

IN THE COURT OF SESSION

Court ref: A152/2024

MINUTE

BY THE SECOND AND THIRD DEFENDERS

In the cause

Sharon MacFadyen, Pursuer

Against

The Scottish Ministers & Others, Defenders

Declarator

The pursuer and the second and third defenders are agreed that the following declarator ought to be pronounced:

“For declarator that the second and third defenders failed to carry out an effective investigation into the death of Allan Marshall, specifically an adequate and timeous investigation that was capable of achieving the following: (i) determination of the circumstances in which Mr Marshall died, (ii) determination of whether the force used by prison staff in restraining Mr Marshall was justified, (iii) identification and, where appropriate, (iv) the punishment of those responsible; that being incompatible with the right to an adequate and timeous investigation of Mr Marshall’s death under Article 2 of the European Convention on Human Rights and thus unlawful in terms of section 6 of the Human Rights Act 1998.”

Narrative

Background

1. The Lord Advocate is legally responsible for the investigation of deaths in custody in Scotland.
2. Where the Chief Constable's officers carry out the initial investigation of such deaths the results of that investigation are communicated to the Procurator Fiscal acting under the authority of the Lord Advocate. As the inquiry progresses, the Procurator Fiscal may direct the Chief Constable's officers to carry out further investigation. It is for the Lord Advocate and those acting under her authority to decide whether the results of the investigation justify prosecution.
3. Allan Marshall was held on remand at HMP Edinburgh. He died on 28 March 2015, following physical restrain by prison officers.
4. The second and third defenders failed to carry out an effective and timeous investigation into Mr Marshall's death in the following respects. This amounted to a breach of his right to life under Article 2 ECHR.

Breaches acknowledged by the Second Defender

5. In the following respects, the second defender has acknowledged that the investigation undertaken by the Lord Advocate fell below the standard required by Article 2:
 - (i) Following the death of Allan Marshall, the second defender failed initially to instruct an appropriate expert opinion in prison restraint techniques.
 - (ii) The second defender's initial consideration of the CCTV footage of the events of 24 March 2015 from HMP Edinburgh was inadequate. The CCTV footage demonstrated that prison officers had used their feet to restrain Mr

Marshall. In the second defender's initial consideration of the footage, no regard was had to this use of feet nor was sufficient regard had to the excessive force used in the restraint. Discrepancies between witness statements of prison officers and the CCTV footage were not sufficiently explored.

- (iii) Crown Counsel issued instructions on 25 May 2015 that criminal proceedings did not appear appropriate. Those instructions were issued prematurely. Instructions were sought, in part, on the basis of the initial post-mortem findings. At the time of Crown Counsel issuing instructions, the final post-mortem report was still awaited.
- (iv) By October and November 2018, further investigations for the purposes of an FAI had taken place. At that time, there was a sufficient basis in the evidence to indicate possible criminality of Scottish Prison Service employees in respect of, at the least, an assault on Allan Marshall on 24th March 2015. Notwithstanding that, the earlier decision of 25 May 2015 was not reviewed. There was no consideration of whether there ought to be a prosecution.
- (v) On 28th November 2018, a Procurator Fiscal Depute, acting on behalf of the second defender, made a clear and unequivocal public renunciation of the right to prosecute any employee of the Scottish Prison Service in respect of the events on 24th March 2015 at HMP Edinburgh which led to the death of Allan Marshall. That decision amounted to an amnesty of those who might have been prosecuted for their role in the death and was a decision which was in breach of the second defender's duty to investigate suspicious deaths under Article 2 of the European Convention on Human Rights and Fundamental Freedoms.

Additional acknowledgement by the Second Defender

6. It is additionally acknowledged by the second defender that the Crown on occasion failed to communicate adequately with Mr Marshall's family .

Breaches acknowledged by the Third Defender

7. In the following respects, the third defender has acknowledged that the investigation undertaken by her officers fell below the standard required by Article 2:

- (i) The steps taken by Police Scotland officers to secure the relevant parts of the locus (the shower room, Mr Marshall's cell and the SRU corridor) were inadequate.
- (ii) The steps taken to ingather evidence were inadequate as regards the following:
 - (a) There was a failure timeously to recover plasticuffs that may have been used in the restraint of Mr Marshall.
 - (b) There was a failure to request that medical professionals retain blood samples pending request for these by the Crown.
 - (c) It is acknowledged that CCTV footage of the restraint indicates that Mr Marshall's head was wrapped in what appeared to be a towel. Two towels, or towel fragments, were recovered by the police. It is not known whether the item shown on CCTV is an additional towel to the two items recovered. The uncertainty on that matter is of itself inadequate, as would be a failure to recover the towel shown on the CCTV, if that is what has occurred.
 - (d) The clothing worn by Mr Marshall while he was in his cell was recovered by police officers. It was not retained.

(iii) CCTV footage of the restraint was not adequately analysed by Police Scotland officers.

8. It is additionally acknowledged by the third defender that officers involved in liaising with Mr Marshall's family did not always display the standards of respect and empathy required of police officers in that situation.

IN RESPECT WHEREOF



COUNSEL FOR THE SECOND DEFENDER



COUNSEL FOR THE THIRD DEFENDER

INTIMATED

A152/24

In the Court of Session

MINUTE BY THE SECOND AND
THIRD DEFENDERS

In the cause

SHARON MACFADYEN

PURSUER

against

THE SCOTTISH MINISTERS

FIRST DEFENDER

THE LORD ADVOCATE

SECOND DEFENDER

CHIEF CONSTABLE OF POLICE
SCOTLAND

THIRD DEFENDER

2025

Agent for the Second Defender
Scottish Government Legal Directorate,
Victoria Quay, Edinburgh, EH6 6QQ