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(subject to editorial corrections)*

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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Campbell's (Glen) Application [2012] NIQB 100

AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW BY GLEN CAMPBELL

AND IN A MATTER OF A DECISION BY THE NORTHERN IRELAND PRISON SERVICE

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HORNER J

[1] The applicant is Glen Campbell. He was convicted of unspecified offences in Scotland and given a period of imprisonment. I have not been told when his sentence expires. He was moved to prison in Northern Ireland in February 2011 under the provisions of the Crime (Sentences) Act 1997. The relevant provisions governing the transfer of prisoners within the British Isles are contained in Schedule 1. In particular paragraph 5 of Schedule 1 provides that the transfer shall have effect subject to such conditions as the Secretary of State may think fit to impose. These conditions were set out in a letter of 7 February 2011 from the Scottish Prison Service which the applicant signed and at the same time acknowledging:

> "I clearly understand the conditions of my restricted transfer to Northern Ireland and wish my transfer to proceed on that basis."

[2] Those conditions were set out in a letter of 7 February 2011. They were as follows:

> "Transfer will be on a restricted basis for an initial period of six months.

> Your case will be reviewed at the end of the sixth month period.
>
> You will be required to adhere to all the rules, regime, protocols operating within HMP Maghaberry, HMP Magilligan or any other prison that you are allocated to.
>
> Visits will be arranged within the constraints of visiting times and availability of visiting spaces.
>
> They will be subject to the laws governing your detention, release and recall in Scotland but would become subject to the rules and regulations applied to prisoners in Northern Ireland for all other purposes.
>
> You should not become involved in any drug related activities.
>
> You should limit the amount of property you take with you to three bags plus any legal papers you may have.
>
> You may be returned to Scotland at any time if this proves necessary, for example should your discipline give cause for concern."

It should also be noted that in the letter it was stated:

> "If you have been receiving regular family visits, conduct and behaviour reports are good and there are no concerns regarding your safety in a Northern Ireland prison, then NIPS will agree to your transfer on restricted non-time limited basis which will allow you to serve the remainder of your sentence in Northern Ireland."

[3] On 25 August 2010 the applicant had requested a transfer to Northern Ireland to serve the remainder of his sentence. He had just re-established ties with Leanne Ferguson with whom he had one son, J who I am informed is 16. I was told without contradiction by Ms Murnaghan for the respondent that the other son, K who is 4 years younger, being aged 12, is not the child of the applicant, although it would be impossible to reach this conclusion from the papers that have been lodged in this application. Leanne Ferguson says in her affidavit "we have two children together" and she subsequently refers to "our children". The respondent's counsel did claim that Ms Ferguson in her affidavit had only paid lip service to her duty of

candour. However, I have insufficient information and I make no findings on this issue generally. I am going to proceed on the uncontradicted statement of Ms Murnaghan on behalf of the respondent as to the paternity of J and K.

[4] The applicant's behaviour in prison in Northern Ireland has been abysmal. He has had a number of adjudications involving drugs. He has even set off an explosive device in which a prison officer narrowly escaped losing his foot or hand. The prison officer remains off work as a result of post-traumatic stress disorder. The applicant has been warned consistently that his behaviour was imperilling his stay in Northern Ireland. He has paid these warnings scant respect.

[5] Further Leanne Ferguson was found guilty of attempting to pass to the applicant cannabis on a visit to the prison and was subsequently banned for six months. She claims that she did not pass him the cannabis but that the applicant already had it. She seeks to explain the absence of prison visits on the basis of this ban. In doing so she relies on a deliberate untruth which if, discovered, would have resulted in a further adjudication or even a criminal conviction against the applicant with a possible further term of imprisonment.

[6] The initial period of six months for which the transfer was originally to take place was extended on two occasions for further periods to allow the applicant to amend his ways. However the Scottish Prison Service wrote on 31 August 2012 making it clear that because of his poor behaviour and refusal to improve his conduct despite ample opportunity to do so, he would be repatriated to a prison in Scotland. There is no mention whatsoever of the failure of the family to visit him on a regular basis being a matter contributing to his recall.

[7] On 30 October 2012 Northern Ireland Prison Service wrote to make clear that one of the main reasons for the original transfer was to allow him to receive regular visits from immediate family members. It went on to say that over the past nine months there had been no visits from members of his immediate family. This was incorrect because Leanne Ferguson had resumed visits in September. She had been unable to visit him because of the ban which had taken place because of the incident referred to above and which only ran out on 4 July. However she recommenced her visits only after the applicant was threatened with transfer to Scotland. I am in a position to determine if this was a coincidence or not. Her reasons for not doing so are that the car broke down and that she had difficulty in arranging someone to look after her sons during the school holidays. It is difficult not to be extremely sceptical about these explanations. The younger son is 12 years old and the older one 16 years. There is no reason why, if required, the older son could not have looked after the younger one. Neither boy has visited the applicant in 2012 and neither intend to do so. Apparently they prefer to talk to the applicant on the phone. I was told without contradiction by the respondent's counsel that J, the natural son, has visited the applicant three times since March 2011 and that K who had never met the applicant before his transfer back to Northern Ireland, has visited him 9 times. None of Mr Campbell's other children, and he has three, have visited him. It is clear that

the applicant's contact with his own natural son has been very modest. It is difficult to avoid inclusion that his claim of a family relationship with K is one of convenience. There has not been a shred of evidence produced to suggest that either child would suffer if they had no further personal contact with the applicant until his sentence had been served. They can continue to speak to him regularly on the phone, and in that respect, there would be no change. Ms Ferguson would be free to visit him in Scotland. However this would undoubtedly be more inconvenient for her.

[8] The applicant asserts that the decisions of the Northern Ireland Prison Service and the Scottish Prison Service are incompatible with his Article 8 rights. It is also claimed that the Northern Ireland Prison Service and Scottish Prison Service have failed to take into account the Article 8 rights of his children and have failed to take into account their best interests as a primary consideration.

[9] In Kavanagh v UK [1993] 15 EHRR CD 106 the European Commission of Human Rights stated in respect of a complaint that the refusal of a transfer, temporary or permanent, was a violation of the applicant's right to respect for their private family life guaranteed by Article 8 of the Convention as follows:

> "The Commission considers it only in exceptional circumstances will the detention of a prisoner a long way from his home or family infringe the requirements of Article 8."

For the avoidance of doubt, and taking the applicant's case at its very height, I conclude there are no exceptional circumstances.

[10] Further, Morgan J gave a decision in an application for leave for judicial review by Edward Coll, Mary Walmsley and Desmond Walmsley Junior in [2009] NIQB 47. The facts of that case are similar in that the prisoner had been transferred to Northern Ireland subject to conditions which included one of good behaviour. He had been subject to a number of adjudications and had not received any visits from family members in Northern Ireland. He was also given a period to show progress and warned that he would be returned to England and Wales. His behaviour did not improve. Morgan J said at paragraph [14]:

> "I accept that the original decision was based upon a mistake of fact in that the decision maker proceeded on 18 July 2008 on the basis that the applicant was not receiving family visits. There does not appear to have been any recognition of this mistake until the correspondence of December 2008. It is clear, however, that this matter was taken into account when reconsideration of the decision was made on 30 January 2009. Nothing in Article 8 of the ECHR gives

> a prisoner a right to choose where he is to be detained and separation of the detained person and his family is one of the inevitable consequences of imprisonment. It is only in exceptional circumstances that detention of a prisoner a long way from his family would violate the convention (see Kavanagh v UK). It is clear that the prison service concerns about this applicant's compliance with the rules and regime of the prison were a material issue in 2008 and led to the position adopted at the case conference on 16 April 2008. The incident in May 2008 exacerbated the situation. Any claim that convention rights have been infringed must take into account the subsequent consideration. Since the emphasis in the paper was on the conduct of the first name applicant there is no reason to doubt the bona fides of the reconsideration. There is nothing to indicate the balance that has been struck is other than proportionate."

The facts of this case are uncomfortably close to the circumstances of this case. If the prison authorities originally made a mistake about why there had been no visits between January and the start of July, this was soon corrected. They also had the explanations offered by Ms Ferguson for her continuing failure to visit over the summer. It is clear that the applicant had no legal right whether under the Convention or at common law to reside in a prison in Northern Ireland. He was granted a privilege on the basis that he adhered to a strict code of conduct and to allow him to receive visits from his family. Regardless of the infrequency of the visits he has received and the reasons for this, there has been repeated, contumelious, calculated and deliberate misconduct on his part and it is such that it evinces an intention that he did not consider that he should be bound by the prison rules in Northern Ireland. The applicant has no one to blame but himself for his transfer back to Scotland. In the circumstances it is not accepted that his Article 8 rights are engaged. If this conclusion is incorrect then I consider that the decisions to repatriate him are in pursuit of one of the legitimate aims provided for in Article 8(2) namely public safety. The removal of the applicant will help prevent disorder in Magilligan Prison. Other transferred prisoners will know that criminal misconduct has consequences and that if they want to remain in the prison to which they have been transferred, that they must abide by the rules. I also consider the decision to be proportionate. The applicant can still have contact with J and K as at present by phone. Ms Ferguson can travel over to Scotland to visit him. I accept that this may be more inconvenient but she managed perfectly well without suffering any apparent adverse consequences when she went for a period of nine months without any contact with the applicant whatsoever.

[11] Finally, in respect of the Article 8 rights of K and J and that is assuming that K does have Article 8 rights (see above) I find that there is no evidence given the

contact and the nature of the contact that the applicant has had over the past year that they have been infringed (see above). There is no evidence given the nature of their previous contact and in particular from January 2012 that lack of personal contact has impacted adversely on them. They seem to be managing perfectly well by speaking to the applicant on the telephone, which of course they can still do when he moves to Scotland. If, contrary to my conclusion their Article 8 rights have been infringed then I consider that interference is for a legitimate reason namely to prevent criminal activity or disorder at Magilligan. I also consider it to be proportionate. Finally, if there has been a failure to consider the Article 8 Rights of the child or children, then given the circumstances of their contact with the applicant prior to the decision, and their likely contact afterwards, such consider would have made no discernible difference to the decision maker acting lawfully: see Belfast City Council v Miss Behavin' Ltd (2007) 1WLR 1420.

[12] A prisoner has no rights under the Convention or at common law to be imprisoned where he chooses, save in exceptional circumstances. If he is granted a concession so as to enable the contact which he has with his family to be more convenient, it is a concession which is usually granted subject to conditions. If the prisoner breaches those conditions this does not convert what was a concession into a right guaranteed by the Convention or by common law. The applicant, and any other prisoner, must realise that actions have consequences and if they are transferred subject to their good behaviour, then if they misbehave they will in normal circumstances be returned from where they came. In those circumstances they have only themselves to blame.

[13] On the facts of this particular case, I do not consider that the applicant has overcome the modest threshold necessary to obtain leave. I conclude that none of the grounds relied on by the applicant give rise to a reasonable prospect of success.