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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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Chakwana's (Tonderai) Application (Leave Stage) [2010] NIQB 72

IN THE MATTER OF AN APPLICATION BY TONDERAI CHAKWANA FOR LEAVE TO APPLY FOR JUDICIAL REVIEW OF A DECISION OF THE NORTHERN IRELAND PRISON SERVICE REFUSING TO ALLOW HIM TO PROGRESS TO THE ENHANCED REGIME

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TREACY J

[1] The applicant Tonderai Chakwana is a sentenced prisoner serving a determinate sentence at HMP Magilligan. By this application he seeks, inter alia, an order quashing the decision of the Northern Ireland Prison Service ("NIPS") refusing to allow him to progress to the enhanced regime, made in or about May 2009.

Background

[2] On 6 March 2009 the applicant was convicted of one charge of rape and on 3 April 2009 he was sentenced to six years imprisonment. He has appealed against that conviction. The applicant was transferred from HMP Maghaberry to HMP Magilligan on 22 April 2009 and has from 3 April 2009 been a standard prisoner within the prison regime.

[3] Following his conviction and sentence the applicant attended a meeting with the Resettlement Board on 6 May 2009 in order to agree his sentence plan. Subsequent to the Resettlement Board meeting the applicant was referred to the Psychology Department for an assessment of his suitability to attend offending behaviour programmes.

[4] The respondent operates only one programme for offenders such as the applicant namely the Sex Offender Treatment Programme ("SOTP"). On 8 June 2009 the applicant was assessed as being unsuitable to attend the SOTP on the basis that he was appealing against his conviction and therefore did not accept responsibility for his offence. As explained by Tracey Murray,

Prison Psychologist, in her affidavit a fundamental requirement of the programme is that participants accept responsibility for their sexual offending as convicted by the courts. Participants must be able to discuss their sexual offending and their thoughts and feelings associated with this in order to progress through the programme. During interview on 8 June the applicant had stated that he was innocent of the offence for which he had been convicted and intended to appeal. He refused to discuss any aspect of his sexual offending and since the applicant was, as Ms Murray put it in her affidavit, "in denial" of any sexual offending at this time he thereby excluded himself from participating in the programme. Individuals are assessed for the programme according to strict guidelines issued by the Minister of Justice. In view of the applicant's stance the Psychology Department was unable to progress any further assessment for the programme as this involves in-depth discussion around the sexual offences committed and the level of responsibility held by the offender for such offences.

[5] The SOTP is the only programme within HMP Magilligan which would have allowed the applicant to address his sexual offending. The applicant was also advised that should his position change the Psychology Department would then *review* his situation in relation to the programme.

[6] The applicant seeks to challenge his inability to progress from standard to enhanced regime through the Progressive Regimes and Earned Privileges Schemes (PREPS). The Scheme provides three levels of prison regime with the applicant currently enjoying standard status. The introduction to the Scheme sets out the purpose of the Scheme as being "to encourage prisoners to engage in developmental activities *and* to address their offending behaviour in preparation for their release." One of its key aims is to encourage and reward prisoner's commitment to the completion of their sentence plan and compact agreement through participation in, inter alia, the offender behaviour programmes and thus motivate prisoners to address their offending behaviour and to reduce the risk of further offending on release.

[7] The applicant received favourable PREPS performance reports whilst at Magilligan, he is well behaved and has no disciplinary record. According to Governor Woods the difficulty for the applicant is that this *in itself* is insufficient to allow him to progress to the enhanced regime. Under the Scheme for a prisoner to be considered for promotion to enhanced regime level a particular assessment factor to be taken into account will be the prisoner's reduced risk of harm or reoffending. Whilst not the sole factor it is a critical factor and one which currently prevents the applicant being assessed as suitable for progression to the enhanced regime. Although the applicant's sentence is subject to appeal the Prison Service treats him as sentenced by the courts since, as Governor Woods points out, to do otherwise would be to treat him differently on the basis that he might overturn his conviction.

[8] As para 114 of PREPS makes clear addressing offending behaviour lies at its heart. Para 114 states:

> **"Addressing offending behaviour is at the *heart* of PREPS so it is essential that attendance on prisoner programmes and courses, as required according to identified risk and need, are undertaken with this purpose in mind and not merely as a method of progressing through the PREPS regimes or to gain extra privileges . . . A prisoner who continuously refuses to admit his guilt or avoids taking a required programme when recommended by professional staff cannot be deemed to be addressing their offending behaviour and may be subject to a reduction in regime level."**

The arguments

[9] The applicant submitted that it was unreasonable for the NIPS to make his progression to enhanced level dependent upon attendance on a course where he must admit guilt particularly where, as here, he is in the process of appealing his conviction and there is therefore no prospect of him admitting his guilt. It is further submitted that NIPS had fettered its discretion in allegedly failing to take into account the individual circumstances of the applicant. The respondent challenged the submissions contending that its decision could not be condemned as irrational or unreasonable, denied that the policy relating to those who can participate in SOTP was inflexible or rigid and contended that properly analysed the respondent applied and then gave effect to the legitimate aims encapsulated in PREPS.

Discussion

[10] Once sentenced the Prison Service treat the prisoner as guilty, as determined by the court, irrespective of the individual's plea or belief. From an operational perspective it is perfectly reasonable that the respondent proceeds on the basis of the guilt of its inmates, as determined by the courts. The presumption of innocence which attaches to an untried prisoner on remand cannot extend to those who, although convicted, dispute their guilt. Moses J, in ***Potter v SoS for the Home Department*** **[2001] EWHC Admin 1041** at para 72 stated:

> **"There is every justification for linking a system of privileges to a system of sentence planning, which *must* operate on the basis that a prisoner is guilty of the offences for which he is convicted."[**emphasis added**]**

[11] Moses J at paras 42-45 stated:

> **"42. There is, to my mind, nothing unfair or inappropriate in requiring a sex offender, guilty of serious sexual offences as these claimants were, to attend at SOTP, *even if he denies* he is guilty of those offences. It is a key purpose of imprisonment to encourage constructive behaviour by a prisoner and thereby reduce the risk of his reoffending and increase protection of the public. It is, therefore, fair and rational to encourage participation in a course which may reduce risk of reoffending by means of the schemes for providing an incentive to attend such a course and granting privileges to those who undertake such courses.**
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> **43. Prison management is entitled to operate IEPS and the court is entitled to proceed on the basis that a prisoner, once convicted, is guilty of the offences that form the subject matter of those convictions. A prisoner is not entitled to rely merely upon his assertions of innocence to excuse himself from confronting his offences. Were it otherwise, the system of rewarding those who are prepared to confront their offences would be undermined. One who denies his offence should not reap the same rewards as one who is prepared to admit and confront them.**
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> **44. It can hardly be supposed that one who at first denies his sexual offences should straightaway be excused attendance on an SOTP. But if he persists in his denial, at what stage is it to be said that the denial is so entrenched that it is inappropriate to expect him to attend such a course? The question whether his denial is a good reason for non-attendance will depend upon the individual circumstances of the particular prisoner.**
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> **45. Those circumstances are considered in the process of sentence planning, as the facts of these particular claimants demonstrate. Sentence planning lies at the heart of the IEPS .... Prisoners are encouraged to achieve the targets set in the individual process of sentence planning by the IEPS. It is through that process that that which can be reasonably required of a prisoner is ascertained……."**

[12] In ***Ex parte Hepworth & Winfield*** **[1997] EWHC Admin 324** Laws J considered the refusal of the equivalent of enhanced status to those who denied their sexual offences stating at para 65:

> **". . . I have some misgivings in principle as regards the privilege cases. They are attempts to review executive decisions arising wholly within the context of internal prison management, having no direct or immediate consequences for such matters as the prisoners' release. While this court's jurisdiction to review such decisions cannot be doubted, I consider that it would take an exceptionally strong case to justify its being done . . . I think that something in the nature of bad faith or what I may call crude irrationality would have to be shown, which is not suggested here."**

[13] Further in relation to the question of fettering of the prison's discretion Laws J stated at para 66:

> **". . . As regards the question whether there is an unlawful fetter of discretion, I cannot think that a clear system for incentives within the prison can sensibly be expected to operate if its administrators have to consider whether in any individual case the scheme's established criteria ought to be disapplied . . . there is no principle of our administrative law which says, in milieu such as this, that there cannot be black-and-white rules."**

[14] The applicant relied on ***Cannan v Governor of HMP Full Sutton*** **[2009] EWHC 1517** in support of the proposition that there could be circumstances in which it would be unreasonable to require a prisoner to attend a course which it was known the prisoner would not attend because he would never admit his guilt. Williams J at paras 28-32 of his judgment in that case referred to the earlier case of ***Potter*** cited above and stated:

> **"28. In Potter all four claimants contended that it was unfair and contrary to the national and local published schemes to require them to attend SOTPs in the face of their denial of guilt. Alternatively each prisoner contended that a scheme which required someone who denied an offence to attend an SOTP was irrational.**

> **29. Moses J set out his conclusions on those issues in paragraphs 42 to 45 of his judgment.** [paras 42-45 are set out at para 11 of this judgment above].
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> **30. Moses J went on to reject the claims of Mr Potter and the other Claimants (save to an extent which is irrelevant to these proceedings). The Claimants sought permission to appeal, first from Moses J himself then, upon his refusal, from the Court of Appeal. That court, consisting of Laws and Keene LJJ, refused permission. In paragraphs 11 and 12 of the judgment of Keene LJ he quoted and specifically approved paragraph 42 of the judgment of Moses J (set out above).**
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> **31. In the light of the decision in Potter it is easy to understand why the Claimant lays stress upon the need for this Court to consider all the circumstances of his case. It is clear, in my judgment, that Potter is authority, binding upon me, to the following effect. First,** ***there is nothing intrinsically unfair, unreasonable or irrational in requiring a prisoner, as part of the sentence planning process, to apply for and if successful undertake, a course designed to reduce the risks of his re-offending. That is so even if the offender maintains his innocence of the crime or crimes of which he has been convicted and eligibility for the course in question requires the offender to admit guilt. Further there is nothing intrinsically unfair, unreasonable or irrational in declining to grant such a prisoner enhanced status if he refuses to apply for and/or undertake such a course.***
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> **32. ... Moses J stopped short of holding that such requirements upon a prisoner could never be unreasonable or irrational. He was, at least, prepared to contemplate that there might be circumstances which would justify a conclusion that requiring a prisoner to apply for and attend a course when it was known that the prisoner would not apply or attend since it was known that the prisoner would never admit his guilt would be irrational or unreasonable."**

[15] Even if, as a matter of theoretical possibility, there might (as ***Potter*** and ***Cannon*** appear to recognise) be some exceptional individual circumstances which could render imposition of the requirement in a particular case irrational this case does not partake of that degree of exceptionality. And as

appears from para 5 above should the applicants position change the Respondent would then review his situation in relation to the programme.

Conclusion

[16] The decisions in ***Hepworth*** **[1997],** ***Potter*** **[2001],** and ***Cannon*** **[2009]** constitute an unbroken line of persuasive authority against the applicant's submissions. I can discern no reason in logic or principle as to why the Court should depart from these authorities, which I propose to follow, and accordingly the application must be dismissed.