

*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

<i>Delivered:</i> 04/04/2008

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

**AN APPLICATION BY CHRISTOPHER DONALDSON
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW**

WEATHERUP J

[1] This is an application for leave to apply for judicial review of two decisions of the prison authorities. The first concerns the policy of the Prison Service directing prisoners not to wear Easter lilies outside the cells in the segregated wing at HMP Maghaberry and the second concerns disciplinary charges being preferred against the applicant for refusing to remove an Easter lily that he was wearing on Easter Sunday 23 March 2008. Mr Hutton appeared for the applicant and Mr Dunlop appeared for the respondent.

[2] The background, as appears from the applicant's solicitor's affidavit, is that he is a sentenced prisoner in the republican segregated wing in Roe House HMP Maghaberry. He has been in custody since June 2004 and is serving a twelve-year sentence and is due for release on 2 June 2010. He is housed in segregated conditions, which means that in practice republican prisoners are housed together and have no contact with any prisoners who are not republicans. It appears that on Easter Sunday the applicant was returning from the exercise yard with an Easter lily affixed to his outer clothing. He was ordered by a prison officer to remove this emblem and he refused. Later he was charged with disobeying a lawful order.

[3] This issue has been addressed by the Court on two previous occasions. First, in Byers Application [2004] NIJB 252, the application was made by a prisoner who was housed in integrated conditions within the prison. The judgment in essence dealt with two grounds for judicial review. One was that the policy in relation to the wearing of this emblem represented an undue interference with the applicant's right to freedom of expression under Article 10 of the European Convention and the other that the policy was discriminatory in that it unjustifiably differentiated between the wearing of Easter lilies, which was prohibited, and the wearing of poppies, which was permitted. The policy of the Prison Service was stated to be that certain emblems are permitted, such as poppies or shamrock, although they are primarily

symbols of particular traditions, while certain emblems are prohibited such as Easter lilies or Orange lilies, because while they may be symbols of a particular tradition they are also regarded as paramilitary symbols of conflict.

[4] In dealing with the issue in relation to integrated prisoners in Byers Application I was satisfied that the wearing of an emblem amounted to an “expression” for the purposes of the right to freedom of expression under Article 10 and decided that restrictions on expression in the form of the wearing of emblems are not a necessary incident of imprisonment. Accordingly, the restrictions on the wearing of the Easter lily amounted to an interference with freedom of expression and had to be justified. I was satisfied that the restriction was prescribed by law and was in pursuance with a legitimate aim, namely the prevention of disorder and crime by maintaining order and discipline in the prison. On the issue of the proportionality I referred to the context of the restriction, being an integrated prison with necessarily confined conditions housing prisoners from a divided society; that certain emblems are perceived as representing primarily one tradition or another and certain of those emblems also come to be regarded as representing the unlawful paramilitary activity of a tradition; that when an emblem came to represent conflict rather than simply tradition its character changed; that change occurred when the perception of others was that the emblem primarily represented conflict. In the particular case I was satisfied that the extent of the interference with the freedom of expression was limited to the wearing of the emblem in the communal areas of the prison where the potential disruption would arise and in the circumstances I was satisfied that the restrictions on the use of the Easter lily were proportionate and not a breach of Article 10.

[5] On the issue of discrimination the applicant in Byers Application contended that the restriction was discriminatory on the grounds of his religious and political/cultural beliefs and was a breach of Article 14 of the European Convention taken in conjunction with Article 10. The applicant accepted that paramilitary badges are symbols of the conflict in Northern Ireland and could be subject to restrictions. However the applicant placed the Easter lily in a different category to a paramilitary badge or a symbol of the Northern Ireland conflict and treated it as being in the same category as the poppy or the shamrock. I was satisfied that the characters of the poppy and the shamrock were not generally perceived as primarily emblems of the conflict. From the applicant’s point of view it may have been that he viewed the poppy as an emblem of conflict, as representing British militarism in Ireland, but the Fair Employment Commission did not consider that the poppy was perceived as a conflict emblem. I accepted the objective and reasonable justification for the different treatment of the Easter lily that was offered on behalf of the respondent.

[6] The matter then moved on to the decision of Girvan J in McCafferty’s Application, decided on 9 February 2007. That application related, as this application does, to a prisoner in segregated conditions. The application arose in relation to the wearing of the Easter lily on Easter Sunday, 16 April 2006. It was alleged that the

restriction was contrary to the right to freedom of expression under Article 10 of the European Convention. The applicant was a prisoner in Roe House in the republican separated regime and he was returning from Mass in Roe House wearing an Easter lily that he was ordered to remove. He contended that the prison policy permitting the wearing of Easter lilies in cells, but not elsewhere, made no sense.

[7] The Governor filed an affidavit referring to emblems that were perceived to be identified primarily with the Northern Ireland conflict and that such emblems must be seen as potentially disruptive and dangerous to the interests of good order and discipline. He accepted that, while it was true that prisoners such as the applicant were detained in separated regime premises, they are less likely to come into contact with non-republican prisoners but the potential for conflict could not be ruled out. The restriction on the wearing of emblems which might be inflammatory was, therefore, likely to assist good order and discipline in the prison. Mr Hutton, for the applicant, seeks to make a factual distinction in the present case because the evidence of the applicant on this leave application is that there is total separation in the prison and that republican prisoners do not come into contact with loyalist prisoners.

[8] However there was another theme in McCafferty's Application, in that the Governor's affidavit was concerned with the impact on the segregated regime of the wearing of the emblem in the separated conditions. It was stated that any relaxation of the rules regarding the emblems for separated republican prisoners would have an unwelcome impact on the Prison Service policy of providing equal and common conditions for all prisoners. It was said that there would be an artificial distinction between separated and integrated prisoners if Easter lilies were permitted in the separated conditions. It was not the intention of the separated regime to allow prisoners held in such conditions to benefit from any enhancements as a result of being separated prisoners.

[9] Girvan J referred to the decision in Byers Application and noted that the thrust of the applicant's case in McCafferty's Application was that there was a fundamental difference between the position of prisoners in the integrated regime and those housed in the separated regime where there was no real contact on a daily basis with non-republican prisoners. The Prison Service argument was that the imperative was the minimising of the distinction between integrated and separated prisoners and prevention of the development of Maze style paramilitary control within the separated conditions. Further, it was stated that there was a need to protect the rights of those, other than prisoners, who may come into contact with a prisoner wearing such an emblem of conflict and to ensure a neutral working environment. This was a concern for the staff who worked in the prison rather than the other prisoners.

[10] Girvan J entertained some doubt about the proposition in Byers Application that restrictions on expression in the form of emblems were not a necessary incident of imprisonment. However Girvan J was prepared to accept that position in the light

of Counsel for the respondent's concession that he should proceed on the basis that that formulation was correct. Girvan J stated that the competing arguments of the parties were finely balanced and that there was force in the applicant's argument that a prisoner in the separated regime was in a different position from prisoners in the integrated section; that Byers Application did not address the issue of separated conditions; that the Prison Service was found to be entitled to take steps to ensure that inroads into the overall prison system brought about by the separated conditions were strictly limited and that applying the same restriction to all prisoners achieves that legitimate policy aim, thus leaving the prisoners in Roe House with the same rights as other prisoners to wear the Easter lily in their cells. He concluded by stating that restrictions on the right to wear political symbols was a minimal interference with Article 10 rights and was justifiable having regard to the contingencies of ensuing an objectively based prison service.

[11] The applicant's grounds in this case are in essence interference with the right to freedom of expression under Article 10 of the European Convention and discrimination under Article 14 together with Article 10. It would be necessary to amend the Order 53 Statement because the ground there relied on deals with discrimination between the wearing of Easter lilies and the wearing of poppies, whereas the discriminatory conduct that Mr Hutton relied on was the distinction between the rules applied to the separated prisoners and the rules applied to the integrated prisoners.

[12] On Mr Hutton's approach, faced with McCafferty's Application which is against his application, he contends that McCafferty's Application was wrongly decided. First of all he contends that in consideration of Convention rights there is a wider scope that applies to the qualified rights when one is dealing with a prisoner, who by the very nature of being a prisoner suffers restrictions, so that a broad interpretation has to be given to Article 10. In this regard the applicant relies on McCotter v The UK [1993] 15 EHRR 98 gave a wide scope to the concept of family life for the purposes of Article 8 of the Convention when it was applied in relation to a prisoner.

[13] Further, the applicant contends that there was not minimal interference in this case in that the nature of the restrictions that were imposed were unnecessary because they applied within the confines of the segregated conditions where there were no other prisoners with whom the applicant and his fellow republican prisoners would come into contact.

[14] Further, the applicant emphasised the differences between the integrated and the separated schemes and contended that different cases should be treated differently. The justification advanced in the case of the integrated prisoners, which was based on the risk of disorder, did not apply in the segregated conditions where there were no prisoners who were likely to react to the use of the emblem. Therefore it was said that the risk of disorder would not arise in the separated areas. In addition it was contended that the aim of the policy in the segregated areas, as

outlined in McCafferty's Application, concerning the limiting of differences between the integrated and segregated prisoners and the impact on staff, are not legitimate aims under the Convention.

[15] Mr Dunlop for the respondent contends that McCafferty's Application illustrates that the legitimate aims in relation to segregated prisoners include the rights and freedoms of others. One concern relates to the display of conflict emblems to staff, with the parallel being drawn with any working environment and the provision of a neutral working environment, which it is said should not involve conflict emblems. Another concern relates to the limiting of the differences between integration and segregation, so that the prison authorities want to accord to the segregated prisoners as many of the conditions as possible that apply to the integrated prisoners. The aims are said to be legitimate policy matters and they relate to the rights and freedoms of others. The competing rights and freedoms of others are not required to be Convention rights - Tweed's Application [2007] NIQB 69 paragraphs 21 -24.

[16] I am satisfied that McCafferty's Application was not wrongly decided. I propose to follow the judgment of Girvan J. The application for leave to apply for Judicial Review is refused.