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Judgment: approved by the Court for handing down | *Delivered:* **20/05/09**

*(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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Coll (Edward) Walmsley (Mary) and Walmsley (Desmond Junior)'s Application for Judicial Review [2009] NIQB 47

AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW BY EDWARD COLL, MARY WALMSLEY AND DESMOND WALMSLEY JUNIOR

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AND IN A MATTER OF DECISIONS TAKEN BY THE MINISTRY OF JUSTICE DATED 18 JULY 2008 AND 30 JANUARY 2009

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MORGAN J

[1] The first named applicant was convicted in England of 2 offences of wounding with intent. As a result of his previous convictions he received an automatic life sentence under the sentencing regime then in operation. His minimum period of custody was set at 3½ years and expired in September 2006. He initially served a sentence in England in HMP Swaleside but applied for and was granted a transfer to Maghaberry in June 2006. The relevant provisions governing the transfer prisoners within the British Isles are contained in the Crime (Sentences) Act 1997 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. In this case it was a condition that the transfer was a restricted transfer so that the applicant was treated as if he were still subject to the provisions applicable under the law of the place from which the transfer was made and as a result he remained liable under paragraph 7 of Schedule 1 to be transferred back to the country from which he was transferred.

[2] The written terms of transfer were provided to the applicant in a document dated 12 January 2006 and included the following.

> "You will be expected to comply fully with the rules and regimes of any establishment in which you may

> be detained in Northern Ireland and failure to do so may result in your immediate return to a prison in England and Wales."

On 18 July 2008 the National Offender Management Service wrote to the first named applicant stating that the Northern Ireland Prison Service had requested his return to a prison in England and Wales. The letter indicated that the applicant had wilfully refused to comply with rules and regulations governing prisoners in Northern Ireland and have been the subject of a number of adjudications. He had been given a number of opportunities to address his behaviour but had not done so. In addition it was stated that he requested transfer to Northern Ireland in order to receive visits from family members resident in Northern Ireland, specifically his cousins Margaret Duffy and Paddy Weir. The letter stated that he had not received visits from family members nor had his father and brother with whom he had made contact visited. In those circumstances the Secretary of State was satisfied that he had failed to comply with the rules and regimes governing prisoners in Northern Ireland and that the purpose of the transfer i.e. family visits was not being met. He ordered the first named applicant's return to a prison in England and Wales. The letter was given to the applicant on 21 July 2008 and he was removed from his cell to go to England early on 23 July 2008.

[3] The first named applicant's solicitors sought fuller reasons for the decision by letter dated 28 July 2008. By letter of 12 August 2008 the proposed respondent indicated that the first named applicant had consistently failed to comply with the rules and regimes of the establishment. He had made little progress in addressing his offending behaviour and was argumentative and aggressive making it impossible for staff to engage constructively with them. He failed 2 mandatory drugs tests and been found guilty of three separate breaches of prison discipline. At a case conference on 16 April 2008 he was told that he would be given a limited period of six months to show progress or he would be returned to England and Wales. Following a further incident in May 2008 which involved allegations against staff he was warned that if the allegations proved to be false that consideration be given to his immediate return to England. The allegation related to an incident where the applicant had gone on to a landing which he did not have prior permission to attend. He now alleges that the prison officer who reported him was manipulating the regime system. The result of this was that the applicant failed to get on the enhanced regime. He alleged that the prison officer made a throat slitting gesture but this was subsequently found to be without merit. This correspondence repeated the suggestion that he had not received family visits. The applicant's solicitors responded promptly on the same day indicating that they had instructions that the second and third named applicants, his mother and brother, and his father had visited him on approximately 30 occasions.

[4] There was further inconclusive correspondence but on 14 October 2008 the first named applicant obtained legal aid authority to conduct investigations and file proceedings. By 18 November 2008 at the latest the applicant's solicitors had access to his Parole Board dossier which included a report dated 23 November 2007 referring to family visits and the potential benefit for the first named applicant of those visits. The report described the first named applicant as something of an enigma who at times has struggled in the prison regime but nevertheless has begun to engage relatively successfully with education and counselling. The report noted that the first named applicant continued to be unable or unwilling to accept full culpability for the offences for which he received a life sentence. He was assessed as posing a serious risk of causing harm although making good progress.

[5] By a further lengthy letter of 9 December 2008 the applicant's solicitors challenged the assertion that the first named applicant consistently failed to comply with the rules and the regime in HMP Maghaberry. They noted that the first named applicant instructed them that he had achieved enhanced status on two separate occasions. The letter noted that the applicant had not made any complaint in relation to the conduct of a prison officer although it appears that his family did so and the applicant apparently approved that complaint. They made the further point that the applicant was receiving family visits. The latter point was accepted in a reply of 16 December 2008. A letter before action was sent by the applicant's solicitors on 28 January 2009 and this appears to have crossed with a letter of 30 January 2009 from NOMS in which the proposed respondent indicates that it remained the view of the Secretary Of State that it was appropriate to order the return of the first named applicant but that a period of temporary transfer to Northern Ireland to facilitate family contact would be considered. It was pointed out that one of the reasons that the first named applicant had made limited progress was because his failure to accept full responsibility for his criminal record prevented him accessing at least one of the necessary courses.

[6] Legal aid applications on behalf of the second and third named applicants were not made until 2 March 2009 and the proceedings were not issued until 5 March 2009. The extensive grounds on which the application has been made are set out below.

> "(a) The impugned decisions, being the initial decision of 18 July 2008 and the confirmation decision 30 January 2009 were unfair to the applicants in that:
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> (i) In the context of the initial decision the Applicants were not afforded any or any adequate natural justice in that they were not advised that a decision was being considered to remove the Applicant Edward Coll back to

England; they were not told what material adverse to them was being considered in the context of that decision and were not asked to make representations in respect of that decision, prior to the initial decision being taken

(ii) In the context of the confirmation decision that decision was tainted by the unfairness in respect of the initial decision – in that the Applicant Edward Coll had already been moved from Northern Ireland to England by the time of the confirmation decision and the decision-maker was taking these changed circumstances and relevant factors into account in taking his confirmation decision, when in fairness to the Applicants these changed circumstances and relevant factors should never have arisen for them to be taken into account at all.

(b) The impugned decision were unfair and unreasonable in that in the course of taking the decisions the decision-maker concluded that the Applicant, Edward Coll had 'consistently failed' to adhere to the rules and regulations within HMP Maghaberry whereas in truth and in fact that Applicant had on the whole conformed with the regime at HMP Maghaberry, so much so that he had been promoted to Enhanced Regime within the prison on two occasions during his stay at HMP Maghaberry, on each occasion having shown prolonged adherence to the rules and good behaviour generally within the prison; in this context the conclusion that that Applicant had 'consistently failed' to adhere to rules and regulations was irrational.

(c) Alternately in coming to the impugned decisions the decision-maker acted unreasonably in failing to take into account relevant factors, namely that the Applicant Edward Coll had shown sustained periods within the prison where his behaviour had been good and had been rewarded by his being given Enhanced Status.

(d) The impugned decisions were unfair and unreasonable in that the decision-maker unreasonably concluded that the Applicant Edward Coll had 'made little progress in addressing his offending behaviour since his arrival in Northern Ireland' whereas in truth and in fact that Applicant had shown himself to be committed to addressing his offending behaviour whilst in Northern Ireland, had engaged in a number of initiatives and courses in this regard and had made progress in this regard which had been characterised as 'good' by his Probation Officer; in this context the conclusion that that Applicant had made 'little progress' was irrational.

(e) Alternately in coming to the impugned decisions the decision-maker acted unreasonably when coming to the conclusion that that Applicant had made 'little progress' in that the decision-maker did not take into account all the material that was relevant in showing that that Applicant had in fact made 'good progress' in addressing his offending behaviour.

(f) The impugned decisions were unfair and unreasonable in that they breached a legitimate expectation of the Applicants, known to the decision-maker, and induced by representations of members of the Northern Ireland Prison Service on 16th April 2008 that the Applicant Edward Coll would be given a further 6 months in Northern Ireland to show an improvement in his behaviour before consideration was given to returning him to England; in this context the impugned decisions breached the substantive and procedural legitimate expectations of the Applicant.

(g) The impugned decisions were unreasonable in that the decision-maker failed to take into account a relevant factor in that he failed to take into account at all the fact that the Applicant Edward Coll was receiving visits from his family on a regular basis at the time of his removal to England.

(h) Furthermore the impugned decisions were unreasonable in that the decision-maker took irrelevant factors into account took into account an allegation that the Applicant Edward Coll was

receiving no family visits whilst in Northern Ireland (and treated this as a fact).

(i) The impugned decisions were unreasonable in that the decision-maker sought to impose a 'de facto' condition on the Applicant Edward Coll's transfer (after the time when the transfer was made) to the effect that that it was a condition of that Applicant's transfer that he avail of family visits in Northern Ireland, in a manner which was unlawful and unreasonable and contrary to the spirit of Schedule 1, paragraph *5* of the Crime Sentences Act 1997.

(j) The impugned decisions were unlawful in that they violated the rights of the various Applicants under Article 8 ECHR; in coming to the impugned decision the decision-maker failed to strike any or any proper balance between the rights of the various Applicants and any other countervailing legitimate aims. "

[7] In relation to each of the ground it seems clear that the factual matters relating to them was within the knowledge of the first named applicant at all times. The same is true in relation to those matters relating to family visits so far as the second and third named applicants are concerned. Indeed the solicitors for the first named applicant wrote to the proposed respondent on 12 August 2008 having taken instructions in relation to the family visit issue. In my view all of the material necessary to maintain the application which the applicant pursues in relation to the decision made on 18 July 2008 was clearly within the knowledge of the applicants by 12 August 2008 at the latest. It is common case that all of the material on which the applicant relied by way of evidence was certainly within the control of the applicants' solicitor by 18 November 2008 when this information was forwarded to counsel. By virtue of Order 53 Rule 4 an application for leave to apply for judicial review should be made promptly and in any event within three months from the date when grounds for the application first arose. This application is made approximately 7½ months after the decision of 18 July 2008 and the applicants must now establish that there is good reason for extending the period within which the applications are made.

[8] I have already indicated that all of the information necessary to sustain the grounds upon which the applicants seek leave to challenge this decision was available to them within one month of the decision. Even if I accept that further information became available in November 2008 it was still a further 3½ months before the application was pursued. The first named applicant had legal aid from early October 2008 and there is simply no explanation for

the failure to initiate proceedings. The second and third named applicants did not seek legal aid until 2 March 2009 and no explanation for that has been offered. This case is concerned with a prisoner subject to a life sentence. As is apparent from the papers a person in the position of the first named applicant needs to be provided with support and access to courses that are likely to be beneficial to him. If there is a delayed challenge to the location at which he is to reside this is likely to be disruptive to the planning of this rehabilitation. This is, therefore, a case where delay is of significance to good administration.

[9] I consider, therefore, that this application should be refused because of delay. It is apparent that the challenge to the decision of 30 January 2009 is in fact a challenge to the decision of 18 July 2008. I do not consider that it can affect the delay issue. I certainly accept that it would be open to the applicant to challenge any failure on the part of the prison service to recognise his right to family life which is referred to in the letter of 30 January 2009.

[10] I will, however, express my views briefly in relation to the proposed grounds of challenge. The first question relates to the nature of the notice that must be provided where a decision to transfer a prisoner on the basis of disruptive activity in his part is being contemplated. The prison authorities have an obligation to maintain good order and discipline within any unit and where a prisoner has given rise to disruptive and argumentative behaviour the prison service is unlikely to be criticised if it gives limited notice of a decision which the prisoner is unlikely to welcome. That does not, of course, prevent a challenge to the decision but perhaps emphasises the need to ensure that the challenges are brought promptly.

[11] The applicant contends that the decision was unfair and unreasonable in that the decision maker concluded that the first named applicant had consistently failed to adhere to the rules and regulations. Consistent failure was not, of course, the standard contained in the transfer conditions. It was not the term used in the original letter but was used in subsequent correspondence. In my view it refers in context to the fact that this applicant had more than one incident of disruption within the prison evidenced in this case by his disciplinary record. That does not conflict with the fact that on occasions this man had achieved enhanced status.

[12] Although the evidence indicates that the first named applicant had engaged with some aspects of the rehabilitation programme within the prison his failure to face up to the consequences of this offending behaviour was a significant impediment to making progress. I do not accept that the assessment by the prison service can be considered either irrational or unreasonable.

[13] It is common case that on 16 April 2008 at a case conference the first named applicant was advised that he would be given a limited period of six

months to show progress or he would be returned to England and Wales. The applicant contends that this gave rise to a legitimate expectation that he would not be removed for a period of six months. The first quality of a representation leading to a legitimate expectation is that it must be clear, unambiguous and devoid of relevant qualification (see ex p MFK Underwriters [1990] 1 WLR 1545). In this case there was no representation that the applicant would not be removed for six months but rather an indication that this conduct would be vital in determining whether he would be removed back to England after six months. I consider, therefore, that the legitimate expectation issue is unarguable.

[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 (1993) 15 EHRR CD 106). 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 papers was on the conduct of the first named applicant there is no reason to doubt the bona fides of the reconsideration. There is nothing to indicate that the balance which has been struck is other than proportionate.

[15] Accordingly I conclude in any event that none of the grounds relied upon by the applicants gives rise to an arguable case with a reasonable prospect of success and on that ground also I refuse this application for leave.