OUTER HOUSE, COURT OF SESSION

[2018] CSOH 104

P105/18

OPINION OF LORD BRAILSFORD

In the petition

(FIRST) BC AND OTHERS

Petitioners

against

CHIEF CONSTABLE POLICE SERVICE OF SCOTLAND AND OTHERS

Respondents

Petitioners: Sandison QC, Young; Kennedys Scotland LLP
Respondents: Sheldon QC; Clyde & Co (Scotland) LLP

13 November 2018

[1] The petitioners are ten individual police officers against whom misconduct proceedings have been brought under the Police Service of Scotland (Conduct) Regulations 2014 (SSI 2014/68) ("the 2014 Regulations"). The compearing respondents are the Chief Constable and Deputy Chief Constable of the Police Service of Scotland and a Chief Superintendent of Police appointed under the 2014 Regulations to conduct misconduct proceedings brought against the petitioners.

[2] The petitioners seek orders finding and declaring that the use by constables in the Police Service of Scotland of messages sent to, from, and amongst the petitioners via the electronic "WhatsApp" messaging system for the purpose of bringing misconduct

proceedings in respect of allegations of non-criminal behaviour on the part of the petitioners is unlawful *et separatim* is incompatible with the petitioners' rights to respect for their private and family life in terms of article 8 of the European Convention on Human Rights ("ECHR") and, further, interdicting the second and third respondents from conducting or maintaining any misconduct proceedings against the petitioners in respect of allegations of non-criminal behaviour on their part on the basis of, or involving the use of, the messages and interdicting the same *ad interim*. Permission to proceed was granted on 15 May 2018 and after sundry procedure by interlocutor dated 4 July 2018 Lord Arthurson ordered that a substantive hearing set down for 19 July 2018 be restricted to matters raised in paragraphs 1, 2 and 10-22 of the petitioners' note of arguments and paragraphs 1-4 on the respondents' note of argument. The effect of this interlocutor was that the substantive hearing before me was confined to discussion of the respondents' first, third and fourth pleas-in-law. These were, first, that the petition did not challenge any act, omission or decision amenable to the supervisory jurisdiction. Second, that the petitioners had not availed themselves of rights of appeal conferred on them under or by virtue of statute and, third, that the petition was directed to matters which have yet to be determined and was accordingly premature. For these reasons it was submitted that the petition fell to be dismissed.

The 2014 Regulations

[3] The 2014 Regulations form the regulatory basis upon which the misconduct complaints which gave rise to this petition proceed. Part 2 of the Regulations contained in Regulations 10-14 set forth procedures to be adopted if misconduct allegations come to the

attention of a deputy chief constable designated to exercise functions under the Regulations.[1] Thereafter Part 3 of the 2014 Regulations, entitled "Misconduct Proceedings" deal with the arrangements for misconduct proceedings and thereafter the procedure to be followed at misconduct proceedings. The relevant regulations are 15-23. It is not necessary to repeat the provisions at length. Regulation 15 applies if the designated deputy chief constable has referred a case for misconduct proceedings. The constable who is the subject of the allegation of misconduct must be served with a misconduct form and thereafter, within a stipulated time limit, the constable must in terms of Regulation 15(5):

> "... provide the deputy chief constable written notice of whether the constable accepts that –
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> > (a) the conduct which is the subject matter of the misconduct allegation is conduct of the constable; and
> >
> > (b) that conduct amounts to misconduct or (as the case may be) gross misconduct."[2]

If misconduct is not accepted by the constable Regulation 16 provides for the appointment of a person to conduct misconduct proceedings. Regulation 17 provides for the agreement of lists of witnesses, failing which the submission by each side to the proceedings of lists of witnesses, all within stipulated time periods. Procedure at misconduct proceedings is set forth in Regulation 18 and provides for evidence to be heard from any witness in attendance (Regulation 18(2)(b)) and, further, stipulates that "[W]hether any question is to be put to a witness is to be determined by the person conducting the proceedings", (Regulation 18(3)). Regulation 21 provides for the determination by the person conducting the proceedings as to whether or not the subject matter of the misconduct allegation is conduct of the constable. Part 4 of the Regulations deals with appeals from such a determination.

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[1] Regulation 5(1)
[2] Regulation 15(5)

Background

[4] The factual background was not contentious and is adequately set forth in paragraphs 4-7 of the petitioners' Note of Argument. That material may be summarised as follows. In July 2016 a detective constable was engaged in an investigation into sexual offences. None of the petitioners were persons of any interest to that investigation. In the course of the investigation the detective constable reviewed certain electronic messages sent via the "WhatsApp" private messaging system present on a mobile phone belonging to a suspect and recovered during the course of the investigation. The suspect was a constable within Police Scotland. The messages which form the basis of the misconduct allegations against the petitioners were contained in "group chats", being messages shared privately amongst members of a closed group of individuals. Having considered the messages the detective constable decided to pass them to other constables in the Professional Standards Department within the Police Service of Scotland. Those other constables thereafter used and relied upon the messages in order to bring misconduct charges against each of the petitioners under the 2014 Regulations.

[5] The petitioners' contention is that the use of the messages in the manner described amounts to an infringement of their common law rights of privacy *et separatim* their rights in terms of article 8 ECHR. The respondents deny this but also take preliminary points that the issues in the petition are hypothetical, premature or academic and, further, that in any event the petitioners have an effective alternative remedy. In terms of the interlocutor of 4 July 2018 already referred to the substantive hearing was confined to the preliminary points noted in paragraph [2] hereof.

Petitioners' submissions

(a) ***Live practical question***

Senior counsel for the petitioners submitted that the general purpose of the supervisory jurisdiction is to control any abuse or excess of power.[3] The proper concern of judicial review is any action or event that has, or will have, substantive legal consequences. It was said that review may be either prospective of the proposed event or action or retrospective.[4] The submission was developed by the observation that the court will not consider hypothetical, premature or academic questions being only concerned with live practical issues. What constituted a live practical issue was dependent upon the circumstances of each case.[5]

It was submitted that as a matter of fact, which fact was not contentious, each of the petitioners were subject to misconduct proceedings. It was also a matter of fact, again accepted as non-contentious, that the respondents had used and proposed to make further use of the messages for the purposes of the misconduct proceedings. The petitioners' position was that these actions infringed both common law rights and are in breach of ECHR rights to privacy. It followed that the matter was not hypothetical. In any event it was, as a matter of expediency, appropriate that the complaint raised by the petitioners should be determined at this stage. This line of

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[3] *West* v *Secretary of State for Scotland* 1992 SC 385 at pp 339-400 per the Lord President [Hope]
4 Shrewsbury & Atcham Borough Council & Another v Secretary of State for Communities & Local Government [2008] EWCA Civ 148 at paragraph 33 per Carnwath LJ
[5] *Wightman & Others* v *Secretary of State for exiting the European Union* [2018] CSOH 61 at paragraphs [47] and [51]; and now see decision in the reclaiming motion at [2018] CSIH 62 at paragraphs [24] and [25] per the Lord President [Carloway]

argument was developed by submitting that the respondents erred in attempting to treat the present petition as if it were only a complaint about a prospective decision of the third respondent in the course of the misconduct proceedings and thereby to treat the messages as merely part of the evidence to be used at any misconduct hearing.

(b) ***No effective alternative remedy***

It was accepted on behalf of the petitioners that the existence of an effective alternative remedy will normally bar recourse to the supervisory jurisdiction of the court.[6] The general principle was said however to be subject to the qualification that an alternative remedy must be effective.[7]

Having regard to that consideration it was submitted that it was likely to be deeply unsatisfactory for someone to have to wait for actual disciplinary proceedings to be brought, for a finding of misconduct to be made and appeal rights exhausted before presenting a fundamental challenge to the process.[8] It was observed that this process of reasoning had been applied in respect of fundamental challenges in the specific context of police misconduct proceedings[9]. The underlying rationale behind the submission was that it would be unsatisfactory if substantive hearings proceeded with the

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[6] *McCue* v *Glasgow City Council* 2014 SLT 891 at paragraphs [32] – [35]
[7] *McGeoch* v *Scottish Legal Aid Board* [2013] CSOH 6 at paragraph 726
[8] *Rossi* v *Magistrates of Edinburgh* [1904] 7 FHL 85 at 89-90, and *Pharmaceutical Society of Great Britain* v *Dickson* [1970] AC 403 at page 420, 429-430, 433
[9] *R (on the application of Wilkinson)* v *Chief Constable West Yorkshire Police* [2002] EWHC 2353 (Admin) at paragraphs 45-48, *R (on the application of Redgrave)* v *Metropolitan Police Commissioner* [2002] EWHC 1074 (Admin) at paragraphs 10-15, and *R* v *Chief Constable of Merseyside ex parte Calveley* [1986] QB 424 at pages 4340-435 and 439-440

associated costs in circumstances where a process was fatally flawed. Support for this essentially pragmatic approach was said to be found in *Lewis* "*Judicial Remedies in Public Law*".[10]

In applying these principles to the present petition it was submitted that the alternative remedy suggested by the respondents, an application at misconduct hearings to request the decision maker to exclude the messages, constituted neither an effective nor realistic remedy. The reasons advanced for this were first, that the nature of the complaint was a fundamental one of unlawful recovery and use of messages. The nature of the complaint made by the petitioners would not usually be regarded as the type which the statutory code on police disciplinary procedures was intended to accommodate. It would not be effective to require the petitioners to participate in that process involving at least potentially a lengthy evidential hearing and appeals before having judicial determination of an obvious and potentially determinative preliminary issue.

Second the petitioners contended that their privacy had already been unlawfully infringed and as a consequence they are being subjected to unlawful disciplinary proceedings based upon that infringement. These disciplinary proceedings will form part of the petitioners' permanent professional records.

Third, it was submitted that the structure of the 2014 Regulations did not provide an effective remedy. They did not provide for effective preliminary challenges on the issue of exclusion of evidence. Even before any

[10] 5th edition at paragraphs 12-044 and 12-046 et seq

evidence was adduced or lodged the petitioners were compelled by the Regulations to admit or deny whether the conduct referred to was their conduct (Regulation 15(5)(a)). It was further advanced that the ability to challenge witnesses was circumscribed and time limited (Regulation 17) and the person conducting the proceedings had no discretion but to admit evidence from any witness in attendance (Regulation 18(2)(b)). Lastly in this regard it was submitted that there was no ability to challenge by way of appeal or review any preliminary ruling on admissibility.

Respondents' submissions

[6] The primary position of the respondents was that the petitioners had failed to exhaust the statutory remedies open to them in terms of the 2014 Regulations. Pending any determination of the use to be made of the messages by the third respondent in the misconduct proceedings the matters complained of in the petition were premature and incompetent. It was said the determination of the substantive matters raised in the present petition would add nothing to any determination by the misconduct hearing and any appeal proceedings following therefrom. Having regard to the fact that the petitioners themselves maintain that the messages are the entire sum and substance of the misconduct charges brought against them it was said to be "highly likely that the misconduct charges would be dropped in the event that messages are found to be inadmissible as evidence".

[7] In development of this it was submitted that the competent and exclusive forum at this stage for the determination of whether the proposed use of the messages breached any private law right or right of privacy under article 8 was the misconduct hearing and that all the arguments advanced by the petitioners were capable of being determined at any

misconduct hearing. Further those issues were, if appropriate, capable of being appealed or reviewed. Specific provision was made in the 2014 Regulations for appeals.[11]

[8] Having regard to those considerations the submission of the respondents was that the present petition was incompetent and fell to be dismissed.

Conclusion

[9] There is no dispute that a detective constable acting in the course of his or her duties came across electronic messages posted by the petitioners on a messaging system. The messaging service used was private and the petitioners had no intention of publishing the contents of their messages to the public at large. It was, further, not disputatious that the messages themselves were of no interest to the investigating police officer who recovered them in the context of the inquiry into possible offences. The inference to be drawn from this is that the messages did not disclose criminal conduct.

[10] One issue which may arise out of the foregoing facts is whether the detective constable who recovered the messages was under any obligation to pass them on to an appropriate officer for consideration as potential misconduct under the 2014 Regulations. That question is not however before the court. The messages were passed to an officer for the purposes of investigation under the 2014 Regulations and it is plain from what has occurred following therefrom, and the misconduct proceedings now challenged, that use has been made of the messages. Given that the messages were circulated on a private messaging system with known and identified participants so far as the petitioners sending the messages were concerned it is tolerably clear that they were, and were intended to be, of a private nature. The private nature of the messages is not disputed by the respondents.

[11] Regulation 24

[11] Having regard to the foregoing consideration I am of the view that the issue of whether or not the messages can be made use of in misconduct proceedings which are essentially private proceedings brought by a police authority against a police constable raises issues of substantive law. Put shortly can private communings lawfully acquired by a police officer in the pursuit of a criminal investigation, which communings are of no interest in the context of the criminal investigation being undertaken by the recovering police officer, be subsequently used for a purpose unconnected with the criminal investigation. That question is, in my view, wider than merely evidential in scope. In order to answer that question issues of confidentiality and privacy both at common law and, no doubt, under the provisions of ECHR require to be considered.

[12] If I am correct in my analysis it would follow that the police officer responsible for determining the misconduct proceedings would be required, in the course of an evidential hearing in the proceedings, to determine a difficult question of substantive law on the basis of an evidential challenge made by the officer, or officers, who were the subject of the proceedings. I would not regard that situation as satisfactory. Moreover, as was submitted by senior counsel for the petitioners, the nature of the challenge being to a substantive legal right is capable of determining whether or not the proceedings are lawfully brought.

[13] In my view the nature of the substantial issue which has emerged is, as was submitted by senior counsel for the petitioners, beyond the scope of what would normally be considered misconduct proceedings. The complaint is, or raises, an issue of fundamental right. I would not consider police misconduct proceedings as the appropriate forum to determine such issues.

[14] Beyond that there is the consideration that the 2014 Regulations do not provide an adequate or effective mechanism for the determination of issues of the nature of the

challenge which has now arisen. There is no provision in the Regulations permitting a challenge on a point of law to the competency or validity of proceedings. There is no provision in the Regulations for a preliminary challenge to an evidential matter. Regulation 18 stipulates procedure at misconduct proceedings. Regulation 18(2) provides, *inter alia*, that:

> "[T]he person conducting the misconduct proceedings must permit - ...
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> (b) Evidence to be heard from any witness in attendance ..."

The implication of this is clearly that the proceedings will simply proceed to hear evidence once convened. The scope of challenging questioning is limited and contained in Regulation 18(3) which provides: "[W]hether any question is to be put to a witness is to be determined by the person conducting the proceedings." Again the emphasis is, in my view, on the functional. The proceedings are essentially a factual inquiry. Whilst it is correct that a challenge to the evidence on the lines envisaged by senior counsel for the respondents would be permissible in terms of Regulation 18(3) it does not appear to me to constitute a satisfactory method for the raising and determination of important questions of law such as those raised in the circumstances surrounding the present misconduct proceedings. I would not regard the misconduct proceedings as constituting an effective mean of determining the substantive issue raised in the present proceedings.

[15] I further have regard to the fact that information claimed to be confidential to the petitioners has already been used for the purpose of investigating and instituting the misconduct proceedings. If the petitioners are correct that the information is confidential in respect of that there has already been an infringement of a right. For this reason alone I do not regard the respondents argument on prematurity as being well-founded.

[16] Having regard to these considerations I have formed the view that the present petition does raise a live question, of a significant or important nature, which does require to be determined. It follows that I do not consider the present petition to be premature. Primarily because of the fundamental nature of the challenge raised by the petitioners I consider that the appropriate method to determine the validity thereof is through the present petition for judicial review. It follows that I shall repel the respondents' first, third and fourth pleas-in-law. The result of this decision will be that the petition will proceed and for that purpose a by order will be arranged to determine future procedure.