BENEDICT IDU, JOSEPH SANGU, ALFRED FA'ARAMOA & DIDIER MARIE EDMOND FARSY -V- ATTORNEY-GENERAL (REPRESENTING THE CONTROLLER OF PRISONS)

High Court of Solomon Islands
(Palmer CJ.)

Civil Case Number 37 of 2004

Hearing: 26th March 2004
Judgement: 4th August 2004

K. Averre for the Applicants
N. A. Moshinsky Q.C. and J. Keniapisia for the Respondents

Palmer CJ: The Applicants are remandees or prisoners being held in custody at the Central Rove Prison. They seek a number of declarations and consequential orders for Mandamus and Prohibition as follows:

1. A declaration that the conditions of the imprisonment of the Applicants as implemented by the Controller of Prisons are unlawful and contrary to the provisions of the Prison Regulations.
2. A declaration that the decision of the Controller of Prisons or any other authority as to the imposition of conditions as to the imprisonment of the Applicants were unreasonable.
3. A declaration that the management plan introduced by the Controller of Prisons is ultra vires.
4. A declaration that the opening of mail of a client/lawyer nature is protected by privilege and is not subject to the relevant Regulations covering mail sent to prisons and a declaration in regards to the undue delay in passing correspondence to prisoners.
5. A declaration that the food rations currently given to the Applicants fails to meet the minimum standards as prescribed by the relevant Regulations.
6. A consequential Order of Mandamus that the Applicant be held in such circumstances as are just and reasonable and fair in all of the circumstances of the case an in particular that the Applicants not be held in segregation from other prisoners, be they remand or convicted prisoners and that the Applicants be afforded such other treatment as usually afforded to prisoners held at Rove Prison.
7. A consequential order prohibiting the Controller of Prisons from opening mail of a Solicitor/Client nature or delaying the transmission of the same to the prisoner or Solicitor.
8. A consequential Order for Mandamus that the Controller of Prisons ensure that the minimum standards in regards to food rations as prescribed by the relevant Regulations are adhered to.

This action was commenced under Order 61 of the High Court (Civil Procedure) Rules, 1964 ("**the Rules**") for the issue of a number of declarations and the issue of Prerogative Writs of mandamus and prohibition. It is interesting to note though that this procedure does not make reference to the issue of declarations. The Rules seem to confine applications under this Order to applications for the issue of writs of Mandamus, Prohibition and Certiorari only. In the United Kingdom, applications for such Prerogative

Writs including Declarations have now been unified under an application for judicial review (see Order 53 rule 1 of the Supreme Court Rules[1]). Our Rules however do make references for the issue of declarations in a number of ways; by Originating Summons under Order 58, or by way of writ for declaratory judgments. Although Order 61 is silent about whether declarations can by obtained through the same process as other Prerogative Writs, it would seem that rule 5 of Order 27 would seem to cover that situation in any event. I quote:

> *"No action or proceeding shall be open to objection, on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether any consequential relief is or could be claimed, or not."*

Relief Sought

There are basically three broad decisions sought to be reviewed in this action. The fourth decision regarding a further decision to allow RAMSI to search the prison on 5th March 2004 has been abandoned. These are as follows:

(i) Review conditions of imprisonment and in particular decision to segregate prisoners and keep them by themselves or with one or two others in confinement most of the day in what is termed "lock up";

(ii) Decision to open prisoners' mail from their Solicitor;

(iii) Decision in relation to rations/meals.

It is not in issue, that the court has general jurisdiction to review in this case the decision of the Controller of Prisons ("**the Controller**") as a governmental authority. It is also not in issue, that the Applicants have standing to challenge the validity and legality of the decisions of the Respondent.

The Applicants rely on the following grounds to challenge the decisions of the Controller:

(i) That the decision of the Controller of Prisons is unlawful or ultra vires;
(ii) That the decision is in breach of the rules of natural justice and fairness in particular in relation to the decision to segregate the prisoners;
(iii) That the decision has been made for an improper purpose;
(iv) Taking into account irrelevant material;
(v) Unreasonableness.

At the hearing the Respondents objected to the ground of natural justice and fairness being raised as there was insufficient material raised in the Statement Accompanying Application for Leave to indicate that the rules of natural justice had been breached and issues of fairness were being relied on. The objection was sustained and that ground has been deleted from this application.

Brief facts

It is important to provide some background information on the position of the Applicants. Some are remandees following a refusal by the courts to grant bail whilst awaiting trial or

[1] See the Supreme Court Practice 1995 Vol. 1 Sweet and Maxwell

determination of their cases. Some are convicted prisoners and serving time in prison. The offences vary in nature. Benedict Idu and Joseph Sangu for instance are currently remanded for violence and other related offences connected with the ethnic troubles. I presume they would be described as "high profile prisoners". Alfred Fa'aramoa is a convicted prisoner for theft related offences committed when law and order was at its lowest in the country. Didier Marie Edmond Farsy is a convicted prisoner for unnatural sexual offences. Those classified as "**High Profile Risk Prisoners**" were subjected to a custody management plan introduced at the behest of investigating officers from the Regional Assistance Mission to the Solomon Islands ("**RAMSI**"). It is the decision to implement this management plan which the Applicants allege is unlawful and or ultra vires the powers of the Respondent, is in breach of the rules of natural justice and fairness in particular in relation to the decision to segregate the prisoners; was made for an improper purpose; took into account irrelevant material; and unreasonable.

The Management Plan: Some of the Applicants are required under this management plan to be kept in a cell on their own. Others are kept in general share cells. The affidavit evidence adduced in relation to this management regime has been unchallenged and I accept what is stated therein. Those required to be kept in a cell on their own spend most of their day in "lock up" in the cells. For some 23 hours they remain behind the four walls of those cells and only allowed 40 minutes for exercise and 20 minutes for clean up and showering. Their association with other prisoners is limited. The Applicants object to this segregation as inter alia unlawful, as the only provision for segregation in the prison regulations is the segregation of prisoners as punishment for behaviour whilst in prison – see regulation 107. Is this management plan unlawful, ultra vires, unfair or unreasonable?

Ultra vires

The Applicants base their submissions on the provisions of section 61 of the Prisons Act [cap. 111] and Regulations 3, 4, 86, 87, 105, 106 and 107 of the Prisons Regulations (hereinafter referred to as "**the Regulations**"). They contend that the Regulations provides no basis for segregating prisoners on the ground of security concerns alone, but merely their age and status of their convictions. They say the Regulations makes reference to separation but provides no authority for holding them in particular conditions. They say regulation 87(4) is a general power of removal which applies only to convicted prisoners. Unconvicted prisoners are to be treated separately.

In as far as regulations 105 – 107 are concerned, they say these are to be confined only to exceptional circumstances for disciplinary reasons. The only exception is in regulation 107(3) which is provided only for good order and discipline of the prison.

The Applicants say there is no power to segregate where there is existence of "possible threats" or where the prisoner may be at risk or a risk to others.

Issue of Classification

The issue of segregation arises from the classification made by the Controller, of prisoners described as of "**High Security Risk**", separating them and placing them in the High Security Unit. This power was purportedly exercised under sub-paragraph 87(1)(f) of the Regulations.

At paragraphs 6 – 10 of the affidavit of Francis Haisoma filed 10th March 2004, he provides explanation or justification for that classification:

"6. *To ensure good order in prisons, each prisoner is accommodated and managed in accordance with the information which the prison has about the person. This information may be obtained from the commitment order, the police, prior knowledge gained from earlier terms of imprisonment etc. and is used to classify prisoners into risk categories. This may include placing certain prisoners together in a cell, or keeping certain prisoners apart from others, for instance, where there are concerns that the prisoner may be at risk or is a risk to others. This is standard prison practice world-wide and is not done as punishment.*

7. *Since the establishment of RAMSI, there has been a significant increase in the number of prisoners admitted to Central Prison in Honiara. To enable the Prison Service to get relevant information on these prisoners an information process was established with the Participating Police Force ("PPF"). This involved the PPF providing the management at Central Prison with some background information on each prisoner admitted from them and their views on how that prisoner may best be managed. This is in the form of a "Case Management Plan". In some cases, the PPF have suggested that a prisoner does not associate with other prisoners because of concerns about their safety or the safety of other prisoners.*

8. *The views expressed by the PPF concerning a prisoner are generally regarded by the Officer in Charge as providing relevant material for the determination of the classification and placement of an individual prisoner. However, any decision with respect to these matters is arrived at after an examination of all relevant matters. Moreover, the views of the PPF are not regarded as being determinative of the question of classification and placement of prisoners.*

9. *On 23 February 2004 there were 211 prisoners at Central Prison and all but 7 prisoners were in shared cells. Prisoners IDU, MAE and FARSY are in cells by themselves. IDU, SANGU and FA'ARAMOA have been accommodated in the High Security Unit since their admission to prison.*

10. *The reasons for the decision made in respect of each of these Applicants were as follows:-*

    (a) *IDU was placed in the High Security Unit because information provided by the PPF is that he "could be a threat to other MEF members in custody" and he could be a "possible threat from members of the GLF". IDU is also charged with the serious offences of murder, abduction and robbery.*
    (b) *SANGU was placed in the High Security Unit because of verbal information provided by the PPF that, as he is Harold Keke's brother, he was potentially at risk from other prisoners, particularly MEF members.*
    (c) *FA'ARAMOA was placed in the High Security Unit because of verbal information provided by the PPF that he should only associate with prisoners IDU and SAENI as he may be a threat to others.*
    (d) *MAE was placed in general prisoner accommodation when he was admitted, but was transferred to the High Security Unit in January because of verbal information from the PPF that he may be at risk from other prisoners.*
    (e) *FARSY was placed in the High Security Unit for observation when he was admitted on 23 October 2003, as he was considered to be a high risk of self-harm. The Magistrate had stated on his accompanying warrant, that FARSY should be placed on 15 minute observations, because of his self-harming behaviour at Gizo. He was moved to general accommodation in "F" unit on 29 December 2003 as his behaviour had stabilized. He*

moved cells several times between "F" Unit and "C" Unit in general accommodation, but was moved back to the High Security Unit for one day on 12 February 2004, as he was again considered at high risk of self-harm. Mr FARSY is currently in "F" Unit in general accommodation. Because of the risk of him self-harming, Mr. FARSY has been under observation since his admission and has been accommodated in a cell by himself."

Does the Controller have power to make such classification?

Section 5 of the Prisons Act gives power to the Superintendent of Prisons (in this case that function is performed by the Controller of Prisons) to classify prisoners according to the classifications specified by regulations made from time to time under section 61 of the Prisons Act. Sub-section 61(1) allows regulations to be made for inter alia:

"(vii) the classification of prisons and prisoners into categories and their separation accordingly;".

Regulations 86 and 87 deal specifically with the question of classification and separation of certain category of prisoners. For instance, section 86 provides for the segregation of (a) male from female prisoners and (b) convicted from unconvicted prisoners.

"So far as shall be practicable, the following prisoners shall be kept apart and confined in separate prisons or in separate parts of the same prison in such manner as to prevent their seeing or communicating with each other –

(a) male from female prisoners; and
(b) *convicted and unconvicted prisoners."*

Regulation 87 provides for further classification of prisoners as follows:

"(1) Prisoners shall be classified and divided into the following classes –

(a) young prisoners;
(b) adults;
(c) first offenders;
(d) prisoners with previous convictions;
(e) unconvicted prisoners; and
(f) *such other classes as the Superintendent of Prisons may determine;... "*

It then further provides that: "... *so far as the prison facilities permit each such class shall be kept apart from the other classes."*

The Applicants say that whilst the regulations allow the Controller some discretion in classifying prisoners, it provides no basis for segregating them on the basis of security concerns alone.

The effect of the Applicant's submissions would be to impose a restrictive interpretation on the meaning of sub-paragraph 87(1)(f) "*such other classes as the Superintendent of Prisons may determine*". To confine such classifications to age and status of convictions alone, in my respectful view cannot be justified in this case. The categories of age and status of convictions are but only two categories identified in the classifications, but there may be more and subparagraph 87(1)(f) in my respectful view recognizes that fact. The only

constraints as to classification should be that dictated to by the provisions of the Act and the regulations, in particular that of regulations 3(1)(a) and 4 which states:

(Regulation 3(1)(a))

"*These Regulations shall be applied, due allowance being made for the differences in character and respect for discipline of various types of prisoners, in accordance with the following principles:-*

(a) discipline and order shall be maintained with fairness but firmness, and with no more restriction than is required for safe custody and to ensure a well-ordered community life;"

(Regulation 4)

"*The Superintendent of Prisons shall be responsible ... for the proper administration and maintenance of discipline in the Service, the efficient management of prisons, the discipline, control and welfare of prisoners and the implementation of the provisions of the Act and these Regulations and shall take all necessary steps to secure as far as may be uniformity of administration throughout all prisons in Solomon Islands.*"

If the Controller considers in his own deliberate judgment that a separate class of prisoners be designated as "**High Security Risk Prisoners**" so as to ensure that there is "*efficient management of prisons, discipline, control and welfare of prisoners*" then subparagraph 87(1)(f) allows him to do that. The affidavit of the Controller provides explanation for the basis of the classifications. Respectfully, I find nothing irrelevant, unlawful or ultra vires about that classification.

Segregation of the High Security Risk Prisoners

On the issue of segregation of this class of prisoners, which basically means separation from other classes, the regulations expressly cater for segregation as follows "... *and so far as the prison facilities permit each such class shall be kept apart from the other classes*". So the Regulations do allow the Controller to separate this class from other classes if he deems it appropriate. How he does that is a matter within his discretion and this court will not interfere with such decision. However, it is important to appreciate that there are basic guidelines inherent in the Regulations which set limits within which his discretion must be exercised. That limit is a matter which this court has jurisdiction to determine, if it is alleged he has overstepped the mark.

That he has made the decision to classify certain prisoners as "High Security Risk Prisoners", and to segregate them in a High Security Unit, is non-reviewable. They are decisions made within his jurisdiction, for the *purposes of securing the efficient management of prisons, the discipline, control and welfare of prisoners*.

What was objectionable however, was the decision to impose a punishment regime or a regime very much similar to and virtually no different to that of a punishment regime for such prisoners. That is the decision which the Applicants have come to court to over-turn. They say it is ultra vires, unreasonable and unlawful.

Discipline of prisoners

The Regulations make clear distinction regarding what I would describe as the "punishment regime" for prison offenders (those who misbehave whilst in prison) from others. That regime is specifically provided for in Division 5 of the Regulations, more particularly regulations 102 – 108. Regulations 105 - 107 sets out the punishment regime for such offenders as follows:

> *"105. Any prisoner who commits any minor prison offence shall be liable to one or more of the following punishments:-*
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> *(a) confinement in a separate cell for a period not exceeding fourteen days;*
> *(b) confinement in a separate cell with penal diet for a period not exceeding seven days;*
> *(c) forfeiture of remission of sentence not exceeding thirty days of the total remission earned; and*
> *(d) deprivation of privileges.*
>
> *106. Any prisoner who commits any major prison offence shall be liable to one or more of the following punishments:-*
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> *(a) confinement in a separate cell for a period not exceeding twenty-one days;*
> *(b) confinement in a separate cell with penal diet for a period not exceeding twenty-one days;*
> *(c) forfeiture of remission of sentence not exceeding sixty days of the total remission earned; and*
> *(d) deprivation of privileges.*
>
> *107. – (1) No prisoner shall be sentenced to be confined in a separate cell for an aggregate of more than ninety days in one year.*
>
> *(2) In any case where a prisoner is sentenced to two periods of confinement in a separate cell the two sentences shall be separated by a period of not less than the longer of the two periods.*
>
> *(3) Notwithstanding anything contained in this regulation, if it appears to the Officer in Charge that it is desirable for the good order and discipline of the prison for a prisoner to be segregated and not to work nor to be associated with other prisoners it shall be lawful for the Officer in Charge to order the segregation of that prisoner for such period as he may consider necessary.*
>
> *(4) No prisoner undergoing separate confinement shall see any person other than prison officers in the execution of their duty, prison ministers, visiting justices and the medical officer of the prison.*
>
> *(5) Every prisoner undergoing separate confinement shall, subject to any directions of the medical officer, be exercised for one hour each day and during such exercise period shall be required to bathe himself.*
>
> *(6) Every prisoner undergoing separate confinement shall be visited by the Gaoler of the prison and not less than once each day and by the medical officer as often as is practicable."*

The Regulations make clear that this regime is to be reserved for the punishment of prison offenders. It is therefore separate and distinct from the treatment of normal prisoners whatever their classifications; that includes the High Security Risk Prisoners. It should not be applied therefore to them. Apart from their classification as High Security Risk Prisoners, these are but normal prisoners who have not done anything which would subject them to the provisions of a punishment regime.

There is nothing wrong in having a separate **High Security Unit** in the Prison to cater for such classification. What is wrong though is in imposing the same or very similar regime to such classifications as would have been imposed for prison offenders. That is wrong and unlawful. I have carefully considered the reasons given to justify the decision to impose the regime for their confinement, but cannot be satisfied that is justifiable in the circumstances. Unless they have been subjected to any disciplinary action, the punishment regime should not be imposed upon them. The unchallenged evidence adduced before me is that those Applicants classified as High Security Risk Prisoners had never been subjected to any disciplinary actions whilst in prison. **They cannot therefore be subjected to the same regime adopted for the punishment of prison offenders. And to the extent such regime has been introduced for High Security Risk Prisoners that must be condemned as being in breach of the Prison Regulations, ultra vires and unreasonable.** The Controller does not have power to apply or impose a "punishment regime" for High Security Risk Prisoners[2]. I am not saying that the regime applied in the High Security Unit should necessarily be the same as that for other prisoners, nor am I seeking in anyway to interfere with the work or discretion of the Controller as to how the prison and prisoners are to be managed, controlled or disciplined. That is his job and job alone to determine. The regime for High Security Risk Prisoners may be slightly different, a little bit more restrictive, confined perhaps, **but cannot and should not be equated with that of a punishment regime.** The regulations are very clear on that. And so in so far as the Controller may have taken into account irrelevant matters, or failed to take into account relevant matters, or may have exercised his discretion for an improper purpose, the decision to impose a punishment regime or one similar must be declared as ultra vires. Also to the extent that it is based on no sure legal footing or basis, it is also unreasonable.

Decision to open prisoners' mail from their Solicitor.

Issues pertaining to prisoner's mail are covered by regulation 81. I quote:

> "*(1) Subject to such limitations as the Superintendent of Prisons may from time to time direct in the case of any prison or any prisoner or class of prisoner, prisoners shall be permitted to send letters at the public expense and to receive letters.*
>
> *(2) Every letter to and from a prisoner shall be read by the Officer in Charge or by a responsible officer deputed by him for the purpose, who shall endorse the letter to the effect that he has done so, and it shall be within the discretion of the Officer in Charge to stop any letter on the grounds that the contents are objectionable.*
>
> *(3) A prisoner to whom or by whom a letter is written which is stopped in terms of paragraph (2) shall be advised that the letter has been stopped.*
>
> *(4) A prisoner to whom a letter is written which has been stopped in terms of paragraph (2) may elect to have the letter returned to the writer or placed with his property against his discharge.*"

The Applicants say that this regulation contravenes their common law rights to privilege over communications between them as clients and their lawyer(s). They object to the

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[2] see Affidavit of Didier Marie Edmond Farsy filed 18th February 2004 at para. 4; Affid. of J.H. Sangu filed 18th February 2004 at paras. 3 – 9; Affid. of A. Fa'aramoa filed 18th February 2004 at paras. 4 – 8; Affid. of Chris Mae filed 18th February 2004 at paras. 4 – 5; Affid. of S. Kaoni filed 18th February 2004 at paras. 4 – 9.

opening and reading of mails containing communications with their lawyers concerning legal advice or any pending judicial proceedings.

The Respondent argues on the other hand that no ground of illegality had been established regarding the actions of the Controller over such matters. He says that the regulation authorizes the Officer in Charge or a responsible officer to read every letter to and from a prisoner for the purpose of stopping any letter on the ground that the contents are objectionable. He says that no evidence has been adduced to show that they have acted ultra vires over that matter.

The principle of legal professional privilege

Legal professional privilege is a substantive principle of the common law, that a person is entitled to preserve the confidentiality of statements and other materials which have been made or brought into existence for the sole purpose of seeking or being furnished with legal advice by a lawyer, or for the sole purpose of preparing for existing or contemplated judicial or quasi-judicial proceedings[3]. It is commonly referred to as legal communications between solicitor and client.

The existence of this rule is fundamental to the effective operation of the accusatorial or adversary system itself. It furthers and promotes the administration of justice and effective adversary system. This rule or doctrine fosters openness/frankness and trust in the solicitor/client relationship and protects the information of each party to adjudication from disclosure to the other side. It has been said that the existence of this rule is crucial to the proper functioning of the common law system and any abolition would be detrimental to the existence of the accusatorial system. This was highlighted by Roskill L.J. in **Causton v. Mann Egerton (Johnsons) Ltd**[4]:

> "*So long as there is an adversary system, a party is entitled not to produce documents which are properly protected by privilege if it is not to his advantage to produce them, and even though their production might assist his adversary if his adversary or his solicitor were aware of their contents, or might lead the court to a different conclusion from that to which the court would come in ignorance of their existence.*"

In **Attorney-General (N.T.) v. Maurice**[5], Mason and Brennan JJ said:

> "*The raison d'etre of legal professional privilege is the furtherance of the administration of justice through the fostering of trust and candour in the relationship between lawyer and client.*"[6]

See also **Grant v. Downs**[7] in which the High Court of Australia said:

> "*The rationale of this head of privilege, according to traditional doctrine, is that it promotes the public interest because it assists and enhances the administration of justice by facilitating the representation of clients by legal advisers, the law being a complex and complicated discipline. This it does by keeping*

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[3] "Law of Privilege" McNicol S.B. 1992
[4] [1974] 1 All E.R. 453
[5] (1986) 61 A.L.J.R. 92.
[6] Ibid. at 96.
[7] (1976) 135 C.L.R. 674

secret their communications, thereby inducing the client to retain the solicitor and seek his advice, and encouraging the client to make a full and frank disclosure of the relevant circumstances to the solicitor."[8]

In **Baker v. Campbell**[9] the High Court of Australia also emphasized the need to protect individual rights and privacy of the citizen from the demands and intrusion of the law and government. Per Deane J.[10]:

> *"The general and substantive principle underlying legal professional privilege is of fundamental importance to the protection and preservation of the rights, dignity and equality of the ordinary citizen under the law in that it is a pre-condition of full and unreserved communication with his lawyer."*

Dawson J. at page 445 said:

> *"If a client cannot seek advice from his legal adviser confident that he is not acting to his disadvantage in doing so, then his lack of confidence is likely to be reflected in the instructions he gives, the advice he is given and ultimately in the legal process of which the advice forms part."*

And at page 436-437, Deane J. concludes his judgment as follows:

> *"Without legal professional privilege there can be no assurance that those in need of independent legal advice to cope with the demands and intricacies of modern law will be able to obtain it without the risk of prejudice and damage by subsequent compulsory disclosure on the demand of any administrative officer with some general statutory authority to obtain information or seize documents."*

See also **Berd v. Lovelace**[11], **Dennis v. Codrington**[12], **Greenough v. Gaskell**[13], and **Anderson v. Bank of British Columbia**[14].

In **A. M & S. Europe Ltd v. Commissioner of European Communities**[15] it has been supported as a fundamental, constitutional or human right.

In **Regina v. Secretary of State for the Home Department; Ex parte Leech**[16], **("Leech's Case")** a decision of the English Court of Appeal, a similar situation arose over the examination of correspondence and legal professional privilege of prisoners. The prison rules (Rule 33(3)) are worded in very similar terms to our regulation 81(2), which allowed for the reading of all correspondence and stopping of letters that were objectionable or of inordinate length. The key issue was whether the Prison Rules allowed the prison to read confidential legal communications.

The Court of Appeal dealt with that issue by saying that the common law rule of legal professional privilege could not be abrogated by legislation without express abolition of the common law rule. Steyn L.J. said:

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[8] Ibid. at 685
[9] (1983) 49 A.L.R. 385
[10] Ibid. at 435
[11] (1577) Cary 62, 21 ER 33
[12] (1580) Cary 100, 21 ER 53
[13] (1833) 1 My & K 98
[14] (1876) 2 Ch. D 644.
[15] [1983] 3 WLR 17 at 54
[16] [1994] QB 198

> *"It will, we suggest be an even rarer case in which it could be held that a statute authorized by necessary implication the abolition of a limitation of so fundamental a right by subordinate legislation."*

His Lordship also held that regulations that impede such right to be ultra vires.

> "In Solovsky v. the Queen (1979) 105 D.L.R. (3d), Dickson described the impact of a right to read a prisoner's correspondence as follows: "*Nothing is more likely to have a "chilling" effect upon the frank and free exchange and disclosure of confidences, which should characterize the relationship between inmate and counsel, than knowledge that what has been written will be read by some third person, and perhaps used against the inmate at a later date*". We respectfully agree. An unrestricted right to read correspondence passing between solicitor and a prisoner must create a considerable disincentive to a prisoner exercising his basic rights, and the right to stop letters on the ground of objectionability or prolixity means that access to a solicitor by the medium of correspondence can be denied altogether. In our view rule 33(3) is ultra vires so far as it purports to apply to correspondence between prisoners and their legal advisors."

A number of matters can be noted from Leech's Case above. First, that the rights to privilege between solicitor and client are rights connected to the civil rights of the prisoner in relation to correspondence. In Leech's Case, at page 7 Steyn L.J. said:

> *"It is an axiom of our law that a convicted prisoner, in spite of his imprisonment, retains all civil rights which are not taken away expressly or by necessary implication: see Raymond v Honey [1983] 1 A.C. 1, 10, per Lord Wilberforce. The present case is concerned with civil rights in respect of correspondence."*

The civil rights of prisoners in relation to correspondence is covered by legislation in section 52(1) of the Prisons Act. I quote:

> *"Every letter or document, except as may be prescribed, written in a prison by or on behalf of a prisoner shall be delivered to the Officer in Charge who shall, before the letter or document is removed from the prison, clearly endorse or cause to be endorsed thereon-*
>
> *(a) the name of the prison;*
> *(b) a statement to the effect that its removal from the prison is authorized; and*
> (c) *the signature or initials of the prison officer making the endorsement."*

It is pertinent to point out that the enabling legislation says nothing about whether privileged communications between solicitor and client should be read or not. The subordinate legislation, regulation 81(2) however goes further than this and requires that every letter shall be read.

The second point to note is the general duty of solicitors to keep confidential all communications between them and their clients. This is a rule based on equity and binds others who knowingly receive the communication in breach of confidence. It means that any communications passing from lawyers to prisoners on matters pertaining to legal advice or any pending case of the prisoner should not be read by the Prison Authorities. Where

that is done, they would become subject to the privilege requirements over such documents or correspondence.

The third point relates to the principle in law that every citizen has a right of unimpeded access to a court. See **Raymond v. Honey**[17] in which Lord Wilberforce described it as a "**basic right**". This right however is enshrined in our constitution as a fundamental right – see section 10 of the Constitution which guarantees the rights of a person to the protection of the law and the right to be afforded a fair hearing within a reasonable time by an independent and impartial court established by law. This right includes the rights of prisoners to the due process of the law and the courts processes whether civil or criminal. Section 18 secures their rights to come to court for any allegations of breach of such rights. Directly linked and forming an inseparable part of the right to access to the courts is the unimpeded right of access of a prisoner to his solicitor for purposes of receiving legal advice and assistance in connection with civil legal proceedings in the courts – see section 10(8) – (10) of the Constitution. See also paragraphs 10(2)(d) and (e) of the Constitution for criminal trials. Any legislation therefore which seeks to take away or hinders the prisoners' rights to access to the courts and access to their lawyers could be unconstitutional.

I have taken time to carefully consider the provisions of the Prisons Act but find nothing to indicate any restrictions of those rights of the prisoners. For instance, section 46 expressly provides for the situation where a prisoner is required to appear in any court under custody of the Prison Authorities.

It is also significant to note that under paragraph 82(2) of the Regulations, the confidentiality of communications between solicitor and client is preserved. I quote:

> "*Provided that where the visit is the prisoner's bona fide legal adviser, visiting the prisoner in that behalf, the visit may be conducted in the sight but not the hearing of a prison officer.*" [Emphasis added]

In **Leech v. Secretary of State for Scotland**[18], a similar rule was interpreted by Lord Caplan as entitling the governor of a prison to withdraw the right to conduct legal correspondence. Their Lordships in Leech's Case however declined to follow the reasoning of Lord Caplan as the legal position in England.

In my respectful view, paragraph 82(2) supports the application of the Applicants that bona fide legal correspondence between solicitor and client is privileged and should not be subject to the requirement of regulation 81.

It follows that the right of access of the prisoner to a solicitor for purposes of seeking legal advice or related matters connected to his rights of access to the courts themselves should not be impeded or hindered and to the extent any such legislation or subordinate legislation seeks to take away such rights it may be unconstitutional and ultra vires.

If regulation 81 is to be construed to include the reading of solicitor/client correspondence, that would clearly have the effect of interfering with the fundamental common law rights or constitutional rights of the prisoner to privilege over solicitor/client communications. It

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[17] [1983] 1 A.C. 1, 13
[18] 1991 S.L.T 910

would create "*a substantial impediment to the exercise of those basic rights*" and greatly diminish any free and frank exchange and disclosure of confidences between counsel and inmate.

In **Regina v. Secretary of State for the Home Department; Ex parte Leech** (ibid), the regulation (rule 33(3)) was declared by the Court of Appeal to be ultra vires in so far as it purports to apply to correspondence between prisoners and their legal advisors. In this case, regulation 81(2) should be given a restrictive construction so as not to apply to bona fide legal communications between solicitor and client. It is not necessary in my respectful view to have the whole regulation declared ultra vires because the offending part of paragraph 81(2) can be addressed by applying a commonsense construction rule; that although it reads as applying to every letter, it does not authorize the reading of legally privileged material. I would urge that the relevant paragraph be amended so as to reflect and protect that right of prisoners in clear and practical terms but also to ensure that any possible abuses are avoided.

Decision in relation to rations/meals

The standard scales of diet for prisoners are set out in the First Schedule. I quote:

"*First Schedule*
(Regulation 80)

A
FULL DIET

1 lb. Rice or 3 lbs. Roots, daily
½ lb. Bread or ½ lb. Biscuits, daily
4 ozs. Fresh or Tinned Meat, or, 4 ozs. Fresh or Tinned Fish, daily
2 ozs. Sugar daily
¼ ozs. Powdered Milk daily
Curry Powder and Salt – as required
Fresh vegetables and Fruit – as required"

When converted to metric measurements, that is, kilograms and grams, the equivalents are as follows, based on the conversion rate @ **1 lb = .453592 kilograms:**

.453592 kg (453 grams) Rice or 1.360776 kg Roots, daily
.226796 kg (226 grams) Bread or .226796 kg (226 grams) Biscuits, daily
.113398 kg (113 grams) Fresh or Tinned Meat, or, .113398 kg (113 grams) Fresh or Tinned Fish, daily
.056699 kg (56 grams) Sugar daily
.007087375 kg (7 grams) Powdered Milk daily
Curry Powder and Salt – as required
Fresh vegetables and Fruit – as required

The issue regarding rations/ meals taken up by the Applicants is that as far as they are concerned the minimum daily requirements are not being provided! They do not say that the daily requirement is not sufficient. What they say rather is that the standard scales of diet for prisoners specified in the First Schedule are not being complied with. They have adduced evidence to the effect that most of their diet consists of rice and tinned fish. They say that fresh fruits and vegetables are provided sporadically, when the regulation says "as required". Alfred Fa'aramoa says he had not seen fruit or vegetables

since his arrest in late November 2003. The same story is repeated by others. Some have fruits once in two or three weeks; Didier Farsy says he only had fruit and vegetables once a month since being in prison.

The Controller on the other hand says that approximately half of the meals are supplemented with a vegetable. These are purchased and provided on a regular basis from the Technical Mission of Taiwan and from local churches.

If the affidavit evidence of the Applicants reflects the correct position on the ground regarding the provision of fresh fruits and vegetables, then that is serious because it reveals that they have not been provided with the basic requirements as stipulated under the regulations; that is, "**as required**". Although the First Schedule does not specify what the phrase "as required" means, whether it means daily or every two days, a week etc., a common sense meaning must be given to it. At least it cannot be read to mean once in two weeks or once a month; that would be depriving them of their rights to a full diet as stipulated and could be harmful and hazardous to their health and well being.

"As required" could mean as required daily, whether it be during breakfast, lunch or dinner. Fruits and vegetables, whether cooked or uncooked, provided at least once a day or even may be every second day, would in my respectful view be adequate. The Controller however says that approximately half the meals are supplemented with a vegetable. There is obviously conflicting evidence before me on this matter of which I have not had the benefit of it being subjected to cross examination. To that extent only general observations and comments can be made about this complaint. Suffice to say that regular access to fresh fruits and vegetables is essential to the health and well being of prisoners and where that has not been complied with to the extent complained of by the Applicants, this amounts to a breach of the requirements set out in the Schedule.

The **second complaint** relates to the provision of powdered milk. None of the Applicants indicated that they had been provided with powdered milk at any time. The regulation is clear; that it is a daily requirement. Where the Controller has failed to provide ½ ounces (7 grams) powdered milk daily, it amounts to a breach of that requirement.

The **third complaint** relates to the failure to provide the minimum requirement of ½ lb (226.796 grams) bread or ½ lb biscuits (226.796 grams) biscuits daily. The unchallenged evidence adduced is that they are only provided with a 40 gm navy biscuit packet each morning.

The minimum stipulated however is ½ lb or 226 grams of bread or biscuits daily. The 40 grams navy biscuit packet is well below that minimum standard. At least each person should have been given 5 packets of navy biscuits daily to make up for the minimum requirement! No evidence has been adduced otherwise to say that this requirement has not been breached.

As far as the complaints regarding curry and salt are concerned, again these are minimum requirements and it is clear on the evidence that these have not been complied with. It is possible, curry may have been utilized in the cooking of meals but at least salt must be provided for the use of inmates.

Some of the matters complained of, are matters which the Gaoler, appointed under regulation 47 should be able to attend to. His general duties include ensuring that all written laws, rules and orders applicable to the prison are strictly observed and that proper discipline is maintained throughout the prison.

Part of his duties includes the supervision of meals and rations of prisoners. See regulation 51, which gives him responsibility to ensure that the meals provided are in accordance with the prescribed scales of diet.

> *"(1) The Gaoler shall from time to time personally inspect and superintend the issuing of prisoners' meals and shall weigh the rations supplied to the prison; and a record shall be made of every such inspection and weighing in a book to be kept for that purpose.*
>
> *(2) The Gaoler shall take care that every article of food supplied of the use of prisoners is sound and of good quality and shall take such measures as may be necessary to have unsatisfactory food exchanged by the supplier before it is issued for prisoners' use.*
>
> *(3) The Gaoler shall take care to see that the rations issued are strictly in accordance with the prescribed scales of diet and that every prisoner receives the diet to which he is entitled.*
>
> *(4) The Gaoler shall take action to ensure that the scales, weights and measures used for weighing prisoners' rations are in good order and accurate."*

I would recommend that the Gaoler reviews the current status of food supplied to prisoners and to ensure that they comply with the requirements set out in their prescribed scales of diet in the First Schedule. The affidavit evidence adduced shows that this has not been complied with. It may also be an opportune time for the Controller to review the scales of diet set out in that Schedule. Paragraph 80(2) of the Regulations empowers the Controller after consultation with the Permanent Secretary, Ministry of Health and Medical Services from time to time to amend the First Schedule.

Conclusion

A number of orders were sought by the Applicants, including orders for declarations, prohibition and mandamus. These can now be answered as follows. For declarations sought in respect of the classification and segregation of High Security Risk Prisoners the only general declaration which can be given in relation to that matter should be to the effect that the decision to impose a regime for such prisoners very similar to the "punishment regime" prescribed by the Regulations is ultra vires, unlawful and unreasonable. As to the question whether an order for Mandamus should be issued to compel the Controller to hold such prisoners, including the Applicants in conditions which are just, reasonable and fair in the circumstances in my respectful view is unnecessary. The regulations require him to do that and it would be superfluous to tell him to do that. Also it is a matter within his expertise to have that sorted out. I decline to issue any order for mandamus; the most this court can do is to define where the limits lie.

As to orders for declaration regarding bona fide legal correspondence, it is sufficient if a declaration is issued to the effect that such correspondence of a solicitor/client nature is protected by privilege and not subject to the requirements of regulation 81. As to orders sought for prohibition it is my respectful view that that is unnecessary.

As to the issue of food rations, the declarations sought can be divided into two categories. The first relates to the complaint about lack of fresh fruits and vegetables being provided. Having read the affidavits of the Applicants and the Controller on this matter, I decline to issue any declarations other than to say that this matter should be considered by the Gaoler and ensure that the minimum requirements are met.

The second category relates to the declarations sought for the failure to provide powdered milk, the required weight of biscuits, and curry and salt. As to the question of powdered milk, there has been a failure to provide the daily minimum and a declaration to that effect should be made. The same applies to the provisions for the required weight of biscuits and curry and salt, and similar declarations should be issued. It is not clear why those other necessities have not been provided but it is imperative that this is done. Again this is a simple matter for the Gaoler to attend to and I see no need for orders of mandamus to be issued at this point of time.

Orders of the Court:

1. **Grant declaration that the decision to segregate prisoners classified as High Security Risk and to keep or confine them by themselves or with others in what is termed as "lock up" very similar to that of a "punishment regime" is unlawful, unreasonable and ultra vires.**

2. **Decline to issue order for mandamus sought in respect of this matter.**

3. **Grant declaration that the decision of the Controller to read correspondence of a solicitor/client nature is ultra vires.**

4. **Decline to issue order of prohibition to prevent the Controller from reading such legal correspondence.**

5. **(i) Grant declaration that the decision not to provide 7.08375 gms of powdered milk on a daily basis is unlawful.**

   (ii) Grant declaration that the decision to provide only a 40 gram navy biscuit packet each morning is in breach of the requirement set out in the First Schedule to regulation 80(1).

   (iii) Grant declaration that the decision not to provide curry and salt as required is in breach of the requirement set out in the First Schedule to regulation 80(1).

6. **Decline to issue order for mandamus regarding those matters.**

The Court.