Neutral Citation no. [2007] NIQB 8 | *Ref:* **WEAC5748**

Judgment: approved by the Court for handing down | *Delivered:* **05/02/2007**

(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

APPLICATION BY JOHN THOMPSON
FOR JUDICIAL REVIEW

WEATHERUP J

De-selection from Foyleview Resettlement Unit.

[1] This is an application for judicial review of a decision of the Governor of HMP Magilligan of 8 September 2006 de-selecting the applicant from the Foyleview Resettlement Unit HMP Magilligan. Ms Quinlivan appeared for the applicant and Ms Murnaghan appeared for the respondent.

[2] The applicant is a prisoner serving a sentence of 12 years imprisonment for possession of firearms with intent to endanger life and is due for release on 23 November 2007. He was transferred to the Foyleview Unit on 10 December 2005 and was removed on 6 July 2006 before being de-selected on 8 September 2006.

[3] The resettlement unit at Foyleview is designed to assist in addressing the needs of prisoners to enable them to resettle back into the community on their release. The needs referred to may include education, employment, accommodation and reinstatement with family or community. An assessment panel determines whether prisoners have met stated criteria. Prisoners admitted to Foyleview enter a "contract" with the prison authorities. The contract includes the following - "You are also reminded that you are on Enhanced Regime. Should you be found guilty of an offence against discipline, or if you have two adverse reports, you could be downgraded to a lower regime, which will make you ineligible to remain in Resettlement Unit Foyleview. As a consequence you will be returned to the main prison." Included in the list of commitments which the prisoner gives

to the prison authorities is - "Failure to comply with some or any of the conditions may result in you being de-selected from the Unit and returned to the mainstream of the prison."

[4] The applicant relies on a variety of grounds of judicial review of the de-selection decision but the essence of the challenge is to the fairness of the procedure whereby he was de-selected. It is necessary to consider in some detail the circumstances of the de-selection.

[5] As set out in the affidavit of Governor Craig, the governing Governor of HMP Magilligan since August 2002, the security department of the prison received intelligence to indicate that contraband articles were being stored in Foyleview. A search of the unit occurred on 5 July 2006 during which illegal drugs and mobile telephones were discovered in a communal area. Foyleview is made up of five accommodation blocks referred to as "terrapins." The focus of the search was concentrated on terrapins 14 and 15. Following the discovery of the contraband every prisoner in those terrapins at the time of the search was interviewed on 6 and 7 July 2006. The applicant was interviewed and denied knowledge of the contraband. On 6 July 2006 five prisoners, including the applicant, were removed from Foyleview.

[6] On 7 July 2006 the applicant's solicitors wrote to the Governor asking for detailed reasons for the applicant's removal from Foyleview and for confirmation that his removal would not interfere with town visits and home leave that had already been arranged. There was to be no reply to that letter until 17 July. Meanwhile on 10 July the applicant completed a "Prisoner Request Form" asking for the reason for his removal from Foyleview. The reply, dated 11 July 2006, stated that the applicant had been removed from Foyleview pending the outcome of an ongoing investigation. The applicant assumed that this related to the discovery of the contraband on 6 July.

[7] However during the interviews of prisoners that took place on 6 and 7 July allegations had been made against the applicant. The allegations came from five prisoners who were to be described by letters. Prisoner A alleged that the applicant was involved in an incident with prisoner E and that the applicant was the "enforcer" for a Loyalist faction. Prisoner B alleged that the applicant had threatened to stab prisoner D in the eye while in the dining room. Prisoner C alleged that the applicant had threatened to stab prisoner D in the eye while in the dining room and further the applicant was known as the "enforcer" for a paramilitary faction. Prisoner D alleged that he had been threatened with being stabbed in the eye but dismissed the gravity of the threat. Prisoner E denied the allegations made by prisoner A. One of the interviewing offices was a Principal Officer Barr who evaluated the information that had been obtained and was satisfied that the allegations were credible. The applicant was removed from Foyleview on 6 July pending further investigation of the allegations. The applicant was not told that this

was the reason for his removal on 6 July. As noted above the information furnished to the applicant in the reply to the Prisoner Request Form on 11 July referred to ongoing investigations without stating the nature of those investigations. Accordingly when the applicant was removed from Foyleview he was unaware that his removal was connected to allegations made against him by other prisoners.

[8] On 10 July 2006 the investigating officers had a meeting with members of the security department and it was agreed in relation to the applicant that a de-selection process from Foyleview should be initiated. At the meeting it was agreed that the particulars furnished to the applicant would refer to the allegations that he was the enforcer and to the threat of stabbing but that in the interests of security other material should only be referred to in a general way as "bullying and intimidation". The applicant had been due a period of home leave but on 14 July his application was marked "De-selected from Foyleview pending investigation. Home leave cancelled."

[9] On 16 July the applicant completed a "Prisoner Internal Complaint Form" in which he referred to his temporary removal from Foyleview pending investigations and referred to this as "collective punishment" and declared his innocence. The applicant still believed that he was being dealt with for the recovery of the contraband on 6 July. On 17 July the applicant's solicitors wrote to a Governor at the prison seeking full reasons for the decision to de-select the applicant.

[10] By letter dated 17 July from the Prison Service to the applicant's solicitors, in reply to their letter of 7 July, it was stated - "Your client was removed from Foyleview Resettlement Unit because of an investigation being carried out into bullying, illegal drugs and telephones." A further letter dated 17 July from the Prison Service to the applicant's solicitors, in reply to their letter by fax of 17 July, stated that the applicant had not been de-selected but had been moved to the main residential unit of the prison while the investigation was completed. Further it was stated that when the investigation was complete and if decisions were made to de-select the applicant he would be told the reason for any such action.

[11] A "Foyleview Resettlement Unit Deselection Proposal Form" was completed by a member of the prison staff on 20 July referring to the applicant as the enforcer for a loyalist faction who was heavily involved in making threats, bullying and intimidation and who had recently threatened to stick a knife into the eye of another prisoner. The applicant was recommended for de-selection. The form was placed before the applicant for his comments on 22 July and his entry included reference to the matter being in the hands of his solicitor and that the allegations were totally untrue. The form was then forwarded to Principal Officer Barr who stated that the applicant posed a significant threat to other prisoners and recommended de-

selection. The form was then forwarded to a deputy Governor on 7 August who recorded that the applicant was not present at that time and the reason for his absence was recorded as "Time pressure". The deputy Governor recommended de-selection. On 9 August the form was returned to the applicant who recorded that he had not been given any time to consider the comments on the form as it was being taken from him to return to the deputy Governor. When the form later arrived with Governor Craig he was not satisfied with the manner in which the form had been put before the applicant and he ordered that the form be returned to the applicant. On 2 September the form was returned to the applicant who recorded that his solicitor was now dealing with the matter. The form reached Governor Craig on 8 September for a decision on de-selection and he accepted the recommendations and ordered de-selection.

[12] As appears above the applicant was informed by the letter of 17 July that he was being investigated for "bullying, illegal drugs and telephones." On 22 July the applicant was presented with the proposal for de-selection stating that he was an enforcer for a loyalist faction and heavily involved in threats, bullying and intimidation and had recently threatened to stick a knife in the eye of another prisoner. The applicant was not otherwise aware of the information furnished by prisoners A to E until it was disclosed in the course of this application for judicial review. The applicant denies the allegations.

The applicant's grounds for Judicial Review.

[13] The applicant's grounds for judicial review are:

(i) no sufficient evidence to justify the decision to de-select;

(ii) no adequate reasons for the decision to de-select;

(iii) not informed of the allegations and no opportunity to respond to the allegations;

(iv) no opportunity to rebut the allegations during the investigations;

(v) no hearing at which the applicant could examine or have examined witnesses against him;

(vi) non-disclosure of the identity of persons making allegations;

(vii) absence of an oral hearing;

(viii) infringement of the right to liberty under Article 5 of the European Convention entitling the applicant to fair trial rights under Article 6 of the European Convention;

(xi) the de-selection decision involved determination of the applicant's civil rights and obligations under Article 6 of the European Convention;

(x) infringement of the right to private and family life under Article 8 of the European Convention entitling the applicant to fair trial rights under Article 6 of the European Convention;

(xi) breach of Article 8 of the European Convention;

(xii) no reasonable grounds for attributing possession of any of the contraband found on 6 July to the applicant;

(xiii) unfair punishment of the applicant;

(xiv) the de-selection decision was based on a mistake of fact namely that the applicant had not denied the allegations;

(xv) the de-selection decision was unfair to the extent that it was based on the applicant's failure to refute the allegations when they had not been put with sufficient particularity to enable him to refute them.

[14] The applicant relies on the European Convention on Human Rights and the right to a fair trial under Article 6, the right to private and family life under Article 8 and the right to liberty under Article 5. The Articles provide as follows -

> "6. In the determination of his civil rights and obligations or any criminal charge against him everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."
>
> "8.1 Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 8.2 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 in the interests of national security, public safety or the economic well-being of the

country, 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."

"5.1 Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
(a) the lawful detention of a person after conviction by a competent court;

5.4 Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

The "civil" limb of Article 6.

[15] The applicant claims that the determination of his "civil rights and obligations" is in play for the purposes of Article 6. His removal from Foyleview is said to engage Article 8 as it involves interference with private and family life by removing certain entitlements to town visits and home leave. For the same reason the applicant contends that his removal from Foyleview engages his right to liberty under Article 5. The scope of the "civil" limb of Article 6 was considered in Corden's Application [2004] in relation to removal from association under Rule 32 of the Prison and Young Offenders Centre Rules (Northern Ireland) 1995. The consideration of the issue in that judgment may be summarised as follows -

(i) A prisoner has a right to association with other prisoners, this being an aspect of the right to maintain relationships with others as an aspect of the right to private life under Article 8. Removal from association may be justified under Article 8(2) (paras. 17-18);

(ii) The engagement of Article 8 or any other Convention right does not by itself involve the application of the civil limb of Article 6 (paras. 19 to 27);

(iii) The civil limb of Article 6 does not apply to prisoners in relation to certain "administrative" decisions such as removal from association, security classification, status of prisoners, loss of privileges in prison adjudications and removal from association in the interests of good order and discipline (para. 28);

(iv) Removal from association does not engage the right to liberty under Article 5. Whether the right to liberty was a "civil" right for the purposes of Article 6 had been raised by Hale LJ in the Court of Appeal in R (Justin West) v The Parole Board [2002] EWCA Civ.1641 (paras. 29-30). This matter was subsequently considered in the House of Lords (as discussed below).

(v) If the civil limb of Article 6 was applicable to removal from association the availability of judicial review of the Governor's decision would have been sufficient to comply with the requirements of Article 6 for an independent and impartial hearing (para. 31).

[16] The relationship of the right to liberty under Article 5 and civil rights under Article 6 was considered by the House of Lords in R (ex-parte Smith and West) v The Parole Board [2005] UKHL 1. The appeals concerned the procedure to be followed by the Parole Board when a determinate sentenced prisoner, released on licence, sought to resist subsequent revocation of his licence. In relation to the application of the civil limb of Article 6 on the basis of the prisoner's right to liberty Lord Bingham referred to the strength of the applicants' argument lying in the undoubted enjoyment, after release, of a conditional and revocable right to freedom which could readily be regarded as a civil right; it was the respondent's contention that proceedings on the grant of conditional release did not concern the determination of a civil right under Article 6(1); it was not necessary to resolve the question whether the civil limb of Article 6 was engaged as determinate prisoners wishing to challenge the revocation of their licences had the protection of the Board's common law duty of procedural fairness; the civil limb of Article 6, even if applicable, would not afford any greater protection (paras 43-44). Lord Slynn stated that decisions as to recall were not within the meaning of Article 6 concerned with "civil rights" (para60). Lord Hope stated that the Article 6 civil right was not infringed by proceedings of the kind that were an issue in the case so long as the individual had access to the domestic courts to assert his right to liberty and the proceedings of the Parole Board did not deprive the appellants of that right of access (para 81).

[17] In relation to Article 8, the applicant had been granted town visits and home leave, both of which were removed. Such visits and leave were privileges to which the applicant had no entitlement, but by their removal Article 8 was engaged. Any interference may be justified on the grounds of the prevention of disorder or crime or the protection of the rights and freedoms of others. The contract between the prison authorities and the prisoner sets out justifiable grounds for the removal of an offending prisoner from Foyleview. However the engagement of Article 8 does not thereby involve the application of the civil limb of Article 6.

[18] In relation to Article 5, I am not satisfied that the right to liberty under Article 5 was engaged. The applicant continued to serve his sentence although he had earned certain privileges whereby he qualified for home leave. However decisions as to selection or de-selection from Foyleview concern the administration and management of the applicant's sentence. He had not reached the point where he had effectively served his sentence and was not entitled to conditional release subject to recall. The applicant continued to serve his sentence and had no issue with the lawfulness of his detention on foot of that sentence. Prisoners may be considered for temporary release while remaining liable to serve their sentences but their right to liberty is not thereby in issue for the purposes of Article 5.

[19] Accordingly neither Article 8, which was engaged, nor Article 5, which was not engaged, gave rise to any civil right that was being determined by the decision to de-select from Foyleview. The civil limb of Article 6 did not apply to the applicant.

Procedural fairness at common law.

[20] However the decision on de-selection did engage Article 8 and in any event did involve the common law obligation of procedural fairness. It is a central requirement of procedural fairness that a party has a right to know the opposing case and to respond to that case, that is, he has a right to know the material that is adverse to his interests and a right to make a response that will be considered by the decision maker. The right to know may involve the disclosure of the substance or "gist" of the adverse material. It may not require the disclosure of all the details or of the sources of information, where it is necessary to withhold such details or sources for the protection of other interests.

[21] The requirements of fairness as applied to a decision on removal from association were stated by Carswell LCJ in the Court of Appeal in Conlon's Application [2002] NIJB 35 –

> "The generalised requirements of fairness articulated by Lord Mustill in *R v Secretary of State for the Home Department, ex parte Doody* [1994] 1 AC 531 at 560 will, however, apply to a decision to remove him. It is important to bear in mind the essentially flexible nature of the principles set out in that case. A decision to remove a prisoner from association may have to be taken and put into effect quickly. It may not be appropriate to enter into a debate about the matter before removing him. In some cases it may not be possible to disclose to the prisoner the information upon which the decision is based, in which event any uninformed

representations which he may make may be of little value. For these reasons we would not go so far as to say, as the judge did, that a prisoner must always be informed of the reasons for his removal from association at the earliest opportunity. We would not go further than to propound a general rule that the governor should at an early stage, but not necessarily before the removal of a prisoner from association, give him where possible and where necessary sufficient reasons for taking that course and afford him the opportunity to make representations about its justification. Whether this will apply on the extension of a period of removal will depend on the circumstances, and comprehensive rules cannot be laid down. Nor do we think that there should be any hard and fast requirement about the form in which the reasons are given to the prisoner. As the judge observed, the important thing is that he is given sufficient information to permit him to understand why he was removed from association and why the visitors accept that his removal should continue. Whether this can be given satisfactorily by oral explanation or whether some documentary material is required depends on the facts of the case, although it seems likely that in most cases the gist of the prison authorities' reasons for wishing to continue the removal can be given in interview."

[22] The further application of the principles to extensions of restriction of association by the Board of Visitors or the Secretary of State based on information received where there are concerns for the personal safety of others was considered in Henry's Application [2004] NIQB 11 at para. 24 –

> "The Court of Appeal decision in Conlon's Application contemplates, first of all, that there will be some cases where it will not be possible to disclose to the prisoner the information on which the decision was based, and secondly, that in most cases the gist of the reasons for wishing to continue the removal from association can be given in interview. In this context where it is judged that information cannot be disclosed to the prisoner I consider that fairness requires that extensions of restricted association include a system of anxious scrutiny of the information by those charged with making the decision to extend the restricted association. Those given in effect a supervisory role by the statutory regulations, namely the members of the Board of Visitors and the Secretary of State must have access to

> the information and be able to subject it to such scrutiny as they consider necessary. Accordingly, fairness in this context would involve in the first place, that there must be information, which is judged to be reliable, upon which it can be determined that the prisoner represents a risk to good order and discipline. Secondly, the information must be available to be assessed by those making the decision in relation to removal from association. Thirdly, the gist of the concern should be disclosed to the prisoner. Fourthly, the details of the information and the sources should be protected to the extent that that is considered necessary in the interests of the informants. Fifthly, the independent scrutiny by the members of the Board of Visitors and the Secretary of State should include ongoing assessment of the information available and of the risks to informants."

[23] There are two aspects of the decision making that affected the applicant. In the first place there was his immediate removal from Foyleview on 6 July 2006 when the allegations were made. The second aspect was the initiation of the de-selection process. The second aspect need not follow, as removal pending investigation may result in re-instatement without a de-selection process. In the same manner as set out in Conlon's Application and Henry's Application in relation to removal from association, the applicant ought to have been informed at an early stage of the reasons for his removal from Foyleview. The outworking of the right to know and the right to respond in relation to de-selection from Foyleview should also operate in similar vein. The procedure is not grounded in statutory regulations and the decision maker is the Governor of the prison. Fairness in this context would involve in the first place that there must be information which is judged to be reliable upon which it might be determined that there are grounds for removal and de-selection of the prisoner. Secondly the information must be available to be assessed by the Governor making the decision that the prisoner be removed and de-selected. Thirdly the gist of the concern should be disclosed to the prisoner. Fourthly the details of the information and the sources should be protected to the extent that that is considered necessary in the interests of the complainants. Fifthly the independent scrutiny by the Governor should include anxious scrutiny of the information available and the risks to informants.

[24] In the circumstances of the present case there was a breach of the applicant's right to know and of his right to respond. The information that might have been disclosed to him, while protecting the interests of the complainants, was not disclosed to him prior to the de-selection decision. This did not accord with his right to know the adverse case. The absence of the

information that might have been disclosed to the applicant deprived him of the opportunity to address the adverse case. This did not accord with his right to respond. The information should be furnished at an early stage, although not necessarily before removal. The delay in giving information to the applicant in the present case was unwarranted. In any event when the information was provided to the applicant, which as stated above was not sufficient to satisfy his right to know, he was not accorded an adequate opportunity to respond to that limited information. By reason of the breach of the rules of procedural fairness the decision of the Governor will be quashed.

[25] The applicant attempted to discover the reasons for his removal from Foyleview. Apart from the delay and the limited information provided there was uncertainty as to the appropriate means of discovering that information. The applicant was advised of various methods by which he might obtain reasons for the action taken. Fair procedures include a settled and stated method by which those affected by decisions might seek to obtain relevant information and present their response. No such method was identified in the early stages of the process.

[26] As the decision will be quashed for breach of procedural fairness it is not necessary to examine all of the ground relied on by the applicant, save for the issue of oral hearings.

Oral hearings for de-selection.

[27] As set out above the applicant has the right to know and to respond. For that purpose the applicant claims a right to an oral hearing. The requirements of procedural fairness are flexible and may vary depending upon context, fact and circumstances. There can be no fixed requirement for an oral hearing in all cases. Where the interests of informants have to be protected it is apparent that no adversarial hearing involving those complainants would be employed in any event. Nevertheless it may be judged appropriate to conduct an oral hearing with prison officers and others who had collected information and assessed that information that they might be questioned about those matters consistent with the protection of the interests of others.

[28] There is a triangulation of interests involving the prisoner, other persons who may be at risk and the public interested in effective prison systems. These interests were considered by the Hose of Lords in R (Smith and West) v The Parole Board [2005] UKHL 1, McClean's Application [2005] UKHL 46 and Roberts v The Parole Board [2005] UKHL 45. These cases illustrate the approach to this issue where a prisoner has completed his sentence, but remains subject to conditional release, so the status of the

applicants and the interests involved are not identical to those who have not yet reached the point where they are entitled to release.

[29] In R (Smith and West) v The Parole Board the appellants contended that a prisoner should be afforded an oral hearing before the Parole Board when a determinate sentenced prisoner released on licence sought to resist subsequent revocation of his licence. Lord Bingham at para. 35 stated:

> "The common law duty of procedural fairness does not, in my opinion, require the Board to hold an oral hearing in every case where a determinate sentence prisoner resists re-call, if he does not decline the offer of such a hearing. But I do not think the duty is as constricted as is hereto being held and assumed. Even if important facts are not in dispute, they may be open to explanation or mitigation, or may lose some of their significance in the light of other new facts. While the Board's task certainly is to assess risk, it may well be greatly assisted in discharging it (one way or the other) by exposure to the prisoner or the questioning of those who have dealt with him. It may often be very difficult to address effective representations without knowing the points which are troubling the decision maker. The prisoner should have the benefit of a procedure which fairly reflects, on the facts of his particular case, the importance of what is at stake for him, as for society."

[30] Accordingly there is no fixed requirement for an oral hearing in order to vindicate the right to know and to respond. In the present case the de-selection form contemplated the personal engagement of the prisoner with the prison staff who were deliberating on the issue of de-selection. Where the grounds for de-selection concern disputed facts an oral hearing may be the only effective means of resolving the dispute. Where there are complainants who in their own interests would not be present at a hearing it may be necessary for the prisoner to have the opportunity to determine how the decision maker and any other party who carried out an evaluation of the complainants were satisfied in their assessment.

[31] In summary, the decision to de-select the applicant from Foyleview will be quashed on the grounds of breach of procedural fairness in not affording the applicant an adequate opportunity to know the case against him or to respond to that case.