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[Categories](#)

[Archive](#)



BS v Scottish Ministers [2024] CSOH 47

2 May 2024

Court of Session (Outer House)

Lady Poole

The right to liberty under Article 5 ECHR protects individuals from unlawful or arbitrary detention, and as part of the case law on that right both European and domestic authorities have established that if a prisoner is given a condition which must be satisfied before being released, but that condition is impossible or disproportionately difficult to access or satisfy in practice, the state will be taken to have effectively arbitrarily detained them, constituting a deprivation of liberty. The petitioner prisoner in this case argued that he was effectively prevented from being released from prison due to not being able to access a certain rehabilitation course.

The prisoner served a significant sentence for sexual and violent offending. The fixed punishment part of his sentence ran to 2022; after that point, he could be released if the Parole Board considered him to be a sufficiently low risk to the public. During his time in prison, he had completed lots of courses and training, and had only one minor offence on his record (of smuggling a SIM card). Despite this, the Parole Board, assessing the suitability of his release upon the completion of the fixed part of his sentence, refused to release him because he had not completed the required rehabilitation course. The prisoner had, however, applied for and had been on the waiting list for, that course for a number of years. According to the prison policy, he

ought to have had access to the course by 2018; the defendant's estimate is that he would realistically not be able to access the course until 2025. The petitioner argued that the prison had essentially imposed a condition of release upon him which he could not satisfy for a number of years.

The Court confirmed that the threshold required to find a breach of Article 5 is a high one; making access to rehabilitative courses or measures conditional or non-absolute would not suffice. Prisoners should expect to encounter some delays and waiting lists as part of the system and do not have an absolute right to rehabilitation courses.

However, in this case, the Parole Board took so narrow a view of the conditions which must be satisfied to prove suitability for release, that the inability to access the course within a reasonable time effectively denied the petitioner any way of satisfying the conditions necessary for his release, for reasons outside of his control. Whilst recognising the scarcity of resources available to the prison, and the understandable delays which occurred during the Covid-19 pandemic, the Court nevertheless concluded that the prisoner's rights under Article 5 had been breached.

The Court did not award any damages for the breach at this stage, but ordered the authorities to remedy the breach. It suggested that if nothing is done, and the prisoner remains in the same situation, it may be minded to award damages in future.

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

para 46

[Link to Judgment](#)