CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

THIRD SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 37471/97
by William FAULKNER
against the United Kingdom

The European Court of Human Rights (Third Section), sitting on 18 September 2001 as a Chamber composed of

Mr J.-P. COSTA, *President*,
Mr W. FUHRMANN,
Mr L. LOUCAIDES,
Sir Nicolas BRATZA,
Mrs H.S. GREVE,
Mr K. TRAJA,
Mr M. UGREKHELIDZE, *judges*,

and Mrs S. DOLLÉ, *Section Registrar*,

Having regard to the above application introduced with the European Commission of Human Rights on 8 August 1996 and registered on 25 August 1997,

Having regard to Article 5 § 2 of Protocol No. 11 to the Convention, by which the competence to examine the application was transferred to the Court,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

The applicant is an Irish national, born in 1947. He is represented before the Court by Mr MacDermott of McCann and McCann, a firm of solicitors practising in Belfast. The facts of the case, as submitted by the parties, may be summarised as follows.

A. Particular circumstances of the case

The applicant, who was released from detention in February 1999, was detained at HMP Magilligan, County Derry, Northern Ireland, on temporary transfer from a Scottish prison while serving a seven year sentence for a drug offence. He complains about the following interferences by the prison authorities with his correspondence:

1. 15 March 1996 – a sealed letter from the applicant to his former solicitors was opened.

2. 15 March 1996 – a sealed letter from the applicant to the Scottish Prison Service was opened.

3. 28 March 1996 – a sealed letter from the applicant to the Northern Ireland Office was opened and returned to him on 29 March, and he was informed that he could not write to the Northern Ireland Office except on an official form.

4. 1 July 1996 – the applicant's sealed letter to the Scottish Minister of State was returned to him.

5. 4 July 1996 – a letter to the applicant from the Commission was opened and left in his cell.

6. 15 January 1997 – a letter to the applicant from his solicitors, appropriately marked, was opened.

7. 12 March 1997 – a letter to the applicant from the Northern Ireland Ombudsman, appropriately marked, was opened.

8. 10 May 1997 – a letter to the applicant from his Member of Parliament was opened.

9. 30 June 1997 – a sealed letter from the applicant to the Legal Aid Board of Northern Ireland was opened.

10. 23 July 1997 – a letter to the applicant from the Commission was delivered to him opened.

11. 24 July 1997 – the applicant was ordered by a prison officer to open a letter, sealed and appropriately marked, from his solicitors.

On 1 July 1997 the applicant addressed a petition to the Secretary of State complaining about an interference with letter No. 9, dated 30 June 1997. By a letter dated 17 July 1997 the Operational Management Division

of the Northern Ireland Prison Service ("NIPS") responded that under the relevant Standing Order (see below):

> "prison staff are instructed to 'examine but not read' such correspondence in order to ascertain that it is what it is stated to be, that is, legal correspondence. Staff have acted correctly in this case and I understand that you are aware that the envelope should not be sealed prior to posting."

On 18 October 1997, the applicant made a complaint to the Parliamentary Ombudsman concerning letter No. 1, dated 15 March 1996 to his former solicitors, and letters Nos. 6, 9 and 11 dated 15 January 1997, 30 June 1997 and 24 July 1997.

On 25 November 1997, the Permanent Under Secretary of State to the Northern Ireland Office, Sir John Chilcot, wrote to the Parliamentary Ombudsman concerning the applicant's complaint. Sir John apologised for the opening of the letter dated 15 January 1997, which he stated had taken place in the context of the "random opening of mail" in response to the discovery at the prison that a solicitor had improperly enclosed money in a letter purporting to be legal correspondence. He further indicated that he found no fault with the handling of the other three letters, including the letter of 15 March 1996 which he said had been opened by a member of staff suspicious that it contained material not related to legal business, and whose actions were therefore in accordance with Rule 72 (4) of the Prison and Young Offenders Centre Rules (Northern Ireland) 1995 (see below).

In a report dated 12 June 1998 the Ombudsman found, *inter alia*:

> "The compulsory opening for examination of legal correspondence ... in the absence of reason to believe that it is other or more than what it purports to be is incompatible with [Rule 72] and with Standing Order 5.3.5. Furthermore, the Governor has neither confirmed nor denied Mr Faulkner's allegations that prison staff went beyond the informal procedure by insisting upon reading legal correspondence when he was not present. I recognise that what [the applicant] considers to be legally privileged correspondence may not always be so under the limited terms of [Rule 72]; nevertheless, the responses to his complaints suggest a failure by the prison authorities to acknowledge and provide the degree of protection afforded by the Rule in those instances where it applies. I conclude that not all of [the applicant's] legal correspondence was handled in accordance with [Rule 72], and criticise NIPS accordingly. I asked the Permanent Under-Secretary if he would make sure that in future all of [the applicant's] legal correspondence was handled in accordance with Rule 72 and Standing Order 5.3.5. The Permanent Under-Secretary confirmed that, with the regulations and procedures protecting the confidentiality of legal correspondence now firmly in place, he was satisfied that the rights of individual prisoners were fully safeguarded."

B. Relevant domestic law and practice

The relevant domestic legislation is the Prison and Young Offenders Centre Rules (Northern Ireland) 1995 ("the Rules"), which came into effect on 1 March 1995.

Rule 67 (1) allows the Secretary of State to impose restrictions on communications between a prisoner and others, either generally or in a particular case, with a view to securing discipline and good order or the prevention of crime or in the interests of any persons. Under Rule 67 (4), except as provided by the Rules, every letter or communication to or from a prisoner may be read or examined by the Governor who may, at his discretion, stop any such letter on the grounds that it is not permitted under paragraph (1) or that it may undermine the prison's security.

Rule 72 ("correspondence in connection with legal matters") provides:

> "(1) A prisoner who is a party to any legal proceedings may correspond with his legal adviser or any court, national or international, in connection with those proceedings.
>
> (2) A prisoner may correspond with a solicitor for the purpose of obtaining legal advice concerning any matter in relation to which he may become a party to legal proceedings or for the purpose of instructing the solicitor to issue proceedings, or to allow him to conduct any legal business.
>
> (3) A prisoner shall on request be provided with any writing materials necessary for the purpose of paragraph (1).
>
> (4) No letter to which this rule applies shall be opened by the governor unless he has reason to believe that it contains matter not related to actual or potential legal proceedings or other legal business."

Detailed procedural instructions for prison staff in this connection are contained in the Northern Ireland Prison Service Standing Orders. Standing Order 5B 28 stated that correspondence between a prisoner and his legal adviser relating to legal proceedings to which the prisoner is a party could not be read or stopped and could be opened for examination only in the presence of the prisoner, unless the Governor had reason to suppose that it contained matter not relating to the proceedings. Envelopes carrying such correspondence had to be marked "SO 5B 28(a)". Other correspondence with a legal adviser could be read, and stopped, if it contained prohibited material as defined in the Standing Order.

Standing Order 5 was amended in July 1997 to take into account Rule 72. A new paragraph 5.3.5 replaced the old paragraph 28. The new provision states that all correspondence between a prisoner and his legal adviser is privileged and should be treated as private and confidential. Envelopes carrying such correspondence should be marked "SO 5.3.5" and "Legal Correspondence". Unless the Governor has reason to believe that such correspondence contains an illicit enclosure or does not concern legal business it may not be opened. The correspondence may only be opened and examined if there is reason to believe that the "private and confidential" privilege is being abused in that the contents endanger prison security, the safety of others or are otherwise of a criminal nature, and the opening and examination should be done in the prisoner's presence and constitute the

minimum necessary to establish the nature of the correspondence. No decision to withhold such correspondence may be taken without prior reference to the Prison Service's Operational Management Division.

COMPLAINTS

The applicant complains that the alleged interferences with his correspondence constitute violations of Article 8 of the Convention.

THE LAW

1. As regards Articles 34 and 35 § 1 of the Convention

The applicant complains of interference with his correspondence contrary to Article 8 of the Convention. Article 8 provides as follows (so far as relevant):

> "1. Everyone has the right to respect for ... his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society … 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."

The Government submit that in respect of the four letters considered by the Parliamentary Ombudsman (the letter dated 15 March 1996 from the applicant to his former solicitors [No. 1 above], the letters dated 15 January 1997 and 24 July 1997 to the applicant from his solicitors [Nos. 6 and 11], and the letter dated 30 June 1997 from the applicant to the Legal Aid Board of Northern Ireland [No. 9]), the applicant has been provided with a remedy by the Ombudsman in her report dated 12 June 1998 and can no longer be considered a victim for the purposes of Article 34 of the Convention. They submit, in the alternative, that the applicant failed to take judicial review proceedings and therefore has failed to exhaust domestic remedies as required by Article 35 § 1 of the Convention. With respect to the other letters, the Government submit that the applicant failed to make any complaint to any domestic authority or to take judicial review proceedings. They accordingly submit that, in respect of these letters also, the applicant has failed to exhaust domestic remedies.

The applicant submits that the Report of the Parliamentary Ombudsman is not sufficient to deprive him of his status as a victim under Article 34 of the Convention. He submits that his complaint in respect of the letter dated

15 March 1996 was not pursued by the Ombudsman or made the subject of a finding; that the letter dated 15 January 1997 was the subject of only an incomplete apology from the Northern Ireland Office; and that the interferences which he alleged with the letters dated 30 June 1997 and 24 July 1997 were not specifically acknowledged by the Ombudsman, and no redress was given by her. He submits that the Ombudsman did not provide an effective remedy for his complaints.

The applicant further submits that a finding in his favour by the Ombudsman is an insufficient remedy in the absence of any coercive power over State organs and the express preclusion by section 12 (3) of the Parliamentary Commissioner Act 1967 of a general review of the merits of a departmental decision. Finally, the applicant submits that judicial review is not an effective remedy for his complaints because the law of Northern Ireland does not recognise proportionality as a ground for review, because judicial review is not suitable for the resolution of disputes of fact, and because of the discretionary nature of the relief capable of being granted on an application for judicial review.

(a) As regards the question of victim

Article 34 of the Convention provides as follows:

> "The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right."

The Court recalls its judgment in Dalban v. Romania, that a decision or measure favourable to an applicant is not in principle sufficient to deprive him of his status as a victim under Article 34 of the Convention unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for, the breach of the Convention (Dalban v. Romania [GC], no. 28114/95, ECHR 1999-VI, 28.9.99, § 44).

The Court notes that in respect of the letter from the applicant's former solicitors dated 15 January 1997 (No. 6), the Northern Ireland Office accepted, in a letter to the Parliamentary Ombudsman, that it ought not to have been opened by the prison staff, and apologised to the applicant. The Court considers that in the light of this apology, and of the confirmation sought by the Ombudsman and given by the Northern Ireland Office that in future all of the applicant's legal correspondence would be dealt with in accordance with the Rule 72 and Standing Order 5.3.5, the applicant can no longer be considered to be a victim of the alleged violation of Article 8 of the Convention as regards this letter.

As regards the letters dated 15 March 1996, 30 June 1997 and 24 July 1997 (Nos. 1, 9 and 11), the Northern Ireland Office did not accept that these letters had been handled improperly, and accordingly offered no

apology. The Ombudsman concluded that not all of the applicant's legal correspondence had been handled in accordance with Rule 72, but did not make a specific finding in respect of these letters. The Court concludes that, although the Ombudsman sought and obtained from the Northern Ireland Office the confirmation referred to above, there was no acknowledgement of the alleged breach of Article 8 of the Convention sufficient to deprive the applicant of his status as a victim.

The Court considers, accordingly, that the applicant continues to be a victim of the alleged violation of Article 8 of the Convention so far as the letters of 15 March 1996, 30 June 1997 and 24 July 1997 are concerned.

(b) As regards non-exhaustion in respect of legal correspondence

Article 35 § 1 of the Convention provides:

> "The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken."

The Court notes that Rule 72 applies not only to correspondence with legal advisers but also with any court (national or international), and prisoners have a right of access to court under the common law of the United Kingdom (Raymond v. Honey [1983] Appeal Cases 1, a decision of the House of Lords). The applicant could accordingly have challenged by way of an application for judicial review the alleged interferences with his correspondence with the European Commission of Human Rights (the letters dated 4 July 1996 and 23 July 1997 [Nos. 5 and 10]) and with his solicitors (the letters dated 15 March 1996 and 24 July 1997 [Nos. 1 and 11]). This he failed to do. The applicant has not, therefore, exhausted domestic remedies in respect of his legal correspondence (see. Leech v. the United Kingdom , application no. 20075/92, Commission. Decision of 31 August 1994).

It follows that this part of the application must be rejected pursuant to Article 35 §§ 1 and 4 of the Convention.

(c) As regards non-exhaustion in respect of the remaining correspondence

The remaining items of correspondence which are the subject of this application were not with the applicant's legal advisers or the courts, but with the Scottish Prison Service (letter dated 15 March 1996 [No. 2]), the Northern Ireland Office (letter dated 28 March 1996 [No. 3]), the Scottish Minister of State (letter dated 1 July 1996 [No. 4]), the Northern Ireland Ombudsman (letter dated 12 March 1997 [No. 7]), the applicant's Member of Parliament (letter dated 10 May 1997 [No. 8]), and the Legal Aid Board of Northern Ireland (letter dated 30 June 1997 [No. 9]).

There appear to be no grounds on which the applicant could have challenged the alleged interferences with this correspondence in the domestic courts, either under Rule 72 or under the common law. Consequently, the Court finds that in respect of this correspondence the applicant has complied with Article 35 § 1 of the Convention.

2. As regards Article 8 of the Convention

The applicant contends that this correspondence was interfered with in the manner described above. The United Kingdom Government submit that the applicant's complaints are unsubstantiated.

(a) Supervision of prisoners' correspondence

The Court recalls its constant case-law that some measure of control over prisoners' correspondence is called for and that the mere screening of non-legal correspondence would not of itself be incompatible with Article 8 of the Convention, but may be a justified interference, necessary in a democratic society for the prevention of disorder or crime (see Silver v. the United Kingdom judgment of 25 March 1983, Series A no. 61, p. 38, § 98, and the Commission's Report in that same case of 11 October 1980, § 424).

The Court notes that the applicant's letters Nos. 2, 7, 8 and 9 were merely opened by the prison authorities and were not stopped or delayed. In these circumstances, the Court considers that any interference which occurred may be said to have been necessary within the meaning of Article 8 § 2 of the Convention.

As regards the applicant's letter to the Northern Ireland Office (No. 3), the Court notes that it was opened and returned to the applicant on 29 March 1996, and that the applicant was informed that he could not write to the Northern Ireland Office except on an official form. The Court does not consider that an obligation to use an official form constitutes an interference with the right to respect for correspondence, ensured by Article 8 § 1 of the Convention, provided that copies of such forms are readily available, as Article 8 § 1 does not guarantee a choice of writing materials (see Farrant v. the United Kingdom, application no. 7291/75, Commission Report of 18 October 1985, Decisions and Reports (DR) 50, p. 5, § 48).

It follows that the complaints in relation to these five letters are to be rejected as being manifestly ill-founded pursuant to Article 35 §§ 3 and 4 of the Convention.

(b) Alleged failure to post letter

As regards the applicant's letter to the Scottish Minister of State dated 1 July 1996 (No. 4), the Court notes that the applicant contends that the letter was returned to him. The Government submit that the applicant's complaint is unsubstantiated.

The Court, having examined the parties' observations concerning the applicant's complaint about this letter under Article 8 of the Convention, considers that it raises issues of fact and law the determination of which should depend on an examination of the merits. The Court concludes, therefore, that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention, but must be declared admissible, no other grounds for declaring it inadmissible having been established.

For these reasons, the Court, unanimously,

Declares admissible, without prejudging the merits, the applicant's complaint regarding his letter to the Scottish Minister of State dated 1 July 1996;

Declares inadmissible the remainder of the application.

S. DOLLÉ
Registrar

J.-P. COSTA
President