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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (CROWN SIDE)

IN THE MATTER OF AN APPLICATION BY MARTIN CORDEN FOR JUDICIAL REVIEW

-AND-

IN THE MATTER OF APPLICATIONS BY STEPHEN McCLEAN, NOEL McCREADY, AND ALAN CAULFIELD FOR JUDICIAL REVIEW

-AND-

IN THE MATTER OF DECISIONS TAKEN BY THE NORTHERN IRELAND PRISON SERVICE

COGHLIN J

The applicants in these associated applications are all prisoners currently serving sentences of imprisonment at Her Majesty's Prison Maze. Each of the applicants had associated himself with one of the self-styled terrorist organisations, the activities of which have produced so much human misery in this jurisdiction. In the case of Martin Corden the organisation is the Provisional Irish Republican Army, while the applicants Stephen McClean, Noel McCready

and Alan Caulfield claim to be "affiliated" with the group known as the Loyalist Volunteer Force. With the exception of Alan Caulfield, each of the applicants has been convicted of terrorist offences. On 2 February 2000 Stephen McClean and Noel McCready were convicted of murder, attempted murder and possession of firearms and ammunition with intent to endanger life and both are currently charged with attempted murder. On 10 December 1998 Martin Corden pleaded guilty to possession of firearms and ammunition with intent. On 27 March 1999 Alan Caulfield was convicted of an offence of robbery which had been de-scheduled on the basis that it was not a terrorist offence. Contrary to his solicitor's affidavit it does not appear that he was convicted of membership of an illegal organisation. It seems that Alan Caulfield was initially committed to Her Majesty's Prison Maghaberry but subsequently transferred to Her Majesty's Prison Maze at his own request. Each of the applicants seeks judicial review of decisions taken by the Northern Ireland Prison Service that the applicants should be transferred from Her Majesty's Prison Maze to Her Majesty's Prison Maghaberry. In the case of the applicant Martin Corden the initial decision for his transfer was taken on 24 July 2000, reviewed and confirmed on 16 August 2000 and confirmed again for the purposes of these proceedings. The initial decision in respect of the applicants Stephen McClean, Noel McCready and Alan Caulfield was also taken on 24 July 2000, reviewed and confirmed on 4 August, 17 August and confirmed again for the purpose of these proceedings.

The facts

Mainly as a result of the early releases resulting from the provisions of the Northern Ireland Sentences Act 1998, the population of Her Majesty's Prison Maze has been dramatically reduced. This population presently stands at 14 and these prisoners are segregated in accordance with their association with particular terrorist groups. These prisoners at the Maze are housed in two blocks, the staffing and maintenance of which make heavy demands upon the resources available to the respondent. The current cost of running a block at Her Majesty's Prison Maze is in excess of £84,000 per month. The substantial costs resulting from keeping two blocks open in order to continue to house the small numbers of prisoners remaining at HMP Maze led the respondent to consider transferring these prisoners to HMP Maghaberry with a view to closing HMP Maze. The gymnasium at the Maze has been closed and there are no longer educational facilities for the prisoners.

On 28 June 2000 a letter was written to all the relevant prisoners at HMP Maze advising them that the respondent was minded to transfer the prisoners to HMP Maghaberry and inviting each prisoner to make representations about such transfer. The Director General of the Prison Service established a special Allocations Committee to consider the issue of transfer in respect of each individual prisoner and the transfer of each of the applicants has been considered by this Committee. In each case the Committee decided to proceed with the transfer after taking into account representations by each applicant and

their legal advisers. In each case the Committee sought advice from the security governors at both HMP Maze and HMP Maghaberry with a view to ascertaining whether there was any known threat in respect of any of the applicants. In the case of each applicant, Mr Bain, the Director of Services in the Northern Ireland Prison Service made appropriate enquiries of the RUC and generally reviewed all the material put forward on behalf of the applicants in these proceedings before confirming the decision to transfer.

The regimes in place at HMP Maze and HMP Maghaberry differ distinctly in a number of important respects. There are both historical and policy reasons for these differences.

Her Majesty's Prison Maze opened in 1975 on the site of the former camp at Long Kesh and inherited prisoners who had been granted "special category status" as a result of which they were segregated into groups claiming affiliation with various terrorist organisations. These inmates had been allowed to spend their time largely free from interference by staff. On the opening of the new prison an attempt was made to introduce a policy of integration of prisoners which proved extremely contentious and, eventually, segregated conditions were restored. A further erosion of staff control took place and, in effect, prison staff withdrew from the wings. From 1994 no attempt was made to lock prisoners in their cells during the day or night. The bizarre regime which exists at HMP Maze is, unsurprisingly, unique in the UK prison system as the Ramsbottom and Narey reports of 1998 confirm.

By contrast, HMP Maghaberry, which opened in 1986, provides a regime typical of normal working prisons found in the United Kingdom and many other jurisdictions. Despite being associated with one or more of the myriad terrorist groups in Northern Ireland, prisoners in Maghaberry are held on a fully integrated basis within landings where, in general, they associate and work together. Supervision takes place by prison staff in accordance with the practices observed in the prison system throughout the rest of the United Kingdom. Upon entering or being transferred to HMP Maghaberry a prisoner is automatically placed on standard regime although, depending upon his behaviour, he may at a later date either move to a more basic regime or to an enhanced regime. The regime at Maghaberry has also successfully housed policemen, army personnel, prison officers and sex offenders.

The submissions

Mr Lavery QC appeared on behalf of the applicants, with Miss Quinlivan on behalf of the applicant Martin Corden and with Mr Browne on behalf of the applicants Stephen McClean, Noel McCready and Alan Caulfield. Mr Maguire appeared on behalf of the respondent in both cases. I am indebted to counsel for the assistance which I derived from their carefully constructed skeleton arguments and concise and helpful submissions.

Without, I hope, doing injustice to his detailed arguments, Mr Lavery QC relied upon two main submissions in support of the relief claimed by the applicants. In the first place, Mr Lavery QC submitted that any prisoner

associated with a terrorist group would be subjected to an increased risk to his life by a transfer between the segregated conditions existing in HMP Maze to the integrated conditions at HMP Maghaberry. He further argued that, since the right to life was a fundamental human right recognised, as such, both by the common law and Article 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms, any decision which brought about a real increase in the risk to life should be reviewed by the court with "anxious scrutiny" according to the relevant authorities and could only be justified by a sufficient overriding interest. Mr Lavery QC further argued that it was clear from the affidavit submitted on behalf of the respondent that the respondent had concentrated upon identifying a specific, identifiable risk to each applicant and had omitted to take into account the fact that any transfer of a terrorist prisoner from the Maze to Maghaberry would automatically give rise to a significant increase in the risk to life. Secondly, Mr Lavery QC submitted that by subjecting the applicants to the more restricted and arduous regime at Maghaberry the respondent was acting in breach of Article 7 of the Convention insofar as a heavier penalty was to be imposed upon the prisoners as compared to the time at which their respective criminal offences were committed.

On behalf of the respondent Mr Maguire reminded the court that the respondent exercised a statutory discretion in determining the prison in which a prisoner was to serve his sentence and that the exercise of such a discretion could only be impugned upon a Wednesbury basis. He maintained that, for the

purposes of exercising such a discretion, the Prison Service was entitled to adopt a policy which was that, subject to exceptions, a prisoner could normally be transferred unless it was established that to do so would result in a real or serious increase in any threat to his life. Mr Maguire argued that a simple assertion that the risk to life had been increased was not sufficient and that none of the applicants in these proceedings had established a sufficient evidential foundation to show that any threat to their lives would materially increase as a result of a transfer to Maghaberry. According to Mr Maguire this was essentially a factual issue in relation to which the judgment of the Prison Service should be allowed to stand unless it was successfully impugned as Wednesbury unreasonable. Mr Maguire submitted that it was wholly unreasonable to read the affidavits lodged on behalf of the respondent as indicating that the respondent had not been aware that any transfer from HMP Maze to HMP Maghaberry would, in itself, increase, to some extent, the risk to the life of a transferred prisoner. Mr Maguire accepted that if any of the applicants had established that any risk to their lives would seriously increase as a result of transfer the degree of intensity of judicial review should be that appropriate to an increased risk to a fundamental human right namely, the right to life, but he argued that any such increase in intensity should be proportionate to the increased risk which, in the case of each applicant, he submitted was minimal.

The law

Section 15(1) of the Prison Act (Northern Ireland) 1953, as amended, provides:

> "A prisoner sentenced by any court or committed to a prison on remand or pending trial or otherwise may, notwithstanding anything to the contrary in any other enactment, be lawfully confined in any prison provided or maintained by the Secretary of State."

Section 15(2) of the same Act gives the Secretary of State power to transfer prisoners from one prison to another. It provides:

> "Prisoners shall be committed to such prison as the Secretary of State may from time to time direct; and may during the term of their imprisonment be removed, by direction of the Secretary of State, from the prison in which they are confined to any other prison."

I respectfully agree with the observations of Kerr J who, in *In Re Mark Fulton's Application* (unreported 1 September 2000) noted that the effect of these provisions was to furnish the Secretary of State with an unfettered discretion as to the movement of prisoners from one prison to another. I am further satisfied that the Prison Service was entitled to devise a reasonable policy according to which this discretion should be exercised. As a consequence of the substantial reduction in the prison population at HMP Maze, consequent upon the provisions of the Northern Ireland Sentences Act 1998, the respondent devised a policy according to which a prisoner could be transferred unless any representations on behalf of the prisoner and/or the detailed investigations and enquiries pursued by the respondent indicated that prisoner to be subject to a

specific or particular threat. In itself, I do not consider this policy to be unreasonable.

In *Fernandez –v- Government of Singapore* [1971] 2 All ER 691, a case concerning the risk of a fugitive being inappropriately tried or punished if returned under Section 4 of the Fugitive Offenders Act 1967, Lord Diplock said, at page 697:

> "My Lords, bearing in mind the relative gravity of the consequences of the court's expectations being falsified in one way or in the other, I do not think that the test of applicability of para (*c*) is that the court must be satisfied that it is more likely than not that the fugitive will be detained or restricted if he is returned. A lesser degree of likelihood is, in my view, sufficient; and I would not quarrel with the way in which the test was stated by the magistrate or with the alternative way in which it was expressed by the Divisional Court. 'A reasonable chance', 'substantial ground for thinking', 'a serious possibility' – I see no significant difference between these various ways of describing the degree of likelihood of the detention or restriction of the fugitive on his return which justifies the court giving effect to the provisions of Section 4(1)(c). But judged by any of these tests or by applying, untrammelled by semantics, principles of commonsense and common humanity which are subsumed by the Act, I can see nothing in the evidence in the instant case to justify discharging the appellant on the ground that 'he might, if returned' be …. detained or restricted in his personal liberty by reason of ….. his political opinions'."

In the recent case of *Osman –v- United Kingdom* (29 EHRR 245) the relatives of Ahmed Osman claimed a violation of Article 2 of the Convention on the basis that the police had failed to protect him after Paul Pagent-Lewis, a teacher, had formed a disturbing attachment. The court held that, on the facts of the case, there had been no violation of Article 2 but it examined the scope of the

right to life in cases, involving a positive obligation on the State to protect life, and stated, at page 305 paragraph 116:

> "Accordingly not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. … In the opinion of the court where there is an allegation that the authorities have violated their positive obligation to protect the right to life in the context of the above-mentioned duty to prevent and suppress offences against a person, it must be established to its satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk."

The court rejected the argument that the failure to perceive the risk to life or to take preventative measures must be tantamount to gross negligence or wilful disregard of the duty to protect life and observed that it was:

> "… sufficient for an applicant to show that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge. This is a question which can only be answered in the light of all the circumstances of any particular case."

In the Divisional Court in *R v Lord Saville and others ex parte A* (unreported 17 June 1999) Roch LJ, after a review of the authorities relating to alleged interference with fundamental human rights observed at page 461:

> "The law is that such rights are to prevail unless either the threat that they will be infringed is slight or there is a compelling reason why they should yield."

Finally, in *R –v- Secretary of State for the Home Department ex parte Turgut* (unreported Court of Appeal (Civil Division) 28 January 2000), a case involving a claim that the applicant would be subjected to torture or inhuman or degrading treatment contrary to Article 3 of the Convention if he was returned to Turkey, Simon Brown LJ stated that the issue was whether "… the Secretary of State was bound to find a risk of this particular applicant being ill-treated to be a real one." In the course of the same judgment, the learned Lord Justice had referred to the ECHR test as to whether a 'serious risk' of inhuman or degrading treatment had been established in Article 3 cases.

Conclusions

The alleged breach of Article 7(1) of the Convention.

I respectfully agree with the observations by Kerr J in *In Re Fulton's Application* (unreported Northern Ireland High Court 1 September 2000) when he expressed the view that the conditions in which a prisoner is held must be distinguished from the penalty imposed by the court. As the learned judge then noted such conditions are a matter for the prison authorities, the Board of Visitors and, in certain circumstances, the Secretary of State. The court has no role in determining these conditions. Accordingly, I reject the submission based on Article 7.

The right to life/Article 2 of the Convention.

It seems to me that, in deciding whether to exercise the discretion to transfer the applicants in accordance with Section 15(2) of the Prison Act, the

Prison Service was required to take into consideration whether it had been established that such a transfer would result in an increase to the threat to the life of any applicant, the extent of any such increase and whether, in the circumstances of any particular individual, such an increased risk was justified by the requirements of the Prison Service. The discretion to transfer has been specifically entrusted by Parliament to the Prison Service and the court must not usurp the role of the primary decision-maker. However, where the result of a flawed decision may imperil life a special responsibility lies on the court which will subject the decision-making process to "anxious scrutiny" or "rigorous examination" – see *R –v- Home Secretary ex parte Bugdaycay* [1987] 1 AC 515 at 531 and *R –v- Secretary of State for the Home Department ex parte Turgut* [Court of Appeal transcript 28 January 2000 at page 11). This higher level of intensity of review will be applied by the court to both factual and policy decisions reached by the decision-maker. This is an Article 2 case and I approach this case on the basis that Article 2 is applicable but I bear in mind the words of Simon Brown LJ in *Turgut* when he said, at page 11:

> "I therefore conclude that the domestic court's obligations on an irrationality challenge in an Article 3 case is to subject the Secretary of State's decision to rigorous examination, and this it does by considering the underlying factual material for its self to see whether or not it compels a different conclusion to that arrived at by the Secretary of State. Only if it does will the challenge succeed."

In *Turgut's* case the court recognised that there was a conflict of opinion as to the degree of risk and it is clear that both Simon Brown LJ and Schiemann

LJ entertained some reservations about the decision, the former referring to a 'lingering sense of unease' while, at page 17, the latter said specifically:

> 'I share my Lord's view that the Secretary of State was not perverse in concluding that he would not (be subjected to Article 3 ill-treatment), albeit that I consider that he would not have been perverse had he come to the opposite conclusion. In those circumstances there are no grounds for intervention by this court.'"

In the context of these principles I have carefully considered the steps taken by the respondent to assess any increase to the risk to the lives of these applicants likely to result from transfer to Maghaberry. I am satisfied that the procedure followed by the respondent was both conscientious and painstaking incorporating, as it did, the setting up of the special Allocations Committee to consider the case of each applicant and to receive any relevant representations, the willingness to receive further representations, if so required, the gathering of intelligence both within the prison system and from the RUC, the additional review, carried out by Mr Bain, which included the material submitted on behalf of the applicants in the course of these judicial review proceedings and the willingness to remain open to the receipt of any further information or representations which might be submitted. The affidavits filed on behalf of the respondent indicate that this process, quite properly, concentrated particularly upon the task of identifying any specific or particular threat to one of the applicants. This type of threat was identified in relation to the INLA prisoners

convicted of the murder of Billy Wright, who, themselves, were regarded as posing a risk to prison staff, and, accordingly, a decision was taken not to proceed with the transfer of these prisoners. However, the applicants make the case that in the course of carrying out this process, the respondent failed to take into account any increase in the risk to the life of a prisoner which, logically and inevitably, arose simply from the change from the Maze regime to the regime at Maghaberry. Paragraph 5 of the affidavit sworn by Brian Noel McCready, Assistant Director of Operational Management in the Northern Ireland Prison Service, indicates that this specific risk was drawn to the attention of the Allocation Committee by Mr Corden. At paragraph 6 of the same affidavit Mr McCready recorded that:

> "The members of the Committee were all aware that HMP Maghaberry is an integrated regime but in the applicant's case the Committee's view was that in no sense was he at greater risk in Maghaberry as a consequence of that regime."

At paragraph 4 of his second affidavit Mr Bain said, in relation to Martin Corden:

> "It remains the position that if the applicant is transferred to Her Majesty's Prison Maghaberry the assessment of the Prison Service is that he will not be exposed to risk."

In relation to the applicants Stephen McClean, Noel McCready and Alan Caulfield Mr Forde, Assistant Director of Policy and Professional Services in the Prison Service, provided an affidavit dealing with the consideration of the applicants' representations by the Allocation Committee and recorded that:

> "Moreover, the Committee noted that each applicant in his representations had not disclosed any specific or particular threat to him. In these circumstances and as there was no other factor which the Committee was aware of which would make any applicant unsuitable for transfer it was decided that a recommendation should be made in each case that the applicant be transferred to Her Majesty's Prison Maghaberry."

Paragraph 6 of the same affidavit Mr Forde stated that:

> "The members of the Committee were all aware that her Majesty's Prison Maghaberry is an integrated regime but in each applicant's case the Committee's view was that in no sense was the applicant at greater risk in Maghaberry as a consequence of that regime."

At paragraph 5(ii) of his affidavit of 4 September 2000 Mr Bain confirmed the view of the Allocation Committee that these applicants could be safely and securely housed in the integrated regime at Maghaberry.

During the course of the oral submissions Mr Maguire candidly accepted that, as a result of the unique segregated system at the Maze, the transfer of a terrorist prisoner to the normal conditions at Maghaberry logically would, in itself, involve some increase in the risk to that person's life. However, he urged the court to accept that, on a fair reading of the affidavits, any such increase in risk must have been taken into account by the respondent, that no reasonable decision-maker could regard any such increase in risk as anything but "slight" and that, in the circumstances, even if the respondent had failed to take into account any such increase in risk the increase was so slight that no reasonable decision-maker could have come to any other decision but to transfer and that,

accordingly, the court should exercise its discretion to refuse to grant relief to any of the applicants.

I have carefully considered all the materials in this case, in accordance with the authorities cited together with the helpful submissions which have been made to the court. Having done so, I have come to the conclusion that it would not be fair, reasonable or realistic to infer from the affidavits furnished on behalf of the respondent that the respondent did not take into account any increase in the risk to life of an applicant which might result simply from the transfer between the two prison regimes. I have formed the view that they did take this factor into account but, having done so, did not consider that such risk was anything by slight. In the circumstances, adopting the approach articulated by the Court of Appeal in Turgut I do not consider that the material placed before the court compels a different conclusion to that of the respondent in relation to any of the applicants and, accordingly the applications will be dismissed.

I have noted earlier in this judgment that the applicant Alan Caulfield does not appear to be a convicted terrorist and that, during the course of the hearing, I was informed that, contrary to the averment contained in the solicitors affidavit, he was not convicted of membership of an illegal organisation. The robbery of which he was convicted was de-scheduled on the basis that there was nothing to indicate paramilitary involvement. I was also informed that, having been convicted of a non-terrorist crime, Alan Caulfield was originally committed to HMP Maghaberry and that the subsequent transfer to the Maze was at his

own instigation, but did not occur as a result of any allegation or complaint of threats or intimidation. I regard the false assertion in the affidavit and the failure to deal with Alan Caulfield's original admission to Maghaberry as serious matters. In making applications for judicial review the applicant must show uberrima fides and make full and frank disclosure of all material facts. If leave was obtained on the basis of false statements or the suppression of material facts the court may refuse an order on this ground alone and, in appropriate cases, may set aside a grant of leave – see *R v Jockey Club Licensing Committee ex parte Wright* (1991) COD 306 and *ex parte Lawrence* (The Times 13 July 1999). However, if his application had been otherwise successful I would have been very reluctant to withhold relief by an adverse exercise of the courts discretion in a case involving a fundamental human right.

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