OUTER HOUSE, COURT OF SESSION

[2019] CSOH 103

P493/19

OPINION OF LORD PENTLAND

In the petition

of

DAVID GILDAY

Petitioner

for judicial review of the actions of the Scottish Ministers in interfering with his mail

Petitioner: Leighton; Drummond Miller
Respondent: Byrne; Scottish Government

10 December 2019

Introduction

[1] This is another case concerning a prisoner's correspondence. The background to it lies in the challenges currently faced by the Scottish Prison Service ("the SPS") in trying to control the smuggling of drugs, including new psychoactive substances, into prisons by ever more devious means.

[2] The petition for judicial review came before me for a substantive hearing. The petitioner is currently serving a number of sentences of imprisonment, amounting *in cumulo* to 18 years 5 months and 3 days, in Her Majesty's Prison, Addiewell. As matters presently stand, the petitioner will be released on 1 February 2024, although the Parole Board for

Scotland is due to review his case in August 2020. The respondents are the Scottish Ministers. They have responsibility for the SPS.

[3] The petitioner complains about the interception of a greeting card ("the card") sent to him whilst he was previously a prisoner in Her Majesty's Prison, Glenochil ("HMP Glenochil"). The respondents maintain that the SPS had reasonable grounds for believing that the card was impregnated with a psychoactive substance and that they were, therefore, entitled to seize and retain it.

[4] The petitioner asks the court to pronounce a declaratory order that the seizure and retention of the card constituted an unwarranted interference with his rights under Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the ECHR"). This, of course, provides in sub-paragraph (1) that everyone has the right to respect for his private and family life, his home and his correspondence. Sub-paragraph (2) states that any interference with this right by a public authority must be in accordance with the law and necessary in a democratic society *inter alia* for the prevention of disorder or crime and for the protection of health or morals.

The facts

[5] For the purposes of the substantive hearing, the petitioner lodged an affidavit setting out the grounds of his complaint. He explained that on or about 3 March 2019, at a time when he was a prisoner in HMP Glenochil, three items of mail addressed to him arrived at the hall where he was then imprisoned. According to the petitioner, a prison officer, with whom the petitioner says that he did not have a good relationship, opened his mail. Issue was taken by the officer with one item of mail; this was the card. The petitioner says that the officer took the card from his mail. The petitioner claims that the officer handled the card

without using any gloves. According to the petitioner, the card was not placed on a lightbox for the purpose of testing whether it contained any illicit substance because the lightbox in the petitioner's hall was broken. The petitioner explains that he was told by the hall manager that the card was to be taken to security.

[6] In their answers to the petition the respondents deny that the lightbox was broken, but for reasons to which I will shortly turn, this is not a dispute that it is necessary to resolve in the circumstances of the present case.

[7] The petitioner goes on to explain in his affidavit that he thereafter submitted a number of complaints to the SPS about the removal and retention of the card. He pursued each of these complaints to the Internal Complaints Committee ("the ICC").

[8] The petitioner claims in his affidavit that it is not unusual for him to receive greeting cards in prison because his friends send them to him with a view to trying to keep his spirits up. They do not just send them to him at the time of his birthday or at Christmas. The petitioner has never seen the contents of the card. He says that he is not certain who sent it to him. He has never been allowed to read the card since it was taken from him before he was able to do so. Nor has he been provided with a photocopy of the card. The petitioner states that he is very keen to discover who sent the card to him and to find out what it said. He will not be able to find out about these matters until his earliest date of liberation which, if he is not released earlier on parole, will be 1 February 2024.

[9] The petitioner accepts that he has had issues with substance misuse. He says that he is presently seeking to address these issues. He acknowledges that he has been the subject of a number of discipline reports, although he claims not to be able to recollect the details of all of these.

[10] The petitioner lodged as productions the official records relating to his various complaints about the seizure and retention of the card. 6/3 of process comprises the documents relating to the third of these complaints. In this complaint the petitioner stated that the hall manager told him that the card had been taken to security. The petitioner said that he asked the hall manager what the time limit was for security keeping the card so that he could get it back. According to the petitioner, the hall manager was dismissive of his inquiry.

[11] The petitioner's complaint was rejected on the basis that the process for seizing suspicious items had previously been explained to him. The petitioner regarded that response as inadequate and asked the ICC to review the matter.

[12] The response provided by the ICC is important because it provides an authoritative explanation as to what happened to the card and why. Mr Leighton, who appeared on behalf of the petitioner, submitted that the court should not have regard to this explanation because it was contained in a document which was not spoken to by a witness from the SPS; no affidavit had been lodged. I reject that submission. Particularly in the context of an application for judicial review, this is too narrow and technical an approach. It is important to note that there is no substantive dispute between the parties as to the accuracy of the documents and of the information and explanations they contain. It was indeed the petitioner who lodged this documentary evidence. He refers in his own affidavit to the complaints and to the productions documenting them. So the documents are in fact spoken to by a witness, namely the petitioner himself.

[13] In their decision of 19 March 2019, the ICC stated that, having considered SPS policy and reviewed the petitioner's complaint, they did not uphold the complaint for two reasons. First, it was noted that the residential first line manager had previously explained the

process to the petitioner in the context of his two earlier complaints about the same matter. The second reason given by the ICC for not upholding the petitioner's complaint was stated to be as follows:

> "(The petitioner) will not receive his mail as during screening there was an indication of a substance by a drug dog. Furthermore, rule 104 Para 6 of the Prison Rules states:- (b) *where the item is seized from any other person in the prison it may be retained in order to be returned to that person upon his or her departure from the prison*."

[14] The ICC added that the petitioner would receive his mail on liberation and not before that date.

The grounds of challenge

[15] The petitioner submitted that the prison authorities had no proper grounds for confiscating the card and refusing to return it to him. He maintains that the removal of the card without providing him with its contents was a disproportionate interference with his rights under Article 8 of the ECHR. He avers that his correspondence has apparently been removed and retained on the basis that it is suspected of being tainted (for example with illegal drugs) not that its contents were in any sense objectionable. In those circumstances, whilst the petitioner acknowledges that the removal of the physical item of correspondence might be legitimate and proportionate, steps ought to have been taken to permit him to have access to the contents of the correspondence. The petitioner contends that the removal of his correspondence, coupled with the failure on the part of the SPS to put in place a mechanism whereby he can become aware of the contents of his correspondence, amounts to a disproportionate interference with his Article 8 rights. He says that it would not unacceptably compromise any possible legitimate aim to provide him with a copy of his correspondence.

The respondents' position

[16] For their part, the respondents rely on the rights conferred on them under the Prisons and Young Offenders Institutions (Scotland) Rules 2011 (SSI 2011/331). The current version of these rules came into effect on 30 November 2018. The rules contain provision dealing with the seizure and treatment of what they describe as prohibited articles and unauthorised property. Rule 2 defines unauthorised property as meaning any property which the prisoner has not been authorised by any officer or by virtue of the rules to possess within the prison or within a particular part of the prison. There is no doubt that a greeting card impregnated with drugs or with a psychoactive substance would constitute an item of unauthorised property; Mr Leighton took no issue with that.

[17] Rule 55 sets out various restrictions on general correspondence to and from the prisoner. Sub-paragraph (4) of Rule 55 permits an officer to read a letter or package in circumstances specified in a direction made by the Scottish Ministers. The relevant direction is to be found in paragraph 5(1)(a) of the Scottish Prison Rules (Correspondence) Direction 2012, which provides *inter alia* that a prisoner may not receive any correspondence which consists of or contains a prohibited article or unauthorised property.

[18] Sub-paragraph (6) of Rule 55 states that where a letter or package is found to contain a prohibited article or any unauthorised property, the Governor must deal with the item in terms of Rule 104. For present purposes, the pertinent sections of Rule 104 are as follows:

> "(1) Any item found –
>
> (a) in the possession of a prisoner or any other person in the prison; or
>
> (b) anywhere else in the prison,

> may be seized by the Governor where the Governor has reasonable cause to believe that the item is a prohibited article or unauthorised property.
>
> ...
>
> (6) Where the Governor is satisfied that an item seized under paragraph (1) comprises unauthorised property the Governor may deal with the item in any of the following ways –
>
> > (a) where the item is seized from a prisoner it may be retained in order to be returned to the prisoner upon his or her release;
> >
> > (b) where the item is seized from any other person in the prison it may be retained in order to be returned to that person upon his or her departure from the prison;
> >
> > (c) in any other circumstances the Governor may dispose of or destroy the item by any appropriate means."

[19] The respondents contend that the seizure of the card was justified and reasonable because there were grounds to believe that it contained drugs. The Governor of HMP Glenochil (or prison officers on his behalf) had reasonable cause to believe that the card sent to the petitioner was unauthorised property. Whatever the position was with regard to whether the lightbox in the petitioner's hall was or was not working at the material time, there could be no doubt that the drug search dog detected an illicit substance on the card. The petitioner was not in a position to dispute that crucial piece of factual evidence.

[20] The respondents explain in their answers that on 6 March 2019 the card was screened by a trained tactical detection dog, also known as a drug search dog. It gave a positive indication that the card contained a drug. Positive indication by a drug search dog is averred to be an accurate, efficacious and, therefore, adequate method of detecting drugs in prison. The respondents go on to say in their averments that a positive indication by a drug search dog forms a good basis upon which to found a decision to seize, withhold and destroy any item. They aver that most commonly drugs are contained "laced" within items

such as cards, letters, children's drawings and clothing. In order to be deployed, a drug search dog must undergo UK wide training and meet a universal standard.

[21] The reasonableness of the steps taken was supported by the need to address the problems arising from the introduction and use of drugs in prisons.

[22] A further relevant factor was the petitioner's history of drug use and of being involved in drugs whilst in prison. For example, at an oral hearing in December 2014 the Parole Board had noted the petitioner's substantial history of substance abuse. In July 2016 tablets, capsules, wraps of powder and SIM cards had been found in Kinder eggs in a cell occupied by the petitioner and other prisoners. Prison officers observed that the petitioner was sweating profusely, his pupils were extremely constricted, and his rate of speech was abnormally fast. At a review hearing in December 2017 the Parole Board noted that the petitioner had been returned to closed conditions following the discovery of an unknown substance and SIM cards in his room; he had appeared to be under the influence of an unknown substance. The petitioner had tested positive for drugs on 16 November 2018 during a mandatory drug test. Since then the petitioner had refused to undergo three further drugs tests.

[23] The respondents also argue that continued retention of the card was reasonable and proportionate in the circumstances. There was no justification for returning it to the petitioner before his release date because it constituted unauthorised property. The drug could not be disaggregated from the card. The card was the means by which it was intended to introduce the drug to the prison estate.

Analysis

[24] In *Campbell* v *UK* (1993) 15 EHRR 137, the European Court of Human Rights acknowledged that some measure of control over prisoners' correspondence was justified and was not of itself incompatible with the ECHR, regard being paid to the ordinary and reasonable requirements of imprisonment. The Court also recognised that in assessing the permissible extent of such control in general, the fact that the opportunity to write and to receive letters is sometimes the prisoner's only link with the outside world should not be overlooked.

[25] Assuming in the petitioner's favour that his rights under Article 8 of the ECHR were engaged by the seizure of the card, I consider that such interference was justified for the prevention of disorder or crime and for the protection of health or morals. In my opinion, the information put before the court in the present case shows that the seizure and retention of the card were (and continue to be) reasonable and proportionate steps for the SPS to take (and continue to take). These measures pursue a legitimate aim, namely taking steps to prevent illicit substances from entering and then circulating within the prison estate. It is well known that drugs cause many difficulties in Scottish prisons. Psychoactive substances present particular challenges for the SPS. Against this background, I do not consider the steps taken in relation to the card to be disproportionate to the achievement of the legitimate aim to which I have referred.

[26] I am not attracted by the argument advanced on behalf of the petitioner that the respondents had failed to prove by admissible evidence the factual circumstances on which they rely. The suggestion that the petitioner is entitled to put the respondents to strict proof of their averments is, in my view, an inappropriate one in the context of the present proceedings for judicial review. The focus of such proceedings should be on whether there

are recognised public law grounds for reviewing administrative decisions taken by public authorities. The court should be astute to ensure that such proceedings are not used as a vehicle for the purpose of trying to open up administrative decisions on questions of fact alone.

[27] It seems to me that, on the basis of the documentary evidence and the explanations tendered to the court on behalf of the respondents, the court should be satisfied that the card tested positive for drugs when the drug search dog was used. That documentary material constitutes the best evidence of the decision upon which the respondents rely (c.f. *Tweed* v *Parades Commission for Northern Ireland* [2007] 1AC 650 per Lord Bingham of Cornhill at paragraph [4]). To insist on such undisputed factual points being set out in the form of affidavits sworn by SPS officers is not necessary or appropriate in the circumstances of the present case. Affidavits would add nothing of substance to the uncontested information that is already before the court in the respondents' averments and in the productions. The petitioner is not in a position (nor does he seek) to dispute the key factual information concerning the use of the drug search dog and the positive finding. In view of the positive test with the drug search dog, whether or not the lightbox was working is irrelevant; the Court does not require to resolve that particular factual dispute.

[28] The short point is that there is documentary evidence, the accuracy of which Mr Leighton did not challenge, showing that the card was tested by using a drug search dog and that a positive reaction was obtained. That being the case, the SPS had sufficient grounds to treat the card as an item of unauthorised property and to seize it.

[29] Mr Leighton also submitted that the petitioner should have been given a copy of the card. Mr Byrne, on behalf of the respondents, explained that this suggestion had been put to the SPS and considered by them. The response was that the unauthorised property (i.e. the

card itself) was currently held in a sealed production bag. The SPS did not consider it appropriate to open the bag and attempt to make a copy of the contents of the card because such steps would potentially expose a prison officer to the substance with which the card was contaminated. Mr Byrne explained that prison officers sometimes come into inadvertent contact with psychoactive substances in prison and the view had been taken that the SPS has a duty not knowingly to expose its officers to the risk of being exposed to such substances. That stance seems to me to be responsible and proportionate. In my opinion, a wide margin of discretion should be extended to the SPS to identify what constitutes a risk in a prison setting and to determine how best to address that risk (c.f. *R* v *Ministry of Defence ex parte Smith* [1996] QB 517 per Sir Thomas Bingham MR at page 556). As I have already explained, the petitioner will become entitled to receive the card in the sealed bag at the stage when he eventually comes to be liberated from custody. I am satisfied that retention of the card until then serves the legitimate aim of controlling the use and distribution of drugs in prison.

Conclusion

[30] In my opinion, the petition is unfounded. There were adequate grounds for the decisions taken in relation to the card by the SPS. I do not consider that there has been any disproportionate interference with the petitioner's Article 8 rights. The steps taken by the SPS were appropriate and justified. I shall accordingly sustain the second plea-in-law for the respondents, repel the petitioner's plea-in-law and refuse the petition. I shall reserve all questions as to expenses.