
**OUTER HOUSE, COURT OF SESSION**

**[2021] CSOH 57**

**P1059/20**

OPINION OF LADY CARMICHAEL

In the petition of

HARPREET SINGH

Petitioner

for

Judicial Review

**Petitioner: Leighton; Drummond Miller LLP**
**Respondents: Byrne; SGLD**

1 June 2021

**Introduction**

[1] The petitioner is a national of India. On 3 August 2016, he was sentenced to 7 years and 6 months in prison, backdated to 28 June 2016, for a contravention of section 28 of the Sexual Offences (Scotland) Act 2009, discounted from 10 years, the maximum sentence for that offence. The victim of the offence was a vulnerable young person, and the offending was of a very serious character. He is challenging a decision of the respondents, taken on 17 September 2020, not to release him on licence. The respondents are the Scottish Ministers. The petition was intimated to the Advocate General for Scotland, but he did not participate in the proceedings.

[2] There is no dispute that the petitioner is a long-term prisoner who is liable for removal from the UK in terms of section 9 of the Prisoners and Criminal Proceedings (Scotland) Act 1993 ("the 1993 Act"). That section makes provision in relation to long-term prisoners who are liable to removal from the UK.

[3] Section 1(3) of the 1993 Act, as it applied at the time the respondents made the decision, provided:

> "(3) After a long-term prisoner has served one-half of his sentence the Secretary of State
>
> (a) shall, except in the case mentioned in paragraph (b) below; or
>
> (b) may, in the case of a prisoner who is liable to removal from the UK (within the meaning of section 9 of this Act),
>
> if recommended to do so by the Parole Board under this section, release him on licence."

Section 9(1), however, read:

> "(1) In relation to a long-term prisoner who is liable to removal from the UK, section 1(3) of this Act shall have effect as if the words ', if recommended to do so by the Parole Board,' were omitted."

The effect of these provisions is that once a prisoner such as the petitioner has served half of his sentence, the respondents may release him on licence.

[4] Section 9(1) was repealed with effect from 20 October 2020 by section 54(3) of the Management of Offenders (Scotland) Act 2019 ("the 2019 Act"). The effect of that is that in relation to decisions taken on or after that date the respondents may release a prisoner who is liable to removal from the UK if recommended to do so by the Parole Board for Scotland.

***The respondents' decision***

[5] The Parole Board for Scotland ("the Board") considered the petitioner's circumstances. On 22 August 2020 the Board declined to recommend his release. It was not satisfied that such risk as the petitioner posed could be managed safely in the community. It

rejected the petitioner's submissions, which were to the effect that the Board should concern itself only with risk that he might pose within the UK. On 25 August 2020 the respondents wrote to him, saying:

> "Scottish Ministers now require to decide whether or not you should be released on parole licence. In reaching a decision the Scottish Ministers will consider the information that was available to the Parole Board (including any representations made by you) and the reasons given by the Parole Board for their recommendation. The Scottish Ministers will only direct your release if they are satisfied that you would not pose an unacceptable risk to the public. In making their decision the Scottish Ministers will take into account the following factors:
>
> (i) the nature and circumstances of your offence and any other offence for which you have been convicted or found guilty by a court;
> (ii) your conduct in custody since the date of your current sentence or sentences;
> (iii) the likelihood of you committing any offence or causing harm to any person if you were to be released on licence; and
> (iv) what you intend to do if you were to be released on licence and the likelihood of you fulfilling these intentions"

[6] The respondents invited the petitioner to make representations. His solicitors submitted representations, which included the following:

> "As Scottish Ministers are aware, Mr Singh is a foreign national prisoner with a live Deportation Order. It is our submission that Scottish Ministers should take a nationalist view with regard to risk, rather than a globalist view. It will be noted that the Parole Board for Scotland took a globalist view, but this does not bind the Scottish Ministers. In our submission, Scottish Ministers should take a nationalist view, meaning that Mr Singh could be released from prison and deported immediately to India. It would seem to us, in all of the circumstances, that it is unlikely that Mr Singh would not be removed from the UK. It is also unlikely that Mr Singh could find himself in a position where he is released on immigration bail. Mr Singh has indicated that he would voluntarily leave the UK and will, if necessary, ask family and friends to provide him with funds to purchase a ticket to India.
>
> We hope that Scottish Ministers have had sight of the representations which we submitted to the Parole Board for Scotland regarding Mr Singh's release. You will see that we have referred to the English legislation and the manner in which the UK government deals with such issues. It would seem to us that there is no benefit to anyone to have Mr Singh remain in custody in circumstances where he should in fact be deported to India. We rely upon the submissions we made to the Parole Board for Scotland on 23 April 2020. We enclose a copy of those submissions, which no doubt

> the Scottish Ministers have read within the dossier, together with the associated enclosures.
>
> In the event that Mr Singh's release is not granted, we will require a reasoned decision to enable us to consider an action of judicial review."

The terms "nationalist" and "globalist" views were intended to refer, respectively, to approaches to risk (a) confined to the risk that the petitioner would pose if at liberty in the UK, and (b) considering the risk that he would pose if at liberty in any location. The petitioner's position was that because he would be deported, he would not be in the UK to pose any risk there.

[7] On 17 September 2020 the respondents declined to release the petitioner. The letter intimating the decision reads:

> "After careful consideration, Scottish Ministers have decided that you should not be released on parole licence as your risk is not considered to be manageable in the community at this time. Your suitability for release on Parole will be reviewed again in August 2021."

**The position in England and Wales**

[8] The petitioner avers:

> "there is a statutory scheme for the removal of FNPs subject to the law of England and Wales. The Criminal Justice Act 2003 makes provision for the release for the purpose of deportation alone in relation to ordinary determinate sentence prisoners and the Legal Aid, Sentencing and Punishment of Offenders Act 2012 makes provision for the release for deportation of indeterminate sentence prisoners at the expiry of their tariff (the expiry of the punishment part of their sentence). Those provisions are given greater specification by various prison service instructions (PSI 18/2012, PSI 52/2011, PSI 59/2011 and PSI 65/2011). Essentially prisoners are deported directly from prison when they first become eligible for release, subject to certain exceptions. If the petitioner were a comparable prisoner in England and Wales he would have been deported (and so released from custody) at or about the half-way point of his sentence i.e. 28 March 2020."

[9] The petitioner did not refer at the substantive hearing to the relevant provisions of the Criminal Justice Act 2003. Section 260 deals with early removal from prison of prisoners

liable to removal from the UK and who are serving determinate sentences. Section 32A of the Crime (Sentences) Act 1997 makes provision in relation to those serving indeterminate sentences. The language used in each case is "removal from prison" rather than release. Although the petitioner referred in his pleadings to certain prison service instructions, he did not produce them. It is not necessary for the disposal of this petition that I consider their terms. The petitioner's challenge does not depend on their precise terms.

**Submissions for the petitioner**

***Construction of section 9***

[10] The petitioner's case is that section 9 of the 1993 Act provides a discretion which would entitle the Scottish Ministers to release the petitioner after serving half his sentence, so that he could be deported. He contends that in failing to exercise their discretion in that way, they have acted unlawfully.

[11] Counsel submitted that the fact that there was legislation which permitted the Scottish Ministers to act other than in accordance with the recommendation of the Parole Board necessarily meant that the Scottish Ministers required to take an approach to risk different from that of the Parole Board. They were empowered and indeed required to release a prisoner liable to deportation who posed a risk at a "global" level, because that person would not remain in the UK. In order to do so, they required to consider risk only in relation to the UK. To take any other view would be to render the statutory provision otiose and of no effect.

[12] He submitted that this was consistent with the approach to foreign national prisoners in *Yan* v *Scottish Ministers* [2020] CSOH 104, paragraphs 18 and 19. In that case the respondents had submitted that they were entitled to have regard to the fact that a prisoner

was liable to deportation in making rules precluding such a prisoner from temporary release, because temporary release was focused on the reintegration of offenders within the UK, and it was neither useful nor desirable to introduce deportees to the community in the UK. Foreign national prisoners were hampered in demonstrating that they no longer posed an unacceptable risk, because they were not eligible for temporary release. That supported the proposition that they ought to benefit from early release for the purpose of deportation, without regard to the risk they might pose outside the UK.

*Departure from published policy*

[13] The UK Government had made statements of policy to the effect that foreign national prisoners who have no right to remain in the UK should be removed at the earliest opportunity, and that the UK Government "aimed" to deport all foreign national prisoners at the earliest opportunity. The petitioner referred to answers to Parliamentary questions on 23 March 2015 and 6 June 2016.

[14] He submitted that it did not matter that the statements of policy were not made by the respondents, rather, "different parts of government [had] to work together to achieve a particular UK-wide result". The "part of government" responsible for the "release" of prisoners, whether within the respondents or HM Government, had to work with the part responsible for deportation. He suggested that the fact that the debate on 6 June 2016 included a question from an MP serving a Scottish constituency indicated that the policy extended throughout the UK.

[15] Alternatively, the respondents had been silent in the face of the stated policy of the UK Government, and therefore it must be taken to be their policy as well.

[16] The Scottish Ministers were frustrating the policy of the UK Government in a reserved matter. The repeal of section 9(1) by the Scottish Parliament was contrary to that policy.

***Legitimate expectation***

[17] The petitioner made much the same points, but presented as a breach of legitimate expectation. There had been a sufficiently clear and unambiguous promise or undertaking to give rise to a legitimate expectation: *Re Finucane's Application for Judicial Review* [2019] HRLR 7, paragraph 64. There was a duty on the respondents to speak out against the policy if they did not intend to be bound by it: *Ted Baker* v *AXA* [2017] EWCA Civ 4097, paragraphs 72-76; 82.

***Reasons***

[18] The respondents had failed to give adequate reasons for their decision. Either the discretion was not exercised properly (in the way the petitioner said it should have been) or it had been but the reasons did not show that and were deficient.

***Unlawful exercise of discretion/irrationality***

[19] The respondents had failed to take into account that the petitioner was to be deported. They failed to take into account the policy of the UK Government. They failed to take into account the desirability of deporting the petitioner, which "increase[d] the protection of the British public", and would result in savings to the public purse. The respondents had failed to take into account these relevant considerations. For the same reasons, the decision was irrational. The test of irrationality was flexible: *R (Keyu)* v

*Secretary of State for Foreign and Commonwealth Affairs* [2016] AC 1355, paragraph 273, and in the present context the court should scrutinise closely the rationality of the decision.

***Lack of legal certainty***

[20] The scheme for the release of prisoners in Scotland went further than required by Article 5 ECHR. The guarantees of that provision nevertheless required to be respected in those procedures: *Stollenwerk* v *Germany* [2017] ECHR 767, paragraph 36. It would be rational for the petitioner to be deported "in line with the approach in England and Wales", but the respondents had failed to take into account that he was liable to be deported. The petitioner was left in a state of uncertainty as to whether it was possible for him to be released for the purposes of deportation, and "what he would require to show in order to be released for deportation". The law lacked the qualities of accessibility, certainty and foreseeability necessary for it to be "in accordance with the law".

**Submissions for respondents**

[21] The respondents submitted that the discretion conferred by section 9 of the 1993 Act was not fettered in any way by the statutory provision. That meant that it was exercisable by them under reference to considerations of their choosing, subject to the requirement that those considerations not be *Wednesbury* unreasonable: *In re Findlay* [1985] AC 318 at 333-4; *R (Hurst)* v *Coroner for Northern District London* [2007] 2 AC 189 at paragraphs 57-58; 79. There was no challenge to the conclusion that the petitioner presented a risk. When considerations such as security or risk were engaged, they were matters within the expertise of the respondents, and the court should exercise restraint in the context of judicial review: *R* v *Ministry of Defence Ex p Smith* [1996] QB 517, at 556A-C. The petitioners' representations

had not identified why the purported benefits of deportation would outweigh the risk posed to children. The petitioner did not establish convincingly that he would immediately be deported on release. The respondents were entitled to choose not to establish a system for the early release of foreign national prisoners.

[22] The reasons were cogent and clear to the informed reader. There was no duty to address every argument that had been or could be made, and the petitioner had in any event not been prejudiced by any failure to give reasons: *English Emery Reimbold and Strick Ltd* [2002] 1 WLR 2409; *South Bucks District Council* v *Porter (No 2)* [2004] 1 WLR 1953, paragraph 36; *Uprichard* v *Scottish Ministers* [2011] CSIH 59, paragraph 26. Although the reasons given were brief, they required to be read in the context of the reasons given by the Parole Board for Scotland.

[23] The petitioner had no legitimate expectation that he would be released early for the purposes of deportation. The discretion to release him was vested exclusively in the Scottish Ministers, and could not be fettered by any pronouncement by a minister of HM Government. The statements on which he relied were not in any event unqualified promises.

[24] It was rational for the respondents to take into account the risk that the petitioner would pose to children, and not to confine that consideration to risk to children in Scotland or the UK. The public interest in deportation would be served in due course; it was not defeated. The question was whether he should be released from a secure environment and released into the community while he presented a risk to children. The respondents' decision served the aims of imprisonment (punishment, deterrence, rehabilitation) and deportation (immigration control and expression of society's revulsion). The petitioner's

representations had in any event not established that he would immediately be deported so that he would constitute no risk to the community in UK.

[25] So far as legal certainty was concerned, the petitioner could have been left in no doubt as to the considerations that the respondents would take into account in making their decision, because they told him what those considerations were in their letter of 25 August 2020.

**Decision**

***Statutory construction***

[26] Section 9(1) as it applied at the time of the challenged decision permitted the respondents to release a prisoner who was liable to be removed from the UK in a case where the Board did not recommend his release. The respondents were entitled to take into account considerations other than those that the Board took into account. Contrary to the petitioner's submission, it does not follow that the respondents were obliged to do so. There is nothing in the language of the provision to suggest that they were. The discretion is not fettered or qualified by the words of the subsection.

***Departure from policy/legitimate expectation***

[27] The argument based on statements made by ministers of the UK Government, whether framed as a failure to adhere to public policy, or as a breach of legitimate expectation, is misconceived. The power to release prisoners is vested in the respondents. The respondents have not made any statement of policy about early release of prisoners for the purposes of deportation, or about the desirability of achieving the early deportation of foreign national prisoners. They have announced no policy on the matter, and have made

no promises, representations or undertakings in relation to the matter. For any case of legitimate expectation, a clear and unambiguous promise is required: *Finucane*, paragraphs 56 and following, and authorities cited there.

[28] The petitioner submitted that the respondents required to "speak out" in the face of the statements of the UK Government, drawing an analogy with dicta regarding estoppel by acquiescence arising out of a failure to speak out when under a duty to do so: *Ted Baker* (a claim against insurers for business interruption losses). There was no requirement on the respondents to speak out in this way. Immigration is reserved to the UK Government. Deportation is a matter for the Secretary of State for the Home Department. It is a matter in relation to which the respondents have no power. In any event, the statements on which the petitioner relied, taken at their highest, are that foreign national prisoners should be removed at the earliest opportunity. In the case of a prisoner for whose release the respondents are responsible, the earliest opportunity will be the date when they release him.

***Reasons***

[29] The petitioner alleges that the reasons given by the respondents were insufficient in law. The petitioner had already received the reasons given by the Board. The respondents told the petitioner that they would have regard to the information before the Board, and the reasons given by the Board. They told the petitioner that they would only direct his release if they were satisfied that he would not pose an unacceptable risk to the public, and listed the matters they would take into account. He made representations. The respondents' decision letter stated that they were not releasing him because his risk was not considered to be manageable in the community. It is therefore clear to the informed reader why the

respondents declined to release the petitioner, and the matters that they took into account in reaching their decision.

**Irrationality/failure to take into account material considerations**

[30] The challenges based on irrationality and on a failure to take into account relevant considerations are founded on the proposition that the respondents should have given weight to the proposition that deportation would increase the protection of the British public, and that it would save money. There is no obligation on the respondents to adopt a system for the early release of foreign national prisoners. They are entitled to choose not to have a system of the sort for which provision is made in the Criminal Justice Act 2003. There is nothing obviously irrational in choosing to determine release on the basis of whether the risk posed by an offender is manageable in the community, or by considering that risk in relation to any community in which the offender comes to live at the point of his release. The desirability of deportation at the earliest possible point of a sentence, regardless of risk outside the UK, is a consideration that can be properly taken into account. It is not, however one that the respondents required to address, and it is not one to which they would have been obliged to give effect in preference to their own selected criterion for release: *CREEDNZ Inc* v *Governor General* [1981] 1 NZLR 172, at 183, cited with approval in *Hurst.*

[31] The petitioner made a further submission in relation to the non-availability of temporary release. The petitioner was caught in a double bind. He could not progress in the prison system. He was not being deported at the earliest opportunity, and his release was determined on the basis of the manageability of his risk in the community. The Lord Ordinary in *Yan* found it unnecessary to express a view on whether there was the potential for tension between a policy which disqualified long-term prisoners who are

subject to removal from the UK from obtaining temporary release, and the provisions of the 2019 Act, which vested the effective decision-making power about release in the Board rather than the respondents: paragraph 38. The point the petitioner in this case sought to make was that by aligning itself with the Board's assessment of risk, the respondents produced just such a tension.

[32] It is legitimate to discriminate between prisoners liable to be deported and those who are not in relation to the allocation of resources. Priority may be given to the latter, as they will benefit most from temporary release because of the opportunities it affords to build links and access education and employment opportunities in the community into which they will be released in the UK: *Yan*; *R (Akbar)* v *Secretary of State for Justice* [2020] HRLR 3. In *Akbar*, which was concerned with a life prisoner, the Divisional Court drew a distinction between prisoners who would resettle in a UK community and foreign national prisoners who would be removed "on tariff expiry": paragraph 117(ix). It does not follow, however, that the justification for allocating resources in this way is necessarily invalidated where deportation does not take place at the very earliest possible point during a sentence. I do not accept, as I understood the petitioner to be submitting, that a decision not to order release at the earliest possible date is rendered unlawful because of the decisions of the respondents about the allocation of resources for temporary release.

[33] I do not require to determine whether there would be a tension between a system which denied prisoners liable to deportation any opportunity to take steps to mitigate the risks they pose, and either a policy or a statutory provision tying the release of such prisoners to a criterion based on the manageability or otherwise of their risk in the community. The petitioner relied on the non-availability to him of temporary release, and the justification for that on which the respondents relied in *Yan*.

[34] I note that before the Board (and therefore also before the respondents) was a communication from the Home Office, dated 6 April and in the following terms:

> "Currently we are unable to provide a timescale regarding Mr Singh's removal from the UK. Should the decision be made to release him from his custodial sentence we would initially seek to detain him under immigration powers with a view to removing him from the UK. Should we be unable to remove Mr Singh within a reasonable timescale then consideration would have to be given to release him from Immigration detention.
>
> Any decision to release Mr Singh on licence lies solely with the relevant Scottish authorities."

Had the respondents been minded to disregard the risk that the petitioner posed elsewhere than in the UK, they would not in any event have been certain on the basis of this information that he would never be at liberty in the UK while on licence.

[35] The petitioner has provided an affidavit for the purpose of the proceedings for judicial review. In it he makes representations about what would happen, and what he would do voluntarily, if he were released. That affidavit was not before the respondents, and it is irrelevant to the lawfulness of their decision.

***Legal certainty***

[36] There was no want of certainty or clarity as to the criteria which the respondents were to impose in reaching their decision. They communicated them to the petitioner in correspondence, and did not depart from them in their decision.

**Disposal**

[37] I therefore sustain the first plea in law for the respondents and refuse the petition.