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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY GARETH ANDERSON FOR JUDICIAL REVIEW OF A DECISION TAKEN BY THE RESPONDENT ON 23 MARCH 2017 TO INCREASE THE APPLICANT'S SECURITY CATEGORISATION

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KEEGAN J

Introduction

[1] This application for judicial review is dated 15 September 2017. The applicant is a sentenced prisoner presently held at Her Majesty's Prison Maghaberry. He was sentenced to life imprisonment for murder. His tariff expiry date is 15 August 2023. The case originated due to the fact that the applicant was placed on "Rule 32" on 21 March 2017. That led to him being kept in isolation. The situation in relation to "Rule 32" was swiftly resolved in that the applicant was released from that categorisation on 12 April 2017. On 7 November 2017 McCloskey J refused leave to bring a judicial review in relation to that issue on the basis of merit and delay. However on 22 March 2017 the applicant was also informed that his security categorisation was increased from Category C to A. Leave to pursue this judicial review was granted by McCloskey J on 8 December 2017.

[2] Mr Devine BL appeared on behalf of the applicant and Mr Corkey BL on behalf of the respondent. I am grateful to both counsel for their economical and focused submissions and for the written materials they presented to the court.

[3] The amended Order 53 claims the following relief:

> "(c) A declaration that the respondent's decision to re-categorise the applicant as a Category A prisoner was unlawful.

(d) An order of certiorari quashing the decision to re-categorise the applicant as a Category A prisoner.

(e) An order of mandamus requiring the respondent to re-instate the applicant to Category C status.

(f) Such further and other relief as the court may deem appropriate damages and costs."

[4] The grounds relied on are as follows:

(i) that it was irrational and/or Wednesbury unreasonable to re-categorise the applicant as a Category A prisoner in the absence of some behaviour on his part to warrant such a decision.

(ii) in failing to provide reasons or lawful justification for re-categorising the applicant as a Category A prisoner, the respondent has acted contrary to the rules of natural justice/procedural fairness.

(iii) that the decision to re-categorise the applicant without providing reasons is contrary to Rule 2G of the Prison and Young Offenders Centres Rules (Northern Ireland) 1995 which stipulate that where a decision is taken which affects the conditions of imprisonment of a prisoner, or a class of prisoners, the reasons for that decision will be made available. It is implicit in this that when making such reasons available sufficient information shall be given to allow the prisoner to make informed representations in respect of those reasons.

The applicant's case

[5] The applicant relies on a number of affidavits which are dated 18 September 2017, 1 December 2017 and 16 January 2018. In the affidavits the applicant explains that on 21 March 2017 he was in the normal prison population and was a Category C prisoner. He avers that he was removed that day and placed on "Rule 32" isolation and that subsequently his categorisation was increased. The applicant explains that in relation to "Rule 32" various steps were taken including a case conference at which he had the opportunity to make representations and he was provided with the gist of information pertaining to the reasons why the rule was invoked. At paragraph 9 of his first affidavit the applicant refers to the content of the letter in relation to "Rule 32" as follows:

> "… I can advise that the gist relates to investigations by PSNI and NIPS into serious criminal activity both inside and outside of Maghaberry."

[6] The applicant complains that in the absence of any detail as to what these investigations were he was left unable to make informed representations. He states that the respondent accepted that he was being placed on "Rule 32" in relation to intelligence matters about which he was not to be given the gist. The applicant then refers to a chain of correspondence which followed in relation to this. In particular in his first affidavit at paragraph 37 he states:

> "In respect of categorisation – I have simply been told that a decision has been made to re-categorise me. No proper reason has been provided. Again I was not given the opportunity to make meaningful and focused representations."

[7] In this affidavit the applicant also avers that he has been affected by the increased security category. He states that he has lost his enhanced prisoner status, that he was rehoused in a remand house, despite being a sentenced prisoner, that he lost an ability to work, that he lost education and he states that in three years' time when he can apply for phased early release that this re-categorisation will count against him and jeopardise such release. He also avers that it will jeopardise his release on parole at the end of his tariff.

[8] The second affidavit refers to the categorisation application given that the "Rule 32" case was not pursued after leave was refused. In this affidavit the applicant refers to the fact that it was initially represented that there was a Police Service of Northern Ireland ("PSNI") investigation however due to inquiries made by his solicitor this turned out to be incorrect. There was simply an on-going Northern Ireland Prison Service ("NIPS") investigation in relation to this applicant. The applicant states that the respondent's initial decision to re-categorise him erroneously took into consideration the fact that there was a police investigation. The correspondence of 3 May 2017 from the NIPS refers to security categorisation as follows:

> "I note from your client's records that he has submitted various complaints regarding the issue of the security categorisation, none of which have been exhausted. Recent case law has shown that all available options of redress should be exhausted before consideration of legal correspondence at the public expense. Your client has not carried this out and should do so before engaging legal means. I am unaware as to where you have received any

> information regarding him having been absolved of any wrongdoing at any time, however I would point out that security categories are not based solely on incidents, charges or criminal convictions. In your client's case factors influencing his categorisation include:
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> - drug association;
> - risk posed to staff and other prisoners;
> - risk posed to general public by escape;
> - escape risk levels of control exerted over prisoners and/or others."

[9] The applicant then refers to the pre-action protocol correspondence. In particular he refers to the fact that the categorisation issue was specifically raised in the correspondence of 16 May 2017 however a reply did not materialise until 21 November 2017. The response to the pre-action protocol is more expansive and states as follows:

> "Security categories are designed to help ensure that prisoners do not escape, abscond or threaten the security, safety and/or the good order and discipline within the establishment. They ensure that prisoners are held with the level of security commensurate with the threat they pose inside the prison and to the general public and others outside the prison should they escape or abscond from lawful custody.
>
> The setting of security categories is completed by examining information and incidents involving a prisoner's behaviour. We can advise that Mr Anderson was removed from Braid following a series of incidents. There continues to be a live and current investigation in regards to serious criminal activity both inside and outside of HMP Maghaberry which I believe the applicant is involved in. Irrespective of the PSNI's criminal investigation Mr Anderson is still considered relevant to NIPS's investigation into these matters and NIPS has intelligence that links Mr Anderson to the activities under scrutiny.
>
> As a result of preliminary investigations and confidential information received, and which was robustly scrutinised, we have concluded that Mr Anderson's continued residence in a lower

> security and high trust area is incompatible and poses a real and credible risk to this area.
>
> NIPS has been undertaking an investigation and said investigation is on-going. In determining the appropriate security category for Mr Anderson, NIPS has carefully considered confidential information that was obtained during the course of the investigation. My understanding from those NIPS senior personnel who were involved is that this confidential information was carefully scrutinised and has been determined to be credible. On foot of the information obtained during the investigation and in light of all the other facts and circumstances of Mr Anderson's detention, NIPS has concluded that Mr Anderson's continued residence in a lower security and high trust area is incompatible and poses a real and credible risk to the area.
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> We would advise that a review of Mr Anderson's alleged actions and the information available had led to the conclusion that he no longer meets the definitions of a Category C prisoner, in that given the information available, the very highest conditions of security are now necessary to ensure that he is being held in a safe and secure environment.
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> Security classifications are a non-judicial process but rather are an assessment of the arrangements that must be enacted for the safe and secure custody of the prison. It is further advised that the raising of Mr Anderson's security category is a necessary, proportionate and reasonable response. We would advise that Mr Anderson was provided with a letter detailing him of his increase in security category and this detailed the means for him to respond should he have wished to do so. We hold the view that we have acted in an entirely open and fair manner at all times."

The respondent's case

[10] In the replying affidavit on behalf of the respondent, the Governor sets out some detail of the security operation. He refers to the fact that intelligence and information came to light that the applicant along with other prisoners had

potentially been involved in a series of criminal activities both inside and outside the prison. He states that the relevant intelligence was gathered from various sources including telephone monitoring, security information reports and CCTV. He also states that this information was relayed to the PSNI for their consideration and thereafter an investigation was conducted. Reference is made to the fact that the PSNI conducted a search and arrest operation on 21 March 2017. It is averred that during the course of this operation a serving prisoner officer who worked in Braid House was stopped from entering the prison, had his car searched and was arrested by the PSNI. The affidavit states that this prison officer was subsequently interviewed by the PSNI and a follow up search of the prison officer's home uncovered a significant amount of cash, drugs and a number of mobile phones.

[11] The affidavit states that as a result of the investigative work intelligence was gathered and is currently being held by HMP Maghaberry Security Department. It states that this information is being shared and scrutinised with senior managers, the Deputy Governor, the Governing Governor, the Director of Prisons, and the Director General and with senior members of the PSNI. The affidavit states that in consideration of the intelligence gathered it appears that serious criminal activity has taken place both inside and outside the prison. The averment is made that the intelligence relates to the trafficking of illegal substances and articles into the prison and some other criminal activity. It appears that the serving prison officer who is currently suspended was being used to traffic such items into the prison. The affidavit accepts that the PSNI investigation is not currently targeted at the applicant. The affidavit states that intelligence held by NIPS gives the Governor reason to believe that the applicant was involved in the illicit activity described above including the smuggling of prohibited articles into the prison.

[12] This affidavit then refers to the definition of security categories and in particular a Category A prisoner is defined as "A prisoner whose escape would be highly dangerous to the public or the police or the security of the State, no matter how unlikely that escape might be, and for whom the aim of the Prison Service must be to make escape impossible." Reference is also made to the fact that Category A re-categorisation is undertaken on an annual basis by a panel chaired by the NIPS Director of Operations and also in attendance are the Deputy Governor of Maghaberry Prison, the Head of Operations at Maghaberry Prison, Head of Residential at Maghaberry Prison, a representative from security and there is input from the prisoner, psychology, probation, prisoner development unit and re-settlement. The affidavit, in referring to the effect of re-categorisation of a security category, states that the applicant has misrepresented the effect of re-categorisation in that he has not lost the ability to work, he has not lost access to education and the categorisation does not currently affect his pre-release testing. The affidavit states that the applicant is not eligible for phased release for another three years by which stage he will have been subject to annual review on at least two occasions.

[13] Paragraph 30 of this affidavit states:

> "As I have stated the purpose of security categorisation is to ensure that prisoners are held within the level of security commensurate with the threat they pose and NIPS does not seek to curtail a prisoner's activities or education/development opportunities where such curtailment can be avoided. To that end a Category A prisoner can avail of education/the gym/work within the prison and Category A prisoners can attain enhanced status. Security categorisation is not designed to be punitive."

[14] The affidavit refers to the protection of the lives of human sources and avers that methods of intelligence gathering are important considerations when intelligence is relied upon. The affidavit refers to the risks exposed to those who would provide intelligence and to that end it states that the prison authorities are extremely reluctant to provide any information that would lead to the potential identification of human intelligence sources. The prevention of the smuggling in of illicit items is also referred to in the affidavit as an important factor in terms of the preservation of the lives of both the prisoner and the staff. The affidavit refers to the fact that there was no bad faith on the part of the NIPS in terms of the issue of the police investigation. The affidavit states that the re-categorisation of the applicant occurred as a result of NIPS obtaining intelligence that the applicant was taking part in illicit activity that put the lives of prisoners and staff in danger and threatened good order and discipline within the prison. The affidavit then sets out in detail the issue of the scrutiny of the intelligence.

[15] Attached to the affidavit is the letter of 22 March 2017 which was sent to the applicant. I should say that it is only a copy letter because the affidavit avers that the original letter cannot be found. This is a sparse letter which states:

> " It is to inform you that based on information and due to an on-going PSNI investigation, your security categorisation has been raised to Category A. You will now be housed within the Maghaberry main prison site. It also refers to the fact that should you wish to make any mitigation regarding this you may do so in writing only to the Security Governor, Maghaberry."

[16] In his third affidavit the applicant replies to this affidavit and states that the detail contained within the affidavit was not provided to him. He re-refers to the issue of there being no active police investigation against him. He refers to the gist letter being lost. He also states as follows:

> "That I am also very anxious as I realise that the high likelihood is that my categorisation is not going to change since I am never going to be in a position where I can accept that there is problem and work with the prison authorities to address it in the normal way. This is likely to mean that I spend many more years in prison than I would otherwise have done."
>
> "In any event I asked the court to consider that
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> (1) The respondent relied right from the outset on an on-going PSNI investigation which ultimately did not involve me, at all.
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> (2) Given the further elucidation by the Governor in his affidavit this tends to suggest that even the respondent accepts the information provided was inadequate."

Submissions

[17] Mr Devine frankly accepted that the case being made by the applicant in his initial affidavit about a loss of privileges on a day to day basis such as work, education and such like could not be maintained. I must record that the applicant exaggerated the effects upon him in his affidavit and that offends the duty of candour. However, that is not fatal in this case as I accept the additional impact of categorisation which is the safer ground upon which Mr Devine relied. He stressed the fact that Category A led to difficulties down the line in relation to release but more fundamentally that it was a stain on the applicant's record. He said this was particularly important in a case where the applicant denied any wrongdoing.

[18] Mr Devine relied heavily on the fact that contrary to the initial letter sent on 22 March 2017 this applicant was not subject to any ongoing police investigation and that this was only uncovered by the diligence of his solicitor. He also referred to the inadequacy of the gist letter and the fact that the letter provided was a copy because the original letter to the applicant had been mislaid. Mr Devine accepted that the decision in the case of *McCormick's Application* [2017] NIQB 65 posed a problem for him on the face of it because leave to apply for judicial review was refused to a prisoner involved in the same investigation within the prison. However, he said that *McCormick* could be distinguished on a number of fronts. Firstly, he argued that there was no police investigation in this case and secondly that this applicant's family had not been interviewed. Mr Devine relied on the authority of *Re Hart's Application* [2009] NIQB 57 which sets out the duties in this type of circumstance to achieve procedural fairness. He also relied on another case of *Re Wilson's Application* [2009] NIQB 60. Finally, Mr Devine made some submissions about the issue of delay

in this case given that the incidents happened in March 2017 and the case is now nearly one year old.

[19] Mr Corkey on behalf of the respondent, relied upon *McCormick's Application* and said that there was no substantive distinguishing factor. He made the case that this was an area where a high degree of discretion is allowed to the prison authorities. He also said that the issue was whether there had been sufficient disclosure but that was a qualified right and in this circumstance enough information had been provided by way of gist. Mr Corkey contended that there was a lack of candour on the applicant's part given the exaggeration of the effects upon him. He said that the case would be dealt with at the annual review which is imminent and that would involve further scrutiny by a number of important different individuals. Overall Mr Corkey said that the case was not made out. However he could not explain why it took six months to provide a substantive response to the pre-action protocol letter.

Consideration

[20] In this case there is an obvious cross over between the factual circumstances surrounding the "Rule 32" adjudication and this categorisation case. Understandably the initial focus was on "Rule 32" given that it leads to immediate isolation. The issue of categorisation then came to the fore after the "Rule 32" issue had resolved. The decision making in relation to that is impugned.

[21] The argument focussed upon a *Wednesbury* unreasonableness challenge and a claim of procedural unfairness. I deal with these in turn. Firstly, I am not convinced that the *Wednesbury* ground achieves any traction. An issue of this nature which involves a serious management problem within a prison and the ordering of prison discipline and the keeping safe of prisoners and staff affords the decision maker a high degree of discretion. The legitimate aim is obviously the smooth running of the prison. In the circumstances of this case given the very serious nature of what transpired which involved a prison officer and a police investigation and a prison investigation I do not consider that it can be seriously argued that there was unreasonableness to the high threshold required exhibited by the prison Governor.

[22] The real issue in the case is rooted in a consideration of procedural fairness. This relates to what is actually required in order to comply with the obligation to provide reasons for the re-categorisation. It is accepted that in the circumstances where there is intelligence or other sensitive material that the procedural obligation is a qualified right. However the issue really is what gist should be provided to allow the applicant to effectively make representations about the case being made against him within those parameters.

[23] In *Re Hart's Application* Weatherup J sets out the principles in relation to this qualified right at paragraphs [11] and [12]. In particular quoting from paragraph [12] I glean the following assistance:

> "The starting point is the provision of sufficient information to enable the prisoner to understand the reasons for removal, if so required. Where such disclosure is subject to constraint by reason of other interests the decision maker is required to make a judgment as to the extent to which the provision of information should be limited in order to protect the rights of others. The decision maker must be accorded a discretionary area of judgment in relation to the extent to which the release of information should be limited. If an applicant requires information or further information in order to understand the reasons for removal then that should be requested."

[24] In a case of this nature a broad discretion is vested in the prison Governor. It is very clear that the decision of the Governor was based on intelligence and confidential information from various sources. As I have said this is fully set out in the pre-action response and the Governor's affidavit. Various cases have dealt with the issue of Category A status given that it has particular bearing on a prisoner being released. The case of *R v Home Secretary Ex Parte Duggan* [1994] 3 AER 277 dealt with this issue and it was further developed in a case of *R (Lord v Secretary of State for the Home Department)* [2003] EWHC 2073. The latter case involves disclosure of materials from a panel and so it is somewhat different. In a case such as this there are no reports yet available in relation to the annual review and the information is simply intelligence information held by the Governor. Such information is exempt from disclosure under the Data Protection 1998 Act.

[25] Mr Devine's main attack was against the initial letter sent to the applicant on 22 March 2017. I accept that there is some merit in the argument made on two fronts. Firstly, the letter sent is clearly inadequate in relation to giving the applicant a formal steer as to the issues. Secondly it refers to the PSNI investigation as the grounding reason which ultimately proved to be incorrect. In the immediate aftermath of the letter I can see how a procedural challenge may have been sustained however this challenge was brought in September 2017 and the case has developed since then.

[26] The question is whether the initial inadequacies render the entire decision making process unlawful. In particular I bear in mind that information was shared as part of the "Rule 32" process. Also, this case has not been static in that more information has been provided. Further and more comprehensive information is contained in the pre-action protocol response of November 2017 and in the

Governor's affidavit. There was no reason given as to why it took so long to file the pre-action protocol correspondence. That is an area of concern. Also, it seems to me that on any level there needs to be an urgent rethink about exactly what is put in the first letter sent to an applicant in these circumstances. However, in this case the reasons provided in the subsequent material and the "Rule 32" adjudications gave the applicant a clear enough indication as to the basis of the intervention in relation to criminal activity and illegal smuggling of drugs within the prison.

[27] Accordingly whilst I have raised certain issues about the initial letter sent to the applicant, this cannot be viewed in isolation. The applicant had information from the parallel "Rule 32"adjudicative process. It seems to me that NIPS has also corrected the deficiency by way of information provided in these proceedings. I am dissatisfied by the time it took, but nonetheless it seems to me that the applicant is now equipped to know the case against him in broad terms and given the qualified right in relation to intelligence information.

[28] Also, while I accept that there may be some differences from *Re McCormick's* application they are not such as to undermine the principles expressed in that case which I have also applied.

[29] Another important feature of this case is the fact that the annual review is imminent. The issue has been live now for nearly one year and this review is crucial. Given that there will be further scrutiny of this issue within a very short period of time I am satisfied that the applicant's position is protected.

Conclusion

[30] Accordingly I have decided that the application must be dismissed.