provide an alternative to prosecution in relation to specified low level offences in order that police time should be freed up and so that the burden on the courts of dealing

with minor cases might be reduced. The types of offences to which the scheme applies are specified in section 128 of the 2004 Act. They include some low level statutory offences such as refusing to leave licensed premises on being requested to do so, being drunk and incapable in a public place, persisting in playing musical instruments to the annoyance of others on being required to stop and vandalism. The common law offences of breach of the peace and malicious mischief are also included.

[20] The 2004 Act provides that a constable who has reason to believe that a person aged 16 or over has committed a fixed penalty offence in a prescribed area may give the person a fixed penalty notice in respect of the offence (section 129(1)).

[21] The effect of giving a person a fixed penalty notice is that the penalty stated in the notice is immediately due to be paid. Payment may be made up to 28 days after it becomes due, failing which the penalty due is then increased to one and a half times the amount (section 131(5)). The only other step which the recipient of the notice may take is to request to be tried for the offence, which request must also be made within the 28 day period (section 131(3) & (4)).

[22] The variation on ordinary procedure which the 2004 Act introduces is that the giving of a notice by a police officer has the effect of preventing the public prosecutor from bringing proceedings in relation to the subject matter of the notice, save in one specified circumstance – if the recipient asks to be tried for the alleged offence within the 28 day period.

[23] The respondent was therefore correct to acknowledge that the giving of a fixed penalty notice constitutes a criminal charge for the purposes of article 6. As was accepted by the petitioner, section 131(3) provides the recipient with a method of having that charge

determined in a fair trial by a court providing all of the guarantees associated with article 6, if he so wishes.

[24] However, the petitioner's submission was that he remained subject to a criminal charge after the expiry of the 28 day period without taking any action. He contended that he remained subject to proceedings which might result in a penalty as a consequence of the fixed notice penalty being treated as if it were a fine and his consequent liability to be cited to the Fines Enquiry Court and dealt with there by punishment for non-payment. The submission was founded upon the passage of the Lord President's opinion in *S v Miller* at paragraph 23 where he explained:

"In my view, once the procurator fiscal has decided not to proceed with the charge against a child *and so there is no longer any possibility of proceedings resulting in a penalty*, any subsequent proceedings under the 1995 Act are not criminal for the purposes of art 6." (emphasis added)

[25] The submission was that by contrast with the circumstances of the child in *S*, the petitioner remained subject to proceedings in the Justice of the Peace Court which might result in a penalty. Article 6 therefore remained engaged. In our opinion this submission was not well-founded. The public prosecutor's ability to bring criminal proceedings against the petitioner in respect of the offence was barred from the moment the notice was given to him. The petitioner's right to request a trial expired 28 days after receipt of the notice. The criminal charge ceased to exist for any purpose from that point onwards. This is the effect of the decisions in the cases of *S v Miller* and *R v Durham Constabulary*. Anything which might happen thereafter is not concerned with the determining of a criminal charge. What happens thereafter is concerned with enforcement.

[26] It is not correct to say that there would be a public pronouncement of the petitioner's guilt before a Fines Enquiry Court. In the scheme of the 2004 Act that court is performing an

enforcement function. It makes no pronouncement on guilt or innocence. It is also worth noting the extent of the powers available in that court. Section 219(2) of the Criminal Procedure (Scotland) Act 1995 provides that the maximum period of imprisonment which may be imposed in default of payment of a fine not exceeding £200 is 7 days. The submission that the petitioner might find himself liable to imprisonment in respect of an unpaid penalty in the sum of £60, which is treated as if it were a fine, has to be seen in this context. Furthermore, the effect of section 227M of the 1995 Act is that the court would be required to impose a community payback order instead of a period of imprisonment.

[27] It is also incorrect to assert that the giving of a fixed penalty notice would be recorded against the petitioner as a criminal conviction and that he would have a criminal record in consequence of receiving the notice. The concern which he expresses in his affidavit of 9 March 2018 is misplaced. For the purposes of the Rehabilitation of Offenders Act 1974 the giving of a fixed penalty notice is treated as an alternative to prosecution. The notice becomes spent at the time it is given (section 8B(1)(d) and Schedule 3 para 1(1) of the 1974 Act). His concern about enhanced disclosure is also misplaced and we find it hard to understand why this concern should have been repeated in the present proceedings. On 21 February 2018, the petitioner was sent a letter from Police Scotland in which it was confirmed that the information about his fixed penalty notice would be removed from the record kept on 12 August 2018 and would thereafter be incapable of being disclosed to Disclosure Scotland.

[28] In the case of *Ozturk v Germany* the European Court of Human Rights was considering the application of an administrative scheme for the imposition of a fine in relation to a minor road traffic offence. The court observed that the Convention is not opposed to the moves towards decriminalisation which the court noted were taking place in

extremely varied forms in the member States of the Council of Europe. The issue was whether the classification of the road traffic offence as “regulatory”, instead of criminal, excluded the application of article 6. The court concluded that article 6 remained applicable. What is of importance for present purposes is that the European Court of Human Rights expressly acknowledged that a Contracting State may have good cause for relieving its courts of the task of the prosecution and punishment of minor offences and recognised that conferring the prosecution and punishment of minor offences on administrative authorities is not inconsistent with the Convention. The proviso which the court required was that the person concerned is enabled to take any decision thus made against him before a tribunal that offers the guarantees of article 6 (see para. 56 of the court’s decision).

[29] The fixed penalty notice scheme provided for by the 2004 Act is of the kind referred to by the court in *Ozturk*. It provides for the prosecution and punishment of minor offences in the manner recognised by the European Court. Importantly, it includes the requirement identified by the court of an entitlement to challenge the decision made against the recipient of the notice. The recipient of a fixed penalty notice is entitled to challenge the decision made against him by the police officer issuing the notice and to do so before a court offering the guarantees of article 6. It is in this fashion that the presumption of innocence remains in place.

[30] The petitioner’s real complaint was that there was no method of bringing a challenge to the imposition of a penalty back before the court after the expiry of the 28 day period. Attention was drawn to the Criminal Justice and Police Act 2001 which provides for the issuing of a penalty notice in England and Wales. In common with the Scottish legislation, that Act provides that if the applicable penalty is not paid within the specified period then a

sum equal to one and a half times the amount of the penalty may be enforced in the magistrate's court as if it were a fine.

[31] It was observed that section 10 of that Act, which is headed "Enforcement of fines", provides in subsection (5) that: "The court may set aside a fine in the interests of justice."

[32] The petitioner's contention was that this was a provision which had no equal in the Scottish legislation. As we understood him, counsel's submission was that a provision of this sort would address the circumstances of the hypothetical coma patient and would also enable someone in the petitioner's situation to seek the remedy which is otherwise unavailable to him.

[33] In our opinion this submission fails to take account of section 213 of the 1995 Act. That section provides that a fine may, at any time, be remitted in whole or in part. The power given to the court by this section is not qualified to any extent and, in our opinion, must be the equal of a power capable of being exercised "in the interests of justice".

[34] The petitioner's argument fails to give proper weight to the fact that the 2004 Act provides for the imposition of a penalty by an administrative authority and provides for a review of that decision before an article 6 compliant court. The petitioner has never contended that the requirement to engage this review within the 28 day period imposes an obligation which interferes with or denies him his article 6 rights. His argument is that there requires to be a separate procedure, which in itself requires to be article 6 compliant, available after the expiry of the 28 day period to those who deliberately, negligently or otherwise fail to comply with the statutory time period. In our opinion there is no substance in this argument. The petitioner's article 6 rights are not re-engaged after the point has been reached where there can be no prosecution. The penalty is fully determined at the expiry of the 28 day time period and the further procedure available under the Criminal Procedure

(Scotland) Act 1995 is concerned only with enforcement. That enforcement procedure is sufficiently flexible to be able to take account of the interests of justice.

[35] For these reasons the reclaiming motion is refused.