OUTER HOUSE, COURT OF SESSION

[2018] CSOH 3

P697/16

OPINION OF LORD TYRE

In the petition

WILLIAM FREDERICK IAN BEGGS

Petitioner

against

THE SCOTTISH MINISTERS

Respondents

Petitioner: K Campbell QC; Drummond Miller LLP
Respondents: Byrne; Scottish Government Legal Department

30 January 2018

Introduction

[1] The petitioner is a prisoner in HM Prison, Edinburgh. In this application he seeks judicial review of certain decisions made in relation to the opening of his correspondence. By interlocutor dated 6 July 2017 (see [2017] CSOH 99), Lord Doherty granted the petitioner permission to proceed with his application in respect of two matters only, namely:

(i) an application for declarator that the opening of a letter received from the Health and Care Professionals Council (HCPC) on 6 May 2016 was unlawful because it breached the petitioner's legitimate expectation that correspondence from the HCPC would be treated as "privileged" and not opened; and

(ii) an application for declarator that the respondents' refusal to designate as confidential correspondence between prisoners and regulatory bodies of the legal profession in parts of the United Kingdom other than Scotland is irrational and accordingly unlawful.

[2] A reclaiming motion by the petitioner against Lord Doherty's refusal of permission in respect of the remainder of his application was dismissed on 11 October 2017 as incompetent. The application came before me for a substantive hearing.

Opening of Prisoners' Correspondence: The Rules

[3] Prisoners' correspondence and other communications are regulated by Part 8 of the Prisons and Young Offenders Institutions (Scotland) Rules 2011 (SSI 2011/331). Rule 54 permits prisoners to send and receive letters and packages by means of the postal service or otherwise. Rule 55(2) provides, as a general rule, that a prison officer may open a letter or package sent to or by a prisoner and remove the contents. The contents may not however be read, except in certain specified circumstances.

[4] A separate rule applies to a letter or package which can be clearly identified from the outer face of the envelope or packaging as containing "confidential correspondence". In terms of Rule 56, as it has been in force since 24 March 2016, such correspondence must not be opened unless an officer has cause to believe that it contains a prohibited article or unauthorised property, or that it endangers the security of the prison or the safety of any person, or relates to a criminal activity. A procedure is then set out that must be followed if the officer proposes to open the letter or package.

[5] "Confidential correspondence" is defined in Rule 56(7). There are four categories:

- "court correspondence": a letter or package addressed to a court or sent to the prisoner by a court;
- "legal correspondence": a letter or package addressed to a legal adviser or sent to the prisoner by a legal adviser;
- "medical correspondence": a letter or package containing personal health information about certain prisoners addressed to a medical practitioner or sent to the prisoner by a medical practitioner; and
- "privileged correspondence": a letter or package addressed to a person, authority or organisation specified in a direction made by the Scottish Ministers or sent to the prisoner by such a person, authority or organisation.

The present application is concerned with the fourth of these categories.

[6] For the period prior to 24 March 2016, the relevant rule in respect of "privileged correspondence" was Rule 59 (now repealed). The position was, however, the same: the respondents were given a power to specify in a direction the persons, authorities and organisations with whom a prisoner might correspond subject to the condition that a letter or package was not to be opened save in the exceptional circumstances already mentioned. I pause to note that the word "privileged" is not used here in the technical sense of legal privilege or confidentiality (which is addressed elsewhere in the Rules) but rather as a descriptive term for correspondence from persons, authorities and organisations that have been specified in a direction by the respondents.

[7] On 19 March 2012, the respondents made the Scottish Prison Rules (Correspondence) Direction 2012. Paragraph 7(1) of that Direction specifies 10 authorities for the purposes of what was then Rule 59 (and is now Rule 56) of the 2011 Rules. These include the Law Society of Scotland and the Scottish Legal Complaints Commission. Most of the bodies

listed are Scottish; some, however, such as the Equality and Human Rights Commission and the Office of the UK Information Commissioner, have a UK-wide jurisdiction. The HCPC, which regulates a variety of professions including occupational therapists, paramedics, physiotherapists, practitioner psychologists and radiographers, is not and has not at any time been listed. The Direction was signed by an officer of the Scottish Prison Service (SPS), an agency of the respondents. The SPS has also published a document dated January 2016 entitled "Policy & Guidance for the Management of Prisoner Correspondence", which states *inter alia* that the reference to correspondence from prisoners' legal advisers is to be taken to include correspondence to and from the Faculty of Advocates and Faculty Services Limited.

Factual background: the petitioner's complaints

(i) HCPC

[8] On 31 July 2015, the petitioner submitted a complaint to his residential first line manager ("RFLM") that the SPS was failing to recognise on a consistent basis that mail to him from the HCPC, in connection with a complaint made by him against a member of SPS staff at the prison, fell to be treated as "privileged". The petitioner sought formal recognition by the prison governor that such correspondence required to be treated as "privileged". The RFLM sought advice from "Business Support". On 6 August 2015, the RFLM replied as follows:

> "Mr Beggs,
>
> Further to my response of 5.8.15 to your complaint I have further information on this matter. I can confirm that from now on your letters from the HCPC will be treated as privileged. I trust this answers your complaint."

[9] It appears that correspondence from the HCPC was thereafter delivered to the petitioner unopened until 6 May 2016 when a letter to the petitioner from HCPC was opened by an officer, though not read. The petitioner complained that it ought to have been handed over unopened and the officer undertook to investigate. On 9 May, the prison governor wrote to the petitioner in the following terms:

> "Following your PCF 1 complaint noted above, I have been advised that your mail from HCPC has been dealt with as Privileged Mail. 'The Policy and Guidance for the Management of Prisoner Correspondence' lists organisations to which 'Privileged' status applies and HCPC is not on the list. I hereby retract the agreement to treat HCPC mail as 'Privileged' forthwith."

[10] The petitioner's complaint was then considered by an internal complaints committee who stated in a letter dated 2 June 2016:

> "The ICC uphold your complaint as a discretionary decision not to open your mail had been made. The ICC would like to apologise for the mail being opened."

The committee went on to explain that there was no statutory obligation to treat mail from the HCPC as confidential, and that they considered that the discretionary decision could not be allowed to continue *ad infinitum*. They noted that the governor no longer considered that there was a requirement for mail from the HCPC to be treated as confidential, nor any statutory obligation to do so.

[11] In these circumstances the petitioner now seeks declarator that by opening the letter from the HCPC on 6 May 2016, the respondents acted unlawfully, he having had a legitimate expectation that the SPS would adhere to the undertaking given on 6 August 2015 that such letters would be treated as privileged.

(ii) Non-Scottish legal regulatory bodies

[12] The second issue raised by the petitioner in respect of which permission to proceed

was granted concerns the omission from "privileged" status of correspondence to and from bodies regulating the provision of legal services in parts of the United Kingdom other than Scotland. The petitioner states in an affidavit that he has commenced proceedings in London for judicial review of certain decisions of the HCPC concerning his complaint about the SPS staff member mentioned above. He states that he has required to correspond with the Law Society of England and Wales, in order to identify an English lawyer with a specialism in regulatory practice, and with the Solicitors' Regulatory Authority, in order to identify solicitors who offer services under the legal aid scheme. Neither of these bodies is listed in the 2012 Direction and accordingly his correspondence with them is not treated by the respondents as "privileged" and so is not delivered unopened.

[13] The petitioner has asked the respondents to include the Law Society of England and Wales in a direction for the purposes of what is now Rule 56(7), but the respondents have declined to do so. The petitioner now seeks declarator that the respondents' refusal to accord "privileged" status to prisoners' correspondence with regulators of the legal profession in the United Kingdom, other than the Law Society of Scotland and the Faculty of Advocates, and with legal complaints bodies other than the Scottish Legal Complaints Commission, is irrational and accordingly unlawful.

Issue 1: Opening of HCPC letter on 6 May 2016

Argument for the petitioner

[14] On behalf of the petitioner it was submitted that in the light of the undertaking given to him by the RFLM on 6 August 2015, he had a legitimate expectation that the letter from the HCPC would not be opened on 6 May 2016. Reference was made to the judgment of Lord Woolf MR in *R* v *North and East Devon Health Authority, ex parte Coughlan* [2001] QB 213

at paragraphs 55-60; the present case fell within the third category identified by Lord Woolf, ie a lawful promise or practice that had induced a legitimate expectation of a substantive and not merely procedural benefit. Emphasis was placed firstly on the context in which the undertaking had been given. This was not a casual statement: it was an undertaking given in response to a complaint, by an individual in the prison management who had referred the matter to higher authority for guidance. In the circumstances it was clear that the RFLM had had ostensible authority to give the undertaking. Secondly, it was instructive to examine the language used by SPS when the undertaking was withdrawn: the governor had "retracted the agreement"; similarly the internal complaints committee had referred to revocation of the undertaking and regarded the matter as deserving of an apology. In these circumstances, the respondents could not now contend that the petitioner's expectation had not been a legitimate one.

Argument for the respondents

[15] On behalf of the respondents it was submitted that although the petitioner may, in the light of the undertaking given on 6 August 2015, have had an expectation that mail from the HCPC would not be opened, it had not been a legitimate one. Designation of a body whose mail was "privileged" could only be done by means of a direction by the respondents in terms of the Prison Rules. The prison officer who erroneously indicated that mail from the HCPC would be treated as privileged did so *ultra vires* of the Rules. The undertaking had been given without either actual or ostensible authority. The petitioner's expectation was accordingly illegitimate and did not attract the protection of the court. In all of the circumstances the apology tendered provided an appropriate remedy.

[16] In any event, the declarator sought by the petitioner had no practical purpose or benefit. The court did not entertain declarators with no practical consequence and should refuse to grant the one sought by the petitioner.

Decision

[17] I am satisfied that the undertaking received by the petitioner induced an expectation of a substantive benefit, namely that his correspondence with the HCPC would not be opened by SPS. The question is whether, in the words of Lord Woolf in the *Coughlan* case, it was a "lawful promise or practice that induced a legitimate expectation", the non-implementation of which would amount to an abuse of power. In my opinion it was not. In *South Bucks District Council* v *Flanagan* [2002] 1 WLR 2601, Keene LJ observed (para 18):

> "Legitimate expectation involves notions of fairness and unless the person making the representation has actual or ostensible authority to speak on behalf of the public body, there is no reason why the recipient of the representation should be allowed to hold the public body to the terms of the representation. He might subjectively have acquired the expectation, but it would not be a legitimate one, that is to say it would not be one to which he was entitled."

In *R* v *Secretary of State for Education and Employment, ex parte Begbie* [2000] 1 WLR 1115, Peter Gibson LJ referred with apparent approval to the categorisation proposed in *Coughlan*, but noted (page 1125) that "it is common ground that any expectation must yield to the terms of the statute under which the Secretary of State is required to act". At page 1127, Peter Gibson LJ continued:

> "… I cannot accept that the mere fact that a clear and unequivocal statement such as that made in [a letter from the Secretary of State for Education and Employment] was made is enough to establish a legitimate expectation in accordance with the statement such that the expectation cannot be allowed to be defeated."

[18] Applying those observations to the circumstances of the present case, I reject the petitioner's contention that the prison officer who gave the undertaking on 6 August 2015

had ostensible authority to do so. Ostensible authority relies upon representations made not by the agent but by the principal. Applying that principle to the present context, the only "representation" made by or on behalf of the respondents at the material time consisted of the Prison Rules, which made clear that privileged status applied to communications from a body listed in a direction, and the 2012 Direction, which made no mention of the HCPC. Whatever erroneous understanding may have underlain the undertaking given by the RFLM, apparently after having consulted a "business support" division of SPS, this did not amount to ostensible authority for the purposes of the creation of a legitimate expectation. Instead, any expectation entertained by the petitioner had to yield to the clear terms of the Rules, under which the HCPC was not and never had been a body whose correspondence attracted privileged status. All that happened was that the petitioner obtained a temporary benefit to which he was not and had never been legally entitled. It follows that the respondents' failure on 6 May 2016 to treat a letter from the HCPC as privileged did not constitute the breach of any legitimate expectation on his part.

[19] Even if I had been persuaded that the opening of the letter on 6 May 2016 had constituted a breach of the petitioners' legitimate expectations, I would have refused to grant decree of declarator in the terms sought. It is well settled that the court will not grant declarator without there being some practical purpose or benefit to be achieved thereby: see eg *Mahmood* v *Secretary of State for the Home Department* [2005] CSOH 52 at paragraph 67. In the present case it was submitted that the granting of declarator would serve a purpose in reminding public authorities, and in particular the respondents, of the importance of complying with an undertaking given in response to a specific complaint. This court does not, however, grant declarators for no purpose other than to rebuke a party for a past act with no practical or continuing consequences. The petitioner received an apology from SPS

and, although as counsel pointed out this was not a case concerning alleged breach of Convention rights, such apology would in my view have constituted appropriate and ample satisfaction had a breach of a legitimate expectation in fact occurred.

Issue 2: Failure to treat non-Scottish legal regulatory bodies as "privileged"

Argument for the petitioner

[20] On behalf of the petitioner it was submitted that the respondents' refusal to treat legal regulatory bodies such as the Law Society of England and Wales and complaints bodies such as the Solicitors' Regulatory Authority in the same way as their Scottish equivalents was irrational and accordingly unlawful. Correspondence was likely to contain the same types of subject-matter. It was extremely unlikely that the petitioner was the only prisoner in a Scottish prison who would require to instruct an English solicitor or seek legal aid in England and Wales, and who might accordingly require to seek advice or information from a regulatory body there. It appeared from the respondents' own averments that if such bodies were treated as privileged, there was a very low likelihood that security risks would be increased. The respondents' refusal was accordingly not a balanced response.

Argument for the respondent

[21] On behalf of the respondent it was explained that the making of the 2012 Direction had followed a review of the Prison Rules, including a public consultation. The bodies listed were included because they were bodies with whom prisoners frequently corresponded on potentially sensitive matters. But the list was intended to strike a balance between a desire to extend privileges to prisoners and a need to control the avenues through which prohibited items such as drugs might enter prisons. The list had to be operated day by day

by prison officers; an unnecessarily long list increased the risk of handling errors. The incidence of abuse of confidential communications was increasing. Adding bodies to the list created fresh opportunities for the sending of prohibited items in mail masquerading as privileged communications. The court should be slow to interfere with a policy decision as to the extent to which a privilege should be accorded: cf *O'Connor* v *Chief Adjudication Officer* [1999] 1 FLR 1200. Hardship in an individual case did not amount to irrationality.

Decision

[22] As Sir Thomas Bingham MR observed in *R* v *Ministry of Defence, ex p Smith* [1996] QB 517 at page 556:

> "The greater the policy content of a decision and the more remote the subject matter of a decision from ordinary judicial experience, the more hesitant the court must necessarily be in holding a decision to be irrational. That is good law and, like most good law, common sense. Where decisions of a policy-laden, esoteric or security-based nature are in issue even greater caution than normal must be shown in applying the [irrationality] test …"

The decision taken in the present case as to which bodies to include in a direction for the purposes of what is now Rule 56 was a policy decision taken by the respondents, having regard, on the one hand, to a desire to allow prisoners to correspond on sensitive (but not legally confidential) matters without their mail being opened (though not read) and, on the other hand, to the need to restrict means by which prohibited items such as drugs may enter prisons. It is one with which the court should be slow to interfere unless it is obvious that it is beyond the range of decisions reasonably open to the respondents. In my view the circumstances of the present case do not come close to meeting that test. The assessment of risk of abuse of the privilege with a view to smuggling in prohibited items is a task best carried out by the respondents. I accept that there is a clear and legitimate security reason

for restricting the number of bodies on the list. The relative infrequency with which prisoners in Scottish prisons are likely to require to correspond with legal regulatory bodies outside Scotland constitutes a rational place to draw a line. Indeed, as counsel for the respondents pointed out, if regulatory bodies in England and Wales and Northern Ireland were included in the list it might be argued that there was no reason to exclude equivalent bodies elsewhere in the world. It should also be borne in mind that correspondence with lawyers outside Scotland falls within the category of "legal correspondence" and is not opened.

[23] For these reasons I hold that the non-inclusion in a direction for the purposes of Rule 56 of legal regulatory bodies in parts of the United Kingdom other than Scotland has not been demonstrated to be irrational, and I refuse to grant the declarator sought.

Disposal

[24] The petition is dismissed.