OUTER HOUSE, COURT OF SESSION

[2015] CSOH 93

P1306/13

OPINION OF LORD STEWART

In the Petition

CHARLES O'NEILL and WILLIAM LAUCHLAN

Petitioners;

for

Judicial Review of the Prisons and Young Offenders Institutions Rules 2011, rule 63(8), etcetera

and Answers for

THE SCOTTISH MINISTERS

Respondents:

Petitioner: Leighton; Drummond Miller LLP
Respondent: Springham; Scottish Government Legal Directorate

28 October 2015

[1] The joint petitioners are Charles O'Neill, age 52, and William Lauchlan, age 39. Mr O'Neill and Mr Lauchlan are predatory paedophiles, a gay couple (so it is averred in the petition), convicted of crimes of extreme depravity, imprisoned for life with minimum terms of 30 years and 26 years respectively, locked up in different prisons, HMP Glenochil and HMP Edinburgh. Their complaint is that their "right to respect for family life" in terms of the European Convention on Human Rights [ECHR], article 8, has been violated and is being violated and that they are the victims of discrimination, all because the Scottish Prison Service ["the prison service"] refuses to arrange inter-prison visits for them. The petitioners want compensation. The first hearing took place on 20 and 21 November 2014. Mr Leighton, advocate, appeared for the petitioners and Ms Springham, advocate, for the Scottish Ministers, who have responsibility for the prison service. I took the case under advisement.

[2] At the end of February 2015 I ordered the case to be brought out to hear submissions on a variety of matters not dealt with in November 2014, principally the criminal justice history of the petitioners in the period since 1993 and some case law not canvassed in argument at the first hearing. The case law includes the decision of the Court of Appeal in *Bright* v *Secretary of State for Justice* [2014] EWCA Civ 1628—a case about the management of prisoners in same-sex relationships in England & Wales—which was handed down on 22 December 2014. Because of the non-availability of counsel and my absence on circuit, the hearing did not take place until 12 May 2015.

[3] At the hearing on 12 May 2015 Mr Leighton proposed to amend the petition to add averments about the petitioners' "family life" since 1993. For her part, Ms Springham told me that the prison service now accepts that the petitioners have been in a same-sex relationship since before they were taken into custody in 2008; and that since 21 November 2014 one inter-prison visit has already been facilitated for the petitioners by the prison service. Notwithstanding this departure by the prison service from its previous position, the issues raised in the petition remain live, live that is as regards the past attitude of the prison service to the petitioners' requests for visits and as regards the inter-prison visiting regime.

[4] As regards the substantive complaints which are specific to the petitioners I have decided—decided, I have to emphasise, on the information made available to me—that the prison service has not acted unlawfully towards the petitioners: in particular, the prison service has not failed to respect the petitioners'

family life in terms of article 8 ECHR; and the prison service has not discriminated against the petitioners. Accordingly, the petitioners are not entitled to damages or human rights "just satisfaction". I shall therefore refuse the joint petition. Albeit that no substantive injustice has resulted to the petitioners, I do accept that the prison rule about inter-prison visits, rule 63(8), though not in itself unlawful, is part of an unlawful regime because, in the absence of explanatory context, the rule alone does not satisfy the requirements of legality or lawfulness; and—a related point—that the reasons given by the prison service for refusing the petitioners' requests for inter-prison visits to date have tended towards inadequacy. I reject the respondents' submission that the petition is time barred in terms of the Scotland Act 1998 section 100(3B).

[5] This opinion deals with the petitioners' entitlement to inter-prison visits in terms of article 8 ECHR, the discrimination issues and the issue of time bar. A supplementary opinion deals with the lawfulness of prison rule 63(8), etcetera.

Time bar

[6] I shall determine the respondents' time bar plea before moving to the merits. The petition was presented on 27 December 2013. If the twelve-month human rights time bar applies, complaints about prison service conduct before 27 December 2012 cannot be entertained [Human Rights Act 1998 section 7(5); Scotland Act 1998 by section 100(3B); *Dunn* v *Parole Board* [2009] 1 WLR 728]. Ms Springham contends that the petitioners' complaints about the prison service's handling of petitioners' visit requests before 27 December 2012 are time barred. I reject that contention, essentially for the reasons given by Mr Leighton; and I hold that in any event it would be equitable to extend the time bar. This is on the supposition that, if not time-barred, the complaints would have merit. The hypothetical failures to respect the petitioners' article 8 ECHR and article 14 ECHR rights constitute a single, continuing act or omission; the issue about the lawfulness of prison rule 63(8) has been a constant, and is a continuing issue which is not time-barred; the petitioners' claims under the Equality Act 2010 and their common-law complaints about the prison service's decision-making are not caught by the specifically human rights time bar.

The situation in summary

[7] The factual and legal situation in summary is as follows. The petitioners are currently serving life imprisonment for murder with minimum terms as stated above. They are also serving concurrent sentences for a number of sex offences. The murder victim was the mother of a male child RM. The petitioners were sexually abusing the boy—anal rape in modern parlance—and had been for years. When the mother threatened to report the sexual abuse of her son to the authorities, the petitioners killed her and dumped her body in the Firth of Clyde. The body has not been found.

[8] The petitioners were convicted of the murder and other offences in 2010 and were sentenced on 10 June 2010. They had already been in custody on remand since 25 March 2008. (The unusual length of the proceedings is possibly attributable to the number of right-to-a-fair-trial objections.) The petitioners have been requesting inter-prison visits since at least 2010 on, they say, "family life" grounds in terms of article 8 ECHR. Until very recently the prison service has declined to grant the petitioners' requests.

[9] The petitioners accept that it is for them to demonstrate that they have a family life which attracts the protection and support of article 8 ECHR [note of argument for the petitioners, 2]. The primary position taken by the respondents is, I think, at least until recently, that the petitioners have not demonstrated that they are in a family relationship or, in any event, that the petitioners have, or at least had, good reason to remain unclear about the matter [note of argument for the respondents, paragraphs 37-39]. For me the main issue is whether the petitioners' life together is or was of a quality, and has been shown to be of a quality that does engage the protection and support of article 8 ECHR. If not, any delay or refusal on the part of the prison service to organise inter-prison visits for Mr O'Neill and Mr Lauchlan has not violated, and does not violate their family life rights in terms of article 8 ECHR.

What the case is not about

[10] Before giving my reasons I should make clear what this case is *not* about. It goes without saying—but let me say it—that all "family life" between the murdered woman and her son was terminated. The reported

psychological trauma to RM raises the question whether he has any hope of enjoying a family life of his own. Some might think that condign retribution would terminate the petitioners' own family ties such as they may be. But, no. Counsel agree that in terms of the European Convention on Human Rights it is no proper part of punishment to deprive imprisoned offenders of their human rights except insofar as such deprivation is necessarily incidental to incarceration [*Hirst* v *United Kingdom (No 2)* (2006) 42 EHRR 41 at §§ 69-71]; and in terms of article 8 ECHR the petitioners like everyone else have "a right to respect for their private and family life" [*McCotter* v *United Kingdom* (18632/91) (1993) 15 EHRR CD 98; *Messina* v *Italy No 2* (25498/94) 28 September 2000; *R (P & Q)* v *Secretary of State for the Home Department* [2001] 1 WLR 2002 at paras. 67-78]. For the avoidance of doubt, same-sex relationships are generally recognised for ECHR "family life" purposes [*Schalk and Kopf* v *Austria* (2011) 53 EHRR 20 at §§ 90-95]; and to treat people differently on the basis of their sexual orientation is also contrary to domestic law in terms of the Equality Act 2010. Further I am told, by counsel on both sides, that the question of public confidence in the justice system has no part to play in decisions about inter-prison visits for the petitioners unless specific questions of resources, safety and security are involved, which, apparently, they are not in this case, on the assumption that occasional visits only are in contemplation [*Dickson* v *United Kingdom* (44362/04) (2008) 46 EHRR 41]. So, as the law stands, there is no justification for denying the petitioners inter-prison visits as part of their punishment, or because they claim to be a same-sex couple or because public opinion would be affronted.

[11] Another thing this case is *not* about is "conjugal visits": conjugal visits are not permitted in United Kingdom prisons; while the European Court of Human Rights approves the evolution of European prisons policy towards conjugal visits it has not interpreted article 8 ECHR as requiring conjugal visits [*Dickson* v *United Kingdom* (44362/04) (2008) 46 EHRR 41; *Varnas* v *Lithuania* (42615/06) 9 December 2013]; and the petitioners are not looking for conjugal visits, only visits. As a rule, visits take place within the sight and hearing of a prison officer.

[12] The sentencing judge, Lord Pentland, described the petitioners as "highly ruthless and unrepentant individuals with no respect for the law or the values of a civilised society." I had hoped that the values-of-a-civilised-society criterion might be determinative of the inter-prison visits issue one way or the other. It is disconcerting to find that the phrase "civilised society" barely features in the lexicon of the European Court of Human Rights. I can find the words used by the court itself in only one of its 45,993 judgments; and the case in question was about pulling people's finger and toe nails out [*Buntov* v *Russia* (27026/10) 5 September 2012 at § 160; *cf. T* v *United Kingdom* (24724/94) 16 December 1999, joint partly dissenting opinion of Judge Pastor Ridruejo and others]. So, again, the present application is *not* about what should happen in a civilised society, whether it be facilitating the visits or not facilitating them.

[13] No point is taken about the fact that the petitioners are accommodated separately. The petitioners do not contest in this petition that the prison service is entitled to lock them up in different prisons.

Family relationships, near relatives and family relations

[14] What is the purpose of inter-prison visits from an article 8 ECHR perspective? The material cited by Mr Leighton emphasises the emotional benefits and rehabilitative effect of sustaining normal family ties during imprisonment [Scottish Prison Service Action Note 20A/08; National Strategy for the Management of Offenders (2006); *X* v *United Kingdom* (9054/80) (1983) 5 EHRR 260 CD; *McCotter* v *United Kingdom* (18632/91) (1993) 15 EHRR CD98; *Messina* v *Italy No 2* (25498/94) 28 December 2000; model European Prison Rules (2006), rule 24.4]. Since the petitioners are unrepentant co-offenders who continue to protest their innocence and are years away from release it is difficult to be persuaded that facilitating face-to-face contact is likely to assist with their rehabilitation or reintegration into society; and to be fair they do not make that claim.

[15] So the question is purely about "respect" for the petitioners' "family life" as such having in view the non-utilitarian benefits to the petitioners themselves within the wider social context. As Mr Leighton and Ms Springham debated the matter it became apparent that "family life" can refer to two different but overlapping things: it can refer to the type of relationship and it can refer to the quality of the relations between or among those concerned. There is no exhaustive definition of the relationships which attract the protection and support of article 8 ECHR: but it would seem to include, potentially, near relatives of the full blood and of the half blood, near relatives by fostering or adoption and near relatives by affinity namely

partners and the near relatives of partners. As to the quality of relations between or among near relatives which engage article 8 ECHR, living under the same roof would be an indicator, and also unique or strong bonds of affection, confidence and dependence, that is financial, social and emotional dependence, or the potential for such bonds. This is on the understanding—which may be displaced in particular cases—that positive value is to be attributed to these relations from an individual and a societal point of view. Article 8 ECHR does not, for example, oblige the state to respect abusive, coercive and exploitative relationships [*R (on the application of B)* v *Governor of Wakefield Prison* [2002] 1 FCR 445; *M* v *Secretary of State for Work and Pensions* [2006] 2 AC 91 at para. 5 *per* Lord Bingham; *Huang* v *Secretary of State for the Home Department* [2007] 2 AC 167 at para. 18 *per* Lord Bingham giving the opinion of the Appellate Committee; *Bright* v *Secretary of State for Justice* [2014] EWCA Civ 1628].

The relationship between the petitioners

[16] The evidence provided by the petitioners is equivocal as to the type of their relationship. When remanded on 25 March 2008 they entered the prison system from different home addresses. Mr Lauchlan listed a third party friend as his next of kin and stated his relationship with his co-accused Mr O'Neill as "cousin". Mr O'Neill listed Mr Lauchlan as his next of kin without specifying the relationship. In the period up to 2014 a substantial part of the declared motivation for more contact on the part of Mr O'Neill, the more dominant personality, has been to assist with preparations for various appeals and other legal challenges. The published judgments give a flavour to the petitioners' litigiosity: *Lauchlan and O'Neill* v *Her Majesty's Advocate* [2012] HCJAC 137 (5 June 2009); *Her Majesty's Advocate* v *Lauchlan and O'Neill* [2010] HCJ 03 (17 July 2009); *Her Majesty's Advocate* v *Lauchlan and O'Neill* [2010] HCJ 1 (14 January 2010) also HCJ 3 (2 July 2010); Scottish Information Commissioner, decision 015/2010 *Mr William Lauchlan and the Scottish Prison Service: policy on same sex partners* (29 January 2010); *Lauchlan and O'Neill* v *Her Majesty's Advocate* [2012] HCJAC 20 (8 February 2012); *Lauchlan and O'Neill* v *Her Majesty's Advocate* [2012] HCJAC 51 (19 April 2012); *O'Neill and Lauchlan* v *Her Majesty's Advocate* [2013] UKSC 36]; *Lauchlan and O'Neill* v *Her Majesty's Advocate* HCJAC 62 (19 June 2014); *Lauchlan and O'Neill* v *Her Majesty's Advocate* HCJAC 22 (20 June 2014)]. Mr Leighton "thinks" the appeals process is exhausted: but he is not in a position to rule out applications to the Scottish Criminal Cases Review Commission or to the European Court of Human Rights in Strasbourg. He is not a member of the criminal advocacy team for either petitioner. (Since Mr Leighton said this I have noticed *Lauchlan* v *United Kingdom* 75702/13 communicated case, [2014] ECHR 1452 (17 December 2014).)

[17] In his requests for inter-prison visits over the years since 2010 Mr Lauchlan has answered the question about relationship with the word "partner". Mr O'Neill has described his relationship with Mr Lauchlan as "partner", "partners", "long term partner" or "life partners". He has also stated: "William... is the only blood relative I have in Scotland/UK." He has stated that he and William Lauchlan have been "together for some twenty odd years as a couple, though not in a sexual relationship." This is at odds with paragraph 7 of the joint petition which avers: "Prior to their imprisonment the petitioners were in a long standing intimate and sexual relationship with each other." On the other hand the statement that they are not in a sexual relationship with each other would be consistent with the copious information tending to show that the petitioners find their sexual gratification in criminal intimacy with boys and vulnerable youths.

[18] It was represented in submissions that Charles O'Neill has family who cannot visit him because they live in Australia and that William Lauchlan has family in the United Kingdom who want nothing to do with him. The petitioners have only one visitor, a mutual friend, the same person, I believe, who is listed as Mr Lauchlan's next of kin. It is documented that when asked by prison officials in 2009 to provide evidence of cohabitation prior to custody Mr Lauchlan offered "only a few holiday photographs". Charles O'Neill has provided no other evidence.

[19] Mr Leighton submits that there is enough additional information available from criminal justice sources to confirm that the petitioners were in a long-standing cohabiting relationship before they were remanded. He refers to the evidence at their trials—the petitioners were tried in 2010 but the charges on the indictment were separated on the view that it would be prejudicial to try the petitioners for a string of child sex offences and murder in the same proceedings. Thus there were two trials. Lord Pentland presided at

both. Sentencing took place at the conclusion of the second trial, the trial for murder. The information from the trials founded on by Mr Leighton is included in Lord Pentland's life sentence reports to the parole board, one for each petitioner. The reports state that in 1997 the petitioners were living together in a flat in Largs. On the night the murdered woman disappeared she had reportedly visited the flat and argued with the petitioners. She called the petitioners "a fucking pair of poofters" and had threatened them with the police just before she disappeared. (The words in quotation marks signify "a [*expletive*] pair of male homosexuals" and are relied on by Mr Leighton for the purpose of showing that the petitioners were in fact living together as a same-sex couple.) The petitioners were also described by Mr Leighton, with reference to the reports, as "sharing a car", the vehicle which, I presume, the prosecution invited the jury to infer was used to move the body. Mr Leighton relies as well on the reference to the circumstances of an offence in 2004 when the petitioners abducted a fourteen-year old boy in their motor home and attempted to anally rape him. This shows, counsel submits, that the petitioners were living together in the motor home in and near Benidorm in southern Spain. This is the sum total of the information from criminal justice sources on which Mr Leighton relied at the hearing on 20 and 21 November 2014 to establish that the petitioners lived together as a couple prior to imprisonment.

Concessions by the prison service?

[20] Mr Leighton 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.

[21] Mr Leighton also founds on the prison service response to requests in 2013 for additional contact, that is contact additional to written correspondence and telephone calls. The petitioners' solicitors asked whether the prison service accepted that Mr O'Neill and Mr Lauchlan were in "a homosexual relationship with each other". The prison service lawyer replied [*emphasis added*]: "We are content to accept your clients' assertion that they *are* in a relationship, although that fact alone will not necessarily entitle your clients to... inter-prison visits." Ms Springham attempts to finesse this awkwardness by saying that it has not been conceded that the petitioners *were* in a homosexual relationship at the relevant point in time for the purpose of the prison definition of "near relative", namely "prior to imprisonment". She emphasises, correctly I am sure, that the prison service has a duty of care to be on its guard for abusive, coercive and exploitative relationships. That is why, she says, it is important to know that the claimed partnership was a stable one "prior to imprisonment" [*cf. Bright* v *Secretary of State for Justice* [2014] EWCA Civ 1628]. I am not confident that this really works as a way of avoiding the effects of the extra-judicial concession: but, on my analysis, it does not matter at this stage of the argument. It may matter when the quality of the prison service reasons for refusing visits comes to be looked at.

[22] It would be of concern if the prison service concession had misled the petitioners into thinking that evidence of their same-sex relationship need not be adduced. But the express non-admission of that relationship in the answers to the petition alerted the petitioners; and when they came into court they were prepared to ask for the opportunity to prove their relationship with parole evidence [answers, paragraph 7; note of argument for the petitioners, 1-2]. Then, in oral argument, Mr Leighton submitted that he had enough material with (1) the documented representations made by Charles O'Neill and William Lauchlan about their relationship referred to above, (2) the criminal justice information referred to above and (3) the prison service concession just quoted—which, counsel submits, is subject to interpretation in the light of the solicitors' inquiry and the whole background and which has not been withdrawn; and he asked me to decide the application on the material presented at the hearing. In any event as Mr Leighton submits, albeit in a different context, the issue is not whether the prison authorities reasonably think this or that about the petitioners' relationship but whether there has actually been a violation of the petitioners' article 8 ECHR rights [note of argument for the petitioners, 2; *Belfast City Council* v *Miss Behavin' Ltd* [2007] 1 WLR 1420 at paras. 30-31 *per* Baroness Hale of Richmond].

The duration of the relationship and the quality of the petitioners' relations

[23] Ms Springham responds that the type of the relationship remains unclear; and she also counters with her calculation of the time available to the petitioners to actually live together since 1997. During the period of more than 17 years from September 1997 to November 2014 (when I first heard the argument) the petitioners have been simultaneously at liberty for only 32 months or so. The argument is that 32 months together scarcely makes a "life partnership". That is, in my view, a relevant factor but not by itself determinative: I am inclined to give more weight to the fact that in their relatively brief spells of simultaneous liberty by far the most powerful evidence of the petitioners' togetherness has been their complicity in sexual offending against young males.

Togetherness and complicity in grooming and sexual abuse

[24] As stated above, Mr Leighton founds on the life sentence reports made by Lord Pentland to the parole board in 2010 [numbers 6/5 and 6/6 of process]. In the reports, Lord Pentland said of the petitioners that: "Their whole lives have, for many years, been focussed on finding victims they can groom and then sexually abuse." I have, on my own initiative, researched the petitioners' criminal justice records (two indictments, related minutes of proceedings, judicial opinions) to verify Lord Pentland's summary and to check Ms Springham's calculation of the number of months that the petitioners could have spent together outside prison.

[25] The petitioners were at liberty for a period of years up to January 1998 when they were taken into custody. They were at liberty simultaneously again from May 2003 to May 2004. Their next spell out of prison at the same time was from November 2006 to March 2008 when they were charged with the offences for which they are now in prison. I find that Ms Springham's calculation is correct for the period since September 1997; and that Lord Pentland's summary (above) is a fair epitome of the petitioners' life together while at liberty. I have provided parties with copies of the documents and with a draft narrative. The finalised narrative which follows takes account of comments made by parties at the hearing on 12 May 2015.

Togetherness and complicity from March 1993 to January 1998

[26] Going back to the first period, in the almost five years from March 1993 to January 1998 the petitioners were alleged to have sexually abused 16 males aged from eight to 17 years at the time the offences were committed. The alleged abuse went on for several years in some cases. The petitioners were charged with these offences on 21 January 1998, remanded in custody and indicted for trial together. The indictment contained 31 charges, being three charges of supplying controlled drugs (to alleged abuse victims), one charge of assault and 27 sex charges. Sixteen of the sex charges alleged that the petitioners had offended together. Of the four sex charges directed against Charles O'Neill alone, two charges involved victims also alleged to have been abused by William Lauchlan on other occasions acting alone or together with Charles O'Neill. Of the seven sex charges directed against William Lauchlan alone, five charges involved victims also alleged to have been abused by Charles O'Neill on other occasions acting alone or together with William Lauchlan. The petitioners were charged together in respect of the three alleged drugs offences. On 18 June 1998 the petitioners appeared from custody and were convicted on their own pleas of serious sexual offences against six of the alleged victims. One of the victims was the boy RM whose mother was subsequently proved, on the basis of evidence that came to light in the years that followed, to have been murdered by the petitioners on 21 June 1997. The prosecutor accepted pleas of not guilty to the sex charges involving the other alleged victims. (I shall say something more about the not guilty pleas and other charges not proceeded with below.) William Lauchlan was sentenced to six years imprisonment and Charles O'Neill to eight years, presumably backdated in each case to the date of their remand.

Togetherness and complicity from May 2002 to May 2004

[27] In January 2002 Mr Lauchlan was released on licence after four years served. Mr O'Neill got his early release on licence on 22 May 2003. The petitioners decamped to Spain in breach of their licences and the sex offender restrictions that went with their convictions. They were then at large, together it is said, for the period from May 2003 to May 2004. The subsequent indictment brought against them alleged that between May 2003 and May 2004 Mr O'Neill and Mr Lauchlan (1) conspired to sodomise and did together at various

locations in Benidorm, Spain, sexually assault and sodomise a young man CH; and (2) did together sexually assault and attempt to sodomise a fourteen-year old boy DW in their motor home at l'Alfas del Pi near Benidorm. The charge eventually formulated in relation to the attack on CH emphasises the joint nature of the enterprise by alleging against the petitioners that "you did... enter his bed together, repeatedly penetrate his hinder parts with your private members and have unnatural carnal connection with him..." In May 2004 Charles O'Neill was arrested by the Spanish police on a European arrest warrant as an absconder, judicially transferred back to Scotland and returned to prison. William Lauchlan was arrested on a European arrest warrant and released to return to Scotland voluntarily. He was sent back to prison in Scotland in June 2004. The alleged offences committed in Spain were not prosecuted at that time.

Togetherness and complicity from November 2006 to March 2008

[28] By the end of November 2006 the petitioners were both at large again. One of the published judgments recounts that they went back to Spain, this time, possibly, to the Canary Islands—Gran Canaria is mentioned as a place where a self-incriminating statement to a third party about the murder was made. The petitioners returned to the United Kingdom in November 2007 and went to live in Blackpool, where they registered as sex offenders with the local police. The police regarded them as presenting a high risk and subjected them to surveillance. The surveillance revealed that, contrary to what Mr Lauchlan and Mr O'Neill were telling the police, they regularly came to Scotland and had begun grooming a five to six year old boy here for the purpose of subjecting him to sexual abuse [*Lauchlan and O'Neill* v *Her Majesty's Advocate* [2012] HCJAC 137 (5 June 2009) at para. 10; number 6/5 of process, "charge 10"]. The subsequent indictment brought against them in 2008 alleged that, in the period 10 December 2007 to 23 March 2008, (1) they together sexually assaulted and sodomised a seventeen-year old youth JG at various places in central Scotland; (2) they together arranged, at various places in Scotland and in the north of England, to meet a six-year old boy SA with the intention of engaging in unlawful sexual activity with him contrary to the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 section 1; (3) they together used lewd, indecent and libidinous practices against the six-year old boy SA on five occasions at various locations in Scotland. The petitioners were also jointly charged with taking and having in their possession indecent images of children at various locations in Scotland over the whole period from 2003 to 2008. On 25 March 2008 the petitioners were apprehended and charged with the offences alleged to have been committed by them in Spain, England and Scotland since 2003 and with the murder of the woman in 1997. They have been in custody ever since, on remand pending trial and subsequent to conviction.

[29] In 2010 both petitioners were convicted of the murder of the boy's mother in Largs in 1997, of the joint sexual assault and attempt to sodomise the fourteen-year old boy DW in and near Benidorm, Spain, in 2004 and jointly of the statutory offence of meeting the six-year old boy SA in 2007 and 2008 with the intention of engaging in unlawful sexual activity with him. Charles O'Neill was also convicted of a solo offence of drugging and sodomising a fourteen year old boy AY in Irvine just after his release on licence and before he decamped to Spain in 2003.

The quality of the petitioners' life together and article 8 ECHR

[30] If I may at this point repeat what Lord Pentland said about the petitioners when he sentenced them in 2010: "Their whole lives have, for many years, been focussed on finding victims they can groom and then sexually abuse." The quality of the petitioners' life together as described by Lord Pentland is, if I may respectfully say so, sufficiently evidenced by the offences of which they were convicted.

[31] The convictions in 1998 were for only some of the 31 offences alleged in the period 1993 to 1998. Likewise the convictions in 2010 were for only some of the 18 offences indicted in 2008: the prosecution withdrew or accepted not guilty pleas in respect of a dozen charges. For the purpose of forming the fullest possible impression of the quality of the petitioners' "family life"—though not of course for the purpose of taking a view of their criminal liability—I am prepared to contemplate that, on the balance of probabilities, the petitioners committed the alleged acts in respect of which charges were withdrawn and not guilty pleas or verdicts were accepted or recorded. There may have been some "evidential" charges but the charges as a whole could not have been brought without the approval of crown counsel and overall I expect that the indictments were framed on the basis of corroborated or mutually corroborative testimony provided by the

alleged victims. The indictments are therefore a kind of hearsay evidence. The fact that the charges were brought is evidence of a higher quality than would be accepted, in my experience, for prison intelligence assessments. If I am wrong about this, it does not affect the conclusion which has to be drawn from the offences for which convictions were recorded. The criminal record demonstrates, according to Ms Sprinham's supplementary submissions, that the petitioners were "partners in crime" rather than "partners in love".

[32] The key point, it seems to me, is about the quality of the petitioners' so-called "family life" and not about the precise type of their "family" relationship, whether cousins, non-copulating cohabitants or intimate same-sex partners. It is a dangerous thing, I accept, to pass judgement on the value of someone else's family life. Sometimes it has to be done [*cf. Neulinger and Shuruk* v *Switzerland* (41615/07) Strasbourg 6 July 2010 at § 136; *In re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] 1 WLR 1911 at para. 198 *per* Baroness Hale of Richmond]. In this case I feel justified in saying that the life Charles O'Neill and William Lauchlan have had together when at liberty since 1993, to the extent evidenced to me, is so negative that it cannot be "family life" as that concept should be understood. Their relationship and relations between each other do not engage, do not attract the support of, do not merit the protection of, the "family life" provisions of article 8 ECHR. Alternatively it is for the petitioners to demonstrate that they had and have a life together of a type and quality that engages article 8 ECHR; and they have failed to do so. If, contrary to the foregoing, what has been demonstrated on the available material is "family life" within the meaning of article 8.1 ECHR, limited weight attaches to it for the purpose of assessing, in terms of article 8.2 ECHR, the proportionality of restrictions imposed by the prisons regime. The Council of Europe model European Prison Rules (2006), rule 24.4 provides: "The arrangements for visits shall be such as to allow prisoners to maintain and develop family relationships in as normal a manner as possible." I could be wrong, but I think the rule presupposes a degree of normality in the family relationships which are to be maintained and developed.

Equal treatment and discrimination

[33] Article 14 ECHR obliges public authorities to secure the enjoyment of convention rights and freedoms "without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status." Counsel agree that "other status" includes sexual orientation [*Karner* v *Austria* (2004) 38 EHRR 24]. Since I take the view that the prison service has not failed to secure the petitioners' article 8 ECHR rights, it follows that I also take the view that there has been no breach of article 14 ECHR read with article 8 ECHR. In any event there is no basis for finding, on the material presented, that the petitioners have been discriminated against in the matter of inter-prison visits because of their sexual orientation.

[34] The petitioners do not claim that being a paedophile is a matter of sexual orientation and thus some "other status" for the purpose of article 14 ECHR—the debate over the classification of paedophilia or "pedophilia" in the *Diagnostic and Statistical Manual of Mental Disorders*, 5th Edition ["DSM-5"], first printing, published by the American Psychiatric Association in May 2013, suggests that the question may be an open one. The petitioners' argument is that the petitioners, as a homosexual couple, are less favourably treated by the prison service in the matter of inter-prison visits than heterosexual couples. The petitioners' argument seeks support from information recovered from the prison service about inter-prison visit applications and visits authorised from 2010 to 2013 [numbers 20/3/1 and 20/4/1 of process]. In the 28 month period from 1 June 2010 to 30 September 2012 there were "two inter-prison visit applications and one potential inter-prison visit application… made and granted in respect of formerly cohabiting [*heterosexual*] couples". In the following fifteen month period from 1 October 2012 to 31 December 2013 inter-prison visits were arranged for two heterosexual couples, recorded as "spouse – common law", twice for each couple. No same-sex couple inter-prison visits were documented. The only documented same-sex couple inter-prison visit applications were the applications made by the petitioners. Mr Leighton makes two valid points: first, the fact that there have been inter-prison visits means that in principle there is no obstacle to such events; and, secondly, the logistical challenges are fewer for same-sex visits since the prisoners concerned do not require gender-segregated facilities.

[35] On a "free evaluation" of the evidence, including the information (or lack of information) available to the prison service at the time about the petitioners' supposed relationship and the prison service's stated non-discrimination policies, I do not accept there is enough to show a difference of treatment capable of shifting the burden of proof to the prison service in terms of the case law relied on by Mr Leighton [*DH* v *Czech Republic* (57325/00) (2008) 47 EHRR 3 at paras. 172-189].
[36] As regards domestic law, I agree with Ms Springham that something more than a difference in status coupled with a difference in treatment—if, indeed, a difference of treatment can be identified—is required to raise a *prima facie* case of discrimination in a situation like the present one: the statistics—if they can be called that—are not sufficiently robust to allow any conclusion to be drawn [Equality Act 2010 section 137; *Madarassy* v *Nomura International Plc* [2007] ICR 867 at paras. 56-58; also *Enderby* v *Frenchay HA* (C-127/92) [1994] ICR 112 at paras. 13-19].

The information available to the prison service
[37] I suspect that one point of distinction between the petitioners and the heterosexual comparators is that the comparators entered the prison system declaring themselves to be couples. When the first claims of a partnership between the petitioners were made, some time after their remand, the prison service had no information to support the claim apart from the say-so of the petitioners. I have been given no reason to suppose that the prison service had any of the criminal justice information now founded on by Mr Leighton; and, even if the prison service did have that information, the information, referring as it does to events in 1997 and 2004, does not obviously support the proposition that the petitioners were cohabiting in a stable relationship immediately prior to their most recent incarceration in 2008.
[38] It is documented that even in 2013 Mr Lauchlan was refusing to engage with the prison service requests for further information about his relationship with Mr O'Neill. It may be of course that the petitioners were anxious not to volunteer any information—such as being together at a particular location at a particular time—that could possibly be used against them at their trials and subsequently to negative their protestations of innocence. At the hearing on 12 May 2015 Mr Leighton conceded—very fairly I thought—that criticism could be made of the adequacy of the information previously provided to the prison service by the petitioners about their relationship.
[39] At the hearing on 12 May 2015 Ms Springham told me about the change of position on the part of the prison service. She stated that the prison service now accepts that the petitioners did cohabit in a same-sex relationship before their incarceration. In a written note of further submissions Ms Springham states:

> "... following the first hearing and the statement by the petitioners' counsel that the petitioners are able to provide evidence to the [*prison service*] that the petitioners did cohabit in a same sex relationship before their incarceration, coupled with information received from Social Work department records, [*the prison service's*] position is now [*that the petitioners did cohabit in a same-sex relationship*]."

Ms Springham was unable to tell me what evidence the petitioners have in fact provided or what the "information received from Social Work department records" is and why it has made a difference. Whatever the prison service now "knows", I agree with Ms Springham that ignorance or uncertainty can justifiably be claimed by the prison service, until at least late 2013, because of equivocation and non-cooperation on the part of the petitioners, as to whether they, the petitioners, had a family life together before imprisonment.

New information offered by the petitioners
[40] At the hearing on 12 May 2015 Mr Leighton asked for leave to amend the petition by adding averments about the petitioners' family life. The proposed averments state that whenever they were at liberty from 1993 onwards the petitioners had a household together. Most importantly, the petitioners seek leave to prove that during their incarceration between 1998 and 2002 the petitioners were accommodated in the same prison hall, had frequent contact and were able to socialise freely; and that, when imprisoned apart from 2004 to 2006, they kept in contact by correspondence and through an intermediary. No household documentation, such as council tax records or utility bills has been produced. None of the correspondence has been produced. I infer that the main purpose of these proposed averments is to counter Ms Springham's

submissions about the short duration of the petitioners' "family life". Ms Springham opposes the amendment on the grounds that it comes too late and is in any event unnecessary. I agree with Ms Springham. Separately and in addition the proposed amendment is of negligible relevance to the basis on which I think the petition should be decided. I shall allow the petitioners' minute of amendment presented on 12 May 2015 to be received and marked no. 23 of process so that there is a record of it: but I shall refuse the motion to amend the petition.

Decision

[41] The basis on which I have rejected the petitioners' complaints is not one pled distinctly on behalf of the prison service: but it is in my view the necessary result of the material relied on by the petitioners. As a public authority the court has an independent duty to uphold European Convention rights which, as I interpret it, includes the duty to maintain respect for the European Convention as a source of law. To extend protection for qualified rights like article 8 ECHR to egregious conduct far beyond European norms—which is what the court is being asked to do in the present case—undermines respect for the Convention and the rule of law. While I hold, on the material available to me, that the petitioners have not so far been entitled, and are not currently entitled to inter-prison visits in terms of article 8 ECHR, it may be for all I know that the prison service now has additional information—the additional information alluded to by Ms Springham at the hearing on 12 May 2015—which satisfies the prison service, and properly so, that the petitioners did have and do have a family life within the meaning of article 8 ECHR that requires to be respected. I have not been asked to adjudicate on this new information. In any event the prison service is, as I understand it, perfectly at liberty to arrange inter-prison visits to the petitioners if it sees fit for "operational", public interest reasons or even on charitable or compassionate grounds which do not amount to legal entitlement.

[42] The petitioners' pleas-in-law focus on the alleged violations and breaches by the prison service of the petitioners' ECHR rights and the Equality Act 2010 and the consequences in damages and "just satisfaction". Since the petitioners' case fails in relation to these matters I shall repel the petitioners' pleas-in-law, as tabled, in their entirety. I shall repel the respondents' first plea (time bar) and the respondents' second plea (irrelevant in law). *Quoad ultra* I shall sustain the respondents' pleas and refuse the petition. All questions of expenses are reserved.

[43] Explanation is required for sustaining the respondents' sixth plea inserted by adjustment on 12 June 2014. The plea reads: "The prison rules not being *ultra vires* or in breach of the petitioners' Convention rights, the petition should be refused." This plea does not mirror any plea tabled by the petitioners. The issue whether prison rule 63(8) is *ultra vires* of the Scottish Ministers, though not focussed in the petitioners' pleas, is raised at paragraph 3 of the joint petition which seeks declarator that the rule is *ultra vires* and which looks for partial reduction of the rule by deleting the reference to "exceptional circumstances". My view is that the rule, including the reference to "exceptional circumstances", is not in itself *ultra vires* but that the rule is, without explanatory context, not fully intelligible and potentially unlawful. The prison service has a duty to clarify the circumstances in which inter-prison visits will be arranged [*cf. R (Purdy)* v *Director of Public Prosecutions (Society for the Protection of Unborn Children intervening)* [2010] 1 AC 345]. The supplementary opinion deals with this matter.