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(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

AN APPLICATION BY PATRICK McALLISTER
FOR JUDICIAL REVIEW

WEATHERUP J

The Old and New Home Leave Schemes for Prisoners.

[1] This is an application for judicial review of a decision made by a Governor of HMP Maghaberry on behalf of the Northern Ireland Prison Service dated 9 December 2005 confirming that the "Pre-Release Home and Resettlement Leave Arrangements for all Sentenced Prisoners" introduced on 1 March 2004 applied to the applicant. Mr Sayers BL appeared for the applicant and Mr McGleenon BL appeared for the respondent.

[2] The applicant was remanded in custody on 1 July 2003. He appeared at Newry Crown Court on 7 January 2004 and pleaded guilty to the charges. The applicant's case was adjourned to 4 March 2004 for pre-sentence reports. By reason of other issues concerning the applicant he was not sentenced until 17 November 2004 when he received 12 years' imprisonment. Taking account of the period spent in remand and the applicant's entitlement to remission his early release date is in August 2009.

[3] Under the "Pre-Release Home Leave Arrangements for all Determinate Prisoners" introduced on 21 September 1998 ("the old scheme"), the entitlement to home leave depended upon classification as a star class determinate prisoner or an ordinary class determinate prisoner. Star class determinate prisoners were those who were serving their first sentence of imprisonment or had by reason of their good behaviour been reclassified. For those serving continuous custody of 72 months or more (as in the case of the applicant) the pre-release home leave eligibility date was 24 months prior to the early release date and the period of leave was 34 days. Accordingly, under the old scheme the applicant would have been entitled to 34 days' leave from August 2007 – had he been a star class prisoner. An ordinary class determinate prisoner was one who had served a previous sentence of imprisonment

or by reason of his unsatisfactory behaviour had been reclassified. For ordinary class determinate prisoners serving a continuous custody of 72 months or more the pre-release home leave eligibility date was 6 months prior to the early release date and the period of leave was 7 days. Accordingly, under the old scheme, had the applicant been an ordinary class prisoner, he would have been entitled to 7 days' leave from February 2009.

[4] Under the "Pre-Release Home and Resettlement Leave Arrangements for all Sentenced Prisoners" introduced with effect from 1 March 2004 and revised in April 2005 ("the new scheme") the star and ordinary classification of prisoners was abolished. The new scheme applies to all prisoners sentenced after 1 March 2004. Home leave entitlement for a prisoner in continuous custody for 72 months or more involves a leave eligibility period 12 months prior to the early release date with a home leave quota of 12 days and a resettlement quota of 12 days. Accordingly, under the new scheme the applicant would be entitled to a total of 24 days' leave from August 2008.

[5] Governor Jeanes explained on affidavit the transition from the old scheme to the new scheme. A first draft of the new scheme was published for consultation purposes in March 2002 and the consultation included sentenced prisoners. Subsequent consultation drafts were issued in September, October and December 2003 and each consultation involved sentenced prisoners. The last version of the new scheme before implementation was completed in February 2004 and took effect on 1 March 2004. The applicant was a remand prisoner throughout this period and accordingly was not included in the consultation process.

[6] The applicant having been sentenced on 17 November 2004, his solicitor wrote to the Governor at HMP Maghaberry on 19 May 2005 seeking confirmation that the old scheme would apply to the applicant as he had been in continuous custody since 1 July 2003. The Prison Service replied on 3 June 2005 indicating that as the applicant had been sentenced on 17 November 2004 he came within the new scheme. The applicant's solicitor responded on 30 November 2005 indicating that the applicant had been in custody from 1 July 2003 before the introduction of the new scheme, that he had served a previous custodial sentence and was aware of the old scheme when he entered custody on 1 July 2003 and that he expected the old scheme to apply. The Prison Service replied by letter of 9 December 2005 restating the position that the applicant fell under the new scheme as he was sentenced after 1 March 2004, and that letter of decision is the subject of the present application for judicial review.

The Applicant's Grounds for Judicial Review.

[7] The applicant's grounds for judicial review are as follows –

(a) The impugned decision was reached without any or adequate analysis of the impact of the proposed course of action on the Article 8 ECHR

rights of the applicant, where an outcome other than the course of action decided upon could be contemplated.

(b) The impugned decision fails to recognise that Article 8 ECHR is engaged by the matters under consideration and is in breach of the applicant's right to respect for his private and family life under Article 8.

(c) The impugned decision is in breach of the applicant's legitimate expectation that the arrangements in respect of pre-release home and resettlement leave in place when he entered custody would apply to his eventual release.

(d) The impugned decision was taken by virtue of an application of an inflexible policy without any or adequate consideration of the individual circumstances of the applicant.

Delay.

[8] The respondent makes a preliminary point relating to the delay of the applicant in making the application for judicial review. An application for judicial review must be made promptly and in any event within 3 months of the decision in question. The decision relied on by the applicant is the letter dated 9 December 2005 and the applicant applied for judicial review on 25 January 2006. However, the respondent contends that the operative decision date was in November 2004 when the applicant became a sentenced prisoner to whom the new scheme applied.

[9] When the applicant was sentenced on 17 November 2004 he appealed against sentence and the appeal focused on the absence of a probation component in the applicant's sentence, contrary to the recommendations of the pre-sentence report. The applicant's appeal was dismissed on 21 October 2005. The applicant contends that the nature of his home leave entitlement only became a primary concern after the dismissal of the appeal and hence his solicitor's further letter to the Prison Service of 30 November 2005 leading to the response of 9 December 2005. It is clear from the correspondence that the issue of the applicant's entitlement to home leave was being actively considered prior to the conclusion of his appeal. His solicitor had raised the issue by letter dated 19 May 2005 and had received Prison Service confirmation on 3 June 2005 that the applicant fell under the new scheme.

[10] The earliest date for a relevant decision that might have led to a judicial review challenge was towards the end of 2004 when the applicant would have been informed of his home leave position after being sentenced on 17 November 2004. However at that time there were two existing judicial review challenges underway, as discussed below, and a further challenge from this applicant was not to be expected or encouraged until the earlier challenges had been completed, which occurred in April 2005. Thereafter the applicant's solicitor made the inquiry about

the applicant's position and received his answer on 3 June 2005. I consider that the relevant decision for the purposes of the delay argument was made on 2 June 2005. Thereafter this application for judicial review was not made promptly or within 3 months. However I propose to extend the time for the application to reflect the applicant's concentration on his appeal against sentence and the renewed request for confirmation of his home leave position after the completion of his appeal.

The Earlier Applications for Judicial Review of the New Scheme.

[11] In Griffin's Application [2005] NICA 15 the Court of Appeal considered the earlier version of the new scheme that was initially applied retrospectively to prisoners such as Griffin who had been sentenced before 1 March 2004. The Court of Appeal rejected an absurdity argument that was advanced on the basis that entitlement under the scheme based on continuous custody penalised those granted bail and was governed by the timing of the grant of bail, which was said to produce patently absurd results. The Court also rejected an inflexibility argument that the scheme had placed an unacceptably high threshold for an applicant to cross or had been applied too rigorously. The Court accepted an argument that the applicant's right to respect for private and family life under Article 8 of the European Convention had been engaged by the reduction in the amount of home leave that the applicant might otherwise have expected to receive as a sentenced prisoner under the old scheme. The Court found that the respondent had failed to justify the interference with the applicant's Article 8 rights. As justification for the change from the old scheme to the new scheme the respondent had relied on grounds relating to the treatment of prisoners unlawfully at large and a need for consistency and certainty in the operation of the scheme, both of which grounds were rejected at first instance and on appeal. As a further ground of justification the respondent had also relied at first instance on a need to restore public confidence as there was said to be a public perception of a revolving door of sentence and release which the old scheme was said to be generating. This further ground based on public confidence was accepted as sufficient justification by the Court at first instance. However, on appeal the respondent disavowed public confidence as a justification for the new scheme and relied on public safety considerations as a justification. The Court of Appeal concluded that the respondent had not provided evidence that the need to safeguard public safety prompted the amendment of the scheme or warranted amendment of the scheme and accordingly the respondent was found to have failed to justify the interference with Article 8 rights.

[12] In Neale and Others Applications [2005] NIQB 33, Deeny J dealt with a further challenge to the application of the new scheme to prisoners sentenced prior to 1 March 2004. It was found that the applicants, who were serving sentences at HMP Magilligan, had a legitimate expectation that they would be entitled to the application of the old scheme, as their entitlement under the old scheme had been notified to them in a written statement of particulars furnished on their transfer to HMP Magilligan.

[13] After the delivery of the two decisions referred to above the Prison Service issued the revised version of the new scheme dated 21 April 2005 which confirmed the application of the new scheme to those sentenced after 1 March 2004 and which is the version of the scheme under challenge in this application.

[14] Whether the new scheme is more beneficial than the old scheme to prisoners sentenced before 1 March 2004 will depend on whether the prisoner was entitled to star status or ordinary status under the old scheme. Recognizing that some prisoners sentenced prior to 1 March 2004 may be better off under the new scheme, the Prison Service, in April 2005, issued a notice to all prisoners sentenced prior to 1 March 2004 requiring them to elect to have home leave arrangements determined under the old scheme or the new scheme and in default of election they would be considered under the new scheme. For those electing to be treated under the old scheme it was necessary to revive the classification of star status and ordinary status.

Article 8 of the European Convention.

[15] [15] The applicant relies on the right to respect for private and family life under Article 8 of the European Convention. Article 8 provides that –

> "(1) Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> (2) There shall be no interference by a public authority with the exercise of this right except such as 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."

[16] Restrictions on private and family life are necessary incidents of lawful custody, however any restrictions do not remove such right to respect for family and private life as may be compatible with the lawful deprivation of liberty, see Daly v Home Secretary [2001] 2 WLR 1622. When assessing the obligations imposed by the article "regard must be had to the ordinary and reasonable requirements of imprisonment and to the resultant degree of discretion which the national authorities must be allowed in regulating a prisoner……" per Kerr LCJ in Griffin's Application at paragraph 25.

[17] While in Griffin's Application the Court of Appeal found that there had been interference with the applicant's Article 8 rights because his existing home leave had been reduced, it was further stated at paragraph 34 –

> "Without reaching any final decision on the matter, it appears to us that there is a strong argument available to the respondent that the 2004 scheme does not infringe Article 8 rights of prisoners sentenced after the scheme came into force. Certainly in the present case we have concluded that Article 8 has been engaged solely because the entitlement that would have been available to the applicant was reduced".

[18] In the present case there was no reduction in the entitlement that would have been available to the applicant because the scheme did not apply until he became a sentenced prisoner on 17 November 2004 and on that date his entitlement arose under the new scheme. That the applicant had served a previous sentence of imprisonment during the currency of the old scheme, or that he had been in custody on remand during the currency of the old scheme, does not assist the applicant as he had no entitlement to home leave until he was sentenced to the current period of imprisonment. Accordingly, there was no reduction in his entitlement to home leave after the date of his sentence. Article 8 was not engaged and there was no interference with the applicant's right to respect for privacy and family life.

[19] If, contrary to the above conclusion, the circumstances of the applicant do involve an interference with his Article 8 rights then the respondent must justify that interference. Governor Jeanes seeks to justify the change from the old scheme to the new scheme at paragraph 9 of his affidavit where he states that the new scheme provides for a meaningful sanction against prisoners who remain unlawfully at large after a period of temporary release and there has been a significant reduction in the number of prisoners unlawfully at large since the introduction of the new scheme. Further, he states that under the old scheme prisoners were entitled to apply for home leave at a relatively early point in their sentence, particularly if they had spent protracted periods on remand, and this was a matter addressed in the new scheme in order to enhance public confidence in the system and sensitivity to the views of victims of crime. Governor Jeanes states in paragraph 10 of his affidavit that the change was necessary in order to respond to changing circumstances in the prison system and that in making the change the respondent sought to balance the concerns of sentenced prisoners with the duty to protect the public and ensure public confidence in the workings of the prison system. The reference to the changing circumstances in the prison system is to the working group established in June 2001 to review the workings of the temporary release system taking into consideration the fact that home leave arrangements under the old scheme had been devised to deal with the prison population which was predominantly composed of terrorist prisoners housed at HMP Maze and the belief that the arrangements under the old scheme did not adequately address concerns with regard to rehabilitation, prevention of reoffending and risks to the public. So the public confidence justification relied on by the respondent at first instance in Griffin's Application, and disavowed by the respondent in the Court of Appeal in favour of public safety, is now being reasserted as the justification for the change from the old scheme to the

new scheme. This justification has been enlarged by the account of the changed character of the prison population. At first instance in Griffin's Application I accepted the public confidence justification and do so again in the present case.

Legitimate Expectation.

[20] The applicant relies on a legitimate expectation that the old scheme would apply in his case. Legitimate expectation requires a promise given or a practice undertaken by the respondent that legitimately engenders the expectation. Unlike the two earlier cases there was no representation made by the respondent to the applicant that he would be covered by the old scheme. As a remand prisoner no representations are made about home leave as the home leave scheme does not apply to remand prisoners and it cannot be assumed that remand prisoners will become sentenced prisoners. The applicant relies upon a number of features of his circumstances in support of his claim based on legitimate expectation. The applicant was a remand prisoner who had served a previous sentence of imprisonment and thereby had knowledge of the old scheme. However, it would not be legitimate for a prisoner to expect that the home leave scheme may not have changed from that which applied during a previous sentence of imprisonment. His expectation would be that he would have the benefit of the home leave scheme that applied during his later sentence of imprisonment.

[21] Further, the applicant pleaded guilty on 7 January 2004 and was remanded in custody pending sentence and given his circumstances he had the virtual certainty of becoming a sentenced prisoner. However it remains the case that entitlement to home leave does not arise until the prisoner is sentenced and there was no promise or practice that would have entitled the applicant to expect that such entitlement would arise from his plea of guilty.

[22] The applicant was not sentenced until 17 November 2004. However upon his plea the applicant's case was adjourned to 4 March 2004 for pre sentence reports, so his sentence was always going to be imposed after the commencement date of the new scheme. In the event there were various problems that arose that resulted in a delay in sentencing but none of those matters altered the applicant's position after the commencement date of the new scheme. When the applicant was sentenced the new scheme had been in operation for 8 months.

[23] None of the features relied on by the applicant provides the basis for a legitimate expectation that the new scheme would be applied to the applicant.

Inflexible Policy.

[24] Further, the applicant claims an inflexible policy and a failure to give individual consideration to the applicant. The general power to order temporary release arises under Rule 27 of the Prison and Young Offenders Rules (Northern Ireland) 1995. The Prison Service have applied the general home leave scheme to the

applicant. The Prison Service are entitled to apply to prisoners a policy on home leave. The Court of Appeal in Griffin's Application expressed itself satisfied that the Prison Service was entitled to devise a policy that decisions on home leave should only be taken in headquarters in order to aspire to consistency of approach to requests for home leave. The applicant complains that further to the solicitor's letter requiring the applicant to be treated under the old scheme, the Prison Service response did not consider the general application of Rule 27. The issue dealt with in correspondence between the applicant's solicitor and the Prison Service concerned the application of the old scheme or the new scheme to the applicant and the general application of Rule 27 did not fall to be considered. The applicant's individual circumstances do fall to be considered within the parameters of whatever scheme is applicable. The applicant remains entitled to apply for temporary release under Rule 27 and to be considered under the conditions and policies that apply to such applications.

[25] The applicant has not established any of his grounds for judicial review and the application is dismissed.