OUTER HOUSE, COURT OF SESSION

[2019] CSOH 95

P1306/18

OPINION OF LORD ARMSTRONG

In the petition

WILLIAM FREDERICK IAN BEGGS

Petitioner

against

THE SCOTTISH MINISTERS

Respondents

Petitioner: Crabb; Drummond Miller LLP
Respondents: Byrne; Scottish Government Legal Directorate

26 November 2019

Introduction

[1] The petitioner is a long-term prisoner, serving a life sentence, who in the past, with varying degrees of success, has brought legal proceedings bearing on the issue of the manner in which his correspondence is dealt with by the Scottish Prison Service ("SPS"). The respondents are the Scottish Ministers, having responsibility for SPS, which in turn is responsible for the petitioner's detention.

[2] By this petition, the petitioner seeks declarator that certain acts of SPS were incompatible with his rights as conferred by Article 8 the European Convention on Human Rights ("ECHR"), unlawful in terms of section 6 of the Human Rights Act 1988, and beyond

the powers of the respondents in terms of section 57(2) of the Scotland Act 1998; and damages in the sum of £5,000 as just satisfaction in terms of section 6 of the Human Rights Act and section 100(3) of the Scotland Act.

The legal framework

[3] Article 8 ECHR provides as follows:

> "1. Everyone has the right to respect for his ... correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

[4] Prison correspondence and other communications are regulated by Part 8 of the Prison and Young Offenders Institutions (Scotland) Rules 2011 ("the 2011 Rules"), which provide, *inter alia* as follows:

> "55. **Restrictions on general correspondence to and from the prisoner**
>
> (1) This rule applies to any letter or package, other than one to which rule 56 or 57 applies, which a prisoner wishes to send or which is addressed to a prisoner.
>
> (2) An officer or employee may open a letter or package to which this rule applies and remove the contents of that letter or package
>
> (3) Where an officer or employee proposes to open a letter or package to which this rule applies, or remove the contents of that letter or package, the officer or employee may ask the prisoner to be present when the letter or package is opened or its contents removed.
>
> (4) The contents of a letter or package to which this rule applies may only be read by an officer or employee –
>
> (a) in the circumstances specified in a direction by the Scottish Ministers made under paragraph (7); and

(b) in accordance with any conditions specified in a direction by the Scottish Ministers made under paragraph (7).

(5) Subject to paragraph (6), where a letter of package to which this rule applies is, or is found to contain anything, in contravention of the restrictions specified in a direction by the Scottish Ministers made under paragraph (7), an officer or employee may –

(a) prevent the letter or package, or the contents of the letter or package, from being sent or from being received by the prisoner; and

(b) deal with the letter or package, or the contents of the letter or package, in accordance with such arrangements as may be specified in a direction by the Scottish Ministers made under paragraph (7).

(6) Where a letter of package to which this rule applies is found to contain a prohibited article or any unauthorised property, the Governor must deal with the item in terms of rule 104.

(7) The Scottish Ministers may specify in a direction any of the following matters in relation to letters and packages to which this rule applies –

(a) the circumstances in which such a letter or package may be read;

(b) the conditions under which a letter or package may be read;

(c) the officers or employees who may be authorised to read a letter of package;

(d) the restrictions as to the number of letters or packages which a prisoner may send;

(e) the restrictions as to the amount of money (whether in the form of cash, cheques, bankers' drafts or otherwise) which a prisoner may send or receive in a letter of package;

(f) the times and frequency at which a prisoner may send or receive money (whether in the form of cash, cheques, bankers' drafts or otherwise) in a letter or package;

(g) the persons, authorities and organisations to whom a prisoner is prohibited from sending a letter or package;

(h) the restrictions or conditions which apply where a prisoner wishes to send a letter or package to a person, authority or organisation with whom the prisoner is not prohibited from corresponding;

(i) the general nature and description of letters or packages which a prisoner is not permitted to send or receive; and

(j) the arrangements in accordance with which a letter or package or the contents of a letter or package, may be dealt under paragraph (5)(b).

56 . **Opening and reading of confidential correspondence**

(1) This rule applies to a letter of package which can be clearly identified, from the outer face of the envelope or package, as containing or comprising confidential correspondence.

(2) An officer or an employee must not open a letter or package to which this rule applies, or remove the contents of that letter or package, unless –

(a) the officer or employee has cause to believe that it contains a prohibited article or unauthorised property; or

(b) the officer or employee has reasonable cause to believe that the contents of the letter or package may –

(i) endanger the security of the prison;

(ii) endanger the safety of any person; or

(iii) relate to a criminal activity.

(3) Where an officer or employee proposes to open a letter or package to which this rule applies, or remove the contents of that letter or package, under paragraph (2), the officer or employee must –

(a) inform the prisoner who wishes to send the letter or package or to whom the letter or package is addressed of the reason for opening the letter or package or removing its contents; and

(b) ensure that the prisoner is present when the letter or package is opened or its contents removed, unless the prisoner refuses, or does not wish, to be present.

(4) The contents of a letter or package to which this rule applies must not be read by an officer or employee unless that officer or employee has –

(a) been authorised by the Governor to do so under paragraph (5); and

(b) informed the prisoner of the reason for reading the contents of the letter or package.

(5) The Governor may authorise an officer or employee to read the contents of a letter of package to which this rule applies where the Governor has reasonable cause to believe that the contents of the letter or package may –

(a) endanger the security of the prison;

(b) endanger the safety of any person; or

(c) relate to a criminal activity.

(6) Where a letter or package to which this rule applies is found to contain a prohibited article or any unauthorised property, the Governor must deal with the item in terms of rule 104.

(7) In this rule –

'*confidential correspondence*' means court correspondence, legal correspondence, medical correspondence or privileged correspondence;

...

'*legal correspondence*' means a letter of package which is –

(a) addressed to a legal adviser and which a prisoner gives to an officer or employee for the purpose of sending to that legal adviser; or

(b) sent to a prisoner at the prison by a legal adviser;

'*medical correspondence*' means a letter of package which contains personal health information about a relevant prisoner and is –

(a) addressed to a registered medical practitioner and given to an officer or employee by the relevant prisoner for the purpose of sending to that registered medical practitioner; or

(b) sent to the relevant prisoner at the prison by a registered medical practitioner;

'privileged correspondence' means a letter or package which is –

(a) addressed to a person, authority or organisation specified in a direction made by the Scottish Ministers and which a prisoner gives to an officer or employee for the purpose of sending to that person, authority or organisation; or

(b) sent to a prisoner at the prison by a person, authority or organisation specified in a direction made by the Scottish Ministers;

'relevant prisoner' means a prisoner who –

(a) is certified as having a life-threatening illness by the registered medical practitioner from whom the prisoner is receiving treatment for that illness; and

(b) has obtained the Governor's prior consent to communicate with that registered medical practitioner in confidence."

[5] The Scottish Prison Rules (Correspondence) Direction 2012 ("the 2012 Direction") provides, *inter alia*, as follows:

"3. (1) Subject to sub-paragraph (2), the contents of correspondence to which rule 55 applies must not be read by an officer or employee unless the officer has reasonable cause to believe that the contents of the correspondence may –

(a) endanger the security of the prison;

(b) endanger the safety of any person;

(c) relate to a criminal activity; or

(d) constitute a breach of paragraph 5.

(2) Correspondence from a prisoner to a person who has made a request under rule 60(1) may be read by an officer.

(3) Correspondence may only be read by an officer under sub-paragraphs (1) or (2) where –

(a) the officer has explained to the prisoner concerned the reason why the correspondence is being read; and

(b) the prisoner concerned is present when the correspondence is being read."

The facts

[6] The petitioner's factual averments are to the following effect:

(i) On 1 October 2018, in the presence of the petitioner, a prison officer opened certain medical correspondence, marked as such and addressed to the petitioner, and asked him to read its contents in order to ascertain whether it included notification of a medical appointment. The petitioner confirmed that the correspondence included notification of an appointment scheduled for the following month. The respondent was informed that the appointment would be cancelled and re-arranged. The appointment was subsequently cancelled.

(ii) On 12 October 2018, in similar circumstances, in the presence of the petitioner, a prison officer read medical correspondence, marked as such and addressed to the petitioner, and informed him that any appointment would require to be cancelled and rescheduled, should the petitioner become aware of its date. In the event, the referable appointment was not cancelled.

(iii) On 12 November 2018, prison officers opened legal correspondence, marked as such and addressed to the petitioner. The opened envelope contained a further smaller envelope which, in turn, contained certain confidential legal advice.

[7] In answer to these factual averments, the respondents aver that, in respect of the first two incidents, SPS was entitled, as a matter of domestic law, to open certain correspondence

in terms of rules 55 and 56 of the 2011 Rules, and the 2012 Direction. Such acts were merited where there was reasonable cause to believe that the contents of the correspondence might endanger, *inter alia* the security of the prison, endanger the safety of any person, or relate to criminal activity. The notification of an external appointment might endanger the security of a prison, in that where a prisoner had fore-knowledge of such a visit, in particular in the circumstances of the petitioner who was assessed as presenting a high risk of serious harm, there was a risk that the prisoner might be approached by third parties to be used as a vehicle to introduce prohibited articles into the prison on his return, or that the prisoner might seek to arrange his escape from custody.

[8] In respect of the third incident, the respondents accept that the referable correspondence was opened inadvertently by an office administrator, by way of genuine and innocent error, in respect of which the petitioner has received a full apology. The office administrator had mistakenly thought the correspondence was addressed to the prison governor. The correspondence was not read, and, immediately upon recognising her mistake, the office administrator inserted the correspondence back into its envelope.

[9] Before me, both parties adopted their respective written notes of arguments, the terms of which, together with the oral submissions advanced in the course of the hearing, are reflected in what follows.

The submissions

(i) The submissions for the petitioner

[10] Given the position of the respondents in relation to the third incident, the petitioner's submissions, bearing on the issue of whether the actings of SPS were compatible with his rights, were directed towards the first two incidents.

[11] In so far as the first two incidents were concerned, having regard to the petitioner's right to privacy, it had been neither necessary nor proportionate for SPS to open his medical correspondence, and their actings were therefore incompatible with Article 8 ECHR and unlawful in terms of the Human Rights Act.

[12] Under reference to *Silver* v *UK* 1983 5 ECHR 347 at paragraph 97, there was authoritative guidance as to what was meant by the phrase "necessary in a democratic society". The word "necessary" was not to be taken as being synonymous with the word "indispensable". The margin of appreciation in the matter of the imposition of restrictions was not unlimited. The phrase "necessary in a democratic society" meant that in order to be compatible, the interference must correspond to a pressing social need and be proportionate to the legitimate aim pursued. In assessing whether an interference with the exercise of the right of a convicted prisoner to respect for his correspondence was "necessary", regard had to be paid to the ordinary and reasonable requirements of imprisonment.

[13] In the petitioner's case, that was the relevant test. The test set out in *Regina* v *Ministry of Defence, ex parte Smith (CA)* 1996 QB 517, per Sir Thomas Bingham MR, at 556B-C, referable to the issue of irrationality, was not appropriate to the facts of the petitioner's case, the principal issue in relation to which was whether the acts in question were necessary, or whether, not being in accordance with Article 8 ECHR, they were unlawful. Since 1996, Article 8 ECHR had become enforceable by domestic courts and, accordingly, this Court had a primary judicial role, rather than the limited ability to produce a secondary or reviewing judgment (page 564B-E). In any event, the case of *Regina* v *Ministry of Defence, ex parte Smith* was to be distinguished from the petitioner's case in that the magnitude of the effect of that decision, given the significant factual issue under consideration, which had no parallel in civilian life (whether homosexuality was incompatible with service in the armed forces), was

not comparable. The level of complexity in that case, involving a necessarily multi-facetted approach, was not necessary in the petitioner's case. In his case, the question was whether there had been a realistic risk of him causing harm to others, seeking to escape, or becoming involved in the introduction of prohibited items into the prison.

[14] In considering the proportionality of the actings of SPS, in relation to the petitioner's correspondence, it was appropriate to have regard to his prison record. He had attended civil hearings at court, under escort, on a number of occasions, in the course of which he acted co-operatively and had not presented a danger to the security of the prison or to others. He had never attempted to escape from custody. He had no involvement with illicit drugs, and had never failed a drugs test. His treatment by SPS was not consistent with its management of other prisoners. A fellow prisoner, whose affidavit was lodged in process, who previously had experience of drugs issues and was prescribed methadone, had been allowed to attend hospital on a daily basis in circumstances where he was aware in advance of his appointment times.

[15] In any event, concerns held by SPS staff in relation to the identification of the timing of medical appointments could be addressed by less intrusive measures, such as the opening of prisoners' medical correspondence by medical staff within the prison health centre.

[16] In considering the petitioner's entitlement to the remedies he sought, it was appropriate to have regard to the whole context and prevailing circumstances. It was significant that in relation to the handling of his correspondence by SPS, there had been breaches in the past, and that, in related matters, the Court had previously found in his favour and against the respondents.

[17] Both his medical and legal correspondence had been clearly identifiable as such. Notwithstanding a particular protocol put in place by SPS in respect of his correspondence,

and updated in 2017, he continued to experience problems. In addressing his rights in that regard, it was incumbent on SPS to err, in his favour, on the side of caution. Neither the measures put in place, nor decisions by the Court in his favour, had resolved the issues arising. In such circumstances, the declarators sought were necessary.

[18] Given the lengthy factual background, and the degree of anxiety and frustration caused to him, the damages sought by the petitioner were necessary in just satisfaction. In that context, each case must be assessed on its own particular facts and circumstances (*Woodin* v *The Home Office* 31 July 2006 QBD, Case No HQ06X00100, at paragraph 3; *Francis* v *The Home Office (and Others)* [2006] EWHC 3021 (QB), at paragraphs 12 and 74). That noted, the cases of *Woodin* and *Francis* were otherwise to be distinguished from that of the petitioner. In both *Woodin* and *Francis*, there had been no prior history of interference with the prisoner's correspondence, and, in any event, the facts in either case were not comparable.

(ii) Submissions for the respondents

[19] In relation to the notification of the timing of medical appointments, SPS, since October 2018, had been in correspondence with the National Health Service with a view to improving lines of communication. The intention was that details of medical appointments for prisoners would be communicated directly to the health centre in the referable prison, rather than to the prisoner or other prison staff, and that the confidentiality of the dates and times of medical appointments would thereby be maintained. The matter was in hand.

[20] The letters concerned in the first and second incidents, to the extent that they disclosed the timing or location of medical appointments, were not "confidential correspondence" for the purposes of Rule 56, since, because they did not contain "personal

health information", they did not fall within the category of "medical correspondence" (Rule 56(7)), and in any event, for the purposes of Rule 56(7), the petitioner did not fall within the class of "relevant prisoner".

[21] As to the proportionality of SPS obtaining information relating to medical appointments for prisoners, such information was necessary in order to put escort arrangements in place. It was proportionate that such information should be withheld from prisoners because of the consequent material risk which would arise were a prisoner to know, in advance, when he would be introduced into an insecure environment. Subject to the oversight of the Court, it was for SPS to determine and assess the nature of any such resultant risk. In that regard, the petitioner was serving a long sentence in respect of a serious and violent offence. The facts that he had never absconded, and had no record of involvement with illicit drugs, were relevant but not determinative. It was significant that he had never admitted the index offence. SPS was under a duty to consider the possibility of the petitioner being approached when outwith the prison, such as by, for example, an organised crime interception, or other circumstances which might affect his own safety. Previous escorted attendances to courts were not comparable for the reason that such an environment was considerably more secure than a NHS facility. In any event, if such information was not known to SPS, the petitioner would require to intimate any appointment arrangements in order to allow his attendance outwith the prison.

[22] In so far as general correspondence was concerned, such correspondence might be opened by a prison officer without qualification (Rule 55), and the correspondence might be read where there was a relevant perceived risk (2012 Direction, paragraph 3). In the context of considering escort to a non-secure environment, paying due regard to the material risks involved, and where no sensitive medical content was concerned, it was within the ambit of

the state's margin of appreciation to determine that it was necessary to open letters in order to gain knowledge of intended appointments and thereby maintain security. That being so, in relation to the first two incidents, having due regard to the whole facts and circumstances pertaining, the relevant rules were not breached, and no violation of Article 8 ECHR had occurred.

[23] Such a situation was not comparable with that considered in *Szuluk* v *UK* (2010) 50 EHRR 10, in which it was held that a violation of Article 8 ECHR had occurred in circumstances in which sensitive medical data, in relation to a life-threatening condition, was read by prison authorities, where, given the nature of the prisoner's condition there was a need to be able to communicate freely in relation to the particulars of his treatment. In contrast, the petitioner's case concerned only the details of the timing and location of an appointment, the details of which would require to be known by the prison authorities in any event. In the petitioner's case the issue of sensitive medical content did not arise.

[24] In relation to the third incident, in respect of which it was accepted by the respondents that confidential correspondence had been inadvertently opened, the petitioner had received an apology which had subsequently been repeated. Although it was accepted that correspondence had been opened on two previous occasions, in similar circumstances in 2003 and 2013, no further remedy, beyond the apologies already tendered, was merited. The incident had not occurred as the result of a systemic failure, but through simple human error as to the nature of the correspondence concerned. Under reference to the affidavit of the business improvement manager employed at the prison, measures had been put in place to prevent such a recurrence.

[25] In relation to the issue of just satisfaction in the form of monetary relief, general guidance as to the appropriate approach was to be found in the case of *Woodin (supra)*, at

paragraphs 41 and 42. In that case, which involved four incidents of interference with a prisoner's correspondence, apologies were tendered and further instructions and reminders given to relevant staff (paragraph 23). A claim of psychiatric damage was not made out (paragraph 32). As a matter of generality, an important consideration in such claims was whether the breach was deliberate or systemic, whether there was malice at play, whether apologies had been made, and whether remedial steps had been put in place.

[26] Under reference to *Regina (Greenfield)* v *Secretary of State for the Home Department* [2005] 1 WLR 673, given that the focus of ECHR was on the protection of human rights, and not the award of compensation, where a violation of an individual's human rights was confirmed, the finding of violation itself might be treated as just satisfaction. In the case of the petitioner, in relation to the question of the appropriate remedy, and having regard to the particular facts bearing on the incident, including that the matter had been appropriately investigated, apologies had been made, and the issue had been addressed by appropriate steps having been put in place to prevent a recurrence, that was the more equitable approach.

Discussion

[27] In relation to the incidents of 1 and 12 October 2018, I accept that, for the reasons submitted on behalf of the respondent, the letters concerned were not "medical correspondence" for the purposes of Rule 56, and that neither, for these purposes was the petitioner a "relevant prisoner".

[28] The matter then falls to be considered as one concerning "general correspondence" under Rule 55. In that regard, the petitioner has not challenged the legality of Rule 55. Thus, in relation to these incidents, the question is whether the acts of SPS were necessary

and proportionate in the sense of being justified for any of the reasons set out in paragraph 3 of the 2012 Direction, as read with Rule 55(4). In that regard, the issue raised by the petitioner is whether, given his prison record, it was proportionate to interfere with his correspondence on the basis that there was legitimate reasonable cause to believe that a possible material risk of the type of concern to SPS in such circumstances, and as set out in paragraph 3 of the 2012 Direction, might arise.

[29] It was accepted that in assessing whether an interference with the exercise of the right of a convicted prisoner to respect for his correspondence was "necessary" for one of the circumstances set out in Article 8(2) ECHR, regard had to be paid to the ordinary and reasonable requirements of imprisonment *Silver (supra)* at paragraph 98; *Szuluk (supra)*, at paragraph 46). In that latter regard, in relation to the first two incidents, and the extent to which relevant restrictions were imposed, I find that, SPS, as the appropriate prison authority, were well placed to assess the likelihood of any material risk contingent on the introduction of the petitioner to an insecure environment.

[30] Having weighed in the balance the positive aspects of the petitioner's prison record, against his high profile and the very serious consequences were any of the identified risks to materialise, I am satisfied that the referable acts of SPS were necessary in terms of paragraph 2 of Article 8 ECHR, and proportionate. I find that, in respect of the first two incidents, paying due regard to the whole facts and circumstances, the referable margin of appreciation was not exceeded, that the 2011 Rules were not breached, that no violation of Article 8 ECHR occurred, and that the acts of SPS were not unlawful.

[31] In relation to the third incident, in accordance with the position of the respondents, I find that the petitioner's legal correspondence was inadvertently opened by an office administrator on 12 November 2018. In that regard, in considering the question of remedy,

it is significant that the petitioner's claim is formulated by reference to Article 8 ECHR. In that context, I acknowledged that whether the petitioner is to be considered to fall within the class of victim for the purposes of section 7 of the Human Rights Act is to be determined by the particular facts of the case in issue, and is very much a question of fact and degree.

[32] In that context, I attach weight to the following facts: the opening of the correspondence was inadvertent, erroneous and unintentional, rather than deliberate or malicious; only one item of correspondence was concerned; the correspondence was not read; the matter was investigated; an apology was tendered; corrective action was put in place to prevent recurrence; the recognised failure was not a systemic one; and no vouched loss resulted. Against that background, under reference to *Woodin (supra)* at paragraph 35, and to *Francis (supra)*, at paragraph 67-70, I find that, notwithstanding the petitioner's stated resulting anxiety and frustration, to which I have attached due weight, he does not fall within the category of "victim", as defined. That being so, in relation to the incident of 12 November 2018, he has no standing to claim the remedies he seeks.

[33] In any event, had I determined that the petitioner was a victim for the purposes of Article 34 ECHR and section 7 of the Human Rights Act, I would not have granted the remedies sought. In terms of section 8 of the Human Rights Act, an award of damages in just satisfaction should not be made unless it is necessary. Having regard to the facts to which I have referred, I am satisfied that, in the particular circumstances of the incident on 12 November 2018, that is not the case. Nor, in such circumstances, would I have pronounced the declarator sought. In that context, under reference to *Woodin (supra),* at paragraph 41, and *Francis (supra),* at paragraph 71, given that an apology was tendered and corrective steps put in place, I would have considered it a sufficiently equitable disposal that the referable failure on the part of SPS was identified in this judgment.

Decision

[34] In summary, therefore, I find that in respect of the incidents of 1 and 12 October 2018, the acts of SPS were not incompatible with the petitioner's Article 8 ECHR rights, were not unlawful in terms of section 6 of the Human Rights Act, and were not beyond the powers of the respondents in terms of section 57(2) of the Scotland Act. In respect of the incident of 12 November 2018, I find that the actings of SPS were wrongful, but that, in that regard, the petitioner is not a victim as defined by section 7 of the Human Rights Act 1998.

[35] I shall therefore sustain the respondents' second plea-in-law, and repel the petitioner's second, third and fourth pleas-in-law. I shall reserve, meantime, all question of expenses.