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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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2017 No. 11865/01

IN THE MATTER OF AN APPLICATION BY DEREK BROCKWELL FOR JUDICIAL REVIEW OF THE DECISION TO PLACE THE APPLICANT ON RULE 32

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MAGUIRE J

Introduction

[1] These proceedings were commenced on 3 February 2017. Leave to apply for judicial review was granted on 7 February 2017. The case has been moved forward quickly. This judicial review concerns the applicant who is a man of 55 years of age and is a sentenced prisoner currently incarcerated at Her Majesty's Prison Maghaberry. Mr Devine BL represented the applicant before the court and Mr McQuitty BL represented the respondent. The court is grateful to them for their extensive written submissions and oral arguments which the court has taken into account.

[2] The applicant seeks to challenge the invocation by the prison authority in respect of him of the regime provided for in rule 32 of the Prison Rules. He also contests his continued placement on this regime. Rule 32 was invoked in this case on 5 October 2016. It is, therefore, the case that the applicant has been subjected to this regime for in the region of eight months to date. He remains on rule 32 at the time of writing. The regime itself involves that he is subject to restriction of association. What this means in practice is that the applicant is housed in what is called the Care and Supervision Unit ("CSU") within the prison. In that unit there are a number of individual cells. The exact number has not been provided to the court but at the date of Governor Armour's affidavit, filed on behalf of the respondent, there were some 19 prisoners housed in the unit. The unit is manned 24 hours a day and 7 days per week. The prisoner, subject to whether he avails of a one hour period of exercise which he will be offered per day, is retained in his cell for 23 hours per day. He eats his food in his cell and attends to his toileting in cell.

He has open to him the use of an emergency call bell when he wishes to contact medical staff. He is visited by healthcare professionals at least once a day and, according to Governor Armour "all prisoners are … visited daily by a senior member of the management team". A member of the Independent Monitoring Board ("IMB"), the court has been told, visits the CSU once per week.

[3] The applicant can be visited by visitors but his domestic visits must take place in what is described as closed conditions. A glass partition therefore separates him from his visitors. The court has been informed that his legal visits are conducted in the normal way in the legal visits area.

[4] The court has been assured that the applicant can on request have access to telephone and showers.

[5] While there is no description of the cell contained in the papers the court has no reason to believe that it is other than basic. What is in the cell appears to depend on the prisoner's regime level.

[6] Prisoners on Rule 32 are not able to associate with one another and their dealings with staff are generally conducted at the door of the cell which is not fully opened but kept on a chain. There is no contact with prisoners in ordinary location.

The background

[7] As the court understands it, the applicant is an Englishman. While the court has not been provided with a copy of his criminal record, it appears that he has a very significant record mostly in the context of robberies and other offences of violence.

[8] According to the affidavit evidence, he had been serving out the tariff period of a number of life sentences to which he was subject at Kirkham Prison in England. He was getting towards the end of his tariff period. On a date in 2012 the applicant went absent without leave from the prison having been involved in a form of outside placement. The applicant fled to Dublin where he committed a number of robberies for which he was later sentenced to imprisonment in the Republic of Ireland. He was housed as a result in Portlaoise Prison. On or about 17 February 2015, the applicant attended Tallagh Hospital in Dublin in connection with medical treatment for his diabetic condition. In order to attend he was accompanied by two prison officers. While in the hospital (probably with the assistance of others who are unknown) he was able to acquire a sharp edged weapon which he proceeded to use on the two prison officers. Both officers, the court has been told, were caused serious injuries and the applicant (again with the likely help of others) escaped and went at large.

[9] On the following day the applicant was arrested in Belfast. Before his arrest he is believed to have committed a number of robberies in the city. At the time of his

arrest he was armed with a weapon. He had to be subdued using a Taser but, before it was used, he himself used the weapon he possessed to inflict serious wounds on himself.

[10] As a result of his capture, the applicant was for a period housed at Maghaberry. The duration of his stay has not been provided by the respondent to the court but, on the basis of piecing together other information, it may have been in the region of 2-3 weeks. He later was transferred to Her Majesty's Prison Frankland in the north of England. He remained in Frankland for a period but in October 2016 he was transferred to Maghaberry in order to enable him to face trial for the robberies he allegedly committed in Belfast before his arrest here.

[11] It is unclear what the approach of the Dublin authorities is to the applicant's alleged offending in that jurisdiction, especially in relation to the serious assaults which appear to have been committed in relation to the two prisoner officers who had accompanied the applicant to Tallagh Hospital.

[12] The following, however, appears clear:

(a) The plan to remove the applicant to Maghaberry to attend his trial in Northern Ireland would have been known about quite some time in advance of his return to Northern Ireland and, at least, from 4 August 2016.

(b) The court has not been told what preparations were made by the authorities at Maghaberry prior to the applicant's arrival in Northern Ireland in October 2016.

(c) While there is reference in Governor Armour's affidavit to Frankland providing the respondent with "various oral briefings as to the security risks associated" with the applicant, none of these has been shared with the court. There is, however, a reference to the provision by Frankland of what is described as "a formal risk assessment for transfer document". This was provided, Governor Armour says, on 4 October 2016.

(d) There is no substantive information in the papers about the applicant's period in custody at Maghaberry prior to his transfer to Frankland. This is, in the court's view, surprising as in one of the documents in the papers there is a clear reference to the impugned decisions not being based solely on material provided by Frankland.

(e) While at Frankland between 4 March 2015 and 4/5 October 2016 it appears that the applicant's association was restricted for a period following his arrival there, having been transferred from Maghaberry. However, he appears to have been held in a normal location for in the

region of one year prior to his transfer back to Maghaberry. During this time the applicant claims he was adjudication free.

The chronology of the invocation and maintenance of the applicant on Rule 32

Invocation

[13] Rule 32 in this case was invoked by Governor Davidson at 1400 hours on 5 October 2016. The applicant's association, by the Governor's decision, was for a period of not more than 72 hours restricted. There is a record of Governor Davidson telling the applicant the following:

> "I have placed you on Rule 32 based on information received from another jurisdiction and I consider you a serious risk to staff and other inmates if I had to place you in normal location."

Governor Davidson has not filed an affidavit in these proceedings.

[14] The only source of information about the consideration of the original decision to invoke Rule 32 is found in the affidavit of Governor Armour. At paragraph 9 he states that:

> "[g]iven the serious risk factors apparent from the risk assessment [provided by Frankland on 4 October 2016], it was determined that the applicant should at least initially be place (sic) on Rule 32, restricted association."

[15] It is not clear from Governor Armour's affidavit whether the deponent was present during or took part in any discussion about the issue. Nor is it clear who, if anyone other than Governor Davidson, was involved in the decision-making process. The implication appears to be that the decision was only made after 4 October 2006. As already noted, there is no reference of substance to the matter having been discussed by the Northern Ireland Prison Service in advance of the applicant's arrival at prison, despite there having been notice of this arrival since early August 2016.

First review - 7 October 2016

[16] The first review of the applicant's case appears to have been convened on 7 October 2016. There is evidence of a Review Assessment Committee, chaired by Governor Bell, considering the applicant's case. A member of the IMB was present. The prisoner appears to have attended the meeting of the Committee. There is reference to the applicant saying that he had been in the general population in Frankland and had had no adjudications there. The applicant also said that his trial

could be held by video link from England and that "he would continue to refuse to eat or take his insulin in protest at being held in such a strict regime".

The Committee recommended that there should be an extension of seven days.

[17] It is unclear from the record of the Committee what documents, if any, were before them. This is a recurring theme with the reviews in this case. The court, in particular, has no information about (i) whether the Frankland prison document had been shared with any of the members of the Committee and (ii) whether a document in the form of a security report/risk assessment had been before them.

[18] After the Committee made its recommendation the court's understanding is that the matter then fell for consideration by Governor Dowds. It seems to have been his decision as to whether to accept the recommendation and extend the time. Governor Dowds has not filed an affidavit in these proceedings. He did, however, sign a document entitled "Restriction of Association". He has signed as an authorised person on behalf of the Department of Justice ("DOJ"). He states:

> "I spoke with Stephen who confirmed that he knew why he was being held on Rule 32 and he had attended his review, although he complained it was unfair. I explained I would be agreeing to the extension (seven days) due to previous risk assessments and to allow for local assessment. He acknowledged he understood but still disagreed with being held on Rule 32."

[19] Governor Dowds signed an authority for restriction of association with effect from 7 October 2016 until 14 October 2016. There is no evidence in the papers of the applicant being provided with any other information in addition to that provided to him on 5 October 2016.

[20] There is no reference to the applicant having made a complaint on 6 October 2016 in the above documents. However we know that he did so as Governor Armour has exhibited such a complaint on an official complaint form. The complaint referred to the applicant seeing himself as being "punished" and the staff at Maghaberry taking orders from another prison in another country. It said that "in the meantime will not eat or take diabetic medication till I am taken off this rule". Consideration of the complaint appears to have been a separate process to that which applied to the issue of extending the restriction of association. The complaint appears to have been the subject of an interview between Governor Savage (a duty Governor) and the applicant on 7 October 2016. In respect of the applicant's concern that Maghaberry was acting at the behest of another jurisdiction, Governor Savage said that this was not the case. The Governor went on:

> "I advised that although you were never committed to Her Majesty's Prison Maghaberry you had been in the

> custody of NIPS and as such we did have knowledge and experience of you."

[21] The remark above is not further explained. Governor Savage also told the applicant that the prison had to look after the Article 2 rights of staff, prisoners and visitors.

[22] According to Governor Savage, the applicant advised that he had given staff his word that he would remain compliant and "offered me this assurance". The Governor's response to the complaint was provided to the applicant on 10 October 2016. The outcome was Governor Savage was satisfied that Rule 32 had been accurately applied to the applicant.

[23] There was no sign that the applicant's assurance was acted on by Governor Savage or was considered by him or Governor Davidson.

[24] The court has been told that the applicant, before he received the response to his first complaint (*supra*), made a second complaint which later gave rise to a further response from Governor Savage. This complaint was made on 9 October 2016. *Inter alia*, it makes the point that while the applicant had spent 8 months on a restricted regime at Frankland, he later had been taken off that regime and was in ordinary association for a year prior to his removal to Maghaberry. This complaint was rejected in a response to the applicant on 11 October 2016 from Governor Savage.

Second review - 13 October 2016

[25] As before, the mechanism of review was a Review Assessment Committee. This was chaired by Governor Deans. An IMB member was present. The applicant attended the meeting. The applicant is quoted in the record of the meeting as having said that he had been the subject to a "stitch up and people telling lies". The outcome of the Review Assessment Committee was a recommendation for an extension of the applicant's period on Rule 32 for 28 days. The reason for this was expressed in terms of protecting the safety of others in the prison. On behalf of the DOJ, Governor Watterson accepted the Committee's recommendation. It appears he spoke to the applicant. His record of the conversation, in its material part, reads:

> "I confirmed that he understood the reason he was being held on Rule 32 and that he had the opportunity to make his case to the Review Panel … I am aware of the information that Maghaberry received to instigate this period of Rule 32 as this information won't change. I agree with the Panel's decision to extend this Rule 32 for up to 28 days."

[26] Governor Watterson has filed an affidavit in these proceedings. In it he states that he had no memory of the applicant making any particular objection to being held on Rule 32. In particular, Governor Watterson avers that:

> "I did not tell the applicant that he would be placed on Rule 32 for the duration of his stay in HMP Maghaberry. I would not have been in a position to tell Mr Brockwell or any other prisoner this."

[27] This averment appears plainly to be a direct response to an averment made by the applicant in his first affidavit in these proceedings. Dealing with the words Governor Watterson used in the interview record, quoted above, in particular, the reference in the record to "this information won't change", the Governor explains that "I was making reference to the fact that the decision to place the applicant on Rule 32 and my decision to extend it was being made on historical evidence and intelligence which I believe indicated the applicant's predisposition to the use of violence".

[28] In the court's view, the language used by Governor Watterson was not well chosen, even if the court accepts his account, as against the applicant's version which says that he told the applicant that he would be placed on Rule 32 for the duration of his stay in Maghaberry. At the least, it is likely to be needlessly crushing for the Governor to have adverted to the reasoning behind the decision being unchanging with the likely inference arising (not unreasonably in the prisoner's eyes) that his period on Rule 32 also would not change.

[29] In respect of the second review, no new information, it appears, had been provided to the applicant. By this point the extension granted meant that the applicant could have his association restricted until 11 November 2016.

[30] Prior to the third review, there was an exchange of correspondence between the applicant's solicitor and Governor Armour. The former sent to the prison a pre-action protocol letter dated 17 October 2016 questioning the imposition of Rule 32 in the applicant's case. Particular reference was made to the applicant not being provided with information as to why this step had been taken, other than "information had been received" from the previous prison at which the applicant had been housed. This letter received a prompt reply from Governor Armour on the same day. This reply noted the following:

> "Restriction of association will only be considered if it is judged to be a necessary, proportionate and reasonable response to the threat posed by the prisoner involved. It does not follow, or require, that an incident should occur …

… Your client was a category A prisoner in England where he was serving 22 life sentences for robberies and violent offences.

The offences in Belfast occurred after he had absconded from a work party in England and escaped to the Republic of Ireland. Whilst in Dublin, he committed various other robberies for which he was serving a custodial sentence. He then orchestrated an escape from lawful custody whilst being treated in Tallagh Hospital in Dublin. During this escape, your client caused life changing injuries with a sharp edged weapon to two Irish Prison Service officers.

During his arrest in Belfast, whilst armed with an offensive weapon, Mr Brockwell inflicted severe wounds on himself. His risk was such that PSNI used 'Taser' to subdue and arrest him.

Information from Mr Brockwell's last UK prison was requested and received. This highlighted that throughout his custodial career, he had a history of threatening staff and prisoners, suspicion that he was in possession of a sharp edged weapon, and attempts to secrete needles used to treat his medical condition. There are older incidents of assaulting staff, assaulting prisoners, being in possession of various sharp edged and pointed weapons.

Since his transfer to Maghaberry, he has been abusive and threatening to staff on several occasions, and stated to a supervisor when being asked if he would comply with a blood sugar check 'I'll stick this in your fucking eye'.

It is clear that Mr Brockwell is and remains to be a real and credible threat to health and safety and Article 2 rights of staff, others, other prisoners and himself …

NIPS personnel do not carry Tasers, nor are they equipped with stab proof personal protection equipment.

There is no other, lesser alternative that will ensure, as far as possible, the rights privileges of others. The only option for safety and effectively achieving this is to

> restrain his opportunities to harm others (Restriction of Association)."

[31] No explanation is provided in the letter as to why the same information had not been provided to the applicant when Rule 32 had been invoked in the first place or in the course of subsequent reviews.

[32] The court notes that the Governor placed reliance on an incident subsequent to the applicant's transfer to Maghaberry. No date is given for this but it appears likely that it will have taken place after Rule 32 had been invoked.

[33] The court also notes that there is no reference at this stage to the applicant's posture in respect of the issue of him having attended the review meetings or to him giving Governor Savage assurances about his position. There is also no reliance in the letter on anything based on the applicant's prior period of custody in Maghaberry. It is also to be observed that the violence referred to by the Governor relates to (a) the applicant's direct offending (robberies in particular), (b) his escape in Dublin and his later arrest. No particulars are given of his alleged history of threatening staff and prisoners outside the above context or in respect of assaulting staff or other prisoners, or being in possession of various sharp edged and pointed weapons.

Third review - 10 November 2016

[34] A Review Assessment Committee met to consider the applicant's case on the above date. On this occasion it was chaired by Governor Magennis. A member of the IMB, *inter alia*, attended. The applicant also attended. The record of the meeting refers to the applicant as "belligerent" from the outset continually questioning the Chairman in respect of the information being held on him. In the end, the Chairman asked the applicant to leave. It is noted that initially he refused but then got out of his chair and stated to the Chairman "your card is marked for a judicial review". The Review Committee recommended another 28 days restriction of association.

[35] On the same day Governor Bowden, for the DOJ, accepted this recommendation. He spoke to the applicant at 1600 hours. It is noted in the record of the discussion that the applicant was concerned that he was not aware of the information held in relation to him. This does not appear to have been explored by the Governor. The applicant clearly indicated to the Governor that he was not content to be on Rule 32. Again there is nothing in the record which demonstrates that there was any discussion about what the applicant needed to do to get off Rule 32 or anything of that sort. The extension period allowed was to the end of 8 December 2016.

Fourth review - 7 December 2016

[36] The only significant occurrence in respect of the fourth review is that the applicant on this occasion declined the opportunity to attend the committee meeting which was chaired by Governor Magennis. A representative of the IMB was present at the committee meeting. A recommendation was made for a further 28 days extension. This was considered by Governor Dowds, on behalf of the DOJ, who accepted the recommendation. Governor Dowds spoke to the applicant. The applicant explained that he did not attend the Review Committee because he felt Governor Magennis did not listen to what he wanted to say. Specifically the applicant asked to be given the opportunity of being placed in the general population so his behaviour could be gauged there. The response of Governor Dowds was that "this would need to be the decision of a Review Committee and security conference" but that he would raise the matter with the Governor.

[37] The court finds the response of Governor Dowds not wholly satisfactory in that the Governor had himself the power to decide on the question of extension. However he appears to have chosen not to discuss the issue with the applicant himself or to advise him about how to effect change or progress the matter in a favourable direction.

[38] There was an extension granted to 4 January 2017. There is no evidence in the papers before the court that Governor Dowds in fact took the matter up with the Governor as he said he would.

Fifth review - 3 January 2017

[39] On the above occasion the applicant did attend the Review Assessment Committee which was presided over, in the presence of a member of the IMB, by Governor Smith. The applicant appears to have sought improvements in his regime and raised the issue of his closed visits. It is stated in the record of the meeting that the applicant "accepted my recommendation for extension". The court thinks that this is not likely to be correct if it is intended by it to mean that the prisoner agreed to it. The Committee's approach seems to have been that as the gist of the security information remained valid, there should be an extension.

[40] On this occasion Governor Rockwell, on behalf of the DOJ, dealt with the applicant's case. He extended the time to 31 January 2017. He spoke to the applicant around 1605 hours. The outcome was explained to him. There is no reference to any discussion or even conversation between the two save that the applicant confirmed that he attended the review.

Sixth review – 30 January 2017

[41] The applicant attended the Review Assessment Committee on the above date. The meeting was chaired by Governor McCready and an IMB member was present. The record of the meeting was perfunctory. It notes without any elucidation:

> "Prisoner says he doesn't feel great about on Rule 32."

[42] An extension was recommended and later granted by Governor Ferguson on behalf of the DOJ. There is a record of a short meeting between the Governor and the applicant. The record is basic in its contents.

Further provision of information

[43] On 21 February 2017 Governor Armour provided further information to the applicant by way of what he refers to as "a further gist summary". The provision of this was ostensibly not linked to any specific event but the court notices from the Notice of Motion in this case that on 7 February 2017 the court granted leave to apply for judicial review.

[44] In his affidavit, Governor Armour asserts that "this document was provided so as to give the applicant a further opportunity to address the matters of concern".

[45] In view of the history *supra* it is not easy to accept Governor Armour's characterisation of the situation if it is intended to depict a situation in which the applicant had failed up to this date to show readiness to address such matters.

[46] The gist summary document provided on 21 February 2017 indicated that it is NIPS's view that the applicant is "entitled to sufficient information to enable [him] to understand the nature of the allegations … that led to restriction of association". Under the head "Further Gist" the document reads:

> "This should be read in conjunction with the disclosed source material.
>
> In advance of your transfer to HMP Maghaberry the Northern Ireland Prison Service received a risk assessment for transfer document from HMP Frankland. This document detailed very serious concerns about your management in prison. A redacted copy of this document was forwarded to HMP Frankland by this Department for their approval prior to being disclosed to you as part of our response, to date we have not received their approval and as such we cannot release this document to you at this time. We can however summarise the contents as follows:

You are a category A prisoner serving 22 life sentences with a history of escaping from custody. You are violent, manipulative and unpredictable man.

1. On 17 February 2015 you escaped from Dublin hospital after stabbing two Irish prison officers and fled to Northern Ireland. At that point in time you were serving a sentence in Portlaoise Prison. The circumstances of your escape and the extreme violence apparently used by you are of the greatest concern to the Northern Ireland Prison Service.

2. Prior to this you had failed to return to custody in HMP Kirkham from an outside placement and then made your way to the Republic of Ireland. Intelligence suggests you were involved in illegal activities while at HMP Kirkham.

3. You then ended up in prison in the Republic of Ireland until your escape in February 2015.

4. Following this last escape you were arrested by the PSNI in Belfast. This arrest required the use of a Taser to subdue you and to prevent you from causing further harm to yourself (having stabbed yourself). Your arrest was in connection with armed robberies allegedly carried out by you in Belfast and for which you are now due to stand trial in Belfast.

5. Intelligence material indicates you are a patient, highly manipulative individual who can plan a complex escape from lawful custody to include the use of extreme violence. This material also shows you to be an individual who is capable of enlisting the criminal support of others to make good your plans, even whilst you remain in custody.

6. There are concerns about the extent of your associations with criminal gangs.

7. Intelligence suggests other concerns your conduct and views.

8. You have history of making threats.

9. You have history of violence.

10. You have a history of possession of potential weapons in custody.

11. On 1 January 2016 you received a warning in HMP Frankland due to your abuse of staff.

We can disclose a copy of an e-mail about you from the Irish Prison Service.

I can also indicate to you that NIPS staff have had direct discussions with staff at HMP Frankland about you since you have been in Northern Ireland. They indicate that while you can present as a polite and plausible individual you can "turn" violent in an instant. They consider you to be a highly dangerous and volatile prisoner."

[47] The document provided from the Irish Prison Service, referred to above, is undated and Governor Armour has not provided the court with any information as to when it was obtained. It provides information about the applicant's escape and states that the applicant was relatively well behaved until it. Reference is then made to the applicant posing an extremely high risk to prison staff and being willing to take extreme measures in order to escape lawful custody.

[48] The above correspondence was supplemented by a further communication dated 28 February 2017. At this time a redacted copy of the risk assessment formulated by HMP Frankland prior to the applicant's transfer to Northern Ireland was provided to the applicant's solicitors.

[49] This document was provided at the point at which the applicant had been on Rule 32 for over 5 months. The document refers to a wide range of matters but features chiefly –

- The applicant's escape in Dublin.
- His good behaviour in the year prior to his escape.
- Some details of his arrest in Belfast and the injuries he sustained at that time.
- Allegations about him being involved in trade in SIM cards and drugs while in prison.
- His racist views.
- His dealing in "spice" while on day release from Kirkham Prison.
- Numerous threats made by him to staff and other prisoners while in custody.
- Him being in possession of hooch on a number of occasions.
- An incident in 2003 when he smashed a bottle over a prisoner's head.
- That in 2003 he was in possession at one stage of a homemade knife.
- A strengthened metal rod also in 2003 was found inside his radio.

- He possibly had a blade, it was reported in his possession in 2015.
- His intimidating and abusive behaviour to staff.

[50] The Frankland document also refers to the fact that the NIPS had highlighted to them their assessment that the applicant was a particularly intelligent, manipulative individual. No other detail is given. This presumably related to the applicant's period in Maghaberry prior to him being transferred to Frankland. As already commented on, the court has no information about the applicant's status and behaviour during that period.

Seventh review – 24 February 2017

[51] A Review Assessment Committee was convened on the above date to consider the applicant's case. It was chaired by Governor Mann. A member of the IMB was in attendance. The Committee recommended a further extension of 28 days which was agreed to by Governor Ferguson for the DOJ. The applicant, though notified about the review, did not attend it. The applicant told Governor Mann that it was not worth attending as the Review Committee had already made up its mind. Governor Ferguson spoke to the applicant after the review but nothing of substance emerged from this.

Eighth Review – 22 March 2017

[52] An eighth review was conducted on the above date chaired by Governor Smith. A member of the IMB *inter alia* was present. The applicant did not attend. The review recommended a further extension of 28 days. The note of the review indicates that "the concern around his potential management in normal population still exist and remain valid". Governor McKee for the DOJ interviewed the applicant at his cell door. The discussion was desultory with the prisoner relying on his up-coming judicial review. Governor McKee authorised a further period of 28 days to 19 April 2017.

Relevant legal provisions

[53] The legal provisions relevant to this case consist of prison rules. Of particular importance are:

> "Restriction of Association 32(1)
>
> Where it is necessary for the maintenance of good order or discipline, or to ensure the safety of officers, prisoners or any other person 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 72 hours without the agreement of the Department of Justice.

…

(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 a prisoner who is subject to restriction of association to resume full or increased association with other prisoners at any time, and in exercising that discretion the governor shall fully consider any recommendation that the prisoner resumes full or increased association on health and welfare grounds made by a registered general practitioner or a health care officer."

[54] Rule 2A-L deals with reviews and the role of the IMB.

[55] The role of the Board is to satisfy itself that the procedure for arranging and reviewing the restriction of association of the prisoner has been followed and that the decision of the Governor to restrict association of the prisoner is reasonable in all the circumstances (2F).

[56] If the Board is not satisfied as aforesaid it can draw this to the attention of the Governor in writing (2I).

The guidance

[57] The Northern Ireland Prison Service have published a policy and guidance document for governors and DOJ representatives. The latest version is dated 2016. In it, it is noted *vis a vis* Rule 32 that "such restrictions will be monitored and reviewed within the required time scales and a prisoner will not be subjected to such arrangements for any longer than necessary. Representations from the prisoner should be taken into account." The document goes on:

> "Engagement with the prisoner is vital to the legal integrity of the process and decisions to invoke or extend

Rule 32 should not be taken lightly or give the impression that governors and staff are simply following a process."

[58] Other parts of the document of interest in this case are:

"2.2 The objective of this policy is to ensure that full consideration is given to all relevant matters that may have a bearing on the decision to remove a prisoner from association with others, and where appropriate, Governors are aware of the necessity to develop a managed plan of activities and support aimed at producing the conditions that will enable the safe return of the prisoner to the integrated population.

3.1 Prior to the imposition of Rule 32, governors must ensure that due consideration is given to any alternative interventions. It is important that all relevant information is made available to decision-maker so that an informed decision can be made. Such information should include (but is not limited to):

- The prisoner should be informed that the governor is actively considering placing them on Rule 32 and their reasons behind the decision. … Procedural fairness dictates that the information provided to the prisoner must be of sufficient detail to allow the prisoner to make meaningful representations that will inform the decision-making in arriving at the decision to invoke Rule 32.

- If security information reports form part of the consideration to invoke Rule 32 a gist of this information should be provided to the prisoner.

- The past history of such events for this prisoner/others.

- What impact are the current behaviours having on staff/other prisoners/good order of the establishment?

- What are the potential risks on maintaining the prisoner in a normal residential location?

- What options have been considered in this case – cell move/wing move other accommodation/referral to services?

- What plans/activities have been considered – pathway off of Rule 32 restrictions.

3.2 The considerations must be recorded on pro forma generated from PRISM. This will form part of the written record that must be included in the papers presented to the DOJ, should there be a request for an extension. PRISM records must also be accurately maintained throughout the process.

5.1 All prisoners managed under the provisions of Rule 32 must be reviewed during the 72 hour period authorised by a governor. The review should be conducted with all interested parties, including the prisoner in attendance. Should the prisoner refuse to attend this fact should be recorded in the notes of the review meeting.

6.4 Headquarters officials representing the DOJ must be satisfied that all options of remedial action have been considered and that they are content that the application merits an extension for the reasons stated. Any extension granted should be weighed against the issues raised, and any human rights considerations on the part of the prisoner.

6.6 Special consideration must be given where a number of repeat applications for extension have been made on an individual. Rule 32 is not to be considered as a long term solution to a particular problem or issue. Local governors should consider convening a case review mid-term of a period of extension, before routinely applying for a further extension. … The application of Rule 32 in every instance must be necessary, proportionate and relevant to the behaviours displayed by the individual."

Relevant case law

[59] The subject of the invocation by the prison authorities of restriction of association for a prisoner and its subsequent extension has been the subject of extensive case law in Northern Ireland. Such cases include Re Conlon's Application

[2001] NICA 49; Re Henry's Application [2004] NIQB 11; and Re Hart's Application [2009] NIQB 57.

[60] In addition to the above there is a recent judgment of the Supreme Court which is of interest: see R (On the Application of Bourgass and Another) v Secretary of State for Justice [2015] UKSC 54, though it is to be noted that the terms of the relevant rule in England and Wales are not identical to the terms of the rule in Northern Ireland, especially as regards the requirement in Northern Ireland that the step of invoking rule 32 must be "necessary" as opposed to "desirable" in England and Wales.

[61] The main features of the legal landscape in this area appear to be as follows:

- That Rule 32 should not be invoked lightly and is, in effect, a measure of last resort.

- That the Rule 32 regime is likely to be challenging for the prisoner. There has now been recognition by the Supreme Court of the effects of segregation on a prisoner: see paragraphs [35]-[40] of the judgment of Lord Reed in Bourgass.

- A test of necessity governs the use of the power in Northern Ireland. It should, therefore, not be used where there is a viable alternative way of dealing with the matter.

- The longer a prisoner is placed on the rule, the greater will be the risk of harm to him and the more compelling the justification for the use of this power must be.

- There are a range of safeguards both procedural and substantive which need to be carefully policed. It is an objective of policy in this area that a prisoner should not have to endure any period on Rule 32 longer than strictly necessary. Consequently all reasonable efforts must be made to find another way of handling the prisoner which does not involve keeping him indefinitely in separated conditions: see Conlon.

The Court's Assessment

[62] The applicant seeks to make the case that the invocation of rule 32 in his situation and its continuation is unlawful both on substantive and procedural grounds.

[63] The respondent in all respects argues that there is no flaw in its approach and that it has acted strictly within its powers.

[64] In a number of ways the court is of the opinion that the respondent's approach to this judicial review has been unsatisfactory. It is difficult for the court to

do other than believe that the respondent has in some areas been less than fulsome in the provision of information to the court. In particular, the court in two areas feels it may not have received the full picture. The first area relates to the issue of the planning for the applicant's transfer to Maghaberry. The impression provided in the respondent's affidavit is that the applicant was simply placed on rule 32 following his arrival at the prison but the court has a nagging doubt that, while technically what the respondent has said may be correct, it has not been told of what went on beforehand. In simple terms, the court finds it difficult to believe that the proposal to house the applicant in the CSU was not the subject of pre-planning and prior discussion within Maghaberry before the applicant arrived in Northern Ireland and between Maghaberry and Frankland. If there had been a planning phase it has not been shared with the court. Secondly, the court is concerned that it has not been provided with information about what occurred during the period when the applicant had been in the care of the Northern Ireland Prison Service prior to his removal to Frankland. It seems to the court that information about this should have been provided to the court. As it is, the court does not know where the applicant was housed in that period or how the applicant behaved and how he was managed. This is not unimportant in a case of this kind where the view of the prison authority is that there was no viable alternative following the applicant's return to Maghaberry but to place him on rule 32.

[65] There are also other imperfections in the way in which the respondent has communicated its case to the court, though the court accepts that these are of a lesser importance than those discussed above. Into this category fall the failure of the respondent to file an affidavit from the person who invoked rule 32 in the first place and to file an affidavit from the Security Governor without explanation of what precisely his role in the decision making process was. These failures only have the effect of increasing the court's concern that it is being excluded from receiving the full story. While Governor Davison made the decision to invoke rule 32, the court is left to believe that the decision had not either been taken as a result of pre-planning or as a result of discussion involving other senior staff within the prison (or elsewhere).

[66] The court is also concerned about the extent of the documentation provided to it and the lack of information about what documents were being provided to decision makers. For example, the court has not seen a number of documents which are referred to in the guidance document highlighted *supra*. Reference in this regard is directed specifically at the requirements of paragraphs 3.1 and 3.2 which implicitly, if not explicitly, refer to records being accurately maintained throughout the process. To take an important provision, the court would have expected to see some form of document in which the consideration of other options to the use of rule 32 were recorded and what plan or activities had been considered. There is also reference (at paragraph 2.2) to the necessity to develop a managed plan of activities and support aimed at producing the conditions that will enable the safe return of the prisoner to integrated conditions. The court has seen nothing to suggest that such a

plan was developed in this case, despite the fact that the applicant has now been on rule 32 for a prolonged period.

[67] The result of these misgivings on the court's part is that it gives rise to elevated concern about the way in which the respondent was handling this applicant's case.

Invocation

[68] As far as the substance of the decision to invoke rule 32 in this case is concerned it seems to the court that it is for the respondent objectively to demonstrate that the use of such a drastic option was necessary. The question which arises is whether it has done so?

[69] In considering this question the court acknowledges that it should be slow to seek to place obstacles in the way of the taking of this step where it is justified. Often the invocation of rule 32 will be necessary as a response to an urgent or emergency situation and undoubtedly there may be cases where a quick decision is required, not always with the benefit of full information. But the court doubts that this case can properly be viewed as falling into this category. In this case it is clear that the prison authority had prior notice of the date when it was expected that the applicant would be transferred to Northern Ireland and had the opportunity to plan for this event. In these circumstances the court would have expected there to have been high level discussions within the prison authority as to how the applicant was to be managed. Such discussions, no doubt, would be informed by relevant information from other prisons which had managed the applicant in the past as well as information in relation to the applicant's period of custody in Maghaberry prior to his removal to Frankland. The totality of information about the prisoner, one would expect, would have been considered in order to develop a plan for his handling.

[70] In the court's view, it is difficult not to view a consideration of the range of options which were available in relation to the applicant's management as forming an essential element within the decision making process, but in this case the court has seen no evidence that such a consideration occurred. Plainly such an approach is recommended in the guidance (see paragraph 3.1) and, in any event, such an approach would be consistent with the notion that a step of last resort which, statutorily must be a necessary one, should only be taken having rejected other available options.

[71] In this case the court is unaware of any reason why alternative options could not have been considered. There would logically appear to be other options which, at the least, could have been explored. The usual option would be placement in ordinary regime with no restriction on association but the court is minded to believe that other options will also have been available. For example, the applicant might have been placed in a smaller or specialist regime with association with other prisoners within that regime. Or the applicant might have been made the subject of

closer supervision or CCTV observation while in another part of the prison. It seems to the court it is not for it to seek itself to suggest what steps might have been taken. This aspect of the matter could have been dealt with in detail in an affidavit filed on behalf of the respondent and, as pointed out earlier, one would have expected that there would be a record of the consideration of alternatives to rule 32 in the applicant's case if the guidance document had been adhered to.

[72] While the court has no doubt that the applicant is a person with a propensity to seek to escape and a willingness to use violence to effect his purpose and while the court is willing to accept that he is a person who needs to be appropriately controlled, these factors by themselves do not demonstrate that necessarily the only solution to the problem he represents is incarceration on rule 32. In a prison establishment, such as Maghaberry, the court bears in mind that at any given point in time, it will house dangerous prisoners with violent tendencies and a willingness to inflict harm on prison staff or others within the prison but many such persons, it seems reasonable to infer, can be managed without loss of association, albeit that, no doubt, this is a difficult task.

[73] The court can only reach its conclusion on the substantive invocation of rule 32 in the applicant's case on the basis of the information which has been exposed in the proceedings before it. That information, in the court's eyes, is deficient in that the court is unable to say that it has been shown that the step taken, in the circumstances pertaining when it was taken, was necessary as required by the prison rules, the legal authorities and the guidance published by the prison authority itself. While it may well be that had the prison authority provided the court with fuller information the court might have reached a different conclusion, this is a matter for speculation upon which the court cannot pronounce. In this area it is not enough simply to assert that other options to the use of rule 32 have been considered. Because of the court's finding on this point, the applicant's claim of substantive breach of Article 8 ECHR need not be addressed, a position conceded by Mr Devine. The court, however, for the avoidance of doubt, will make it clear that the analysis which it has employed above could equally be deployed in an Article 8 context, especially as the respondent accepted at the hearing that Article 8's private life limb was both engaged and interfered with. Consequently any interference would have to be justified and be shown to be proportionate. This would involve demonstrating that a test of necessity is met which would bring with it the question of whether alternative methods of dealing with the applicant were considered.

Procedure on Invocation of Rule 32

[74] In the court's estimation there are plain procedural flaws in the way in which rule 32 was imposed in this case.

[75] The court is, as before, mindful of the context as discussed, in particular, at paragraph [69] above. It will not repeat what it has already said.

[76] The principal flaw in this case in respect of procedure involved the failure to provide the applicant with sufficient information about the basis for the invocation of rule 32 and its subsequent extensions to enable him to make informed representations in response to it. The initial information provided on the day of invocation was paltry and it is evident that the applicant was left without significant information being disclosed to him, despite two reviews having been conducted, until Governor Armour's reply to the applicant's solicitor's pre-action protocol letter. Even then the applicant was not provided with much of the detail of the information troubling the prison authority to much later in February 2017. The approach appears to have been that the provision of information was linked to impending legal challenge and its progress.

[77] In the court's opinion, this state of affairs is not good enough and is inconsistent with the NIPS guidance and with legal authority in Northern Ireland and England and Wales.

[78] The guidance clearly envisages that prisoners are to be informed about the basis for rule 32 decisions. In particular, paragraph 3.1 indicates that as a general rule procedural fairness dictates that the information provided to the prisoner must be of sufficient detail to allow the prisoner to make meaningful representations.

[79] The approach of the courts is similar but there is an emphasis on what is feasible and, in proper cases, on protecting sources of information, particularly by the use of gists. However, in the present case, the court knows from the extent of disclosure belatedly made to the applicant or his solicitor that in fact there was a substantial amount of information which could have been provided to the applicant from the outset but which in fact was withheld. The court also takes into account that in the case of Conlon the Court of Appeal indicated that it 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 the prisoner from association, give him where possible and where necessary sufficient reasons for taking that course of action. The court has no quarrel with the view that procedural fairness at common law is a flexible concept which must be applied having regard to context and not by rote. But it must, it seems to the court, have some irreducible minimum if it is to be meaningful. In its consideration of procedural fairness in this context in England and Wales, Lord Reed, speaking for the Supreme Court in Bourgass, stated at paragraph [98] that, in the context of extensions to the period a prisoner is required to be on rule 32 [rule 45 in England and Wales[1]]:

[1] No side in Bourgass sought to argue that there was a requirement at common law to disclose prior to the invocation of Rule 45 in England and Wales. This was on the basis of an acceptance that segregation has to be decided upon in circumstances of urgency. As already noted, this factor is of little strength in this case as, on a proper analysis, the authorities at Maghaberry had plenty of time to consider what it should do with the applicant when he arrived at the prison.

> "Whatever the position may have been in the past, the approach described in Doody[2] and Osborn[3] requires that a prisoner should normally have a reasonable opportunity to make representations before a decision is taken by the Secretary of State under r45(2). That follows from the seriousness of the consequences for the prisoner of a decision authorising his segregation for a further 14 days [in Northern Ireland a potential extension of one month]; the fact that authority is sought on the basis of information concerning him, and in particular concerning his conduct or the conduct of others towards him; the fact that he may be able to answer allegations made, or to provide relevant information; and, in those circumstances, from the common law's insistence that administrative power should be exercised in a manner which is fair."

In an important further passage at paragraph [100], Lord Reed went on to say:

> "A prisoner's right to make representations is largely valueless unless he knows the substance of the case advanced in sufficient detail to enable him to respond. He must therefore normally be informed of the substance of the matters on the basis of which the authority of the Secretary of State is sought. This will not normally require the disclosure of the primary evidence on which the governor's concerns are based… It is however important to understand that what is required is genuine and meaningful disclosure of the reasons why authorisation is sought."

It is not enough simply to provide a general idea of the nature of the concerns and why those concerns were held, Lord Reed indicated.

[80] In the present case the court is unable to accept that procedural fairness, in fact, was attended to in the particular circumstances of this case. If the NIPS guidance had been followed, there should have been pre-invocation of rule 32 disclosure to the applicant. This was not a case where rule 32 was invoked out of the blue as a matter of an emergency, or where disclosure would have created significant problems of a public interest nature. In any event, disclosure should, at minimum, have been made prior to or as part of the early reviews. This did not occur. While it may be that after February 2017 it can be said that the applicant has had available to him all the information he reasonably required, this does not mean that the court should not provide him with a remedy for earlier defaults.

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[2] [1994] 1 AC 531
[3] [2014] AC 1115

Reviews

[81] As is clear from the court's consideration of the facts of this case there have been a large number of reviews conducted in respect of the applicant's position on rule 32, which is as it should be.

[82] Aspects of the history of the matter give the court more than a little ground for concern. The court need not rehearse the position about the provision of information to the prisoner, which has been sufficiently discussed in the immediately preceding paragraphs of this judgment. What has left the court uncomfortable is that, despite the length of time which the applicant has now spent on rule 32, there continues to be an absence of any sign of positive progress in respect of the issue of when the applicant will be taken off rule 32 or what he must do in order for this to be achieved.

[83] There may be a number of factors involved in the current impasse, if it may be described as such. As already acknowledged, there are concerns about how to manage the risks which the prisoner is said to represent. It is said that he is untrustworthy and manipulative. On the other hand, it cannot be said that the applicant has not on occasions sought himself to signal that he appreciates that there is a need for him to try and prove himself with the prison authority.

[84] What is now tolerably clear is that, while all individuals are different, a long term stay on rule 32 is likely to be negative to the prisoner's well-being. The matter is developed in some detail in the Bourgass case by Lord Reed at paragraphs [35]-[40]. The court has no reason to disagree with the view set out at paragraph [40] from a recent report of a UN Special Rapporteur, quoting the Istanbul Statement on the Use and Effects of Solitary Confinement, that "[n]egative health effects can occur after only a few days in solitary confinement, and the health risks rise with each day spent in such conditions". This chimes with a number of averments in the affidavits of the applicant in these proceedings.

[85] In these circumstances there must be a premium placed on the need to bring a period of segregation to a close. This, moreover, appears to be recognised in the guidance document where there is reference to "the necessity to develop a managed plan of activities and support aimed at producing the conditions that will enable the safe return of the prisoner to the integrated population". As the guidance later notes: "Rule 32 is not to be considered as a long term solution to a particular problem or issue" (paragraph 6.6).

[86] In the present case there is little evidence to support the view that these sentiments have been informing the approach taken by the prison authority in the applicant's case, which in the court's eyes, is disappointing. While the court can see that there are cases in which no viable alternative to rule 32, even with the best will

in the world, can be said to exist[4], it is unconvinced on the evidence now before it that this is such a case.

[87] It is unnecessary for the court in this case, given the findings it has already made, to make a legal ruling on this aspect of the matter but in the context of the grant of extensions it seems to the court that these factors should be borne in mind by those whose responsibility it is to make such decisions. The continuing impact of the use of rule 32 on the prisoner will always be relevant and agreement to an extension of the period on rule 32 should never be viewed as pre-ordained or routine.

Remedies

[88] Subject to what is said below, the court has decided that it should quash the decision to invoke rule 32 in the applicant's case both on substantive and procedural grounds in line with its findings as set out above. It is also of the view that the extensions to the period on rule 32 should also be quashed.

[89] This does not, however, mean that the respondent is prevented from reconsidering the matter or from making the same decision if it so judges it appropriate to do so, provided it makes a decision which is procedurally fair and can be shown to be legally justified.

[90] The court will consider suspending the granting of *certiorari* for a short period from the handing down of this judgment in order to enable the prison authority to take stock of its position in the light of this judgment.

[4] An example might be Mr Conlon's case where this aspect clearly troubled the court.