OUTER HOUSE, COURT OF SESSION

[2020] CSOH 13

P794/19

OPINION OF LORD BOYD OF DUNCANSBY

in the petition of

WILLIAM McCULLOCH

Petitioner

for

judicial review of decisions of the Scottish Ministers

Petitioners: Campbell QC, Crabb; Drummond Miller LLP
Respondents: Byrne; Scottish Government Legal Directorate

29 January 2020

[1] The petitioner is a prisoner in HMP Edinburgh. He claims that a letter from his solicitors was opened by the prison authorities. He seeks a declarator that the act of opening the letter was incompatible with his rights under article 8 ECHR and therefore unlawful under section 6 of the Human rights Act 1998 ("HRA") and beyond the powers of the respondent in terms of section 57(2) of the Scotland Act; and damages in the sum of £5000 as a necessary award to afford him just satisfaction in terms of section 8 HRA and section 57(2) of the Scotland Act.

Issues

[2] As a primary point the respondents submit that the petition is not seeking the supervisory jurisdiction of the Court of Session and is therefore incompetent. They also submit that on the facts that can be ascertained from the affidavits and pleadings that the petitioner is not a victim for the purposes of the HRA. In any event the court should refuse to grant an order in the exercise of its equitable jurisdiction.

[3] The petitioner resists the competency point. The petitioner wished to call witnesses but a motion before the procedural judge for authority to cite three named prison employees was refused. Before me Mr Campbell QC submitted that I could deal with the competency issue and if I rejected it I could hold a further substantive hearing at which witnesses could be called. Alternatively there was sufficient evidence before me from which I could draw the necessary inference of a violation of the petitioner's article 8 rights.

Legal background

[4] The parties are agreed that the opening of correspondence from a legal advisor to a prisoner by prison authorities potentially engages article 8 ECHR (see amongst other cases cited by the petitioner *Campbell* v *United Kingdom* (App 13590/88) (25 March 1992)). The rule for handling such correspondence is Rule 56 of the Prison and Young Offenders Institutions (Scotland) Rules 2011/331. Additional guidance is contained in the Scottish Prison Service document Management of Prisoner Correspondence Policy Revised 25 February 2019.

Facts

[5] There is no dispute that on 1 June 2019 the petitioner received a letter from his solicitors regarding an ongoing prosecution for assault following an incident in prison. A

number of prison officers were potential witnesses. The letter was in a brown envelope that had his name written in hand on the outside, together with his prison number, and stamped "confidential correspondence 1 June 2019". It was apparent that it had been opened in the prison before it got to him.

Competence

Submissions for respondents

[6] The action is essentially an action for damages under the HRA. It could be brought in the sheriff court. Given the sum sought it is well within the exclusive jurisdiction of the sheriff court; Court Reform (Scotland) Act 2014 section 39(1)(b)(ii). The sheriff court could grant a declarator in just satisfaction either instead of damages or as well as damages; section 8(1) HRA. The juridical basis of the judicial review was a breach of the HRA. There was no averment that anyone acted ultra vires or were irrational or unreasonable. There was no aspect of this case that only a Lord Ordinary could deal with. An application to the supervisory jurisdiction of the Court could not be pursued where application could be made by appeal or review; Rule of Court 58.3(1); McCue v *Glasgow City Council* 2015 SCLR 186 paras 60, 61. There was an alternative remedy in the sheriff court. Where an action is essentially one of damages judicial review was not appropriate; *Sher* v *Chief Constable of Greater Manchester Police* [2011] 2 All ER 364; *Bell* v *Fiddes and another* 1995 SCLR 1123. The addition of a declarator in the crave made no difference; *Docherty* v *Scottish Ministers* 2012 SC 150, per Hamilton LP at para 21. The approach of the First Division in *Docherty* was specifically endorsed by Lord Hope DPSC in *Ruddy* v *Chief Constable of Strathclyde* 2013 SC (UKSC) 126 at paras 14 – 20; see also *Sher* at paras 63, 65, 73 and 72 – 82. Where, as here,

there was a potential dispute of fact judicial review was not apt to resolve the matter. It should only be in exceptional cases that witnesses would give evidence in a judicial review.

Submission for petitioner

[7] There was no argument that as a matter of law the petitioner was entitled to the remedies sought assuming there to have been a violation of his rights. The issue was one of whether it was competent to seek these remedies through judicial review. This was not the first petition for judicial review following on an allegation that a prisoner's confidential correspondence had been interfered with by the prison authorities. The point had not been taken before. It was clear that the supervisory jurisdiction of the court was not confined to reviewing decisions; *Elmford Ltd* v *City of Glasgow Council* 2001 SC 267 at para 8. What the petitioner was seeking was a declarator of his rights. It is the character of the act that is important; *Ruddy*, per Lord Hope at para 18. The declaratory relief that the petitioner is seeking is peculiarly one for judicial review and defines its scope. A finding of a violation of a right is an important vindication of the right; *R (Greenfield)* v *Home Secretary* [2005] 1 WLR 673 per Lord Bingham at paras 8, 9 and 19. The judicial review was seeking to control the actions of officials for whom the respondents were responsible.

Decision on competence

[8] The fallacy which lies behind the petitioner's approach is that he is seeking an exercise of the Court's supervisory jurisdiction. He is not. There is no attempt to review any decision or control the actions of any officials. What he is seeking is just satisfaction for one completed act which he says is a violation of his article 8 rights. As Lord Hope remarked in *Ruddy* the sole purpose for which the supervisory jurisdiction of the Court of Session may be

exercised is to ensure that a person to whom a power may be delegated or entrusted does not exceed or abuse that jurisdiction or fail to do what is required; para 18. That statement may be thought to be too bald in view of recent developments in the law (see for example *Wightman* v *Advocate General for Scotland* 2018 SC 388). Nevertheless this is a claim for vindication of rights arising out of one alleged breach of ECHR rights which occurred in the past. In *Docherty* v *Scottish Ministers* it was argued that an action for damages arising out of alleged breaches of article 3 should be raised as a judicial review. The First Division held that an ordinary action in the sheriff court was competent. The addition of a crave for a declarator made no difference. It did not involve the invocation of the supervisory jurisdiction (para 21).

[9] Accordingly I hold that the petition for judicial review is incompetent. The fact that this Court has dealt with such actions in the past without questioning whether it was appropriate to do so does not alter the competence of the petition. There is an alternative forum in the sheriff court which could competently give the petitioner just satisfaction. Given that the action is not one of judicial review the sheriff court has exclusive jurisdiction; section 39(1)(b)(ii) of the Court Reform (Scotland) Act 2014.

Merits

[10] In any event I do not consider that there is any merit in this action. There is a procedure called double enveloping. This is the system recommended to solicitors by the Law Society. Solicitors writing to prisoners will put the letter in an envelope which is clearly marked with the name, date of birth and hall location as well as the name and address of the sender and point of contact. That envelope is sealed and put in another envelope with a letter to the governor asking that the enclosed envelope be passed to the prisoner.

[11] An affidavit from the solicitor who wrote the letter to the petitioner confirms that his firm uses that system. If that had occurred in this case then the petitioner would have received not a brown envelope from the prison but a white envelope from his solicitor. It is therefore clear that the letter had been opened.

[12] Occasionally the double enveloping system is not followed. If that happens then the mail will be opened in the normal way. If it is then clear that the letter is confidential correspondence it is then placed in an internal brown envelope, stamped on both sides and passed to the prisoner. The envelope, a copy of which has been produced, conforms to that procedure. The solicitor who sent the mail confirms that he did not deal with the mail himself. While he considers it unlikely that the letter was not double enveloped he cannot rule out that possibility.

[13] In my opinion the most likely explanation for why the petitioner received the letter in a brown envelope is that it was not double enveloped. It is true that the mail administrator in the prison did not record the failure to double envelope as the guidance required. Nevertheless there are no averments which suggest that the petitioner's confidential mail was deliberately opened and read in spite of having the protection of being double enveloped. That being so there is no breach of the petitioner's article 8 rights. Even if there was in the circumstances of this case it would be *de minimus*.

Disposal

[14] I will sustain the third plea in law for the respondents and dismiss the petition. I reserve the question of expenses.