**Neutral Citation No: [2013] NIQB 125** | *Ref:* **TRE9067**

*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **27/11/2013**

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

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**QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)**

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**Conway's Application [2013] NIQB 125**

**AN APPLICATION BY BRENDAN CONWAY FOR JUDICIAL REVIEW**

**AND**

**IN THE MATTER OF AN ADJUDICATION AT HMP MAGHABERRY ON 25 OCTOBER 2010**

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**TREACY J**

**Introduction**

[1] This matter comes before the court again after remittal from the Court of Appeal following its judgment ([2012] NICA 11) on the appeal from my earlier decision ([2011] NIQB 40 and [2011] NIQB 49). The Court of Appeal held that subject to the issue of inflexibility the respondent's general policy of full body searching was not disproportionate.

[2] The Court of Appeal, for the reasons set out at paras 36-44 of its judgment, remitted the matter to the Trial Judge for determination of the question whether the policy was so inflexible that it was an unlawful policy. In para37 of its judgment the Court said:

> "This thus raises the question whether the full body search policy in question admits of no flexibility and is thus an unlawful and disproportionate policy."

And at para 41 the Court said it will be necessary for the Judge to consider the question whether there was in fact "total inflexibility" on the part of the Prison Service.

[3] The applicant's complaints relate to the practice of full body searching in respect of non-compliant prisoners. These prisoners are in the minority of the prison population and are, predominantly, prisoners involved in a protest in the separated wing at Roe House. The vast majority of prisoners in the Northern Ireland Prison Service ("NIPS") never undergo a non-consensual full body search because they comply with the searching policy on entry to and exit from the prison.

**Discussion**

[4] We are here concerned with an examination of flexibility shown in the confined and challenging circumstances that apply when prisoners such as this applicant refuse to comply with the normal searching regime and a non-consensual full search is required. Girvan LJ, at para 41, stated that it would be necessary for the Judge to consider the question whether there was in fact total inflexibility in the application of the policy. He said that if that were established the policy would be unlawful and disproportionate since it would preclude the exercise of any discretion to disapply the policy in any circumstances even where the dictates of proportionality might require it not to be applied in given situations.

[5] Some flexibility has been a feature of the applicant's and others experience of the full search regime. Governor Armour deposed to various occasions where exceptions have been made to the full body search policy of prisoners. He lists specific occasions in respect of 6 prisoners, including the applicant, where full body searches were **not** conducted on leaving the prison. He concludes that this demonstrates that:

> "...the Respondent's policy on the full body searching of prisoners entering and leaving prison establishments is not imposed on every occasion, no matter the pertaining circumstances. The prison authorities have the flexibility to depart from the provisions of the policy where there exist exceptional circumstances justifying that course of action in the exercise of discretion." (at para 5)

[6] I accept that the affidavit evidence identifies exceptions being made for prisoners who refused full body searching and who would otherwise have been subject to the non-consensual search arrangements. This evidence which was not controverted defeats the claim that there was "total inflexibility" in the application of the policy.

[7] The respondent contended that given the small cohort of prisoners who are involved in the Roe House protests and the related refusal to comply with full searching, the fact that there has been so many examples of discretion being exercised in the period from August 2010 speaks of a proportionate and flexible

response by the Prison Service. Whether that be so or not I accept that it does not evidence "total inflexibility".

[8] The applicant referred to various policy documents pointing out that there are no exceptions expressed on the face of the policy. However, as the evidence in this case demonstrates, the fact that there is a general rule does not mean that the policy, in practice, does not permit discretion to be exercised in exceptional circumstances. The affidavit of Governor Armour demonstrates that the discretion has been exercised notwithstanding the silence of the policy as to the existence of such a discretion.

[9] The respondent also relied on evidence that NIPS has adopted a flexible approach elsewhere to the full body search policy. In particular it referred to the additional evidenced filed by the applicant before the Court of Appeal demonstrating the modification of the *manner* of conducting searches which has occurred over time. Reference was made to the Prisoner Ombudsman having produced a report into complaints from prisoners in Roe House about full body searching in July 2011. The applicant's case is referenced at para 15 *et seq* of the report. At para 25 the Prisoner Ombudsman records that the relevant policies were fully considered in her investigation.

[10] At para 28 of the report the Ombudsman observed:

> "it was also seen to be the case that, over time, the manner of conducting searches was modified. It was evident from interviews and CCTV observations that the adjustments reduced the discomfort experienced by prisoners."

[11] At paras 44-46 she found:

> "The investigation found that the searches that were the subject of the complaints investigated were broadly carried out in line with Prison Service policy. However, variations in the manner of application of laid down search procedures, and in the approach of individual staff members, were noted.
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> 45. It was also evident that the Prison Service have, over time, modified the manner in which full body searching of non-compliant prisoners is being carried out. This has occurred in circumstances where the Roe House separated prisoners say that, whilst not consenting to or co-operating with search procedures, they will not actively resist.

> 46. It follows that there may be some circumstances where a prisoner refuses a body search and is not compliant, but it is the assessment of Prison Service that there is no threat of violence and it is unlikely that the prisoner's behaviour is likely to change unpredictably during the course of the search. In such circumstances, it is reasonable, and compliant with Prison Service policy, to modify the manner in which the search is carried out to reduce as far as possible the discomfort caused."

[12] This independent Ombudsman's report in relation to the full body search policy in Roe House highlights that the respondent was prepared to adapt their policy demonstrating some flexibility in relation to its implementation.

[13] The primary policy is that all prisoners should be subject to full searching on entry to and exit from the prison. This is a policy which the Court of Appeal, subject to the issue of inflexibility, held was lawful in that it was in accordance with law and shown to be necessary for the protection of rights and freedoms of others and the prevention of crime. The affidavit evidence establishes that the respondent does, in certain circumstances, permit exceptions to be made. The respondent's policy on full body searching prisoners entering and leaving the prison establishment is not inflexibly imposed on every occasion. As Governor Armour deposes, the prison authorities have the flexibility to depart from the policy where there exist exceptional circumstances justifying that course of action and have in fact departed from the policy on the occasions and in the circumstances referred to in his affidavit.

[14] The respondent submitted that in the context of a prison environment it is entirely defensible to have a policy that does not, on its face, admit of exceptions. Rigidity, in certain situations is entirely defensible they submitted referring the Court to para 50.4.8 of Fordham 6th Ed. Such an approach, they say, will ensure consistency of decision-making and avoid arbitrariness. Such a policy did not, in the present case, prevent the exercise of a residual discretion to address exceptional circumstances. Accordingly, the Court cannot find, on the evidence presented, that there is total inflexibility in the application of the policy precluding the exercise of discretion to disapply it when the dictates of proportionality might so require.

[15] I agree with the respondent that the above approach addresses the two conflicting imperatives of public law:

> "the first is that while a policy may be adopted for the exercise of a discretion it must not be exercised with a rigidity which excludes consideration of possible departure in individual cases ...; the second is that a discretionary public law power must not be exercised arbitrarily or with partiality between individuals or

> classes potentially affected by it…" [per Sedley J in *R v Ministry for Agriculture, Fisheries and Food ex parte Hamble Fisheries (Offshore) Ltd* [1995] 2 All ER 714]

[16] The need for such a balance was recognised by the Court of Appeal in the present case:

> "38. ... A general policy seeking to achieve the desirable aim of consistency and equality of treatment is particularly important in the context of prison life where there is a pressing need for such consistency and equality of treatment as between prisoners. But the aim of consistency cannot totally destroy the possibility that in special and, no doubt, very limited circumstances the application of the general policy may result in a disproportionate outcome and that some degree of flexibility thus must exist."

**Conclusion**

[17] As the Court has already observed the Court cannot find, on the evidence presented, that there is total inflexibility in the application of the policy precluding the exercise of discretion to disapply it when the dictates of proportionality might so require. The evidence demonstrates that there is scope for flexibility in exceptional cases. This avoids the possibility of disproportionate outcome and there is, accordingly, no illegality in the application of the policy. The desirable aim of consistency has not, in the present case, extinguished the possibility that exceptional circumstances might require departure from the policy.

**Addendum**

[18] Further to the provision of the above judgment I held a further short hearing on 3 December when counsel addressed me in relation to costs and to the issues referred to in paras 42-43 of the judgment of Girvan LJ. As to the latter I consider that these should more properly be dealt with by way of separate civil proceedings as they appear to involve matters of contested fact. It will be a matter for the applicant if he wishes to pursue the other matters and whether the County Court rather than the High Court is the appropriate forum. I do not propose therefore to convert the proceedings into a writ action under Order 53 rule 9(5) or Order 28, rule 8.

[19] The applicant has not succeeded in any aspect of his challenge to the impugned policy. The Court of Appeal ordered that the costs of the appeal be determined by the trial judge. I see no reason for departing from the general rule that the successful defendant should be awarded his costs (see Re Kavanaghs

Application [1997] NI 368). This applies to the costs above and below. As I understand the applicant is legally assisted an order in the usual terms will issue.