Scottish Court of Session Decisions

OUTER HOUSE, COURT OF SESSION

[2015] CSOH 98

P241/14

OPINION OF LADY STACEY

In the petition of

WILLIAM FREDERICK IAN BEGGS

Petitioner;

for

Judicial Review of actions by the Scottish Ministers

Petitioner: Campbell QC and Leighton; Drummond Miller LLP
Respondents: Byrne; Scottish Government Legal Directorate

21 July 2015

[1] This is a petition for judicial review by Mr Beggs. He is a prisoner. He complains of maladministration by the Scottish Prison Service (SPS) prison authorities concerning his mail.

[2] The events with which this petition is concerned started in January 2013 and continued until January 2015. In the period between January and March 2013 the petitioner was a prisoner within HMP Glenochil and he was thereafter transferred to

HMP Edinburgh. The petitioner made complaints to SPS that his mail from the UK Information Commissioners' Office had been opened on 14 January 2013 while in Glenochil; that other confidential mail addressed to him was opened in Edinburgh in August, September (on two occasions), November, and December all 2013; that he suffered delayed receipt of mail of a confidential nature in April and August 2014, and a further delay of receipt of mail in January 2015. As the hearing before me progressed, it appeared that the complaint by the petitioner was that there was no efficient system of delivery of mail, leading to delay; and that there was no efficient system of sorting privileged mail from other mail. It was conceded that changes had been made since the petition was initiated. I find that the complaint about delay is not made out and that the complaint about the privileged mail is made out. My reasons for these decisions follow.

[3] Counsel for the petitioner moved to amend the petition in terms of a minute of amendment and answers which motion was not opposed by the respondents. Parties were agreed that the petitioner should be found liable to the respondents for the expenses of the amendment. The petitioner is legally aided and it was agreed that he should be found liable as a legally aided person with his liability modified to nil. I allowed that motion and made the finding on expenses in the form sought.

[4] The petitioner produced an affidavit which he sought to have received; that was opposed by counsel for the respondents. The affidavit was said to amplify the averments made on behalf of the petitioner; it did not introduce new facts and was not a basis for any new legal claims. It was lodged on the day of the hearing because it had taken a long time to prepare. Consultation with the petitioner had been generally by video link; arranging attendance for execution of the affidavit had taken some time. Opposition was on the basis that the respondents had no notice and so no opportunity to dispute the evidence given in the affidavit. Counsel sought to discharge the diet if the affidavit was allowed. I was advised that several diets of this hearing had already been discharged for other reasons. Parties were of the view, absent the controversy relating to the affidavit, that oral evidence was not needed and that the petition could be disposed of by submissions with reference to the productions.

[5] As I decided it would be best to proceed to hear the petition without further delay, I decided to allow the affidavit to be received, but stated that it would have little weight if it contained material evidence which was disputed. After hearing parties I decided that the affidavit did contain evidence about matters not referred to in the petition, namely the petitioner's claims of interference with his mail on other occasions; information about the petitioner's inability to call a witness at an internal appeal; and about another prisoner's successful complaint to the Scottish Public Services Ombudsman. I put no weight on these matters.

[6] It was argued on behalf of the petitioner that I should sustain the second, third, fourth, eighth and tenth pleas in law of the petition. In order to do so, counsel argued that the petitioner was a victim for the purposes of section 7 of the Human Rights Act 1998 and

section 100 of the Scotland Act 1998; that Article 8 of the European Convention on Human Rights (ECHR) had been breached by the opening of his confidential correspondence and by delay in delivery of his correspondence; and that the actions referred to were in breach of the respondents' own mail handling policy. If I were to find that the petitioner is a victim in terms of the legislation, then counsel proposed that a further hearing be held on the question of remedy.

[7] The first issue between the parties was whether the petitioner is a victim as defined by section 7 of the Human Rights Act 2000, which refers to article 34 of the ECHR. In order to decide it is necessary to examine the facts of the case and to make findings about events said to be in breach of a substantive right guaranteed by the state, and if such events have occurred, to make findings about any acknowledgement and redress made by the authority involved. It was agreed between the parties that the case of *Eckle* v *Germany* 1982 A 51 was authority for the proposition that a person need not be prejudiced by a breach, so long as he is directly affected by it.

[8] The ECHR guarantee said to have been breached is that contained in article 8 which is in the following terms:

> "Article 8
>
> Right to respect for private and family life
>
> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals or of the protection of the rights and freedoms of others."

[9] The delegated legislation relevant to correspondence in prison is the Prisons and Young Offenders Institutions (Scotland) Rules 2011 and the Scottish Prison Rules (Correspondence) Direction 2012. The relevant rule is as follows:

> "59. (1) This rule applies only to letters and packages which –
>
> (a) are sent to a prisoner from a person, authority or organisation specified in a direction made by the Scottish Ministers in terms of paragraph (2);

(b) are sent by a prisoner to a person, authority and organisation specified in a direction made by the Scottish ministers in terms of paragraph (2).

(2) The Scottish Ministers may specify in the direction the persons, authorities and organisations with whom a prisoner may correspond subject to the conditions specified in paragraphs (3) and (4).

(3) Subject to paragraph (5), a letter package to which this rule applies must not be opened by an officer or employee unless –

(a) the officer or employee has cause to believe that it contains prohibited article;

(b) the officer or employee has explained to the prisoner concerned the reason for that belief; and

(c) the prisoner concerned is present.

(4) the contents of a letter or package to which this rule applies must not be read by an officer or employee except where paragraph (5) applies.

(5) A letter or package to which this rule applies may be opened, and once open, the contents of the letter package may be read by the Governor, or by an officer or employee specially authorised by the Governor, where the government has reasonable cause to believe that the contents of the package may –

(a) endanger the security of the prison;

(b) in danger the safety of any person; or

(c) relate to a criminal activity.

(6) Where the Governor decides that the contents of a letter or package to which this rule applies may be read in terms of paragraph (5), the Governor must, prior to the contents of the letter or package being read, inform the prisoner of that decision and the reasons for that decision.

(7) Where a letter or package to which this rule applies is found to contain a prohibited article of any unauthorised property, the Governor must deal with the item in terms of rule 104."

[10] The direction, made on 19 March 2012 so far as relevant is in the following terms:

"7. (1) Prisoners may correspond with the following persons, authorities and organisations subject to the conditions specified in rule 59 (3) and (4) –

(a) The Scottish Human Rights Commission;

(b) The Equality and Human Rights Commission;

(c) The Law Society of Scotland;

(d) The Office of the Scottish Information Commissioner;

(e) The Office of the UK Information Commissioner;

(f) The Risk Management Authority;

(g) The Samaritans;

(h) The Scottish Children's Reporter Administration;

(i) The Scottish Legal Complaints Commission;

(j) The Scottish Public Services Ombudsman

(2) Correspondence sent by The Scottish Legal Aid Board to a prisoner and marked 'privileged' shall be subject to the conditions specified in rule 59 (3) and (4)."

[11] Counsel drew my attention to a number of internal SPS documents known as Governors and Managers: Action Notices (GMAs) which set out the relevant procedure for the handling of privileged mail for prisoners. He began with GMA 26 A/09, which had been updated in terms of GMA 28 A/10, 34 A/10 05 A/13 and GMA 41 A/14. In 26 A/09, the following is stated under the heading "Identifying privileged correspondence":

"In order to help SPS comply with the requirements that privileged correspondence is passed to the prisoner unopened, agreement has been reached with a number of organisations on how they or those they represent should address and envelope such correspondence. Governors may wish to make an approach to the main local law firms representing prisoners in the prison to facilitate wider take-up of the process.

When writing to a prisoner the letter should be 'double envelope'. The letter to the prisoner should be sealed in a first or inner envelope clearly marked to identify the sender, the recipient, and the privileged status of the correspondence. This should include as much as possible of the following:

- the full name of the prisoner, his date of birth and Hall location
- the words 'legal correspondence' for correspondence from a court or prisoners' legal agents; and
- the word 'privileged' for other than 'legal correspondence'.

  Alternatively this information may be contained in a covering letter to the Governor, providing the envelope clearly identifies the petitioner and the privileged status of the correspondence.…

  There may be other bodies who, for various reasons, do not subscribe to the "double envelope system. In a case where the 'double envelope' system has not been used but the envelope bears a clear indication such as a logo, frank or return address that it is from a prisoner's legal adviser or one of the other bodies mentioned above, then the mail should be treated as privileged and passed to the prisoner unopened."

[12] By 34 A/10, dated 30 July 2010, the UK Information Commissioner was added to the list of authorities from which correspondence was to be treated as privileged. Further, an appendix giving samples of logos likely to be found on communications from that authority and on others on the list was attached. The list was stated to be not exhaustive and to be intended as guidance only. No indication was given of the return address which may be expected from the various authorities. By 05 A/13 Governors were reminded of the need to take reasonable steps to identify correspondence to a prisoner from one of the organisations identified in the direction. Governors were reminded that while the double envelope system was the most robust and preferred manner for insuring correspondence was appropriately passed to prisoners unopened, if that system was not used but the envelope bore a clear indication such as a logo or frank or return address then it must be passed to the prisoner unopened. In a document entitled "Prisoners Correspondence Include (sic) Legal & Privileged Mail: a guidance document" dated April 2015 the address of the Information Commissioner is given, along with the following instruction:

> "Remember it may only show this address on the envelope. There may not be any logo."

[13] As stated above, changes had been made to the policies and procedures of the respondents during the existence of this petition. By 001 A/15, dated 12 January 2015, policy and guidance for the management of prison correspondence was sent to the heads of prisons. It included a reminder that the double envelope was used by some senders of correspondence. Governors were reminded that a stamp bearing the words "privileged correspondence" was to be used by all establishments. The list of organisations to which privileged status applies was set out. An annex was provided giving those organisations'

logos. Governors were reminded that the list is not exhaustive and is intended to provide guidance only. Staff were asked to be alive to the possibilities that organisations change their logos. Governors were reminded that some organisations will use the double envelope system recommended by the Law Society of Scotland. Others will not. The following is stated:

> "There may be other bodies who, for various reasons, do not subscribed (sic) to the 'double envelope' system. In a case where the 'double envelope' system has not been used but the envelope bears a clear indication such as a logo, frank, or return address that it is from a prison's legal adviser or one of the other bodies mentioned above, then the mail should be treated as privileged and passed to the prisoners unopened.… Governors should take reasonable steps to minimise the risk of bona fide legally privileged material being opened."

[14] A further document of guidance for prisoners' correspondence in HMP Edinburgh was issued in April 2015. It provided that a member of staff was to be allocated to deliver mail to individuals as soon as operationally practicable, but within the same working day as receipt.

[15] The petitioner had raised petitions in the past to vindicate his rights concerning his correspondence. An undertaking had been given by the respondents in 2003 not to open the petitioner's correspondence unlawfully and that undertaking was breached. The respondents admitted in the court process that it had been breached, in December 2004. Subsequently petitions were raised for judicial review in 2005 and 2006. While the details of these matters were not the subject of any submissions before me, counsel for the petitioner made it plain that the context in which the complaints which were before me required to be examined was that of there having been an earlier breakdown of the system for delivery of mail.

[16] The incidents of which the petitioner complained and the explanations from SPS were as follows:

1. On or around 14 January 2013 when he alleged that an employee of the respondents opened privileged correspondence from the Information Commissioners Offers (ICO).The mail had not been stamped in accordance with the relevant policy.It bore a clear and distinctive frank and came at a time at which the petitioner had received a large number of items of correspondence from the ICO bearing that distinctive frank.That frank comprises a return address but no logo and no name of sender. The position of the respondents in connection with this was that if the staff were not aware that the letter was from the ICO and was privileged correspondence.A necessary implication of that answer was that the staff responsible for handing the letter to the petitioner did not know the return address of the ICO.

2. On or around 11 April 2013 the respondents opened an item of mail from the Scottish Information Commissioner (SIC) addressed to the petitioner.The envelope containing the correspondence clearly bore the logo of the SIC.The answer from the respondents is to the effect of that the envelope did not bear a clear indication that it was to be treated as privileged.The petitioner complained and the complaint was dealt with within two days.

3. On or around 28 August 2013 the respondents opened an item of mail from the SIC addressed to the petitioner.The respondents' position is that the envelope in question was addressed to the petitioner in handwriting and was marked "privileged" in handwriting.The officer within the hall was suspicious because of the unusual marking of the envelope.He opened the envelope in front of the petitioner and having realised that it did not contain any prohibited article the envelope and the contents were handed to the petitioner unread.The petitioner argued in respect of this occasion that if a "double envelope" system was used the envelope was precisely as one would expect it to be.The respondents argued that at that time, the SIC did not use a double envelope system. Therefore the envelope was not recognised as one received in a double envelope and instead was seen as suspicious.

4. On around 22 September 2013 the petitioner received a previously opened item of mail from the SIC.The respondents' response was that while the petitioner made an allegation shortly after uplifting his mail that the envelope appeared to have been opened and resealed, following investigation the respondents were not able to confirm that that had happened.The respondents stated that in general mail is not opened outwith the presence of prisoners and it is therefore highly unlikely that if the envelope had been opened and resealed, as claimed by the petitioner, it would have been done by the respondents' staff; it was more likely that it was opened and resealed by staff within the office of the SIC.The respondents state that since August 2014 a system for marking letters as "damaged on receipt" has been employed in respect of letters which are already damaged when received into the prison.

5. On around 30 September 2013 the respondents opened an item of mail from the ICO to the petitioner.The item had not been stamped as confidential nor had it been recognised as such by the residential first line manager.The item was however franked.The petitioner argues that the staff ought to have been aware that the distinctive frank indicated that it was correspondence from ICO.There are 11 bodies who may send privileged mail and so staff ought to be aware of the franking. The respondents' position is that the envelope did not bear a clear indication that it was from the ICO and that the staff concerned were therefore not aware that it had come from that source.

6. On 26 November 2013 the respondents opened an item of mail from the ICO to the petitioner.It had not been stamped as confidential nor recognised as confidential.It also bore a clear and distinctive frank.The petitioner argues that the respondents should have recognised that frank, especially as an identical envelope had been the subject of complaint less than two months prior to this occasion.The respondents' position is the same as before, that is that the envelope did not bear a clear indication that it was from the ICO and that the staff concerned were therefore not aware that the mail had come from that source.

7. As regards delay, the petitioner asserts that on around 4 April 2014 an item from the SIC was delivered to the prison.It was sent by recorded delivery and signed for on that date.The item of mail was issued to the petitioner on 7 April 2014.The petitioner complained.The petitioner refused to speak with the residential first line manager investigating the complaint.The matter was escalated to an internal complaints committee, (ICC), the outcome being an apology to the petitioner and a direction given to the staff member who had failed to deliver.

8. On about 9 July 2014 the petitioner maintained that a letter from his solicitors was delivered to him in a substantially damaged condition and appeared to be open to a large extent.The petitioner complained.Following an investigation, the respondents' position was that there was no evidence to suggest the letter had been opened before the petitioner received it.This matter was escalated to a complaint to the Scottish Public Services Ombudsman.The petitioner's complaint was not upheld. The petitioner also avers that mail from his solicitors was received in damaged condition on or around 22 April and 14 July 2014.

9. On around 22 August 2014 the petitioner received mail in the early evening, that mail having been posted on 19 and 20 August 2014.He also received privileged mail dated 19 and 20 August 2014.The petitioner believed that the letters dated 19 and 20 August were posted on the dates they were written and that those dated 19 August were delivered on 20 August and that those posted on 20 August were delivered on 21 August.The respondent's position is that the mail was all received at the prison on 21 August. It was delivered to the petitioner on 22 August.The reason for the delay was that the staff member responsible for issuing the mail was dealing with an incident in the prison on 21 August and so was not available to collect mail for the hall.The petitioner complained and the respondents apologised for the delay in his receiving his mail.

10. The petitioner was involved in litigation in the Court of Session in January 2015.On 6 January 2015 the solicitors representing his opponents wrote to him, posting the letter on the date it was written.It arrived in the prison on 7 January 2015 and was delivered to the petitioner after the close of business on 8 January 2015.According to the petitioner this had a practical detrimental effect on him.The subject of the correspondence was the lodging of a list of authorities for the court, which required

to be lodged no later than 9 January 2015.The petitioner did not get the letter in time to respond and had to deal with the matter at the beginning of the substantive hearing on 29 January 2015. (The petitioner had in fact lodged a list, which did not conform to the Practice Note, limiting the number of authorities allowed.) The respondents' position was that the petitioner refused to discuss the issue with the residential first line manager who apologised for the failure of process.

[17] The petitioner made a complaint about 2 December 2013 about the handling of his mail and in particular about the response from the respondents in relation to the events of 26 November 2013. He stated in his complaint form that he wished an explanation as that would "assist him to instruct his solicitors in any ensuing proceedings." The petitioner states in his petition that other mail addressed to him received since March 2013 has not been correctly stamped and that only by chance it has not been opened. The respondents make no admission about this.

[18] In his petition, the petitioner makes averments about correspondence sent to him from the Scottish Legal Aid Board. At the hearing before me counsel stated that he did not intend to proceed with this part of the petition.

[19] The petitioner argues that the respondents being aware of the difficulties with the system of categorising confidential mail have failed to take effective steps to remedy those difficulties. He argues that there were 88 complaints by prisoners in relation to the handling of correspondence at HMP Edinburgh between January 2013 and July 2014. That was the highest number of complaints about correspondence received by any prison in Scotland during that time. According to the averments for the respondents the number was 78 rather than 88. The respondents argue that the mail which can be identified as privileged is stamped and is handed to the prisoner unopened. Mail that is not readily identifiable as privileged remains unopened until the recipient prisoner is present and is then opened by staff in front of the prisoner. The mail is not read. The respondents argue that the processes are audited regularly.

[20] Thus the petitioner alleges that his correspondence has been the subject of interference and delay. The respondents accept that most, though not all, of the events referred to above happened, while arguing that the events have been dealt with in a fashion such as to be satisfactory and prevent the petitioner being correctly categorised as a victim.

[21] Counsel for the respondents argued that even if the various incidents were ones which should have been avoided, they were all occasions in which the petitioner's mail was opened in front of him. It was not read. Both oral and written apologies were made. There is a sophisticated complaints system which the petitioner made use of, although he failed to co-operate to some extent. The errors were not intentional; that the petitioner had not been singled out and in context of the many items of mail which were received the

failures were understandable. He submitted that the petitioner's interest in this had in any event faded as there had been no incidents since January 2015. Thus he does not claim that his rights are being breached now.

[22] Counsel argued on behalf of the petitioner that it was not necessary to demonstrate prejudice to show that his article 8 rights had been interfered with but as a matter of fact he had been prejudiced on several occasions by reason of delay in being able to respond to matters relating to litigation in which he was involved. An example was given where he had to instruct his solicitors in an urgent matter but did not get a letter sent to him which had arrived in the prison the day before. It was handed to him one day late and he had to give instructions by telephone. On another occasion his opponents in a case in which he was representing himself had written to him the day before a deadline expired for the lodging of authorities. He had given a list of his authorities but had not appreciated that there was a limit of 10. The agents for his opponents advised him of that, but he did not get the letter in time.

[23] Counsel for the petitioner acknowledged that on several occasions the respondents apologised to the petitioner for any breach of his rights. The petitioner had made use of the SPS complaints system, which enabled him to complain and to appeal if not satisfied by the result to an independent complaints committee. He was also able to refer the handling of complaints to the Ombudsman, and had done so on one occasion. Counsel argued that while apologies might have a bearing on the remedy appropriate to any breach, the making of an apology did not deprive the petitioner of the status of the victim. Counsel argued that article 8(1) ECHR includes a right to the protection of correspondence. Any interference by a public authority must therefore meet the proportionality test in article 8(2). It was accepted that the respondents are entitled to a measure of control of prisoners' correspondence for the prevention of disorder and crime. Nevertheless special considerations apply to lawyer client correspondence and, it was argued, those special considerations extend to communications with the bodies listed in the Scottish Prison Rules (Correspondence) Direction 2012 by virtue of the character of the bodies and the likely reasons for communication between those bodies and people detained in prison. It was accepted on behalf of the petitioner that the proper operation of article 8 required a balance between the petitioner's right to private correspondence and the respondents' legitimate reason for interference with it. It was for the respondents to devise a suitable system and to implement that system efficiently. The argument on behalf of the petitioner was that if the system was not effective there was a breach of article 8 because there was no sufficient safeguard against interference beyond that which is proportionate. The petitioner argued that it was admitted by the respondents that they had opened mail which they should not have opened on several occasions. That showed that the system did not work or at least did not work sufficiently well. Counsel argued that the respondents had failed to adhere to their own policy.

[24] The delay suffered by the petitioner in getting his mail was, it was argued, also a breach of his article 8 rights. Due to the nature of the correspondence recognised as

confidential, which is correspondence which is characterised as either legal or privileged by the respondents, it was argued that it was foreseeable that at least some of it may relate to imminent court or other proceedings. Thus it is necessary that it be delivered without undue delay. The petitioner argued that that meant delivery to the prisoner on the day of receipt by the prison unless there was some compelling reason why that was not possible. It was argued that that is set out in the respondents' revised policy and practice guidance dated March 2015. The petitioner argued that he had not got his mail on the day it was delivered to the prison on the occasions referred to above and therefore his article 8 rights had been breached.

[25] Counsel for the respondents argued that out of six instances of complaints concerning privileged mail being opened, no item of mail adequately identified as privileged was opened. Four items of mail over a two year period were opened because the envelope did not adequately identify the mail as privileged. There was no system failure; there was nothing more than inadvertence.

[26] As for delay, the petitioner complained of three occasions. The respondents argued that one was caused by an incident within the prison diverting the relevant staff and the other two were admitted and gave rise to an apology and a review of the process of mail delivery. Thus delays, if so characterised, were caused by inadvertence and a proportionate allocation of resource within the prison. Counsel for the respondents emphasised that on each occasion the petitioner had made a written complaint within the prison, that complaint had been dealt with, also in writing, and on occasions when the petitioner so required it had gone to an ICC. This had resulted in review of mail procedures, improvements being made and apologies being issued to the petitioner.

[27] Counsel for the respondents argued that the petitioner was not a victim as defined by the Act. He made reference to two cases, *Howard Woodin* v *Home Office* and *Francis* v *Secretary of State* [2006] EWHC 3021, both judgments of Mr Justice Davis, now Lord Justice Davis. The question was approached as one of fact and degree. It was thought by the court that it was important to discover if the letters had been opened deliberately or inadvertently and to discover what steps by way of apology and assurances or action as to future conduct with regard to correcting mistakes were taken. The court found that Mr Francis was not a victim because only two letters were involved and neither was read; the letters were not opened deliberately but rather inadvertently and apologies and explanations were given together with assurances; further there was no question of Mr Francis being singled out or picked on in any way. Counsel argued that all of that applied in the present case.

[28] The case of Mr Woodin was more marginal. The court found that inadvertence as the cause of infringements of the prisoner's rights regarding mail did not of itself operate to preclude the prisoner having the status of a victim. However, the court found that Mr Woodin did not have victim status because the infringements were relatively limited; they were not deliberate, apologies were made, and corrective steps were taken.

[29] Counsel for the respondents referred to the case of *Mark Armstrong* v *United Kingdom* (Application no 48521/99) in which a prisoner complained that his privileged mail was always opened contrary to prison rules. His application was found to be inadmissible as he could not establish victim status. The court regarded as significant that the opening was in error, that an apology was tendered, that there was no malice, and that there was no systematic intention to deny the applicant his right to correspond. A similar conclusion was reached in the application of *Michael Ryder* v *United Kingdom* (application no 14176/88). It was found that the complainer was not a victim because he had failed to demonstrate any deliberate flouting of his rights. Counsel also referred to the case of *Windsor* v *United Kingdom* (application no 16244/90) which was found to be manifestly ill-founded on the basis that one letter was opened inadvertently. Thus counsel argued that the petitioner was not a victim and that his petition could not succeed. His fall back position was that even if the petitioner was a victim as defined, no declarator or other remedy should be granted.

[30] As regards article 8 rights, counsel argued that the interference did not have sufficient gravity to engage article 8. Counsel for the respondents argued that there was no breach of the rights under article 8 because the events were not sufficiently serious. He made reference to cases under immigration statutes, notably *A G (Eritrea)* v *Secretary of State for the Home Department* [2007] INLA 407, *Boum* v *Secretary of State for the Home Department* 2006 CSOH 111 as authorities for the proposition that the interference complained of did not cross the threshold of seriousness required. Counsel argued that in the case of *AG (Eritrea)* it was held that there is a minimum level of engagement with article 8 rights before there can be a breach of those rights. He argued that cases involving for example asylum seekers and others who seek to argue that they should not be deported were more likely to engage that minimum level than the petitioner who was claiming interference with his mail, which did not amount to his mail going missing, or even to any prison officer reading it. It seems to me correct to argue that there is a minimum level of interference required. The right to respect for correspondence is of course a different right to that of respect for family or private life. The rights are not comparable. The question is whether there was a sufficiently serious interference in the right of respect for correspondence. Counsel argued that the interference did not have sufficient gravity to engage article 8 because the mail had not been read, scrutinised or censored. The incidents of opening the mail could not in the context of the volume of mail overall received, which was high, be capable of rationally restricting the petitioner's willingness to enter into correspondence. In my opinion the failure over a period to implement a system set up by SPS is sufficient to reach that minimum level.

[31] Counsel argued that the complaints made were not concerned with solicitor client confidentiality. The privilege said to have been interfered with in the present case was correspondence from the Scottish Information Commissioner and the UK Information Commissioner therefore arising from domestic law and being contained within the 2012 Direction and were therefore separable for the purposes of the convention. Counsel

argued that if the petitioner's article 8 rights had not been interfered with then the court need not ask whether any interference was in accordance with law or whether it was of a proportionate measure.

[32] If he was wrong in that, counsel argued that mail had to be identifiable as privileged before it became privileged. He argued that the relevant guidance (GMA) identified as a matter of practice how protection for privileged correspondence operates in a prison environment and he argued that it was entirely appropriate.

[33] I find from the guidance given that prison officers were told that correspondence from the Information Commissioners' Office was not to be opened because it was privileged but they were not told what the envelope would look like. From the productions in the case it can be seen that on some occasions at least the Information Commissioner sent out correspondence with his address at the front of the envelope but with no logo and no name. Only in 2015 did the respondents include in their directions a note of the address. Thus it seems to me that SPS failed in implementation of its own policy. If a decision is made by policy makers that correspondence from a particular source is to be treated as privileged then it is necessary to implement that decision by telling those who handle the mail how to recognise it. Therefore the prison officers whose task it was to sort and deliver mail had to be informed as to the return address of the senders of privileged mail. SPS was aware that the double envelope system in which authorities would send correspondence addressed to a prisoner inside another envelope addressed to the governor was not universally used, despite their attempts to encourage senders of privileged information to do so. The prison officers dealing with the sorting and delivery of mail had to be made aware of the potential use of double envelopes, and a system of marking the internal envelope as privileged was needed. On one occasion a prison officer thought that a hand written envelope marked privileged was suspicious. That is not surprising if he had not been told that some double envelope mail might be so marked. SPS put in a system whereby such mail would be marked "privileged" by a stamp when it was taken from the outer envelope. That system appears to be sensible and could have been adopted earlier than it was.

[34] As for delay, counsel argued that on the three occasions, one was excusable as a proportionate allocation of resources. The remaining two related to a delay of two days and one day. An apology was tendered and the officer concerned was spoken to. Since March 2015 the respondents have issued a robust guidance note and have therefore taken constructive steps, it was argued, to avoid delay. Counsel argued that this did not constitute a systemic failure or an irrational or unlawful system. In any event, he argued that the matter was now academic because the guidance has been improved and the petitioner does not require the intervention of the court.

[35] Counsel argued that in any event the provisions of article 8 do not extend to a perfectly working national postal service. He referred to the case of *X* v *Federal Republic of Germany* (8383/78) and stated that the distribution of mail within prison had to be

"reasonable facilities for the effective flow of authorised correspondence." The fact that three items were late could not justify an assertion that the system did not exist or was inefficient. He argued that the alleged delay was not excessive or persistent and emphasised that a perfectly working system with no errors was not required.

[36] The petitioner's mail was not recognised as privileged when it came from ICO because the authorities in the prison service did not make sufficiently clear to the officers distributing the mail what that mail looked like. I find that is best described as a failure in implementation of a policy. I also find an implementation failure where a prison officer did not know what would result from a double envelope system, despite that being the system that the prison authority regarded as best and which they tried to encourage. As regards delay, I find that as discussed in the case of *X* v *Federal Republic of Germany* (8383/78) a prisoner is not entitled to expect or demand a perfect mail delivery system. The SPS accept that they require to have a system of delivering mail on the day it is received in the prison, but that has to be subject to operational requirements which occasionally necessitate delay. All systems are vulnerable to the occasional failure due to human error. I do not find anything other than those types of failure.

[37] I respectfully agree with the approach taken by Davis J (as he then was) in the cases of *Francis* and *Woodin*. Each case is fact sensitive and in the current case the context requires to be considered as this petitioner has made complaints in the past which have resulted in court action. He has frequently alerted the respondents to difficulties as he perceived them with his mail. In the case of *Woodin* at paragraph 37 Davis J stated:

> "It seems to me that it is difficult to discern any bright line principle which exists to show where an appellant will in cases of this kind be treated as a victim and where he will not. Acknowledgements, apologies, assurances of remedial steps and a lack of deliberation and malice may well often be a necessary condition for a conclusion that a person is not to be styled as a victim; but it does not necessarily follow in all cases that that will be a sufficient condition for such a conclusion. Ultimately, everything would have to depend on the circumstances of each case."

I respectfully agree with that analysis. In the present case I take the view that the history of difficulty with the petitioner's mail is a relevant consideration. Further, the repeated failure to recognise the return address of the ICO is relevant.

[38] In both of the cases, Davis J found that the prisoners were not properly seen as victims. He did however consider, should he be wrong in that assessment, whether he should grant relief to either of them. I agree with him when he states that it by no means follows that where that has been a violation of human rights financial compensation is necessarily awarded. He went on to state that he would not, in his discretion, grant the declaratory relief in circumstances in which the breaches were not deliberate or systematic and the corrective measures designed to prevent the occurrence had been taken. He dismissed both claims.

[39] In the present case, I find that the petitioner's rights under article 8 have been breached although I make no finding that anything was done deliberately or maliciously. I make that finding because the respondents were well aware of the petitioner's concern about his mail over a period of about 12 years. While the respondents drafted and promulgated policies to conform to the rules and the direction, it seems to me that in respect of the opening of privileged mail the respondents failed in implementation. The respondents took too long to instruct the mail handling officers on the address of the UK Information Commissioner and also failed to instruct the persons handing out the mail on the appearance of mail from a double envelope, or failed to stamp the envelope when it was taken out of the outer envelope. It is not for a court to decide on the detail of the way in which a prison is run. That is a matter for SPS and I should and do show due deference to its ability and experience which I do not share. Nevertheless I am persuaded that the failures in implementation are such as to show that the system put in place by SPS during the time relevant to the complaints relating to privileged correspondence was insufficient in its actual working to enable the petitioner's right to respect for his correspondence to be upheld.

[40] I was not addressed on the remedy which should be available to the petitioner were I to find that he was a victim and was asked by counsel to continue that to another hearing. It may be that counsel intended that if I found the petitioner to be a victim as defined I would pronounce a declarator and any other remedy would be held over. However I am not persuaded that I should necessarily do so and wish to be addressed on that, together with being addressed on the question of any other remedy. I therefore find that the petitioner's rights under article 8 have been breached; that he is a victim; and I will hear counsel on whether a declarator or any other remedy is necessary at a date to be fixed.