**OUTER HOUSE, COURT OF SESSION**

**[2020] CSOH 28**

**P152/19**

OPINION OF LORD BRAILSFORD

In the cause

CHARLES O'NEILL and WILLIAM LAUCHLAN

Pursuer

for

Judicial Review

Of a decision by the Scottish Ministers to refuse to re-instate telephone contact between them

Defender

**Pursuer: Leighton; Drummond Miller LLP**
**Defender: Reid; The Scottish Ministers (Scottish Government Legal Directorate)**

3 March 2020

[1] The petitioners are convicted life prisoners. They seek reduction of a decision to withdraw permission to telephone each other; declarator that they ought to be treated as near relatives for the purpose of a policy in relation to telephone calls by prisoners and declarator of a breach of their Article 8 rights in refusing permission for them to telephone each other. The respondents are the Scottish Ministers.

**Background**

[2] The factual situation giving rise to this petition may be summarised as follows. On 25 March 2008 the petitioners were remanded in custody and in 2010 were convicted of murder and other offences. A minimum term of 30 years was imposed in respect of the petitioner O'Neill and of 26 years in relation to the petitioner Lauchlan. They remain in prison. During the course of the hearing before me my attention was drawn to the decision in *O'Neill* v *Scottish Ministers* (no 1)[1], a decision of Lord Stewart. I would note that the decision was the subject of a reclaiming motion which was refused by interlocutor dated 10 February 2017. The reason I refer to this decision at this stage in this opinion is because it conveniently narrates in detail the history of the petitioners' offending, conviction and certain facts about litigation instigated at the instance of the petitioners previously before this court.[2] It is convenient that I simply note the passages I have drawn attention to and acknowledge that I had regard to them in putting the present application in context.

[3] Prior to raising these proceedings, and indeed at the time of the proceedings which gave rise to the previously mentioned decision of Lord Stewart, the petitioners had been allowed inter-prison telephone calls between each other. It was asserted in the present proceedings on behalf of the petitioners that this facility was permitted because they were treated by the Scottish Prison Service ("SPS") as "near relatives" and were therefore entitled to the benefit of a policy operated by the SPS relative to telephone calls.[3] This assertion was denied by the respondents. The respondents' position was that inter-prison telephone calls between the petitioners were allowed to facilitate legal preparations in relation to litigation

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[1] 2015 SLT 811.

[2] See paragraphs [1] – [22] of the said opinion.

[3] Governors and Managers Action Notice 20A-08 dated 29 July 2008, produced as number 6/1 of process.

they were parties to. It was further contended by the respondents that by mistake inter-prison telephone calls continued after the conclusion of the judicial review proceedings already alluded to. This mistake was eventually recognised in 2018 at which time the petitioners were each informed that they would no longer be afforded the facility of inter-prison telephone calls.

**Procedural history**

[4] The petition was presented on 14 February 2019. By interlocutor dated 22 February 2019 the petition was sisted for 28 days, a period which was subsequently extended until 22 May 2019 to allow applications for legal aid to be determined. Answers were lodged and by interlocutor dated 12 September 2019 permission to proceed restricted to the issue of time bar raised in the respondents' second plea-in-law was granted. The matter came before the court for a hearing on the issue of time bar on 12 December 2019. At that hearing counsel appeared on behalf of the petitioner Lauchlan. The petitioner O'Neill was present but unrepresented. Counsel explained that he had been instructed on the afternoon immediately prior to the substantive hearing. At that time legal aid had only been granted to Lauchlan. In the circumstances, and having regard to the time available, he had had the opportunity to consider the petition and answers and a limited number of other papers. It was his understanding that other papers existed which he had not yet been provided with. He had also had the opportunity to consult with Lauchlan. An application for legal aid had been made on behalf of O'Neill. Whilst it was anticipated that the application would be successful and legal aid granted in early date it had, in the circumstances, been impossible for counsel to consult with O'Neill. Counsel sought a continuation of the hearing to enable

him to consider all available papers and in the event legal aid was granted, consult with O'Neill. This motion was granted.

[5] The matter called for the continued hearing on 12 February 2020. O'Neill's legal aid application had been granted. Counsel now represented both petitioners. The hearing was confined to the issue of the respondents' time bar plea. The bare facts giving rise to that plea are to be found in paragraph 2 of the petition and the corresponding answers on behalf of the respondent. The petitioners' position was that the date on which the grounds giving rise to the petition first arose was 15 November 2018. If that is correct then the petition was presented timeously. The respondents' position was that the operative decision in relation to the removal of inter-prison telephone calls between the petitioners took place on 17 August 2018 which failing 4 October 2018 in respect of the petitioner O'Neill and 26 October 2018 in relation to the petitioner Lauchlan. If any of the dates contended for by the respondents is correct then, as was conceded by counsel for the petitioners the petition was out of time having been raised outwith the three month time limit stipulated in section 27A of the Court of Session Act 1988.

[6] In light of the foregoing there was agreement between parties at the hearing that the questions for determination by the court were: (i) When did the grounds giving rise to the petition first arise?, (ii) Has the petition been presented within the time permitted by section 27A of the said Act of 1988, the answer to which question will be dependent upon the answer to question (i); (iii) If the grounds giving rise to the petition first arose before 14 November 2018 is it equitable having regard to all the circumstances to allow the petition to proceed?

**Petitioners' submissions**

[7] The petitioners' initial argument was that the challenge raised in the petition was to a state of affairs. On this analysis it was incorrect to take account of particular factors as determinative of a date when a right of challenge came into existence. The appropriate analysis was said to be that there was scope for a new challenge every day because the effects of what was characterised as an unlawful act were continuing. The argument was developed to state that there would be real difficulties in a practical sense if time limits run during the course of continuing defaults. Reliance was placed on observations said to support that proposition in the speech of Lord Lloyd-Jones in *O'Connor* v *Bar Standards Board*[4].

[8] In relation to the issue of specific dates my understanding of the submission of counsel was that he accepted that as a matter of fact the petitioners were aware of the decision to remove inter-prison telephone calls between them on 17 August 2018, that being the date when they ceased to be permitted such communications. Further counsel did not dispute that each petitioner had complained to the SPS about the decision to stop telephone calls and that each was aware that on 4 and 26 October 2018 these complaints were finally determined against them.[5] The date of 15 November 2018 was, on counsel for the petitioners' argument, relied on as no more than the formal intimation that inter-prison telephone communication was withdrawn. My understanding of the submission was that counsel did not dispute that each of the petitioners was as a matter of fact and substance aware that inter-prison telephone communications between them had been withdrawn on 17 August 2018.

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[4] [2018] HRLR 2 at paragraph 23.

[5] Numbers 6/4 and 6/3 of process.

[9] The second argument advanced on behalf of the petitioners was that the respondents were barred from insisting on a time bar plea. The argument reflected propositions advanced in the petitioners' eighth and ninth pleas in law added by way of adjustment on 29 January 2020.

[10] These pleas in law were that the respondents were barred from insisting on a time bar plea and separately because the petitioners were said to have a legitimate expectation that the respondents would not take a time bar plea against them. The first argument in support of this submission was based on the fact that the petitioner Lauchlan, with the knowledge of the petitioner O'Neill, sought to use the complaints process provided by the Scottish Public Service Ombudsman ("SPSO") in relation to the issue of inter-prison telephone calls between them. The complaint to the SPSO was only finally dismissed on 9 April 2019. It was submitted that the respondents represented that the SPSO was the last stage of the prison complaints process and, as a necessary inference, judicial review was not competent until that process was complete. If that were correct then the respondents were said to be barred from insisting in a time bar plea in the present petition.

[11] The third and final argument on behalf of the petitioners was that if the petition was otherwise time barred it was nonetheless equitable to permit it to proceed. A number of factors were prayed in aid to support the proposition that it was equitable to permit the present case to continue although out of time. These were that the representations made by the respondents about the SPSO, even if not amounting to personal bar or sufficient to create a legitimate expectation were nonetheless relevant in considering where the balance of equity lay. Second, the respondents were said to have previously adopted a position from which they now seek to resile. As I understood it this was based on the admitted fact that inter-prison telephone calls between the petitioners had been permitted for a number of

years and this position had changed in August 2018. There was said to exist a public interest in "holding the respondents to account" in relation to this change of position. Third, it was said that the complaint of withdrawal of inter-prison telephone communication related to what was characterised as "… a continuing objectionable state of affairs". Fourth, the decision to withdraw inter-prison telephone communications between the petitioners was said to affect only two persons and therefore there was no prejudice to good administration as there was no wider application. Fifth, it was said that the petitioners sought legal advice in good time and that any available remedy which might be available to them, for example suing their solicitors for failure to proceed timeously, would afford the petitioners no practical alternative remedy. Sixth, it was said that any delay was short, the discretion afforded to the court was broad and that there was no suggestion that evidence had been lost or had become any less cogent because of the delay. Beyond these considerations it was said that telephone contact was "one of the few ways" the petitioners can keep in touch and that such contact has an "immediacy that letters do not." Lastly the contention proceeded on the asserted basis that the primary claim was a good one and the prospects of success therein were good. Support for at least some of these propositions was founded upon *D* v *the Commissioner of Police of the Metropolis*.[6]

**Respondents' submissions**

[12] I deal with the respondents' answers to the submissions in the same order as they were presented by counsel for the petitioner.

[6] [2012] EWHC 309 at paragraphs 5 and 35.

[13] In relation to the applicable date it was submitted that the decision to terminate inter-prison calls was made and intimated to the petitioners on 17 August 2018 in terms which were clear and unequivocal. In that regard my attention was drawn to an email dated 17 August 2018 from the chief executive of the SPS to a prison official.[7] In that email the chief executive informed the prison official that he could find "… no justification at this time for continuing with the arrangements". The arrangements he was referring to were the inter-prison telephone communications between the petitioners. By letter sent of even date with the email the recipient of the email confirms that the petitioner O'Neill would be advised of this decision "this evening". I observe at this juncture that neither petitioner disputed at the hearing that intimation of this change in position by the SPS had been intimated to them on 17 August 2018. Beyond this my attention was drawn to the fact that each petitioner complained about the decision to stop the calls.[8] These complaints were finally determined against the petitioners on 4 October 2018 and 26 October 2018, decisions which were intimated to the petitioners.

[14] Counsel then drew my attention to the language of section 27A of the Court of Session Act 1988. The relevant provision provides:

> "(1) An application to the supervisory jurisdiction of the Court must be made before the end of—
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> (a) the period of 3 months beginning with the date on which the grounds giving rise to the application first arise, or
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> (b) such longer period as the Court considers equitable having regard to all the circumstances."

[7] Number 6/2 of process.

[8] Numbers 6/4 and 6/3 of process.

It was submitted that all relevant circumstances were known to the petitioners on 17 August 2018 that being the date when the inter-prison telephone calls were stopped.

[15] In relation to the petitioners' argument in respect of time bar it was submitted that the thrust of the complaint appeared to be that the respondents had created a legitimate expectation that they would not take a time bar point where a complaint was presented to the SPSO. In answering this counsel first drew my attention to a number of propositions which were submitted to apply to the concept of legitimate expectation as a legal principle. It was said that the principle of legitimate expectation had developed to "protect persons from gross unfairness or abuse of power by a public authority".[9] It was further submitted that the principle was best expressed in the opinion of Law LJ in *R (Nadarajah)* v *Secretary of State for the Home Department* [2005] EWCA Civ 1363 at paragraph 68 as follows:

> "Where a public authority has issued a promise or adopted a practice which represents how it proposes to act in a given area, the law will require the promise or practice to be honoured unless there is good reason not to do so."

Beyond these statements of principle it was further submitted that a burden rested upon a petitioner to establish the legitimacy of their expectation.[10] It was said that the starting point for consideration was to pose the question "what in the circumstances the member of the public could legitimately expect".[11] Where the expectation is no more than a public authority bear in mind what it has said in a previous occasion review by the court would be restricted to Wednesbury grounds.[12]

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[9] *Rainbow Insurance Co Ltd* v *Financial Services Commission* [2015] UKPC 15 at paragraph 51 per Lord Hodge.

[10] *Paponette* v *Attorney General of Trinidad and Tobago* [2012] 1AC1 at paragraph 37 per Lord Dyson.

[11] *R* v *North and East Devon HA, ex-parte Coughlan* [2001] QB213 at paragraph 56.

[12] *Coughlan* (supra) at paragraph 57.

[16] In the context of the present petition it was observed that the petitioners made no submission as to how any expectation arose. Moreover there was no basis given as to how the petitioners were aware that the expectation they asserted had arisen. No representations made by the respondents were founded upon.

[17] In relation to the argument that the complaint to the SPSO could bar the respondents from taking a time bar plea in the present petition the submission was that the complaint to the SPSO was a different matter and the remedy sought in the present proceedings was not available from the SPSO. Properly analysed the complaint to the SPSO was not an alternative source of the remedy herein sought. Moreover the complaint to the SPSO was of an entirely different nature. Whether or not the complaint would be investigated was a matter for the discretion of the SPSO.[13] On the other hand judicial review is available as a matter of right. Counsel submitted that the petitioners' argument that a complaint to the SPSO prevents an application to the supervisory jurisdiction was tantamount to saying that the Scottish Public Services Ombudsman Act 2002 ousts the jurisdiction of the court. It was maintained that that proposition was plainly wrong.[14]

[18] In relation to the third argument, whether or not it was equitable to allow the petition to proceed if out of time it was noted that the matter was entirely one for the court's discretion. No substantive or equitable grounds had been advanced and the court's discretion should not be exercised.

[19] Beyond that counsel submitted that time begins to run from the date on which the grounds giving rise to an application first arise. This proposition was founded upon the provisions of section 27A(1)(a) of the said Act of 1988. My attention was also drawn to the

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[13] Section 2 of the Scottish Public Services Ombudsman Act 2002.

[14] Section 7(8) Scottish Public Services Ombudsman Act 2002

observations in relation to this provision of Lord Ericht in Odubago, petitioner.[15] It followed that the court required to consider whether the state of knowledge of the petitioners was sufficient to enable them to appreciate that there were grounds of challenge available to them in relation to a decision. In the context of the present case the petitioners were each aware on 17 August 2018 that inter-prison telephone calls between them were no longer permitted. On the same date they were each aware that that state of affairs was as a result of a decision made by the SPS. The petitioners' awareness of those facts was demonstrated by complaints against the removal of inter-prison telephone calls between them, which complaints were themselves determined against the petitioners on 4 and 26 October both dates more than 3 months before the present petition was presented.

**Decision**

[20] In relation to the date when the court can be satisfied that "… the grounds giving rise to the application first arise" I consider the position to be clear. I do not accept the characterisation of the situation in the present case as a continuing act. A decision whereby that which was previously permitted and facilitated is disallowed and not facilitated is an act. No doubt the effect of that act continues thereafter but the act has occurred as an event, independent of the consequences. The petitioners were permitted inter-prison telephone communications between each other and this facility was terminated on 17 August 2018. As a simple matter of fact they were not afforded inter-prison telephone communication after that date. Termination of a hitherto permitted facility of itself would indicate to persons affected by it, such as the petitioners, that a situation had changed. I am however prepared

[15] [2020] CSOH 2.

to accept that they would not be aware of such a situation in the context of the intention of the respondents until the decision had been communicated to them. On the basis of the documents produced to me and to which I have already referred it seems plain that the intention of the respondents was communicated to them on the day the decision was taken, that is 17 August 2018. In my opinion at that date the respondents were both aware that they were no longer to be afforded inter-prison telephone communication and, if they considered that any right pertaining to them in relation to such communication had been breached or infringed they were in possession of sufficient knowledge at that date to proceed as they saw fit. Lest there is any doubt about that matter I would draw attention to the fact that there were plainly complaints about the withdrawal of telephone communication between them made to the SPS culminating in the letters of 4 and 26 October 2018.

[21] Having regard to the foregoing my view is that for the purposes of section 27A of the said act of 1988 time began to run on 17 August 2018 that being the date when they were aware of the grounds which have given rise to this petition.

[22] In relation to the pleas of personal bar and legitimate expectation I essentially accept the reasoning in the arguments advanced by counsel for the respondent.

[23] The argument that the respondents are barred from insisting on a time bar plea depends on the existence of alternative remedy, the only suggestion of such being the complaint that the petitioner Lauchlan made to the SPSO at a date which I note was prior to 17 August 2018. The only coincidence that I can determine between that complaint and the present judicial review is the subject matter. The language of the Scottish Public Service Ombudsman Act 2002 makes it express that the jurisdiction of the court is not ousted, and indeed that the SPSO will not investigate any matter in respect of which the person

aggrieved has or had a remedy by way of proceeding in any court of law.[16] It is plain from that provision that the SPSO jurisdiction is entirely separate and independent from that of a court of law. That being the case it cannot be said that the existence of an ongoing complaint to the SPSO bars reliance on any remedy which may exist as of right by way of judicial review.

[24] Turning to legitimate expectation it is plain both as a matter of language and on authority that there must be an "expectation" upon which an aggrieved person is entitled to rely.[17] In the present case the basis of any such expectation was neither pled nor was any suggestion of what might constitute that advanced in submission by counsel for the petitioner. My understanding of the submission made by counsel for the petitioner was that the simple fact that the petitioners had been allowed inter-prison telephone communications created an expectation. In my view that is a fallacious analysis. A body such as the SPS charged with administration of a prison system requires to take administrative decisions and there is no reason why any such decision cannot be reviewed or changed with the passage of time. It was suggested in argument by counsel for the petitioner that there was a concession made in a petition at the instance of the present petitioners heard by Lord Stewart in 2015 to the effect that the respondents accepted that there existed between the petitioners status of "near relatives" and that their inter-prison telephone communications were therefore the subject of a SPS policy. Having considered Lord Stewart's opinion I am not satisfied that is a correct interpretation of what he said. The relevant passage is in the following terms:

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[16] Scottish Public Services Ombudsman Act 2002 section 7(8)(c).

[17] R (*Nadarajah*) (supra).

> "Counsel for the petitioners draws support from the fact that Mr O'Neill and Mr Lauchlan have been allowed inter-prison telephone calls over the years, a facility available to 'near relatives' [Scottish Prison Service Action Note 20A/08, 29 July 2008]. I am not sure, even assuming relationship to be the key, that this takes the petitioners very far: On more than one occasion the prison service made it clear that inter-prison telephone calls were being allowed in order to facilitate legal preparations rather than for "family life" reasons."[18]

[25] What is said by Lord Stewart in the passage I have just quoted is consistent with the information given to me by counsel for the respondent in the present matter to the effect that telephone communication was permitted between the petitioners as a result of litigation they were involved in. Albeit that it is accepted that such communication continued, by mistake, after the litigation terminated such an error does not in my view give rise to any expectation that it will be continued thereafter. I am accordingly of the view that there is no basis for the claim of any legitimate expectation the nature of which would preclude a time bar plea being taken in the present petition.

[26] So far as the exercise of the equitable jurisdiction is concerned I can see no basis therefore. The petitioners were aware of the withdrawal of inter-prison telephone calls the day the decision was taken. They were able to instruct solicitors. They were able to enunciate and advance complaints about the matter within the internal SPS complaints process. I accept that there are no wider implications from this petition, but do not regard that as significant. I do not accept the proposition that the delay in the present case was short. I consider that both petitioners were aware of the grounds, giving rise to the petition on 17 August 2018, almost six months before the petition was presented. It is now well recognised and accepted that there are good reasons for the relatively short time limits within which application for judicial review must be brought. The three month time limit

[18] 2015 SLT 811 at p815 paragraph [20].

was selected by parliament in enacting the said act of 1988 " … for reasons of good governance and public policy."[19] I am not prepared to exercise the equitable jurisdiction of the court to permit this petition to proceed out of time.

[27] It follows from the foregoing that the questions for determination identified in paragraph [6] hereof as follows: (i) 17 August 2018; (ii) no and (iii) there is no reason to allow the petition to proceed out of time. I will accordingly uphold the respondents' second plea-in-law and dismiss the petition.

[19] Paterson v Scottish Criminal Cases Review Commission [2018] CSOH 106 per Lady Clark of Calton at paragraph 25.