OUTER HOUSE, COURT OF SESSION

[2007] CSOH 56

P2183/06

OPINION OF LORD GLENNIE

in the cause

STEWART POTTER

Petitioner;

for

Judicial Review of acts and decisions of
the Scottish Prison Service

Respondents:

Petitioner: O'Neill, QC; Delibegovic-Broome; Balfour & Manson (for Taylor & Kelly)

Respondents: Duncan; Solicitor of the Scottish Prison Service

20 March 2007

Introduction

[1] The petitioner is a prisoner in HM Prison Glenochil. He is serving consecutive sentences of 9 years and 12 years imprisonment, imposed after separate convictions for assault and robbery.

[2] By this petition for judicial review, the petitioner challenges the lawfulness of the policy of the Scottish Prison Service and/or of the Governor of the prison that a pre-recorded message should be attached to all outgoing telephone calls made by a prisoner, informing the person receiving the call that the call is coming from a prison.

[3] The attachment of that pre-recorded message to all outgoing calls is part of a package of measures concerning the making of telephone calls from prisons put in place by the prison authorities. These are to the following effect:

(i) the prisoner can only make calls to a person whose number is on a list of pre-approved numbers ("PAN");

(ii) that list is limited to a maximum of 20 numbers;

(iii) the numbers on the pre-arranged list have been submitted to and approved by the Governor;

(iv) the calls made are logged, allowing the prisoner making the call to be identified (by virtue of his PIN number), as well as the number called and the time and duration of the call;

(v) the calls may at any time be recorded and/or monitored by prison service staff; and

(vi) the calls are preceded by an automated message to any person answering the number called to the effect that the call originates from a Scottish prison, that it may be recorded and/or monitored and that if the individual does not wish to accept the call he or she should simply hang up.

This summary is taken from para.4.1 of Mr O'Neill's helpful Note of Argument for the petitioner; and it was accepted as accurate by Mr Duncan, who acted on behalf of the respondent. There is presently no challenge to other parts of this package of measures, but Mr O'Neill did not exclude the possibility that there might be a challenge in the future.

[4] The challenge to the lawfulness of this policy is brought under section 6 of the Human Rights Act 1998, which provides that it is unlawful for public authorities to act or fail to act in a way which is incompatible with a Convention right, i.e. a right enshrined in the European Convention on Human Rights and Fundamental Freedoms 1950; and, in terms of *vires*, under section 57(2) of the Scotland Act 1998, which provides that a member of the Scottish Executive has no power to make any subordinate legislation or do any other act so far as that legislation or act is incompatible with a Convention right.

[5] The Convention right relied upon is that set out in Article 8 of the Convention, which provides as follows:

> "(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 in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic world-being of the country, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others."

It is well established (see, for example, *Klass and others* v *Germany* [1979-80] 2 EHRR 214 and *Alison Halford* v *United Kingdom* [1997] 25 EHRR 523) that the protection afforded by Article 8(1) extends to telephone calls. Mr Duncan accepted that this was so. This is not only because communication by telephone may be regarded in the same vein as written correspondence, but also because communication by any means, including by telephone, is an essential feature of private and family life.

[6] It was common ground before me that, by virtue of the policy by which a pre-recorded message tells everyone answering the telephone that the call emanates from a prison, Article 8 of the convention is "engaged". In other words, it is accepted on behalf of the respondent that the inclusion of that pre-recorded message constitutes interference by a public authority with the exercise of a right protected by Article 8. Of course, telephones have not always been available to prisoners; and it might once have been thought that the provision of access to a telephone was

a privilege, rather than merely the base point for an argument that interference with the free use of the telephone might amount to a breach of the prisoner's rights. But times have moved on. If no provision at all were now made for prisoners to communicate with the outside world by telephone, that lack of provision might itself now give rise to a challenge on Article 8 grounds. In light of the concession by the respondents that Article 8 is engaged, I do not need to consider that question. It is accepted that the message constitutes interference with the prisoner's right to respect for family life and correspondence. Examples of why this is so are given in the Petition. If the petitioner telephones the children's school, the message will be heard by whoever picks up the telephone who might not otherwise know that the children's father is in prison. When he telephones home, the message constantly tells his family, and particularly his children (from whom the fact of his imprisonment might otherwise be kept), of the fact that he is in prison. If he telephones a friend, the telephone may be picked up by someone else in the house, who is unaware of the fact that the friend or relative knows someone who is in prison. The awkwardness and embarrassment caused by such occurrences is likely to act as a deterrent to communication with family and friends.

The issue before the court

[7] The question raised in the petition is whether that interference is justified in terms of Article 8(2), that is to say whether the interference is in accordance with the law; and, if so, whether it is necessary in a democratic society for one or more of the objectives therein set out.

[8] The argument on this first hearing of the petition, however, focused exclusively on the first part of that question, namely whether the interference was in accordance with the law. After

hearing argument, I took the view that it was sensible to use the two days available for the first hearing to determine this issue. If this issue is decided in favour of the petitioner, then, (subject to any reclaiming motion) that is an end of the matter. If, on the other hand, it is decided in favour of the respondents, it will then be necessary to fix a further hearing to deal with the remaining issues. Mr Duncan opposed my determining this issue separately and rightly drew my attention to the danger that, after hearing argument, I might reach the conclusion that it was impossible to answer the first part of the question without hearing the arguments and evidence on the rest. Having now heard argument, I am satisfied that I can answer it without hearing such evidence and arguments.

[9] Before turning to consider whether there is a statutory basis for the interference, it is necessary to mention the common law and Strasbourg context in which the issues of construction have to be approached.

The common law context

[10] Although the challenge to the lawfulness of the policy has been brought and argued under reference to the Convention, the right upon which the petitioner relies was not created by the Convention. Mr Duncan accepted, in my opinion correctly, that the right to respect for private and family life, and for home and correspondence, is a civil right at common law regardless of the convention. By whatever name we choose to call it - whether we refer to it as a "basic right", a "fundamental right" or a "constitutional right", or by some other term - it is one of the rights which the common law has long recognised as inherent in the rule of law in a free and democratic society. Whilst the notion of parliamentary sovereignty which currently holds sway

means that Parliament can legislate to remove such rights, it will not readily be presumed that it intends to do so unless the particular piece of legislation quite clearly reflects that purpose. This is made clear in the cases to which I shall refer. Where the statutory incorporation of the Convention, in the Human Rights Act 1998 and in the Scotland Act 1998, has made a difference in this field is not so much in creating rights which did not previously exist but more in fettering the power of both the legislature and the executive to interfere with such a right, by insisting that any such interference must be not only in accordance with the law but also necessary and proportionate, using those words as a shorthand for the wording in Article 8(2) of the Convention.

[11] The question whether the admitted interference with the petitioner's rights was "in accordance with the law", to use the language of the Convention, is almost identical to the question which has habitually been asked at common law, namely whether the legislature has given the executive the power to interfere with the petitioner's civil rights in the manner complained of.

[12] In some societies it might be regarded as obvious that a person convicted of a criminal offence and sentenced to a period of imprisonment should, for the duration of his imprisonment, be deprived of his civil rights. Such a notion has no place in our society. Nor is it reflected in the common law. In *Raymond* v *Honey* [1983] 1 AC 1, 10, Lord Wilberforce described it as a "basic principle" that

"under English law, a convicted prisoner, in spite of his imprisonment, retains all civil rights which are not taken away expressly or by necessary implication".

Lord Bridge said the same thing (p.14), although in his formulation he omitted the word "necessary". In *R* v *Secretary of State for the Home Department, ex parte Leech* [1994] QB 198, 209, Steyn LJ described Lord Wilberforce's proposition as "an axiom of our law". Lord Steyn, as he had by then come, emphasised the point in *R* v *Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115, 120, when he said this:

> "A sentence of imprisonment is intended to restrict the rights and freedoms of a prisoner. Thus, the prisoner's liberty, personal autonomy, as well as his freedom of movement and association are limited. On the other hand, it is well established that that 'a convicted prisoner, in spite of his imprisonment, retains all civil rights which are not taken away expressly or by necessary implication' [citing Lord Wilberforce in *Raymond* v *Honey*]. Rightly, Judge LJ observed in the Court of Appeal in the present case that 'the starting point is to assume that a civil right is preserved unless it has been expressly removed or its loss is an inevitable consequence of lawful detention in custody' [1999] QB 349, 367".

I would respectfully agree. If that were not the position, a person sentenced to a period of imprisonment could, with impunity, be subjected arbitrary discipline and to all manner of abuse. As Mr O'Neill, QC, on behalf of the petitioner, pithily observed: prison is the punishment, it is not <u>for</u> punishment. If the prisoner is to be deprived of civil rights other than those inherent in the fact of his being deprived of his liberty, that requires to be done by, or with the clear authority of, Parliament.

[13] The requirement that a prisoner's civil rights can be removed only by the clearly expressed intention of the legislature finds expression in a number of domestic authorities. In addition to those which I have already cited, they include *R* v *Secretary of State for the Home Department ex*

parte Pierson [1998] AC 539, *R (Daly)* v *Secretary of State for the Home Department* [2001] 2 AC 532. They reflect the principles applied in other situations where it is argued that the legislature has given the power to act in a manner inconsistent with a basic right: see e.g. *R* v *Lord Chancellor, ex parte Witham* [1998] QB 575, 581. The reason for this requirement is perhaps best explained by Lord Hoffman in *Simms* (at p.131):

"Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual."

I was also referred to the decision of Lord Caplan and of the Inner House in *Leech* v *Secretary of State for Scotland*, reported respectively at 1991 SLT 910 (916L-917G) and 1992 SC 89. The reasoning is to similar effect, though the precise outcome was the subject of adverse comment by the Court of Appeal in the English *Leech* case.

[14] Mr O'Neill urged me to hold that fundamental rights could only be taken away by express words or by necessary implication. I understood this to be advanced as a principle of construction rather than as a question of competency. He contrasted "necessary" with "plain" or "clear". I am not persuaded that this is a real issue rather than one of semantics. The point

brought over forcibly by the judgments is that Parliament should not be taken to have legislated to take away such rights unless that was clearly shown, by the legislation, to have been its intention. In other words, the legislative intention must be so clear that it cannot reasonably be thought that it may have "passed unnoticed in the democratic process". It is an unnecessary complication to ask whether that clarity arises by way of express words or by reason of "obvious", "plain", "clear" or "necessary" implication, still less to draw any conclusion from such a distinction. What is important is that Parliament's intention to remove or interfere with such rights must be clearly expressed. In *Pierson*, at p.575, Lord Browne-Wilkinson, having expressed some doubt about the proposition that "basic rights" could be overridden even by necessary implication, as opposed to express provision, took the following proposition to be established:

"A power conferred by Parliament in general terms is not to be taken to authorise the doing of acts by the donee of the power which adversely affect the legal rights of the citizen or the basic principles on which the law of the United Kingdom is based unless the statute conferring the power makes it clear that such was the intention of Parliament."

I am content to adopt this test, which seems to me to be consistent with the approach identified by Lord Hoffman in *Simms*.

The Strasbourg jurisprudence

[15] The case law from the European Court of Human Rights points in the same direction. But it adds the requirement that the relevant law should be both accessible and foreseeable. I was

referred to the following cases: *Eriksson* v *Sweden* (ECtHR, 22 June 1989) at para.65; *Narinen* v *Finland* (Application No. 45027/98, 1 June 2004) at paras.35-39; *Doerga* v *The Netherlands* (ECtHR, 27 April 2004) at paras.43-54; *Ciapas* v *Lithuania* (ECtHR, 16 November 2006) at para.25; *Golder* v *United Kingdom* (1975) 1 EHRR 524 at para.44; *Sunday Times* v *United Kingdom* (1979) 2 EHRR 245 at para.49; *Silver* v *United Kingdom* (1983) 5 EHRR 347 at paras.85-89; *Malone* v *United Kingdom* (1984) 7 EHRR 14 at paras.68-69 ; and *Kruslin* v *France* (1990) 12 EHRR 547 at paras.31-32. I take the following passage from *Narinen* at para.34 as representative of the tenor of the judgments:

> "The question arises in the present case as to whether the measure was 'in accordance with the law'. This expression requires firstly that the impugned measure should have *some basis in domestic law*; it also refers to the quality of the law in question, requiring that it be *accessible* to the person concerned, who must moreover be able to *foresee* its consequences for him ..."

Mr Duncan founded upon the expression "should have some basis in domestic law" and suggested that this was a somewhat less stringent requirement than the common law requirement that the legislative provision entitling interference with the right should be clear. I am not persuaded that that was the intention of the Strasbourg Court in its judgments. If it were, it would make no sense to insist on the requirement of foreseeability. In my opinion that expression simply means that the interference must be justified under domestic law.

[16] Mr Duncan also pointed to the fact that in certain of those judgments, notably in the *Sunday Times* case and in *Silver*, the requirement for the domestic law to be accessible was qualified by the word "adequately"; and the requirement of foreseeability was interpreted as meaning that the

law should be "sufficiently" precise. He submitted that the requirements of accessibility and foreseeability were both qualified. Whether the domestic law was adequately accessible or sufficiently precise would depend on the nature of the particular interference complained of, how important the right, how serious the interference with it and the context in which the right is infringed. Just as a particularly serious interference would require anxious scrutiny to ensure that the domestic law was both accessible and foreseeable, so a less serious infringement would need less scrutiny. I am prepared to accept that the more serious the infringement, the more carefully the court will scrutinise the legal basis for that infringement, if only because the question whether the legislature could really have intended to permit such an infringement becomes more stark. But I do not think one can ever get to a position where the court requires less than clarity in the legislative intent to permit the interference. The same may be true of questions of accessibility and foreseeability, though for my part I have some difficulty in seeing the distinction between "foreseeability", as that expression is used in the Strasbourg jurisprudence, and the domestic common law requirement that the legislation must be clear if it is to have the effect of interfering with, or permitting interference with, a basic right. However, I am not persuaded that considerations of accessibility and foreseeability (in so far as it does have some different meaning) arise in this case, and I propose to say no more about them.

The primary and secondary legislation

[17] It is appropriate at this stage to consider the primary and secondary legislation upon which the respondents rely. S.39 of the Prisons (Scotland) Act 1989 ("the Act") confers a power to

make rules "for the management of prisons and other institutions", to quote the heading to the section. This section provides, so far as relevant, as follows:

> "39(1) The Secretary of State may make rules for the regulation and management of prisons, ... and for the classification, treatment, employment, discipline and control of persons required to be detained therein."

Detailed Rules made thereunder are contained in The Prison and Young Offenders Institutions (Scotland) Rules 1994 ("the Rules"). Part 7 of the Rules deals with communication. Rule 54, which falls within Part 7, provides as follows:

> "54(1) A prisoner may have the use of a telephone subject to the provisions of paragraph (2).
>
> (2) A prisoner's entitlement to the use of a telephone shall be subject to the provisions of any direction which the Secretary of State may make in relation to-
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> (a) the groups or categories of prisoners who may have the use of a telephone;
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> (b) the times of day and circumstances in which a telephone may be available for use;
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> (c) the conditions applicable to the use of such a telephone; and
>
> (d) the logging, monitoring and recording by any means by an officer of telephone calls made by a prisoner.

(3) Where an officer informs a prisoner that he may not have the use of a telephone by virtue of the provisions of any direction as mentioned in paragraph (2), he shall also inform the prisoner of the reasons for that decision."

Rule 142 should also be mentioned. It contains provisions ancillary to the power of the Secretary of State to give a direction under any of the Rules. It allows the Secretary of State to make provision in the direction for the direction to apply differently in respect of different cases or classes of cases. It also allows him to make further directions which are incidental or ancillary to the main purpose of the direction.

[18] The decision to introduce the system for the pre-recorded message on outgoing telephone calls was made by the Scottish Prison Service and/or the Governor of the prison pursuant to a power given by a direction purportedly made under Rule 54(2). This is entitled The Prison and Young Offenders Institutions (Communication) (Scotland) (No.2) Direction 1999. It provides the detailed directions with regard to the system for outgoing telephone calls described in para.[3] of this Opinion. Para.6(8) of the Direction deals with the pre-recorded message and provides as follows:

"The Governor may if he considers it appropriate arrange for all telephone calls from PIN number phones to be preceded by a recorded telephone message which advises the recipient of the telephone call that the call is coming from the prison and that the recipient should stay on the line to accept the call, or hang up to reject the call."

The preamble to the Direction suggests that it was made by the Scottish Ministers. There is an element of doubt about this, however, because it is signed by Mr Hutchison, the Director of

Strategy and Corporate Affairs, Scottish Prison Service. Whilst reserving the right to argue to the contrary if this case were to go any further, Mr O'Neill was prepared to accept, for the purpose of the hearing before me, that the Direction is to be treated as a Direction by the Scottish Ministers purportedly made under Rule 54.

[19] Although Mr Duncan jibbed at the description of the policy as a "blanket" policy, there is no doubt in my mind that that is precisely what it is. Mr Duncan did not challenge the fact that, as enunciated, the policy in HM Prison Glenochil, and indeed in all prisons in Scotland, applied to all telephone calls from all prisoners. His point was that the operation of the policy is tempered by discretion. The pre-recorded message is part of the PIN system. On occasions, where time has not allowed the list of pre-arranged numbers to be amended, prisoners have been allowed, on compassionate grounds, to make telephone calls outwith that system, and the pre-recorded message has not been inserted in such calls. Further, calls to solicitors and to the Scottish Prison Complaints Commission ("SPCC") are outwith the PAN system. To my mind, those exceptions do not prevent the policy being a blanket policy, applicable to all prisoners in almost all situations. They simply show that, even under such a blanket policy, exceptions may occasionally be made.

Discussion

[20] It was this blanket nature of the policy which provided the focus of Mr O'Neill's argument. There might, he submitted, be a case for targeted use of such a message, for example when the pre-approved number was a shared telephone which might be picked up by any number of

people. But there was no conceivable justification for a blanket approach. The numbers had been pre-approved. That meant that they had already been checked to ensure that the prisoner could not make telephone calls to victims or others who did not want to take calls from him. Further, the calls were, or could be, recorded, so that any threats or harassment could be ascertained or investigated and steps taken to prevent repetition. There might be exceptional cases in which a pre-recorded message was justified, but they would be few and far between. A pre-recorded message on all calls could not be regarded as relevant to the "regulation or management of prisons", nor to the legitimate "discipline and control of persons required to be detained therein", within the terms of s.39 of the Act. In those circumstances the Act did not permit the introduction of the blanket policy of attaching the pre-recorded message to outgoing calls. If, as appeared to be the case, the introduction of that system was permitted in terms of the Direction, then the Direction was *ultra vires*; or, if the Direction, being outwith the scope of the powers conferred by the Act, was within the scope of the Rules, then the Rules were *ultra vires.* That approach was consistent with the way the House of Lords had approached the issue before it in *Raymond* v *Honey.*

[21] The English authorities to which I have been referred are concerned with powers conferred by s.47 of the Prison Act 1952. This is in materially the same terms as s.39 of the Prison (Scotland) Act 1989. The section "is a section concerned with the regulation and management of prisons": *Raymond* v *Honey* at p.13 per Lord Wilberforce. Lord Bridge (at p.15) identified the section as giving the power to make rules for the "discipline and control" of prisoners. Both held the section was "quite insufficient" or "manifestly insufficient" to authorise hindrance or interference with the right of access to the courts. In *Daly*, a blanket policy excluding prisoners from being present when legally privileged correspondence was examined was held to be *ultra*

vires the power in the Act. In *Leech*, which was concerned with the prison Governor's power to examine and stop letters written by a prisoner to a solicitor, the Court of Appeal held that s.47 of the English Act conferred, by necessary implication, a power to make rules to prevent the use of correspondence to plan escapes or disturbances, to detect and prevent offences being committed against the criminal law or against prison discipline, or in the interests of national security (see p.213F-H); but that power did not extend to allowing the reading of all correspondence between the prisoner and his solicitor; and therefore Rules purportedly made pursuant to the rule making power in the Act which permitted this as a matter of routine were too wide. In *Simms* the issue was whether what amounted to a blanket exclusion of all professional visits by journalists was justified on the grounds that to allow any interviews would undermine control and discipline within the prison. It was held that the general wording of s.47 meant that the power to make rules was subject to fundamental civil liberties, and the relevant Standing Order should not be construed as conferring the right to impose an indiscriminate ban on all interviews with journalists such as would infringe the right to seek access to justice. These cases were concerned with issues relating to access to justice. That ranks high in the pantheon of civil rights. But the right to respect for family life and correspondence also ranks high. In *Watkins* v *Secretary of State for the Home Department* [2006] AC 395, 411, a case in which the prisoner sought exemplary damages where the prison officers opened his correspondence with his legal advisors in breach of Prison Rules, Lord Rodger of Earlsferry explained the background to the dispute in a way which recognised that communications to family and friends were not in a different category:

"My Lords, although convicted of crimes and deprived of their liberty, prisoners have the right to send and receive letters and to make and receive telephone calls. Many of the communications to

relatives and friends are social or deal with purely personal matters, but prisoners may also wish to contact the courts or their legal advisers in relation to legal problems, real or perceived. Whatever the nature of the communications, there is a risk that some prisoners may abuse the system to breach the security of their prison. The prison authorities can therefore take measures to counteract that risk by opening, reading and, if necessary, censoring or blocking correspondence. The Secretary of State's authority for taking these measures is to be found in the Prison Rules made under section 47(1) of the Prison Act 1952."

[22] From the terms of s.39 of the Act, from the Rules and from these authorities, I take the following propositions. First, the rule making powers conferred by s.39 are limited to the making of rules which have as their object the regulation and management of prisons etc, and (so far as relevant here) the discipline and control of prisoners. Second, the power to make rules for the discipline and control of prisoners permits the making of such rules not only for the purpose of prison regulation and management but also to prevent the commission of crimes, the obstruction of justice, the harassment of victims and other types of unlawful behaviour. Third, such rules may impinge upon communications with persons outwith the prison, but only where that is necessary for the purposes which I have described. Fourth, except where they are necessarily in conflict, the rule making power must be read consistently with fundamental civil rights, on the basis that had Parliament intended to confer on the Secretary of State, or now the Scottish Ministers, a general power to remove or interfere with such rights, it would have said so clearly in the legislation and not used general words. Fifth, so far as it is possible to do so, the Rules should be read as not going beyond what is authorised by s.39, and therefore as *intra vires*. In the present case, Rule 54(2) is capable of being read as permitting the Secretary of State or the Scottish Ministers to make directions of the type therein set out, but only so far as consistent with

the above, and I would so read it and, on that basis, hold it to be *intra vires*. Sixth, in so far as the Direction or the policy adopted in relation to prisons is inconsistent with s.39, or with Rule 54(2) properly so understood, it is *ultra vires*.

[23] In the course of his submissions, Mr Duncan referred me to the decision of the Court of Appeal in *R (Nilsen)* v *Governor of Full Sutton Prison* [2005] 1 WLR 1028. This is a case which has caused me some concern, not because of the result, which was the prohibition of correspondence which had as its aim the publication of a manuscript glorying in the prisoner's crimes, but because of certain passages in the judgment which appear to give a wider interpretation to the ambit of s.47 of the Prison Act 1952, and which were therefore relied on to give a similarly wide ambit to s.39 of the Act with which I am concerned. In rejecting the argument for the prisoner that the section was concerned with the administration of prisons and not with what went on outside prisons, Lord Phillips of Worth Matravers, giving the judgment of the court, cited the following passage from the judgment of Lord Steyn in *Simms* (at p.127):

> "The value of free speech in a particular case must be measured in specifics. Not all types of speech have an equal value. For example, no prisoner would ever be permitted to have interviews with a journalist to publish pornographic material or to give vent to so-called hate speech. Given the purpose of a sentence of imprisonment, a prisoner can also not claim to join in a debate on the economy or on political issues by way of interviews with journalists. In these respects the prisoner's right to free speech is outweighed by deprivation of liberty by the sentence of a court, and the need for discipline and control in prisons. But the free speech at stake in the present cases is qualitatively of a very different order. The prisoners are in prison because they are presumed to have been

properly convicted. They wish to challenge the safety of their convictions. In principle it is not easy to conceive of a more important function which free speech might fulfil."

Lord Phillips went on to say that these decisions of the House of Lords did not support the proposition that the ambit of the Prison Act 1952 is restricted to what takes place within a prison. Thus far I take no issue.

[24] Lord Phillips continued, at para.19:

"Section 47 of the Act speaks not only of regulation and management of prisons but control of prisoners. If the passage that we have just quoted from the speech of Lord Steyn is correct, one legitimate aspect of a sentence of imprisonment is that it renders subject to control the exercise of the prisoner's freedom to express himself to those who are outside the prison."

That is true, in my opinion, only up to a point. I do not read the passage from Lord Steyn as saying that the right of a prisoner to free expression may be restricted otherwise than by reason of the need for discipline and control in prisons or, more generally, the regulation and management of prisons, which will inevitably curtail the ability of a prisoner to give interviews and meet journalists and others. Had he meant that the prisoner's right to free expression was liable to be taken away or curtailed regardless of whether that was necessary for such purposes, he would surely not have introduced his Opinion with the firm insistence, quoting from Lord Wilberforce in *Raymond* v *Honey*, that "it is well established that that 'a convicted prisoner, in spite of his imprisonment, retains all civil rights which are not taken away expressly or by necessary implication'".

[25] At para.22, Lord Phillips says this:

> "Criminals who are deprived of their liberty by a sentence of imprisonment are deprived of enjoyment of their possessions and of communication with the outside world, save in so far as the prison authorities permit this. Prison rules must necessarily make provision for the use prisoners may make of their possessions and for what may be sent from the outside world in to prisoners and what prisoners may send out. Miss Foster does not challenge this. The issue is the matters to which the Secretary of State can properly have regard when making rules in relation to these matters."

I have no difficulty with that passage. But he continued (at para.23):

> "In *R (Mellor)* v *Secretary of State for the Home Department* [2002] QB 13 Lord Phillips of Worth Matravers MR, with whose judgment the other two members of the court agreed, analysed the speeches in *Simms* at some length. He concluded, at para 52, that they recognised that a degree of restriction of the right of freedom of expression was a justifiable element in imprisonment, not merely in order to accommodate the orderly running of a prison, but as part of the penal objective of deprivation of liberty."

At paras.25 and 26 he came to the following conclusion:

> "25. Penal legislation is not required to spell out those aspects of a prison regime that properly constitute an incident of the punishment of deprivation of liberty. The powers conferred on the Secretary of State under the Prison Act 1952 include, at least, the power to have regard, when regulating what a prisoner can and cannot do, to the natural incidents of penal imprisonment.

> 26. It is not so easy to define the test of what are the natural incidents of penal imprisonment, and these are certainly susceptible to change as a result of changes in attitude to punishment. In *Mellor* [2002] QB 13, para 65 Lord Phillips of Worth Matravers MR expressed the view:
>
> > 'Penal sanctions are imposed, in part, to exact retribution for wrongdoing. If there were no system of penal sanctions, members of the public would be likely to take the law into their own hands. In my judgment it is legitimate to have regard to public perception when considering the characteristic of a penal system.'

We endorse that statement. In considering what restrictions can properly be placed on prisoners as natural incidents of imprisonment regard can be had to the expectations of right thinking members of the democracy whose laws have deprived the prisoners of their liberty."

[26] Lord Phillips' remarks in these passages may be interpreted as supporting the view that a sentence of imprisonment not only deprives the individual of his liberty and of such rights as are inevitably lost or curtailed in consequence of his detention, but also subjects him to the removal or curtailment of such further civil rights as the Secretary of State may in his discretion decide, having regard to the expectations of society that prison should place additional restrictions on prisoners by way of punishment. If that is the approach which he is adopting, I would not apply it to Scotland unless forced to do so by authority binding on me: first, because it appears to fly in the face of the principles enunciated time and again by the House of Lords in the passages cited in para.[12] above; second, because if it is thought appropriate, whether because of public opinion or otherwise, to impose additional punishment upon convicted prisoners in addition to

their loss of liberty and the restriction of civil rights necessarily consequent thereon, this is a matter for Parliament; and, third, because once one moves away from the notion that deprivation of civil rights is justified by reference to the need for regulation and management of the prison, it is difficult to see what test would be put in its place to prevent the discretion being exercised in a wholly arbitrary manner.

[27] The only challenge to the policy in these proceedings is to the pre-recorded message. There is no challenge presently to the system of having 20 pre-approved numbers (PAN), nor to the logging of calls by virtue of the PIN numbers, nor to the recording or monitoring of calls. Given the safeguards provided by the PAN and PIN systems and the recording and monitoring of calls, I can see no justification in terms of s.39 of the Act for the addition, at least as part of a blanket policy, of a pre-recorded message telling the recipients of telephone calls that the call is from a prison. Those safeguards would appear to be entirely adequate to deal with any concern that the prisoner might seek to make unwanted calls to his victims or to vulnerable witnesses. If, despite these safeguards, there is perceived to be a risk in a particular case, some form of message, pre-recorded or otherwise, could be attached on a case by case basis. A blanket policy such as this does not appear to be a restriction made necessary by the need for regulation or management of the prison nor for the discipline and control of prisoners. Indeed, since the message is designed to give information only to the recipient of the call, I cannot see how it could be justified even on the widest interpretation of the words of s.39 - it does not discipline or control the prisoner so much as provide information to someone outside the prison. There is, in my opinion, no power clearly given by the Act, whether expressly or by necessary or obvious implication, to interfere with the prisoner's civil rights in this way.

[28] The justification put forward by the respondents is set out in their Answer to Statement 16 of the Petition. They say this:

"Rule 54(2)(c) provides that a Direction may be made in relation to the conditions applicable to the use of a telephone. That provision carries the clear implication that any Direction promulgated in connection with telephone use may restrict or impinge upon use of the telephone. Plainly, given the terms of 54(2)(b) any restriction under 54(2)(c) will not relate to restrictions in time and duration of use. Further, the terms of Rule 54(2)(d) carry the plain implication that any Direction may be made in connection with logging, monitoring and recording of telephone calls. As the purpose of the pre-recorded message and the relevant part of the Direction is intended at least in part to serve as a warning that the power to log, monitor and record calls is indeed being exercised, the Direction flows from that provision. Given the terms of 54(2)(c) and (d) the Direction is incidental to and consequent on the Rules. The pre-recorded message does not intrude into the substance of [the] prisoner's telephone calls."

This passage presents three distinct arguments.

[29] The first is that the policy is permissible on a proper construction of the Rules. I do not accept this. If the Rules are assumed to be *intra vires*, they cannot give the prison authorities greater power than that authorised by s.39. They cannot give the prison authorities power to interfere with the prisoner's right to respect for family life and correspondence otherwise than for the purposes identified in that section. I note that the respondents' argument addresses itself only to Rule 54(2). They do not present an argument that the policy falls within s.39 if the ambit of that section is as I have construed it (see para.[22] above). If, on a proper construction, Rule 54(2)(c) only had any content if it were taken to authorise interference with the prisoner's civil

right otherwise than for the purposes identified in the Act, that Rule, or at least that part of it, would be *ultra vires*. But since I do not take that view of Rule 54(2)(c), that question does not arise.

[30] Skipping for the moment over the second argument, the third argument is that the substance of the telephone calls are not affected by the pre-recorded message. That may be so, but I do not think that it is relevant. The complaint is about the off-putting effect of the pre-recorded message when the recipient of the telephone call picks up the telephone. Since it is accepted that Article 8 is engaged, I do not think that this argument goes anywhere.

[31] I was at first troubled by the second argument, which is that the Direction is intended at least in part to serve as a warning that the call might be logged, monitored and/or recorded. But on reflection, I consider that Mr O'Neill was correct in submitting that there was nothing to stop such a warning being given, if necessary by pre-recorded message, without reference to the fact that the call comes from a prison. The respondents made no averments that this would be ineffective and Mr Duncan advanced no argument to that effect.

[32] In the circumstances I consider that the respondents have not made good their contention that the policy is authorised by s.39 of the Act or by necessary implication therefrom. Given the limited nature of the justification put forward by the respondents, I do not think that there is anything to be gained by appointing the case to a second hearing at which all the evidence and arguments on the entire case would be deployed.

Disposal

[33] I shall therefore sustain the petitioner's second plea-in-law and grant declarator in terms of the prayer in Statement 4(a) of the Petition, to the effect that para.6(8) of The Prison and Young Offenders Institutions (Communication) (Scotland) (No.2) Direction 1999, and the Governor's introduction of a new telephone system in reliance thereon, providing for all outgoing prisoner calls to be preceded by a recorded message advising recipients that the call is from a prison, are unlawful by virtue of Article 6(1) of the Human Rights Act 1998 and *ultra vires* under reference to s.57(2) of the Scotland Act 1998

Additional observations

[34] I should add two comments. The first is to make it clear that my decision is simply that the blanket policy of ensuring that all outgoing calls are preceded by this particular recorded message identifying the call as having come from a prison was not made with the authority of Parliament. For that reason it fails the "in accordance with law" test in Article 8(2) of the Convention; but it would in any event have been *ultra vires* on common law principles. Had I come to a different view, I would then have had to move on to consider the essentially Human Rights questions of whether the admitted interference with the right, albeit in accordance with domestic law, was necessary and proportional. The same exercise will, of course, be necessary if the legislature decides to give clear authority for the insertion of a pre-recorded message of this sort. Much of the force of the criticism might fall away were the respondents to move away from the present blanket policy to one where the pre-recorded message was used only when shown to be necessary for one of the purposes embraced within s.39 of the Act.

[35] The second comment is by way of observation. The policy has twice been challenged before the Scottish Prison Complaints Commission, in 1999 and 2005. On both occasions the criticisms of that part of the policy dealing with the pre-recorded message have been upheld. At the time of the first such complaint, the system was only in operation at Kilmarnock prison. The formal recommendation of the Commissioner was that there was no lawful authority for that practice. The Direction was introduced after that complaint, no doubt to meet this concern, but it was accepted before me that the Direction did not have legal effect. The respondents continued to "roll out" the system across all the prisons in Scotland. The Commissioner's formal recommendation in January 2005 arising from the second complaint stated that it was highly questionable whether the policy could be justified by Rule 54(2)(c). As I understand it, the respondents have declined to accept that decision.