EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2020] CSIH 64
P750/19

Lord Malcolm
Lord Woolman
Lord Doherty

OPINION OF THE COURT

delivered by LORD DOHERTY

in the Appeal

by

S

Petitioner and Appellant

against

THE SCOTTISH MINISTERS

Respondents

with a public interest intervention

by

THE COMMISSION FOR EQUALITY AND HUMAN RIGHTS

Intervener

Petitioner and Appellant: Leighton; Drummond Miller LLP (for McGreevy & Co, Glasgow)
Respondents: Byrne; Scottish Government Legal Directorate
Intervener: (written submissions only) D McLean; Equality and Human Rights Commission

16 October 2020

Introduction

[1] This is an appeal in terms of section 27D of the Court of Session Act 1988. The petitioner challenges the interlocutor of the Lord Ordinary dated 24 March 2020 which refused to grant him permission to proceed with his petition for judicial review.

Background

[2] The petitioner is a convicted prisoner who is in custody in HMP Shotts. He is serving a life sentence with a punishment part of 33 years. His paternal grandmother, M, was born in December 1920. She is frail and suffers from dementia. In recent times she has been cared for in a nursing home. It is common ground that she is no longer able to travel to visit the petitioner. Until about 2017 she went to Helensburgh to make use of video-conferencing facilities which the Scottish Prison Service ("SPS") made available there. The petitioner and M may also communicate by letter and telephone call, although it appears that she becomes upset during telephone calls because she is unable to see him.

[3] Rules 101 and 102 of the Prisons and Young Offenders Institutions (Scotland) Rules 2011 ("the Prison Rules") provide:

> "**101.— Escorted day absence**
>
> (1) In this rule, "escorted day absence" means a leave of absence granted to a prisoner, under escort from the prison, for a period not exceeding 1 day, to enable the prisoner—
>
> (a) to visit a near relative who it appears to the Governor is dangerously ill;
>
> (b) to attend the funeral of a near relative; or
>
> (c) to attend at any place for any other reason where the Governor is of the view there are exceptional circumstances.

(2) On the written application of a prisoner and subject to any direction made by the Scottish Ministers under paragraph (4), the Governor may grant escorted day absence to the prisoner if satisfied that the purpose of the application is genuine and appropriate.

(3) Where the Governor grants escorted day absence, the prisoner concerned must be escorted by an officer or officers throughout the period of absence from the prison.

(4) For the purposes of escorted day absence the Scottish Ministers may specify in a direction—

(a) the criteria about which the Governor must be satisfied before granting escorted day absence;

(b) the persons who are to be treated as near relatives of the prisoner; and

(c) the proceedings, services or ceremonies which a prisoner may attend for the purpose specified in paragraph (1)(b)."

[4] Articles 3 and 4 of the Scottish Prison Rules (Escorted Day Absence) Direction 2011 ("the Direction") provide:

"**Criteria applicable to escorted day absence**

3. The criteria about which the Governor must be satisfied before granting escorted day absence are –

(a) the Governor has received an application from a prisoner stating

(i) why escorted day absence is required;

(ii) in relation to escorted day absence for the purposes specified in rule 101(1)(a) or (b)the name of the near relative and name and location of the place at which escorted day absence is to be taken; and

(iii) in relation to escorted day absence for the purpose specified in rule 101(1)(c) the name and location of the place at which escorted absence is to be taken, and the exceptional circumstances which justify escorted day absence under rule 101(1)(c).

(b) in relation to escorted day absence for the purposes specified in rule 101(1)(a) the Governor has received confirmation that the near relative is dangerously ill which confirmation must be given –

(i) in writing by a registered medical practitioner;

(ii) where escorted day absence is required urgently, orally by a healthcare professional;

…

(d) the Governor has not been made aware of any objections from any victims of an offence or offences for which the prisoner is serving a sentence which make it inappropriate to grant escorted day absence; and

(e) the Governor has not been made aware of any objections from any persons residing in the community in which the prisoner will spend the escorted day absence which make it inappropriate to grant escorted day absence.

Persons to be treated as a near relative of the prisoner

4. For the purposes of escorted day absence the persons to be treated as near relative of the prisoner are –

…

(e) a grandparent …

…"

For the purposes of rule 102 of the Prison Rules and rule 3 of the Direction "Governor" includes the Deputy Governor (rule 3(1) of the Prison Rules and article 2 of the Direction).

[5] The petitioner was granted escorted day absence ("EDA") to visit M in February 2018 and August 2018. The February 2018 application explained that M was not fit to travel. In approving EDA the Deputy Governor observed:

> "Not dangerously ill so does not meet requirements of Rule 101(a) but I am approving exceptionally under 101(c) on this occasion only."

The visit in August 2018 was EDA under rule 101(1)(a). At that time M was in hospital. The application for that visit vouched that she was dangerously ill.

[6] In December 2018 the SPS issued Supplementary Guidance for RMT Decision Makers in relation to Progression and Community Access ("the Supplementary Guidance"). ("RMT" is an acronym for Risk Management Team.) Paragraph 7.5 states:

> "7.5 Community Access Activities
>
> …
>
> For illustrative purposes a table has been provided at Appendix 2 which outlines community access classifications and establishments where community access can be granted. For comprehensive details please refer to "The Prisons and Young Offenders Institutions (Scotland) Rules 2011" and Directions."

Appendix 2 provides in relation to rule 101:

> "…
>
> Where applications are genuine and appropriate offenders can:
>
> - Visit a dangerously ill near relative;
> - Attend the funeral of a near relative; and
> - Any other reason where the Governor is of the view that there are exceptional circumstances.
> - An exceptional circumstance is likely to be a "one off event" of personal significance to the prisoner i.e. linked to a significant change in family circumstances or a positive opportunity linked to the rehabilitation of the prisoner i.e. job or college interview."

[7] In early 2019 the petitioner initiated a further EDA application to visit M. The SPS wrote a *pro forma* letter to her GP on 27 February 2019 explaining the petitioner's request to visit M and asking whether she was dangerously ill. In the event that she was not, it asked whether she was well enough to travel to HMP Shotts, or to a prison nearer her home. M's GP replied indicating that she was dangerously ill. In commenting on the application, the petitioner's Hall Manager indicated that he:

> "… has presented with no discipline issues and complies with the regime. It is unclear from the GP information if there is an urgent need to arrange for Mr [S] to visit his grandmother."

The Intel Unit commented:

> "Recently Mr [S] has been linked to the introduction and dealing of illicit articles. His previous [EDA] passed without incident however."

The Unit Manager did not approve the visit:

> "There is no evidence to support that [M] is dangerously ill. And considering that a visit was facilitated in Aug 18 I can see no reason to support this application in terms of Rule 101."

On 20 May 2019 the Deputy Governor refused the application, giving the following reason:

> "No evidence to support this application in terms of exceptional circumstances."

[8] In July 2019 the petitioner made a further EDA application. A letter from M's GP stated:

> "I can confirm that [M] is a frail 98 year old nursing home resident with dementia. [M] is on our palliative care register."

A further letter from the GP indicated that M was not dangerously ill, but that she was not able to travel to HMP Shotts or to any prison nearer to her home. The Intel Unit commented on the application:

> "Current intelligence links Mr [S] with drug supply and violence …"

The Unit Manager withheld his approval of the visit:

> "No information recieved [*sic*] to meet criteria of Rule 101. Would not recommend that this visit goes ahead."

On 19 July 2019 the Deputy Governor refused to grant the petitioner's request, giving the following reason:

> "Grandmother too ill to travel is not the reason for an [EDA] being approved. Grandmother is frail and has dementia but not listed as dangerously ill. Does not meet criteria on exceptional circumstances under Rule 101(1)(c)."

[9] In January 2020 the petitioner applied for and was granted EDA to visit M because at that time she was dangerously ill. The EDA was in terms of rule 101(1)(a) and it was granted under rule 101(2).

The petition

[10] The petitioner seeks reduction of the decisions of 20 May 2019 and 18 July 2019. He also seeks declarator that the decisions were in breach of article 8, *et separatim* article 8 taken together with article 14, of ECHR; declarator that the scheme for EDA is lacking in certainty so far as it breaches the petitioner's Convention rights; reduction of the Supplementary Guidance "in whole or insofar as it limits contact between the Petitioner and his grandmother"; and declarator that the Supplementary Guidance is unlawful "in whole or insofar as it limits contact between the Petitioner and his grandmother". In relation to the Supplementary Guidance, the petitioner maintains that the respondents have failed to comply with the general public sector equality duty ("PSED") under section 149 of the Equality Act 2010 ("the 2010 Act"), and also with the specific public sector equality duties under regulation 5 of the Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012 ("the 2012 Regulations"). Section 149 provides:

> "**149 Public sector equality duty**
>
> (1) A public authority must, in the exercise of its functions, have due regard to the need to – (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act; (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.
>
> …
>
> (3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not

involves having due regard, in particular, to the need to – (a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic; (b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it; (c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.

(4) The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities.

…"

Regulation 5 states:

"**5. Duty to assess and review policies and practices**

(1) A listed authority must, where and to the extent necessary to fulfil the equality duty, assess the impact of applying a proposed new or revised policy or practice against the needs mentioned in section 149(1) of the Act.

(2) In making the assessment, a listed authority must consider relevant evidence relating to persons who share a relevant characteristic (including any received from those persons).

(3) A listed authority must, in developing a policy of practice, take account of the results of any assessment made by it under paragraph (1) in respect of that policy or practice.

(4) A listed authority must publish, within a reasonable period, the results of any assessment made by it under paragraph (1) in respect of a policy or practice that it decides to apply.

(5) A listed authority must make such arrangements as it considers appropriate to review and, where necessary, revise any policy or practice that it applies in the exercise of its functions to ensure that, in exercising those functions, it complies with the equality duty.

(6) For the purposes of this regulation, any consideration by a listed authority as to whether or not it is necessary to assess the impact of applying a proposed new or revised policy or practice under paragraph (1) is not to be treated as an assessment of its impact."

The refusal of permission

[11] The Lord Ordinary ordered an oral hearing on the question of permission to proceed. In fact, because of the intervention of the Covid 19 emergency, the hearing was conducted by way of written submissions. On 24 March 2020 the Lord Ordinary refused permission. He was not satisfied that the petition had a real prospect of success. In his view the Deputy Governor had been entitled to refuse both applications. He was not persuaded that the petitioner's rights under articles 8 and 14 were engaged. In any event the refusals were justified and proportionate. Further, they were spent. No purpose would be served by reducing them. The petitioner could apply at any time for EDA, as he had done successfully in January 2020. The Lord Ordinary rejected the petitioner's criticisms of the Supplementary Guidance. He reasoned that the petition was not an appropriate vehicle for raising what he saw as being essentially theoretical questions under the Equality Act 2010. In his view those questions had no practical relevance to the case.

The intervention

[12] The Commission for Equality and Human Rights ("the Commission") was granted leave to intervene in the appeal by way of written submissions. It explained that the proceedings raise important issues about (i) the effect of the PSED in policy formulation by public bodies; (ii) the proper approach to prisoners' Convention rights; and (iii) the application of the test for permission in section 27B of the Court of Session Act 1988.

[13] The Commission submitted that the respondents are a public body to whom the general and specific public sector equality duties apply (2010 Act, schedule 19; 2012 Regulations, schedule 1). They must aim (i) to eliminate discrimination and any other conduct prohibited by the 2010 Act, and (ii) to advance equality of opportunity between

persons who share a relevant characteristic and persons who do not share it (2010 Act, section 149(1); *R (on the application of Hurley and Moore)* v *Secretary of State for Business Innovation and Skills* [2012] HRLR 13 ("*Hurley and Moore*"); *Bracking & Ors* v *Secretary of State for Work and Pensions* [2013] EWCA Civ 1345). They are obliged to assess the impact of any policy (such as the policies in the Supplementary Guidance) against the needs mentioned in section 149 of the 2010 Act; and in developing any policy they must consider evidence relating to persons who share relevant protected characteristics (2012 Regulations, reg 5). Disability is a relevant protected characteristic (section 149(7)). It was notable that the respondents had not produced an Equality Impact Assessment ("EIA"). The document lodged was a mere summary. It did not meet the requirements for an EIA under reg 5 of the 2012 Regulations. In view of the importance of the role of the general and specific public sector equality duties when formulating the Supplementary Guidance, and the potentially wider circumstances in which that document might continue to apply, it had not been sufficient for the Lord Ordinary to say (i) that the petition was "not an appropriate vehicle for raising what are essentially theoretical questions under [the 2010 Act]," and that they "have no practical relevance in the circumstances of the present case."; and (ii) that the petition concerned "two spent and historic decisions that are no longer of any practical relevance."

[14] The PSED is designed to alter behaviour in policy development and decision-making, rather than to enforce particular rules or achieve particular results. It aims "to bring equality issues into the mainstream of policy consideration" (*Hurley and Moore*, paragraph 70 per Elias LJ) with a view to achieving substantive and not merely formal equality. It does so by creating a continuing obligation on public bodies, in the exercise of their "functions", to pay "due regard" to equality issues. The general principles were

distilled by Lord Neuberger of Abbotsbury PSC in *Hotak* v *London Borough Council* [2016] AC 811 at paragraphs 72 to 80, quoted in part by the First Division at paragraph 83 of the Opinion of the Court in *Nyamayaro* v *Secretary of State for the Home Department* 2019 SC 537. The term "function" has a wide meaning. It includes not only formulation of policy but also decision-making in individual cases (*Pieretti* v *London Borough of Enfield* [2011] PTSR 565, per Wilson LJ at paragraph 26). The PSED applies to an extremely wide range of functions. The requirement to pay "due regard" is a requirement to pay "the regard as is appropriate in all the circumstances" (*Baker* v *Secretary of State for Communities and Local Government* [2009] PTSR 809, per Dyson LJ at paragraph 31). The PSED can have the effect that a power or a discretion ought to be exercised in a particular way. A decision-maker must be aware of the duty to have due regard to the relevant matters and the duty must be exercised in substance. There should be a proper and conscious focus on the statutory criteria. A decision-maker must assess the impact and the ways in which the duty may be fulfilled before adoption of a proposed policy. The purpose of the equality duties set out in the 2012 Regulations is to enable the better performance of the PSED. The PSED is of practical relevance in the present case. It is not merely a "theoretical" consideration. The respondents are, through the SPS, responsible for the management of prisons in Scotland. SPS's functions have a direct impact on numerous people, including prisoners and their relatives, all of whom are affected by policies such as those contained in the Supplementary Guidance. Formulation of such policies will engage the PSED to its fullest extent. In addition, decisions in relation to individual applications for EDA engage the PSED. In the case of the respondents, the specific duties are also engaged. In that regard, the document relied on by the respondents as being an EIA is in fact merely a publication document intended to summarise the decisions and actions taken in the EIA. The summary document does not meet the

requirements for an EIA under reg 5 of the 2012 Regulations, and it does not evidence due regard to the PSED. M is disabled. However, the circumstances in which the PSED may be relevant are much wider than the petitioner's own circumstances. In fulfilment of the PSED the respondents were obliged to have due regard to the matters set out in section 149 of the 2010 Act.

[15] The refusal of EDA to visit an ailing relative constitutes an interference with a prisoner's right to respect for family life (*Lind* v *Russia* (2010) 50 EHRR 5). The petitioner's article 8 rights *et separatim* his article 8 rights taken together with his article 14 rights were engaged in respect of the refusals. The questions were whether the interference had a lawful basis, pursued a legitimate aim, and was necessary in a democratic society.

Counsel's submissions

[16] Mr Leighton submitted that permission to proceed ought to have been granted. There was a real prospect of success. That was a modest hurdle. While he adhered to all of the grounds of appeal and to all of the arguments in his note of argument, he developed the following principal submissions. Contrary to the Lord Ordinary's conclusion, the petitioner's EDA applications engaged his article 8, *et separatim* his article 8 taken with his article 14, Convention rights. The petitioner's article 8 right to family life (failing which his right to private life) was engaged (*Znamenskaya* v *Russia* (2007) 44 EHRR 15, paragraph 27). Article 14 has a broad ambit (*Steinfeld* v *Secretary of State for International Development* 2020 AC 1, paragraph 18). It applies to all rights falling within the general scope of any Convention article (*Konstantin Markin* v *Russia (GC)* [2012] EHRR 514, paragraph 124). Refusal of the applications interfered with the petitioner's Convention rights. The interference had not been justified and proportionate. The root of the problem was that the

Supplementary Guidance directed that EDA granted on the ground of exceptional circumstances should involve one-off events. The difficulty with that was that where a near relative was disabled and unable to visit prison it was likely to be a continuing scenario. A one-off approach precluded a proper proportionality assessment (cf *O'Neill* v *Scottish Ministers* 2015 SLT 820). In that respect the policy in the Supplementary Guidance was unlawful (cf *T* v *Greater Manchester Police* 2015 AC 49, paragraph 114) or, at the very least, it was strongly arguable that it was unlawful. In so far as the one-off policy prevented the petitioner from obtaining rule 101(1)(c) EDA it appeared to have been formulated without due regard to the general and specific public sector equality duties. As a result of his grandmother's disability the petitioner suffered indirect discrimination by association (cf *CHEZ Razpredelenie Bulgaria AD* v *Komisia za zashtita ot diskriminatsia* [2016] 1 CMLR 14, in particular at AG 20). The non-disabled relatives of fellow prisoners could visit them in prison, but the petitioner could not visit his grandmother. That also indicated that this aspect of the Supplementary Guidance was unlawful. The petition raised matters which were of ongoing practical relevance to the petitioner and to other prisoners who have disabled relatives who are unable to visit prison. The petitioner would be likely to require to seek rule 101(1)(c) EDA in the future.

[17] Mr Byrne indicated that, in response to the Commission's criticism, the respondents had now produced the full EIA which had been carried out by them. The Supplementary Guidance did not contain an illegal policy. The reference to one-off events was no more than guidance. It was not a free-standing rule or policy. Properly understood it did not limit rule 101(1)(c) to one-off events. There was no rule or policy to that effect. Mr Byrne accepted that there was no discussion in the EIA or elsewhere of how disabled relatives who were unable to visit prison fitted in to the scheme for maintaining contact between prisoners

and their near relatives. However, the policy had had due regard to the promotion of equality between different groups. Application could be made under rules 101(1)(c) and 101(2) to establish that there were exceptional circumstances which made an EDA appropriate. The refusal of the applications in May and July 2019 had been justified by the needs of security and good order (*O'Neill* v *Scottish Ministers*, *supra*). The petitioner's other applications for EDA had been granted. That showed that the system worked satisfactorily in practice. The Deputy Governor had misspoken in January 2018 when he said that rule 101(1)(c) EDA ought to be a one-off. In each case it was for the petitioner to make out a case of exceptional circumstances. Rule 101 and the Supplementary Guidance were capable of being operated in accordance with articles 8 and 14. The respondents had had due regard to the general and specific public sector equality duties in formulating rule 101 and the Supplementary Guidance. There was no foundation for the claim of indirect discrimination. The petitioner's "other status" as a person affected by M's disability was so far removed from the core characteristics protected by the Convention that little by way of justification for the interference was required (*R (RJM)* v *Secretary of State for Work and Pensions* [2009] 1 AC 311, paragraph 5). The requirement to restrict a convicted prisoner's absence from the security of the prison estate to those circumstances identified in rule 101 was sufficient justification. Covid 19 had now resulted in the introduction of new measures. On 15 June 2020 the Prisons and Young Offenders Institutions (Coronavirus) (Scotland) Amendment Rules 2020 came into force. The amended Prison Rules permit virtual visits. They authorise personal communication devices and in-cell telephony to enable prisoners to maintain contact with family and friends during times when actual physical visits to a prison are not possible. Prior to this change a relative who wished to video-conference a prisoner had to go to an SPS nominated location. Since the change travel to such locations was no longer

necessary - a relative could use their own personal device to access a video-conference. It was open to the petitioner to make a further application for EDA at any time. In those circumstances judicial review would be of no practical benefit to him (cf *King* v *East Ayrshire Council* 1998 SC 182, at page 194). The amended rules would remain in place after the lifting of Covid restrictions.

Decision and reasons

[18] This court requires simply to consider whether to grant permission for the application to proceed (section 27D(3) of the 1988 Act; *PA* v *Secretary of State for the Home Department* [2020] CSIH 34, 2020 SLT 889, paragraph [33]). It may do so "only if it is satisfied that … the application has a real prospect of success" (section 27B(2)). In *Wightman* v *Advocate General* 2018 SC 388 Lord President Carloway discussed what that involved (at paragraph [9]):

> "The new test is certainly intended to sift out unmeritorious cases, but it is not to be interpreted as creating an unsurmountable barrier which would prevent what might appear to be a weak case from being fully argued in due course. Of course the test must eliminate the fanciful, but it is dropping the bar too low to say that every ground of review which is not fanciful passes the test … The applicant has to demonstrate a real prospect, which is undoubtedly less than probable success, but the prospect must be real; it must have substance. Arguability or statability, which might be seen as interchangeable terms, is not enough …."

The question is one that depends to a significant degree on impression informed by experience, and it is open to the court to form a different view from the Lord Ordinary (*PA* v *Secretary of State for the Home Department, supra*, paragraph [33]).

[19] We are conscious that we have had advantages which the Lord Ordinary did not have. We have had the benefit of oral submissions and of fuller written submissions (including those lodged by the Commission). However, in our view this is not the time for

detailed analysis of the competing arguments. It suffices to say that we are satisfied that the petition has enough substance to justify the conclusion that there is a real prospect of success. There are significant difficulties which the petitioner will have to overcome if he is to succeed, but our judgment is that it would be going too far too fast to hold at this stage that those difficulties are insurmountable. Likewise, in view of the range of remedies which the petitioner seeks, we think that it would be precipitate to say that success would have no practical consequences for him (or for other prisoners who may be affected by similar circumstances). We have in mind, in particular, that the petitioner is likely to make future EDA applications, and that the Supplementary Guidance is likely to play a part in the determination of such applications.

Disposal

[20] The court will allow the appeal, recall the interlocutor of the Lord Ordinary dated 24 March 2020, and grant permission to proceed. All questions of expenses are reserved meantime.