OUTER HOUSE, COURT OF SESSION

[2018] CSOH 72

P746/17

OPINION OF LORD CLARK

In the petition of

WILLIAM FREDERICK IAN BEGGS

Petitioners

for judicial review of a decision by the Scottish Ministers dated 12 May 2017

Petitioner: Campbell QC; Drummond Miller LLP
Respondents: D Hamilton; Scottish Government Legal Directorate

10 July 2018

Introduction

[1] The petitioner is currently serving a prison sentence in HM Prison, Edinburgh. On 12 May 2017, the deputy governor of the prison issued a decision letter refusing the petitioner's request for permission to purchase a laptop computer for his own possession and use in the prison. In this petition for judicial review, the petitioner seeks reduction of that decision. The grounds upon which reduction is sought are, firstly, that the decision was irrational, secondly, that the Scottish Prison Service ("the SPS") failed to take account of relevant factors, and, thirdly, that the decision infringed the petitioner's rights under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR"). The Scottish Ministers, who are responsible for the actions of the SPS, are the respondents,

Background

[2] On 12 October 2001, the petitioner was convicted of murder. He was sentenced to life imprisonment with a punishment part of 20 years (the period to be served before an application for parole can be made). The sentence was backdated to 20 December 1999, when he was first detained in custody in respect of the charge. He has been in HM Prison, Edinburgh since 15 March 2013. Earlier parts of his sentence were served in HM Prison, Peterhead, HM Prison, Glenochil, and HM Prison, Shotts.

[3] The petitioner has requested access to a laptop computer of his own on a number of occasions since around 2008. The petitioner has indicated that he would meet the cost of purchasing the laptop. The basis upon which the requests were made were that the use of a laptop is necessary for (i) correspondence in connection with legal matters, the petitioner being involved in a number of such matters; (ii) management of documents in connection with those matters, in terms of access, use and storage; and (iii) the continued pursuit of educational interests which the petitioner has pursued on a number of occasions during his period in prison.

[4] In a previous petition for judicial review, the petitioner raised the issue of the refusal by the respondents to accede to his request for permission to purchase a laptop for his possession and use in prison. On 2 November 2016, Lord Malcolm granted decree of reduction of decisions to refuse access: *Beggs*, *petitioner* [2016] CSOH 153. Following upon Lord Malcolm's decision, and having regard to the reasons for it, a meeting took place at the prison on 31 January 2017, attended by the petitioner, the deputy governor of the prison, and two others. The purpose of the meeting was to afford the petitioner an opportunity to explain why he requires access to a laptop computer, and why the prison laptop loan scheme would not be an effective alternative. The petitioner prepared his own record of what was discussed at the

meeting, and the respondents prepared their own minutes of the meeting. The reasons given by the petitioner as to why he required access to a laptop were that he needed it for word processing, for access to CD – RW discs, for educational purposes, to mitigate or eliminate financial disadvantage caused by lack of access to a laptop, to allow equality of arms in relation to legal proceedings, and because of the problems arising from the lack of alternative IT facilities.

[5] The policy of the respondents in relation to ownership and use of computers by prisoners is set out in two Governors and Managers Action Notices dating from 1998 and 1999 (GMA 84A/98 and 15A/99). In broad terms, the first notice provides that, in closed establishments, prisoners cannot own a laptop. Prisoners are permitted access to computers only in education units, or where a clear case was made for facilities to be used in a cell or dormitory, in which case this should be restricted to word-processing equipment only, supplied by the establishment. The second notice recognises that no provision had been made for exceptional cases in closed establishments. It provides that where governors "consider that a prisoner has sufficiently compelling circumstances to justify access to a personal computer, and can give an assurance that effective monitoring of that access can be employed" they should forward details to the SPS Custody Directorate for approval. In addition to this policy, which deals with personally-owned laptops, there exists at HM Prison, Edinburgh, a prison laptop loan scheme, whereby a prisoner can apply to borrow a laptop in order to prepare legal material or view legal material which is sent to him or her on disc, subject to agreeing to certain conditions.

[6] On 12 May 2017, the respondents issued their decision letter in response to the petitioner's request to purchase and use a laptop computer. The decision letter refused the petitioner's application for the following reasons.

> "1. You have not demonstrated sufficiently compelling circumstances to justify access to a personal laptop. The reasons you have provided to justify access to a personal laptop demonstrate that the laptop would be administratively convenient rather than vital to the various interests you describe. You have not demonstrated that you are currently prejudiced by lack of access to a personal laptop or that you will be prejudiced by the ongoing lack of access to a personal laptop; and
>
> 2. Given the nature of the correspondence which you submit will be prepared and viewed on the laptop, there is no way to effectively monitor your access to the laptop. If legal correspondence is to be prepared or stored on the laptop any inspection of the laptop by prison officers or employees would risk breaching the confidentiality of that correspondence."

The reasons for the decision were then explained more fully in the decision letter. It addressed each of the points put forward by the petitioner as justifying access to a personal laptop (noted in paragraph [4] above) and explained additional concerns the respondents had regarding confidentiality of legal correspondence, security and safety risks and resource implications.

[7] In an affidavit lodged with the petition, the petitioner explained the background to and the reasons for his request and the matters which, in his view, the respondents had failed to take into account, or to which they had either attached excessive weight or given insufficient weight.

Submissions for the petitioner

[8] The Opinion of Lord Malcolm explained the lengthy history of requests made by the petitioner for access to a laptop, including at other prisons. In relation to the test for irrationality, reference was made to Lord Diplock's well-known formulation in *CCSU* v *Minister for the Civil Service* [1985] AC 374. It was accepted that the threshold is a high one. The petitioner had advanced cogent reasons, both in correspondence and in person, for having access to a laptop. It was not a frivolous request. He has a significant body of correspondence on foot and is a party in a number of litigations. Having his own laptop would be a reasonable

and practical solution. The respondents had given insufficient weight to a recommendation made by the Scottish Prisons Complaints Commissioner ("SPCC") in 2002 and again in 2010, which was that the petitioner had the right to prepare responses to and instructions for his lawyers and that it appeared reasonable to permit him access to a word processing facility for the sole purpose of undertaking his legal work. It was also recommended that he should have secure facilities for the storage of material on disc and use of a printer. The respondents had given undue weight to the fact the petitioner has access to a typewriter, which did nothing to assist in managing the volume of correspondence and accompanying documents. By failing to acknowledge this volume, the respondents had not given sufficient weight to that factor.

[9] There was much more to the petitioner's position than just inconvenience. The reliance placed by the respondents on the fact that the petitioner has been able to conduct litigation without access to a laptop was irrational because it gave undue weight to that fact, when seen in the context of the volume of correspondence conducted by the petitioner and the volume of material generated by his litigations over the years. Efficient management of documents and correspondence was a relevant consideration. The respondents were well aware of the administrative difficulties and complaints made by the petitioner regarding management of that physical volume. The respondents' concerns about the effective monitoring of usage was a valid consideration but was presented as a false comparison. The circumstances were more compelling than the respondents considered them to be.

[10] The matters relating to the storage of electronic material on re-writable CD Rom ("CD – RW") discs, as discussed in Lord Malcolm's decision and in the petitioner's affidavit, had not been properly considered or given proper weight. In relation to existing means of access to computers, the practical reality was an absence of consistent access to the IT facilities and the

learning centre. Complaints had been made about lack of access. Facilities existed, the real issue being whether these were realistically available.

[11] In relation to financial disadvantage, the respondents considered that the petitioner's circumstances were not compelling because he had not provided or demonstrated how such disadvantage arose. Further, he had been able to communicate with solicitors and many of his court actions were funded by legal aid. In reaching this conclusion, the respondents had failed to take into account or at least to give adequate weight to a number of relevant considerations. Some of the work which had been done on the petitioner's behalf by solicitors was not legally aided. Some of that work could have been done by the petitioner, if he had access to a personal laptop. At the meeting on 31 January 2017 the petitioner drew attention to several instances which illustrated financial disadvantage.

[12] The petitioner had pursued a number of educational interests while in prison. These involved the use of prison-controlled computers and the petitioner's access to these had been impeded because of the unpredictable availability of facilities in the learning centre. This illustrated the inconvenience to the petitioner and indicated that the respondents' assertion that the petitioner's needs could be met by the use of IT facilities and the learning centre was not well founded. The respondents had suggested use of one of the limited number of laptops available for loan to prisoners for legal correspondence, but this was also unreasonable, essentially for the same reasons, and in particular the unpredictability of access. The respondents had given undue weight to the idea of access to IT facilities being currently available and insufficient weight to the matters relied upon by the petitioner.

[13] The matters of security relied upon by the respondents were irrational, at least in the absence of considerations directly relevant to the petitioner. In fact, prisoners can have access to personal laptops under the respondents' policy. This indicated that security issues had been

factored in. No specific issue regarding the petitioner had been raised in the decision letter. Equality of arms was more of an overarching concern and a number of the points made earlier contributed to creating inequality. The respondents had given no weight to that aspect of the petitioner's position. So far as the prison laptop scheme was concerned, the petitioner asked for no more than having his own laptop, which would be to the same specification. The operation of the prison laptop scheme and the petitioner's experience of it were discussed in some detail in the Opinion of Lord Malcolm. A number of impediments to access existed. It was an intermittently available resource. The petitioner had been discouraged from using it, given his experience of the scheme.

[14] As for the matters which the respondents had failed to take into account, these were the volume of material, including correspondence, which the petitioner possessed and the management of that material.

[15] In relation to Article 8 ECHR, this was engaged insofar as the decision complained of concerned: (a) the petitioner's ability to manage his correspondence; and (b) the petitioner's ability to engage in educational activity in the prison. These were both aspects of his private life within the ambit of Article 8, which were impeded by the respondents' decision. It was accepted for the purposes of argument in this case that the need to maintain good order and control in prisons amounts to a legitimate reason to interfere with Article 8 rights in some circumstances. However, the respondents have their own policy in terms of which prisoners are able to have access to a computer of their own. It followed that security concerns had been factored in and that security and good order will not be compromised in all circumstances by a prisoner having access to his or her own computer. It was for the respondents to justify the interference in the petitioner's Article 8 rights and they had advanced no reason specific to the petitioner's own circumstances indicating why the petitioner having a laptop would give rise to

any particular risk to security or good order in the prison. The reasons given were generic and unsupported by the material which was before the respondents. The respondents' decision was a disproportionate interference with the petitioner's Article 8 rights. Reference was made to *R (Ponting)* v *Governor of Whitemoor Prison* [2002] EWCA Civ 224 and *R (Kenyon)* v *Governor HMP Wakefield* [2012] EWHC 1259 (Admin). The issues of confidentiality mentioned in the decision letter did not justify interference. Confidentiality inhered in physical documents as well as in electronic documents and it was not evident from the decision how any problem relating to confidentiality would be insurmountable or of such difficulty to cause it to be a compelling consideration against the petitioner's request. There was nothing more than a vague concern regarding confidentiality.

Submissions for the respondents

[16] The submissions for the respondents can be summarised as follows. It was important to recognise that both aspects of the relevant test required to be met. These were: (i) the existence of sufficiently compelling circumstances to justify access to a personal computer, and (ii) an assurance that effective monitoring of that access could be employed. The test for irrationality was a high one. It was not met in respect of either of the two limbs of the test.

[17] Reference was made to the Opinion of Lord Malcolm and the reasoning within it. The central point Lord Malcolm made was that the respondents had, in respect of the previous requests, failed to set out in sufficient detail or with clarity the reasons why the request had not been granted. In relation to the present request, this issue had been fully and properly addressed. The meeting on 31 January 2017 took place precisely to address the matters Lord Malcolm had raised. The petitioner accepted that all of his grounds for the request were set out in the decision letter. The letter made reference to previous requests. The court should

proceed upon the basis that all of the matters were before the respondents for the purposes of their decision. This included such things as issues raised by the volume of papers, which had previously been the basis for a complaint.

[18] In relation to sufficiently compelling circumstances, more than administrative inconvenience was required. It was no doubt correct that the petitioner was in some respects inconvenienced by not being able to use his own laptop, but that simply did not reach the level of a compelling circumstance. Reference was made to the case *of R (Jackley)* v *Secretary of State for Justice* [2014] EWHC 407 (Admin), in which, in the context of a claim based on Article 6 ECHR, the view was expressed that mere inconvenience is not sufficient. It was accepted that the term "administrative convenience" was the respondents' characterisation of the petitioner's position, but that was a correct characterisation, given the absence of any proper basis for saying there was prejudice.

[19] The protocol for use of prison laptops was very relevant to the question of rationality posed by the petitioner. The petitioner had given no ground on effective monitoring and security. He had not assented to the same monitoring as existed under the protocol. So far as the recommendations of the SPCC were concerned, the protocol met and provided all of the elements identified in these recommendations. Accordingly, the recommendations had been implemented. The protocol allowed access to a laptop and allowed a secure facility for the storage of material and the use of a printer. If the petitioner was prepared to sign the "compact" within the protocol (thereby accepting the stipulated conditions for use) a prison laptop could be made available to him. The laptop scheme for the borrowing of laptops by prisoners was for the purposes of legal correspondence. A number of laptops were available. However, the petitioner had not applied for a prison laptop under the scheme since July 2015.

[20] The petitioner's own record of the meeting referred to the storage of papers. This was therefore a matter before the respondents when making the decision. The petitioner had already been given more than the normal storage capacity. The respondents were aware of the volume of papers which had been generated. However the papers could be scanned and transferred to a disc and then accessed on a prison laptop. The petitioner had been told he could do this. If he was to put the contents of the papers on his own laptop they would similarly need to be scanned. There was no material difference between these two situations, except that under the prison laptop scheme the compact would exist and appropriate monitoring and security could take place. In any event, the vast majority of papers held by the petitioner related to an earlier appeal, which was now over, and were therefore historic.

[21] The respondents had, in the decision letter, offered to allow the petitioner to print off the material on his CD – RW discs. The petitioner was apparently against this on the basis that it produced additional paper. The offer was made in good faith, to address the specific desire of the petitioner to view and print the documents on the discs. Production of paper documents was not a matter which the respondents opposed. Such further volume of paper could be accommodated.

[22] The suggestion that undue weight had been given to the fact that the petitioner had litigated successfully was unfounded. The fact that he had done so was not an insignificant point. A dominant factor in many of the Article 6 cases was the need to demonstrate prejudice. The petitioner is a successful litigant. Whatever inconvenience resulted from not having his own laptop, there was no prejudice.

[23] In relation to the allegations of financial disadvantage, no connection had been made between having a personal laptop and any financial consequences other than that some work could have been carried out by the petitioner. There was simply no specification or support for

any material loss. The examples given by the petitioner did not appear to be linked to a consequence of not having ownership of a laptop. One example in fact post-dated the meeting of 31 January 2017.

[24] Turning to the issue of education, it was correct to say that there had in the past been difficulties with access to IT facilities. Substantial IT facilities were however available and sufficed to meet the petitioner's educational needs. There were no internet connections and so there could be no access to online learning, which appeared to be what the petitioner was suggesting. A new contract for the provision of IT facilities had been put in place in August 2017, which updated some of the facilities. So, there had been intermittent difficulties but the new contract was now operational and matters were now progressing as envisaged under that contract. There had been failures in IT provision from July 2015 and into 2016, but the specific reason for these failures was that illegal software had been uploaded in some of the IT facilities. This required a full investigation and while that was going on the facilities were down. This experience underlined the challenges and risks inherent in providing IT facilities in prisons. Further, there had been difficulties caused by the absence on sick leave of staff from Fife College, who provided teaching. So there had been frustration and inconvenience on the part of prisoners such as the petitioner, but these were caused by unforeseen and exceptional events and the difficulties had now been resolved. The educational provision had been restored and was operational. These past difficulties did not constitute a compelling circumstance. In relation to the hairdressing course which the petitioner was undertaking, access to a laptop was not required. If anything, this was simply another point of alleged inconvenience. The petitioner suggested that he was prevented from engaging in studying for a degree. However, the petitioner had not made an application to the higher education access board for quite some time. Any inconvenience in that regard was unrelated to the owning of a

laptop. A number of the issues the petitioner raised could be addressed under the terms of the protocol. Accordingly, there were no compelling circumstances and that of itself justified the refusal to allow the petitioner to own a laptop.

[25] If for some reason that was incorrect then the question of effective monitoring arose. This was addressed in the decision letter. The agreement reached by the borrower of a prison laptop and the prison authorities was, as noted above, referred to as a compact. No proposal had been made by the petitioner as to the terms of any compact in respect of a personal laptop. A personally owned laptop raised different issues from those arising from a loan laptop and required a bespoke compact. At no stage had the petitioner given any indication of what he was prepared to agree in respect of effective monitoring. The fact that he was not using the existing scheme itself showed that he had a problem with accepting effective monitoring. Also, questions arose about the interaction between the protocol and interference with the personal property of an individual prisoner. A whole range of problems existed in respect of a purchased and privately owned laptop. There was simply no basis for saying that there could be effective monitoring of a laptop owned by the petitioner. The protocol set out a whole range of security arrangements. Under the protocol, a large number of commitments required to be given by the borrower. Matters had been reviewed by an outside expert who had recommended that personally owned laptops should not be permitted, largely for reasons of monitoring and security. The risk posed was not in any event one which arose only from the petitioner's use of the laptop, but from the fact that others might gain access to it. Again that risk was set out in the decision letter.

[26] Within the decision letter the respondents additionally cited the fire and security risk from misuse of the battery, a risk which is greater when a prisoner has ownership and

permanent access to a laptop and greater still if such access is without the monitoring arrangements set forth in the protocol.

[27] As to the criticism that the concerns raised by the respondents were generic, that was a mischaracterisation. The decision letter made clear that the decision was based on information supplied by the petitioner. The petitioner's specific circumstances were considered. In any event, the concerns applied across the spectrum of users. The decision letter also took into account the inability of the respondents to control who accessed any laptop in the possession of the petitioner and what such persons might do with it. There was no suggestion that any issue raised by the petitioner was not considered. Nothing was said by him in response to the points made in the letter regarding confidentiality and security.

[28] In these circumstances in relation to the question of effective monitoring, the decision of the respondents that there could be no effective monitoring was a conclusion which the respondents were entirely entitled to reach. Again, of itself, that sufficed for the decision to be justified.

[29] Overall, the decision made by the respondents was wholly defensible and the petitioner did not come close to reaching the high test for establishing irrationality.

[30] Turning to the Article 8 issue, the starting point was that there is no right under Article 8 for a prisoner to be able to purchase a laptop as a personal possession. The reasons why the petitioner suggested that Article 8 was engaged effectively sought to broaden the scope of Article 8. This was a speculative position not vouched by any authority. The fact that a laptop is a potential means of engaging in correspondence did not result in there being an interference with Article 8 rights when use of a personal laptop is not permitted. Reference was made to the case of *R (Kenyon)* v *Governor of HMP Wakefield,* another Article 6 case, which supported the proposition that there was no general entitlement to a laptop computer. It

simply went too far to say, as was submitted on behalf of the petitioner, that because a person might use a laptop to do something (such as write correspondence) that engaged Article 8, and there was therefore a right under Article 8 to buy a laptop.

[31] If, contrary to that submission, Article 8 was engaged then any interference was proportionate. There was plainly a legitimate aim: prison order and security. There was no form of prejudice alleged by the petitioner which could render the interference disproportionate. Any interference was entirely proportionate given the absence of prejudice and the absence of any proposals as to how legitimate security concerns could be addressed in light of the issues of confidentiality and security raised in the decision letter. In the *Ponting* case the reason why Article 8 was engaged related to the terms of the compact that was agreed. This was a different position from the present case. It was not being said by the petitioner that the compact in the present case breached Article 8 rights.

Reply for the petitioner

[32] There were two points to make in reply. Instructions had been taken on the question of financial disadvantage. The reference in the petitioner's affidavit to litigation in England was an instance of solicitors carrying out work which the petitioner could have conducted himself, thus avoiding the need to pay the solicitors for it. Secondly, the petitioner's submission about the absence of compelling circumstances was that the circumstances have to be taken in the round. The characterisation of the petitioner's complaints as being about administrative convenience was not a matter for the respondents but a matter for the court.

Decision and reasons

[33] It is no doubt the case that the petitioner would find it convenient to be able to own and

use a personal laptop, as would some other prisoners. But the test I have to apply is not whether the petitioner would benefit, or whether it might be thought to be reasonable to allow such access; rather, it is whether the decision by the respondents to refuse access falls to be reduced on any of the grounds put forward by the petitioner.

[34] Those grounds are:

(i) that the decision was irrational;

(ii) that the respondents failed to take account of relevant factors; and

(iii) that there was a disproportionate interference with the petitioner's rights under Article 8 ECHR.

[35] It was accepted on behalf of the petitioner that the respondents had applied the correct test as stated in their policy and that the respondents' record of the meeting of 31 January 2017 correctly identified all of the issues which the petitioner had raised.

Irrationality

[36] In *CCSU* v *Minister for the Civil Service*, Lord Diplock explained (at 410G) the concept of irrationality for the purposes of judicial review in the following terms:

> "By 'irrationality' I mean what can now be succinctly referred to as '*Wednesbury* unreasonableness' (*Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."

Parties were agreed that this is a substantial hurdle for a petitioner to overcome: *M* v *Scottish Ministers* 2013 SLT 875 (paras [97] and [98]). In the present case, the petitioner argued that the test was satisfied as a result of the respondents' alleged failure to have regard to certain factors, and by the respondents not having given sufficient weight to specific points and having given undue weight to others. Senior counsel confirmed that it was not being argued that the

decision maker had taken into account any irrelevant matters and he made clear that the main thrust of the argument concerned issues of weight. The factors which were said not to have been considered were the volume of material, including correspondence, which the petitioner possessed and the management of that material.

[37] In *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759, Lord Keith stated (764G-H) that:

> "…it is entirely for the decision maker to attribute to the relevant considerations such weight as he thinks fit, and the courts will not interfere unless he has acted unreasonably in the *Wednesbury* sense."

Lord Hoffman observed (780F-G) that:

> "Provided that the planning authority has regard to all material considerations, it is at liberty (provided that it does not lapse into *Wednesbury* irrationality) to give them whatever weight the planning authority thinks fit or no weight at all."

Accordingly, the weight to be given to any particular factor is a matter for the decision maker, but the decision remains subject to the test for irrationality. Thus, to succeed on the issues concerning weight, the petitioner requires to show that individually or cumulatively, and taken along with the factors said to have been omitted from consideration, the alleged attachment of excessive or insufficient weight resulted in a decision which was irrational in the sense described by Lord Diplock.

[38] The petitioner contended that the recommendations of the SPCC were not given sufficient weight by the decision maker. There is a prison laptop loan scheme in operation at the prison whereby a prisoner can apply to have access to a laptop computer for the purposes of legal correspondence. It is important to recognise that this does not cover other uses, such as for educational purposes. There is a protocol which sets out the procedure for applying to have a prison laptop and a compact giving the detailed terms for the use of a laptop. It covers matters such as monitoring and security. It seems clear that the protocol deals with the points

raised in the SPCC recommendations in 2002 and 2010, at least when the scheme is operating properly: the protocol allows the prisoner access to a laptop in order to prepare legal material or view legal material which is sent to him or her on disc, to store such material on disc and to print documents. The decision letter refers to the scheme and also makes clear that the petitioner can store material and has access to a printer. The existence of the prison laptop scheme forms part of the context in which the decision complained of by the petitioner was made. The petitioner contended that access to a prison laptop was unpredictable, and a history of the many difficulties which he had encountered is given in Lord Malcolm's Opinion. This history of difficulties is somewhat disconcerting. However, I was advised that the scheme is now operating properly and the petitioner did not dispute the respondents' assertion that he had not applied for a prison laptop since 2015. The SPCC recommendations were effectively implemented by the prison laptop scheme, and arrangements were made for storage of material and access to a printer on the part of the petitioner. It is therefore difficult to see why the SPCC recommendations should have been given greater weight for the purposes of the test of sufficiently compelling circumstances to justify a personally owned laptop. Accordingly, I do not consider it correct to say that the recommendations of the SPCC were not given sufficient weight by the decision maker.

[39] I do not accept that the respondents gave undue weight to the fact the petitioner has access to a typewriter. This was simply one element of the many matters which formed part of their consideration. The respondents noted that the petitioner had been able to instruct solicitors, conduct litigation and correspond with various individuals and organisations without access to a personal laptop. This was plainly correct and it was appropriate to take it into account. In any event, no basis exists for the contention that excessive weight was attributed to this factor.

[40] The petitioner contended that this access to a typewriter did nothing to assist in managing the volume of correspondence and accompanying documents and that by failing to acknowledge this volume, the respondents had not had regard to, or given sufficient weight to, that factor. The decision letter made reference to the previous requests made by the petitioner for access to a laptop and I did not understand it to be disputed that these included issues raised about the volume of papers. Moreover, as counsel for the respondents observed, the petitioner's own record of the meeting makes express reference to the storage of papers. As regards electronic storage of material, the record of the meeting on 31 January 2017 expressly refers to the petitioner having 8-10 discs in his possession containing historical legal correspondence and goes on to state that "he would like to scan existing documents onto disk to allow him to manage the storage of his documentation". The decision letter referred to the petitioner having a number of discs containing historical legal correspondence. The issue of volume of documents was therefore before the decision maker and was taken into account. As I understood the position, the petitioner is able to print off material he wishes to have in hard copy and the respondents will allow it to be stored. No good reason was presented to the court as to why the existing papers could not be scanned and the electronic copies transferred to a disc and then accessed on a prison laptop under the loan scheme. Under that scheme appropriate monitoring could take place and security concerns could be met. I therefore reject the petitioner's argument that this factor (issues related to the volume of papers) had not been considered or given appropriate weight.

[41] The petitioner also argued that the reliance placed by the respondents on the fact that the petitioner has been able to conduct litigation without access to a laptop was irrational because it gave undue weight to that fact, when seen in the context of the volume of correspondence conducted by the petitioner and the volume of material generated by his

litigations over the years. As I have indicated above, the existence of that volume of material was before the decision maker. The fact that the petitioner had been able to conduct many litigations without access to his own personal laptop was considered in that context. It was a relevant factor and had to be given appropriate weight. I see no reason for concluding that it was given undue weight.

[42] The petitioner further argued that matters relating to the storage of electronic material on CD – RW discs had not been properly considered or given proper weight. I see no force in that contention. The point was specifically addressed in the decision letter. The decision letter contained an offer to allow the petitioner to access a standalone computer and printer to enable him to print off all of the documents on the 8-10 discs. In relation to scanning documents, the decision letter stated that the SPS did not provide that facility but that the petitioner could send the documents to an external service provider for that purpose. The difference between storing electronic material on disc and storing it on the hard drive of a personally owned laptop is not of itself of compelling significance. The respondents concluded in the decision letter that the petitioner was not prejudiced by the lack of access to a personal laptop for the purposes of accessing material stored on disc. No real challenge to that conclusion was presented.

[43] Similarly, I see no force in the petitioner's contention that the respondents had failed to have proper regard to, or failed to give adequate weight to, relevant considerations as to financial disadvantage. It is clear that at the meeting on 31 January 2017 the petitioner drew attention to circumstances in which there was said to be financial disadvantage caused by lack of access to a laptop. I accept that the petitioner made express reference to English litigation and other cases in which he said he could have carried out work that solicitors had carried out. However, there was no real detail provided of the extent of any such disadvantage or indeed the precise types of work which the solicitors had carried out but which the petitioner could

have done. Some of the examples founded upon by the petitioner in the petition do not, on the face of it, involve financial disadvantage. The matter of financial disadvantage was expressly dealt with in the decision letter. The respondents concluded that financial disadvantage arising from lack of access to a personally owned laptop had not been demonstrated. In the absence of a clear explanation by the petitioner at the meeting of the nature and extent of alleged financial disadvantage, that was a reasonable conclusion. The argument that relevant considerations on this issue were not considered or were given insufficient weight is not made out.

[44] Turning to the matter of education, the respondents accepted that there were difficulties in the past regarding access to IT facilities and the learning centre in the prison. However, the reasons for these problems were explained on behalf of the respondents. The submissions for the petitioner did not make clear how access to a personally owned laptop would alleviate such concerns. For example, the respondents' assertion that there could be no access to online learning facilities was not disputed. The court was advised that substantial IT facilities were available and sufficed to meet the petitioner's educational needs, a new contract for the provision of IT facilities having been put in place in August 2017. The decision letter stated that the petitioner's educational needs could be met through these existing services. It was said on behalf of the petitioner that he had been unable to engage in studying for a degree. However, the respondents' assertion that the petitioner had not made application to the higher education access board for quite some time was not disputed. Moreover, the precise connection between having access to a personal laptop and degree studies was not made clear. I see no basis for concluding that the respondents gave undue weight to the existence of the current educational facilities or gave insufficient weight to the petitioner's concerns.

[45] Equality of arms was said on behalf of the petitioner to be more of an overarching concern, arising from the other points raised. As was observed on behalf of the petitioner, the

operation of the prison laptop scheme and the petitioner's experience of it were discussed in some detail in the Opinion of Lord Malcolm. It is true that prison laptops have not always been readily available, but I was given to understand that historic problems had been addressed. While the petitioner may have been discouraged from using the scheme, because of his experience, I am told that the scheme is operational. This does not of course result in automatic access to a laptop. As the decision letter makes clear, access cannot be guaranteed. However, on the face of it, the scheme meets many of the petitioner's needs.

[46] The petitioner contended that the matters of security and safety risks relied upon by the respondents in the decision letter were irrational, at least in the absence of considerations directly relevant to the petitioner. It seems to me to be clear that the respondents were not relying upon any particular feature of the petitioner's behaviour or conduct but rather were focusing upon matters which arise in respect of prisoners generally, including the petitioner. The fact that certain issues of effective monitoring and security are generic does not detract from the obvious seriousness of such concerns. Further, as the respondents submitted, the risk posed was not one which arose only from the petitioner's use of the laptop, but from the fact that others might gain access to it. Thus, the decision letter took into account the inability of the respondents to control who could access any laptop in the possession of the petitioner and what such persons might do with it. I also accept the respondents' position that within the decision letter the respondents additionally cited the fire and security risk potentially arising from misuse of the battery in a laptop.

[47] In relation to effective monitoring and security, it does not in my view follow, as senior counsel for the petitioner argued, that it is implicit in the fact that the respondents' policy recognises that use of personal laptops is a possibility that such effective monitoring and security ought to be readily capable of being put in place. What the policy envisages is that

effective monitoring and security require to be the subject of an assurance. It recognises that it may be possible to achieve assurance on these points, but it goes no further. As Lord Malcolm explained in *Beggs*, *petitioner*, another prisoner has been allowed to possess and use a personal laptop, demonstrating that it is possible for security concerns to be satisfactorily addressed. However, the precise means by which such assurance is to be achieved remains a matter for consideration. In relation to the prison laptop loan scheme, the borrower and the prison authorities require to enter into a compact regulating such things as monitoring and security. I accept that, having regard to the report from the independent experts, the issues relating to a personally owned laptop and a loan laptop differ in certain material respects. These include questions of the existence of any right on behalf of the prison authorities to access the device and any information saved on it and any right to modify or disable the technology on the device. If, for example, a communications port is disabled by the authorities, the independent experts concluded that this could void any warranty supplied by the retailer or manufacturer. These are matters which would require specific consideration for the purposes of a bespoke compact in relation to a personally owned laptop. The respondents were not given any information about what the petitioner was prepared to agree to in respect of effective monitoring and security. Even if he had proposed being bound by the same compact as under the protocol for loan laptops (which I did not understand to have been suggested by him) that would not have dealt with the specific issues arising with personally owned laptops. It is worthy of note that the independent experts issued their report in January 2017, prior to the decision of the respondents being made. The report considered the questions of monitoring and security and expressly recommended that personally owned laptops should not be considered. Nonetheless, the respondents did not simply proceed on that basis but rather they took into account all of the relevant considerations. I therefore do not accept that the very fact

that the respondents recognise the possibility of having a personally owned laptop carries with it the consequence that effective monitoring and security can be assured.

[48] Viewed individually or cumulatively, the petitioner's criticisms of the decision letter do not meet the high threshold for irrationality. For all of the reasons stated, I reject the contention on behalf of the petitioner that the decision not to allow him access to a personally owned laptop was irrational.

The failure to take account of relevant factors

[49] As noted above, the factors which were said not to have been considered were the volume of material, including correspondence, which the petitioner possessed and the management of that material. I have already explained my views on these arguments and for the same reasons as given earlier I reject them. In short, I see no basis for concluding that these factors were not taken into account.

Article 8 ECHR

[50] In relation to Article 8 ECHR, I was not addressed in any detail on what positive obligations might apply to prison authorities in the present context or as to what might constitute interference with Article 8 rights. I note that in Reed and Murdoch, *Human Rights Law in Scotland (*4th ed) the authors suggest that the positive obligations under Article 8 might extend to facilitating communication by providing the necessary resources. In that regard, the authors refer (para 6.34) to *Gagiu* v *Romania* (24 February 2009), a case in which the failure by the prison authorities to provide stamps for the purposes of communication with the court, causing the prisoner to sell his food to other detainees in order to buy stamps, was a violation.

In relation to interference with Article 8 rights, the authors refer (para 6.35) to impeding the initiation of correspondence, delaying a communication, or intercepting a conversation.

[51] I do not accept that the petitioner has made out that Article 8 is engaged on the grounds founded upon by him. The first ground was said to be that it was engaged insofar as the decision complained of concerned and impeded the petitioner's ability to manage his correspondence. I was shown no authority for the proposition that where an individual has certain other means of corresponding open to him, such as use of a typewriter and (for legal correspondence) the right to apply under the prison laptop loan scheme, a lack of access to one specific further means of preparing or viewing correspondence (a personal laptop) engages Article 8. There was no material put before the court which demonstrated that these other means of corresponding were so restricted in their availability as to impede or prejudice the petitioner's ability to communicate. There was, for example, no suggestion that the petitioner had been unable on any particular occasion to communicate with a solicitor. The case of *R (Ponting)* v *Governor of Whitemoor Prison* concerned a prisoner who was dyslexic and needed to use his word processor to advance his various litigations. In that case, the applicant focused mainly on Article 6 rights. To the extent that Article 8 was discussed, that concerned the terms of the compact, that is, the conditions under which he could use the computer. That case is therefore of no direct relevance to the issue before the court in the present case. I do not accept that a lack of access to a personally owned laptop by the petitioner engages Article 8 on the first ground advanced.

[52] The second ground upon which Article 8 was said to be engaged was that the lack of access to a personally owned laptop concerned and impeded the petitioner's ability to engage in educational activity in the prison. The factual basis for this proposition was simply not made out. In particular, I was not given any basis for understanding how access to a personally

owned laptop would work in relation to courses the petitioner might undertake in the learning centre, where the material was made available on computers. Obviously, there is a general convenience in using a laptop which might enhance the ability to understand and study material. However, in the same way as for his correspondence, I was not shown any basis for concluding that the lack of access to a particular form of enhancement of access of itself engages Article 8. Accordingly, I do not accept that Article 8 is engaged on this ground.

[53] Even if Article 8 is engaged in the circumstances founded upon by the petitioner, I am in no doubt that the need to maintain good order and security in prisons amounts to a legitimate aim. *R (Kenyon)* v *Governor HMP Wakefield* concerned a challenge to the policy in relation to the provision of laptop computers to prisoners at a prison in England and the application of that policy in the circumstances of the case. Both grounds of challenge were made under Article 6 ECHR. It was held that the governor of the prison was fully entitled to conclude that the refusal of IT facilities being provided to the claimant would not prejudice his right to a fair trial in terms of Article 6. In that case, Hickinbottom J said that counsel for the claimant had rightly accepted that the introduction of computers and other IT facilities into a prison, and particularly a high security establishment, posed substantial risks. The judge noted the various types of risk and added (para 14):

> "The risk is a general one, in the sense that it does not relate solely to the individual prisoner's actions and intentions – because there is a risk that, even if a laptop is given to one prisoner, it might be abused by or at the behest of others."

In the present case, the decision letter made reference to security and safety risks and gave various examples of such risks. The decision letter also referred to these risks applying not only to the prisoner who has access to the laptop but also to other prisoners who may come into contact with the device. The legitimate aim of any interference is therefore clear.

[54] As to proportionality, any interference has to be seen in the context of all of the other factors, including the existence of the prison laptop loan scheme and the fact that the petitioner has been able to engage in a number of litigations and to store both physical and electronic material. No specific incident of prejudice was identified by the petitioner. As I have noted above, the means by which effective monitoring and security concerns in relation to a personally owned laptop might be addressed were not identified or put forward. The references to these in the decision letter reflect the nature and seriousness of the concerns. In addition, the issues of confidentiality mentioned in the decision letter were not said on behalf of the petitioner to be irrelevant. Accordingly, if Article 8 is engaged, I consider that any interference in the petitioner's Article 8 rights pursued a legitimate aim and was proportionate.

Conclusion

[55] For these reasons, I conclude that the grounds of challenge to the respondents' decision of 12 May 2017 advanced by the petitioner are not well-founded. I therefore refuse the petition.