

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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AN APPLICATION BY WILLIAM ANDREW ASKIN  
FOR JUDICIAL REVIEW

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**WEATHERUP J**

**The Application.**

[1] This is an application for judicial review of decisions of the Northern Ireland Prison Service made in May 2007 in relation to the applicant, a prisoner detained at HMP Maghaberry. Ms McMahon appeared for the applicant and Mr McMillan for the respondent.

[2] The applicant is serving a sentence of 8 years imprisonment imposed on 8 October 2005. He is described by the Healthcare Centre Manager at HMP Maghaberry as suffering from a personality disorder and an obsessive compulsive disorder. Further to assessment by psychiatrists there is no clear evidence of mental illness and he has mental capacity in relation to his actions and decisions. The applicant has been attended on many occasions by healthcare staff. In 2007 he had an abdominal wound and received treatment at Belfast City Hospital. The applicant reopened his abdominal wound on 29 April 2007 and refused to have his wound dressed and refused medication.

[3] The applicant's cell was in Glen House (the vulnerable prisoners unit). On 13 May 2007 Governor Treacy visited Glen House and spoke to staff. There were two main concerns. The first was that the applicant had an open stomach wound which he was packing with foreign bodies. The second concern was about the risk of cross-infection because the applicant continually dropped soiled green paper towels from his wound onto the floor and his hands, which were often in contact with his wound, were placed on walls and ledges and handles. The applicant refused Governor Treacy's

requests that he be transferred to an outside hospital or to the prison healthcare centre.

[4] At 10.00 am on 14 May 2007 the applicant became subject to restriction of association under Rule 32 of the Prison and Young Offenders Centre Rules (Northern Ireland) 1995, as authorised by Governor Treacy. The applicant's restriction of association did not involve his transfer to the Special Supervision Unit, as is normally the case when Rule 32 is invoked. Instead the applicant remained in his cell, subject to restriction of association. On 18 May 2007 the applicant was transferred to the healthcare centre. This application concerns the management of the applicant from 14 to 18 May 2007. Initially this application dealt with three matters, namely the operation of rule 32, the provision of medical treatment and the nature of the association permitted to the applicant. Affidavits and exhibits from the respondent have addressed the nature of medical treatment and the character of permitted association to the extent that there are no judicial review grounds arising on those matters. Accordingly the issue concerns the operation of Rule 32 between 14 and 18 May 2007.

### **The terms of Rule 32.**

[5] Rule 32 of the Prison and Young Offenders Centre Rules (Northern Ireland) 1995 provides for restriction of association. Boards of Visitors have been renamed Independent Monitoring Boards.

“(1) Where it is necessary for the maintenance of good order or discipline, or in his own interests that the association permitted to a prisoner should be restricted, either generally or for particular purposes, the governor may arrange for the restriction of his association.

(2) A prisoner's association under this rule may not be restricted under this rule for a period of more than 48 hours without the agreement of the Secretary of State.

(2A) The governor shall inform a member of the board of visitors-

- (a) that he has arranged for the restriction of the association of the prisoner, and
- (b) of the date, time and location of the first review of the restriction of the prisoner's association.

(2B) The governor shall inform a member of the board of visitors of the matters in paragraph (2A) as soon as practicable and in any event no later than 24 hours after the prisoner's association is restricted.

(2C) The governor shall keep a written record of all contact and attempted contact with members of the board of visitors under this rule.

(2D) Unless it is not reasonably practicable, a member of the board of visitors shall be present at all reviews of the restriction of the association of the prisoner.

(2E) The governor shall as soon as reasonably practicable inform a member of the board of visitors:

- (a) of any changes to the date, time or location of the first review of the restriction of the association of the prisoner,
- (b) the date, time and location of any subsequent reviews of the restriction of association of the prisoner, and
- (c) any changes to the date, time or location of any subsequent reviews.

(2F) The board of visitors shall satisfy itself that:

- (a) the procedure in this rule for arranging and reviewing the restriction of the association of the prisoner has been followed, and
- (b) the decision of the governor to restrict the association of the prisoner is reasonable in all the circumstances of the case.

(2G) In order to satisfy itself of the matters in paragraph (2F) the board of visitors shall be entitled to inspect the evidence on which the governor's decision was based, unless such evidence falls within paragraph (2H).

(2H) Evidence falls within this paragraph if:

- (a) it should not be inspected by the board of visitors for the purpose of safeguarding national security;
- (b) its inspection by the board of visitors would, or would be likely to prejudice the administration of justice;
- (c) its inspection by the board of visitors would, or would be likely to endanger the physical or mental health of any individual; or
- (d) its inspection by the board of visitors would, or would be likely to endanger the safety of any individual.

(2I) If the board of visitors is not satisfied of any of the matters set out in paragraph (2F) it shall draw this to the attention of the governor, in writing, who must, review the procedure for arranging and reviewing the restriction of the association of the prisoner, review his decision to restrict the association of the prisoner and take such other steps as are reasonable in all the circumstances of the case.

(2J) The governor must take the steps in paragraph (2I) promptly and in any event within seven days and the board of visitors shall not refer a

matter to the Secretary of State under paragraph (2K) until the governor has taken the steps in paragraph (2I) or the end of the seven days whichever is earlier.

(2K) If after drawing a matter to the attention of the governor under paragraph (2I) the board of visitors is still not satisfied of any of the matters set out in paragraph (2F) it shall draw this to the attention of the Secretary of State in writing.

(2L) If a matter is referred to the Secretary of State under paragraph (2K) he must consider the matter and take such steps as are reasonable in all the circumstances of the case.

(3) An extension of the period of restriction under paragraph (2) shall be for a period not exceeding one month, but may be -renewed for further periods each not exceeding one month.

(4) The governor may arrange at his discretion for such a prisoner as aforesaid to resume full or increased association with other prisoners and shall do so if in any case the medical officer so advises on medical grounds.

(5) Rule 55(1) shall not apply to a prisoner who is subject to restriction of association under this rule but such a prisoner shall be entitled to one hour of exercise each day which shall be taken in the open air, weather permitting.”

[6] The elements of Rule 32 are first of all the recognition of “permitted association” which may be subject to restriction. Secondly, dual reasons for the exercise of the power to restrict association, namely good order and discipline or the prisoner’s own interests. Thirdly, arrangements for the restriction of association being made by the Governor. Fourthly, safeguards that include the agreement of the Secretary of State to any extension of the restriction beyond 48 hours and the monitoring of the process by the Independent Monitoring Board.

**The grounds for Judicial Review.**

[7] The applicant’s grounds for judicial review are that:

(1) The application of Rule 32 was unlawful and procedurally unfair by -

(a) misuse of the powers conferred by Rule 32;

- (b) non adherence to the procedural safeguards in Rule 32;
- (c) powers exercised for a collateral purpose, namely to punish the applicant or subject him to discrimination –
  - (i) Rule 32 is limited to restriction of association for the maintenance of good order and discipline or in the interests of the applicant
  - (ii) letters from Governors Cromie and Treacy to the applicant's solicitors of 26 and 30 May and 15 June 2007 detailing the reasons for the placing the applicant on Rule 32
  - (iii) failure to invoke to Rule 86(7) which enables a medical officer to separate a prisoner from other prisoners on health grounds.
  - (iv) failure to invoke Rule 38(7) which makes it an offence against prison discipline to endanger the health or person safety of others.
  - (v) failure to take seriously the concerns of the applicant in relation to his personal safety.

(2) The applicant was treated unfairly and denied his legitimate expectation that he would be treated with fairness, justice and respect when the reasons for the use of Rule 32 were not explained.

(3) The use of Rule 32 was in contravention of Article 8 of the European Convention by:

- (a) Treating the applicant in a discriminatory manner; and
  - (b) Interfering with his right to pursue the development and fulfilment of his personality and his right to association.
- (4) Misfeasance in public office.

*-the Prison Service explanation for the use of Rule 32.*

[8] The applicant challenges the respondent's explanation for the use of Rule 32. The Rule 32 form completed by the Governor stated that restriction of association was allowed for 48 hours from 10.00 am on 14 May 2007. The

reason was stated to be "For health and safety reasons due to your medical condition". The record of the Governor's interview included "Sought an explanation of Rule 32 - which was given". Governor Cromie completed the form and avers that he was directed by Governor Treacy to issue the papers to the applicant and was advised that the reason for restriction was that the applicant had self-inflicted wounds which were open and weeping and which posed a health and safety risk to staff and other prisoners. Further, Governor Cromie avers that he told the applicant that the restriction was for health and safety reasons. A letter of 26 May 2007 from Governor Martin and a letter of 30 May 2007 from Governor Cromie are to the same effect. A letter of 15 June 2007 from Governor Treacy referred to the applicant being placed on Rule 32 "for a 24 hour period" and referred to the applicant dropping soiled and infected paper towels and touching hard surfaces with his hands which were likely to be cross-infected from his wound. Similar concerns were expressed in Governor Treacy's affidavit.

[9] The applicant interprets the above correspondence as relating to the applicant's behaviour rather than the health and safety issue. Thus the applicant challenges the use of Rule 32 as having been in effect a punishment for the applicant's conduct. Taking account of all the available material I am satisfied that the decision to place the applicant on Rule 32 was taken by reason of concerns for the health and safety of staff and prisoners.

[10] Further the applicant considers his treatment to be discriminatory. He has made many complaints about his treatment in prison and believes that the prison authorities have not taken proper account of risks to his safety. I have not been satisfied that anything other than proper regard has been given to the applicant's safety. Nor have I been satisfied that the treatment of the applicant has involved unlawful discrimination. The decision to invoke Rule 32 was based on concerns for the health and safety of staff and prisoners. On those grounds the restriction of association was necessary for the maintenance of good order in the area where the applicant was detained, being a permitted reason for the use of Rule 32.

*-the failure to use alternative powers.*

[11] However the applicant contends that there were alternative provisions under the Rules which were more appropriate in the circumstances. Rule 86(7) provides that "The medical officer shall give written directions for separating from other prisoners any prisoner whose health makes such separation advisable in his own interests or that of other prisoners." The circumstances of the present case may indeed have brought into play the potential for the intervention of the medical officer to effect the separation of the applicant from other prisoners. However what is in issue is the propriety

of the decision that was made, rather than alternatives that might have been made. There may be circumstances where the existence of the alternative power is a relevant consideration in the assessment of the propriety of the decision made.

[12] Similarly the applicant contends that the respondent should have invoked Rule 38(7) which provides that "A prisoner shall be guilty of an offence against prison discipline, if he -

“(7) endangers the health or personal safety of any person or persons, including prisoners, through intentional or reckless conduct.”

The application of Rule 38 would have imported into the process those procedural safeguards which attach to disciplinary proceedings. Mr McMillan for the respondent refers to the discretion in relation to the initiation of disciplinary proceedings and to the applicant's background and his status as a vulnerable prisoner and the overreaction that might have arisen from the use of disciplinary proceedings in the difficult situation faced by the prison authorities. Again the issue is the propriety of the decision that was made, rather than alternatives that might have been made. I have not been satisfied that the existence of the alternative powers that might have been exercised on medical or disciplinary grounds impacts on the exercise of the powers under Rule 32.

*-the giving of reasons for the use of Rule 32.*

[13] The application contends that he was not given reasons for the application of Rule 32. The extent to which the requirements of procedural fairness requires that a prisoner removed from association under Rule 32 should be informed of the reasons for removal are set out by Carswell LCJ in Conlon's Application (2002) NIJB 35 -

“We are in general agreement with the proposition that a prisoner should where feasible be informed of the reasons for his removal from association, but we do not consider that a hard and fast rule should be laid down, for the circumstances may be infinitely variable....

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 on which the decision is based, in which event any uniformed representations which he may make may be of little value ...

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, given where possible and where necessary sufficient reasons for taking that course and afford him the opportunity to make representations about his justification ...

Nor do we think that there should be any hard and fast requirements about the form in which the reasons are given to the prisoner. As the Judge observed the important thing is that he is given enough information to permit him to understand why he was removed from association ...

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."

[14] Governor Cromie completed the record of interview of the applicant in the Rule 32 form by recording that the reason for the application of Rule 32 was given to the applicant. In his affidavit Governor confirms that in answer to a question from the applicant he told the applicant that Rule 32 was being invoked for health and safety reasons. Adequate reasons for the application of Rule 32 were given to the applicant by Governor Cromie on 14 May 2007.

*-the use of Rule 32 outside the Special Supervision Unit*

[15] The applicant questioned whether Rule 32 could have applied when he was not transferred to the Special Supervision Unit but was retained in his cell. The practical effect of the operation of Rule 32 on the applicant was that during those periods when he would have otherwise have enjoyed permitted association with other prisoners he was locked in his cell. In McAnoy's Application [2007] NIQB 24 I reserved a conclusion on whether Rule 32 can apply to any restriction of association other than that involving a transfer to the segregation unit. In that case the respondent took the position that Rule 32 only applied in circumstances where the prisoner was removed to the segregation unit. In the present case the respondent took the position that Rule 32 applied to the restriction of association while the applicant was retained in his own cell.



[16] The equivalent English Rule is Rule 45, although this refers to “removal” from association rather than “restriction” of association. Livingstone, Owen and McDonald on Prison Law discuss Rule 45 under the heading “Segregation”. The English system treats Rule 45 as applying when prisoners are “segregated from normal location.” The discussion clearly reflects the equivalent English regime as involving the physical separation of prisoners into a separate unit where they no longer enjoy the association with other prisoners that prevails when they are housed in their own cells. However prisoners separated in this manner are not held in isolation as they may associate with other prisoners in the separated unit. The discussion contemplates that Rule 45 is limited to actual transfer to a segregation unit.

[17] The terms of Rule 32 are not limited in the manner of English Rule 45. I am satisfied that Rule 32 is not limited to those circumstances where a prisoner is removed to the Special Supervision Unit or any segregation unit, but that it will come into operation where a prisoner is subject to restriction of association for the permitted reasons. In such circumstances the safeguards set out in Rule 32 are imposed on the respondent. Accordingly I am satisfied that in the circumstances of the present case, where the restriction of association under Rule 32 was applied for a permitted reason, that Rule 32 applied to the restriction of association imposed while the applicant remained in his cell.

*- the period that the applicant was subject to Rule 32*

[18] There is an issue about the period for which the applicant was subject to Rule 32. Rule 32(2) provides that a prisoner’s association may not be restricted for a period of more than 48 hours without the agreement of the Secretary of State. Governor Treacy stated in correspondence that there had been restricted association for 24 hours. By affidavits Governors Cromie and Treacy averred that the applicant had been subject to Rule 32 until 18 May, a total of 96 hours. By later affidavits Governors Cromie and Treacy averred that the applicant had been placed on Rule 32 until 16 May, being a total of 48 hours. The applicant contended that he had been subject to Rule 32 for the four days from 14 to 18 May without any extension of the restriction of association being agreed by the Secretary of State.

[19] There has been unfortunate confusion about the period that the applicant was subject to Rule 32. On the basis of the entry in the Class Officer’s Journal for 16 May 2007 I am satisfied that the applicant was removed from Rule 32 at 10.00 am on that date. Accordingly the applicant was subject to Rule 32 for the period of 48 hours as authorised by the Governor and there was no need to obtain an extension of restriction of

association from the Secretary of State. The applicant was not subject to Rule 32 from 16 to 18 May and was transferred to the healthcare centre on 18 May.

*-the article 8 right to respect for private life*

[20] The applicant contends that the imposition of Rule 32 involves a breach of Article 8 of the European Convention and the right to respect for private and family life. Article 8 provides -

“(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.”

[21] The applicant retains those rights that are not necessarily removed by reason of imprisonment. Rights of association with others are clearly restricted, as a result of imprisonment, to others in the prison. I do not accept that Article 8 adds anything to restriction of association under Rule 32 if that restriction is otherwise lawful. If the application of Rule 32 engages Article 8 and involves an interference with the right to respect for private life, any such interference that otherwise would be lawful, would be justified as being prescribed by law under Rule 32, undertaken for the legitimate purposes specified in Rule 32 and Article 8(2) and would be proportionate.

*-reporting the use of Rule 32 to the Independent Monitoring Boards*

[22] There is an issue as to whether the safeguards in Rule 32 were applied to the applicant. The safeguards include the requirement that the Governor shall inform a member of the IMB that he has arranged the restriction of association and of the date, time and location of the first review of that restriction (Rule 32(2A)) and that such notice shall be given to the member of the IMB as soon as practical and in any event no later than 24 hours after the restriction (Rule 32(2B)). Further the Governor is required to keep a written record of all contact and attempted contact with members of the IMB (Rule

32(2C). Further safeguards in the Rules require that the IMB shall satisfy itself as to the procedure for arranging the restriction and that the decision of the Governor is reasonable in the circumstances. Where the IMB is not so satisfied it shall give written notice to the Governor who must review the procedure, or the decision, promptly and in any event within seven days. If the Governor does not complete that review, or if the IMB remain dissatisfied with the outcome of the review, the matter will be referred to the Secretary of State, who may take such steps as are reasonable in the circumstances.

[23] In the present case the Governor failed to comply with the safeguards that the Governor should give the required notice to a member of the IMB [R32(2A)] as soon as practical and in any event no later than 24 hours after the restriction [(2B)] and keep a written record of all contact and attempted contact with members of the IMB [(2C)].

[24] Governor Treacy attributes the failure to give the requisite notice to the IMB to the terms of the Instruction to Governors issued on 18 May 2005 which states -

“The governor should inform a member of the (IMB) that it has been decided to restrict association under Rule 32 and that authority is being requested from the Secretary of State to extend the period.”

This instruction was being read by Governors as requiring notice to a member of the IMB when authority was being requested from the Secretary of State for extension of the restriction. However Rule 32(2A) requires the Governor to inform a member of the IMB of all restrictions of association and not merely those in respect of which the Governor proposes to apply to the Secretary of State for an extension of the restriction. Having identified this failing in the process the Instruction to Governors is being redrafted to include a provision that the notice to the member of the IMB must be given whether or not there is an intention to apply to the Secretary of State for an extension of the restriction of association.

[25] The uncovering of this non-compliance with Rule 32(2A) also brought to light the process by which Governors authorising restriction of association under Rule 32 leave all the requirements, in relation to the giving of notice to a member of the IMB, to the staff in the Special Supervision Unit where the Rule 32 prisoner would normally be transferred. The applicant objects that the Governor authorising the restriction of association is thereby abandoning responsibility for the prisoner, when it is implicit in the safeguards in Rule 32 that the Governor should keep the IMB informed and keep records of his contacts and should carry out a review of procedures or of the decision to restrict association when required by the IMB.

[26] The Carltona principle was set out in Carltona Limited v Commissioners of Work (1943) 2 All ER 560 by which the courts recognise that ministerial decisions are normally exercised by responsible officials under the authority of the Minister. This approach is based on administrative convenience, where the power in question is such as may be left to an official, the official is suitably qualified to deal with the matter and the Minister continues to be responsible for the decision taken by the official. The Carltona principle has been extended beyond ministerial decision-making to other public authorities – see De Smith’s Judicial Review (6<sup>th</sup> Edition) paragraphs 5-162 to 5-169. Rule 32(1) provides that the substantive decision on the restriction of association to be made by the Governor. Rule 32 (2A), (2B) and (2C) provide that certain procedural matters be undertaken by the Governor. These are matters of administration that may be undertaken by staff on behalf of the Governor. I am satisfied that the Rules do not require notice in person by the Governor to a member of the IMB or a personally written record of contacts and that these matters may be completed by administrative officers on his behalf. However the Governor remains responsible and must ensure that the mechanisms are in place to comply with the duties, that he gives the necessary orders to comply with the duties and that he retains responsibility for ensuring that the obligations have been carried out. In the present case there was no such mechanism because the applicant was not transferred to the Special Supervision Unit and accordingly there were no administrative staff and no process in place to ensure compliance with the Rules. To the extent that Rule 32 operates to restrict association of prisoners outside the Special Supervision Unit there must be parallel administrative arrangements to ensure compliance with the safeguards in Rule 32.

*-misfeasance in public office*

[27] Accordingly there has been a breach of Rule 32(2A), (2B) and (2C). The circumstances that have emerged in relation to the operation of Rule 32 in the circumstances of the present case lead the applicant to claim misfeasance in public office. The elements of misfeasance in public office were stated by Lord Hope in Three Rivers District Council v Governor and Company of the Bank of England (2001) UKHL 16 at paragraph 42 as being:

“First, there must be an unlawful act or omission done or made in the exercise of power by the public officer. Second, as the essence of the tort is an abuse of power, the act or omission must have been done or made with the required mental element. Third, for the same reason, the act or omission must have been done or made in bad faith. Fourth, as to standing, the claimants must demonstrate that they have a

sufficient interest to sue the defendant. Fifth, as causation is an essential element of the cause of action, the act or omission must have caused the claimant's loss."

As to the second and third requirements, the claimants in Three Rivers District Council did not allege that the Bank made the actual omissions intentionally with the purpose of causing loss but rather alleged "untargeted malice". Lord Hope stated at paragraph 44:

"Where the tort takes this form the required mental element is satisfied where the act or omission was done or made intentionally by the public officer (a) in the knowledge that it was beyond his powers and would probably cause the claimant to suffer injury, or (b) recklessly because, although he was aware that there was a serious risk that the claimant would suffer loss due to an act or omission which he knew to be unlawful, he wilfully chose to disregard the risk. In regard to this form of tort, the fact that the act or omission is done or made without an honest belief that it is lawful is sufficient to satisfy the requirement of bad faith. In regard to alternative (a), bad faith is demonstrated by knowledge of probable loss on the part of the public officer. In regard to alternative (b), it is demonstrated by reckless on his part in disregarding the risk."

As to recklessness Lord Hope stated at paragraph 46 that:

"... it is sufficient for the purposes of this limb of the tort to demonstrate a state of mind which amounts to subjective recklessness. That state of mind is demonstrated where it is shown that the public officer was aware of a serious risk of loss due to an act or omission on his part which he knew to be unlawful but chose deliberately to disregard that risk."

[28] The failure to comply with the Rule 32 safeguards in relation to giving the required notice to a member of the IMB and recording contacts and attempted contacts with the IMB was the result of an inadequate Instruction to Governors. The terms of the instruction were confusing in relation to the nature of the obligation to give notice to the IMB. The Instruction also omits reference to the obligation to maintain records of contact or attempted contacts with the IMB. I do not accept that the action or omissions of the Governor amounted to an abuse of power for the purposes of misfeasance in

public office. I accept that the Governor acted on the basis of the Instruction to Governors and did not act in the knowledge that there was an obligation to give notice to the IMB in every instance of Rule 32 being invoked. Nor was the Governor reckless as to the extent of his obligations or their impact on the applicant. He was entitled to act on his understanding of the Instruction to Governors, an understanding that appears to have been shared by other Governors.

[29] Nevertheless this application has uncovered shortcomings in the operation of Rule 32. There has been a systemic breach of Rule 32(2A), (2B) and (2C) as the prison authorities have failed to recognise the obligation to give particulars to a member of the IMB of the use of Rule 32 in every instance and to record all contacts and attempted contacts with the IMB. This may also reflect a broader failure to recognise the ongoing obligations of the Governor in relation to those on Rule 32, as they are liable to be called to account by the IMB for the process and the decision to invoke Rule 32. In the present case this failure contributed to the confusion about the period that the applicant remained on Rule 32. The Instruction to Governors requires amendment to reflect the terms of Rule 32 and to remove the confusion that arises from the existing Instruction. The Governor has responsibility for ensuring compliance with the requirements of Rule 32. Administrative arrangements need to be put in place to ensure compliance with the requirements of Rule 32 in those instances where Rule 32 is applied to a prisoner who is not removed to the Special Supervision Unit.