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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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Craig's (James Junior McKinstry) Application [2010] NIQB 45

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AN APPLICATION FOR JUDICIAL REVIEW BY JAMES JUNIOR McKINSTRY CRAIG

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STEPHENS J

Introduction

[1] The applicant, James Junior McKinstry Craig, is a prisoner at Maghaberry Prison, serving a life sentence for murder. He undertakes work in prison for which he is paid. In these proceedings he challenges the provisions of the Prison Service policy adopted in April 2008 in relation to the use of prisoners' money which policy restricts the passing of monies out of the prison by prisoners and he also challenges a decision of Governor Jeanes made on 30 July 2008 whereby, pursuant to the terms of the policy, he was refused permission to pass money out of the prison to his daughter. On closer analysis it transpires that the challenge is to two decisions of Governor Kennedy made on 28 July 2008 and 13 October 2009 rather than to the decision of Governor Jeanes.

[2] The application for leave to apply for judicial review was adjourned, it being perceived that the judicial review application brought by Ralph Phillips, which also challenged the validity of the Prison Service policy adopted in April 2008, would determine the application in this case. Judgment was delivered by Morgan LCJ in *Phillips' Application* [2009] NIQB 64 on 30 June 2009 dismissing the challenge to the policy. However factually and in summary this case differs from Phillips' application in that the money which the applicant wishes to pass out of the prison is earned by the applicant in prison whereas in *Phillips' Application* the money had been passed into the prison to him. The applicant contends that money earned in prison, as opposed to money passed into the prison, is treated differently in the Prison

Rules and furthermore that he did not have the facility, as Phillips did, of diverting money to his daughter by the device of requesting those who were to pay money into the prison, instead to give that money to his daughter. In the event, *Phillips' Application* was not determinative of this application and Weatherup J granted the applicant leave to apply for judicial review on 11 September 2009.

[3] Mr Scoffield appeared on behalf of the applicant and Ms Murnaghan appeared on behalf of the respondent. I am indebted to both counsel for their careful preparation of the case and their well-marshalled written and oral submissions.

The policy

[4] The policy is contained in a document headed "Inmate's Personal Cash Accounts". It was sent by the Deputy Director, Head of Operations, Max Murray, to amongst others all governors on 15 April 2008. The new arrangement contained in the policy came into effect on 14 April 2008. Paragraph 1 provides that no external money will be accepted to an Inmate's Personal Cash Account where the amount in the account is in excess of £500 though prisoners' earnings will continue to be credited to the account. The portion of the policy dealing with the payment out of monies provides as follows:-

> "The passing out of any money by a prisoner should only be allowed in exceptional circumstances. It is likely that any such cases will be minimal. The prisoner must make a request in writing to the governor who will consider the request on its merits. Reasons of family occasions, such as birthdays, christenings, communion or confirmations will be not be a sufficient reason to pass money out. The Prison Service is currently progressing work on introducing a voucher scheme which will be available through tuck shops. Prisoners will be able to purchase gift vouchers and post them out for such occasions."

[5] Paragraph 5 of the policy is headed "Governor's discretion in cases of genuine hardship". It gives and considers one example of genuine hardship and concludes with the following:-

> "There will undoubtedly be other issues that arise as the new arrangements are progressed. These will have to be discussed and agreed while maintaining a level of oversight and management of the

> arrangements to ensure that the purpose and effect of the new arrangements is not diluted."

The decisions

[6] By letter dated 17 April 2008 the applicant's solicitor wrote to the governor stating that the applicant had informed them that certain changes had recently been made to the arrangements for money being passed in and out of prison. That the applicant received no money from outside the prison but saves what he is given within the prison so that it can be passed from time to time out to his daughter for her support. The applicant's solicitor asked for confirmation that this arrangement would not be affected by any changes to the monetary regime within the prison.

[7] The letter was acknowledged on 21 April 2008 and it was passed on for reply to Governor Jeanes.

[8] On 2 June 2008 the applicant made his own direct handwritten request to pass money out to his daughter. A prison officer typed verbatim the applicant's handwritten request on to a computer form entitled "Request Details". Thereafter she printed out a copy of the form and gave a copy of it together with the original handwritten request to him. The details entered by the prison officer on the Request Details form were as follows:-

> "From 14 April prisoners were told that no money was allowed to go out of the jail for our visitors unless it was for something like a wedding gift or anniversary gift. I do not receive any money in when I get a visit and before this day I always left my daughter's money out. My daughter is going on holiday on 27 June and I would like to leave £250 out for her. I have a visit booked for 22 June. Thank you."

It is common case that the assertion by the applicant that money was allowed to go out of the jail for something like a wedding gift or anniversary gift was a misunderstanding of the policy by the applicant.

[9] The Request Detail form was then passed up the normal chain of command and was considered by Governor Kennedy. He spoke to Governor Jeanes who was the Residential Governor for Erne House which was where the applicant was housed at the time. There is no evidence that Governor Kennedy was made aware by Governor Jeanes of the letter dated 17 April 2008 which referred to the applicant having passed money out from time to time to his daughter for her support. It was Governor Kennedy's understanding from the Request Form that the principal reason the applicant wished to leave money

out, was because his daughter was going on holiday. Given the paucity of information contained in the Request Form he printed out a copy of the applicant's Inmate's Personal Cash Account. He took into consideration the information contained in that account and in particular that the applicant's visitors did not leave money for the applicant's Inmate's Personal Cash Account and the fact that the applicant had left out money (presumably for his daughter) before the introduction of the new policy. That the applicant was a life sentence prisoner in respect of whom no tariff period had been set. That the applicant was in receipt of £25 in earnings from which he financed his requirements in the tuck shop and was able to save money as his expenditure was relatively modest. He also took into account that the applicant only had three visitors, that he was well behaved and had tested drug free. Governor Kennedy refused the request. His decision was recorded in the following terms:-

> "I have spoken to Governor Jeanes on this matter and I can confirm that the new cash in and out for prisoners' policy and arrangements do not permit any money to be sent out except in exceptional circumstances which do not include family occasions such as holidays, weddings, etc. Following the guidelines from Prison Service headquarters I therefore refuse this request."

[10] On 30 July 2008 Governor Jeanes replied to the applicant's solicitor informing them that the applicant had requested permission to leave money out for his daughter who was going on holiday. He stated that the request had been considered against the policy and refused. The letter went on to state that in relation to the request for monies to be left out the policy directs that prisoners should only be allowed to pass money out in exceptional circumstances and that reasons of family occasions such as birthdays, christenings, communion or confirmations will not be sufficient reason to pass money out. That whilst the applicant's request was not for one of the example purposes it was not considered exceptional. In effect Governor Jeanes was informing the applicant's solicitors of the decision made by Governor Kennedy it being recollected that Governor Kennedy's understanding was that the principal reason the applicant wished to leave money out was because his daughter was going on holiday.

[11] As a consequence of this application for judicial review Governor Kennedy became aware that the applicant believed that a significant factor in his decision to refuse the request was because he considered that the purpose of leaving the money out was for his daughter to go on holiday but whereas his contention was that it was for her general support. Governor Kennedy then reconsidered his original decision and in his affidavit sworn on 13 October 2009 concluded that the general financial support of one's child, without more, did

not constitute the type of exceptional circumstance to derogate from the policy. He again declined the applicant's request.

[12] The challenge by the applicant is to the decision of Governor Jeanes as set out in his letter dated 30 July 2008. In fact it transpires that there have been two decisions both by Governor Kennedy. The first is Governor Kennedy's decision made on 28 July 2008. Information about that decision was imparted to the applicant's solicitor by Governor Jeanes in his letter dated 30 July 2008. The second was the decision of Governor Kennedy as recorded in his affidavit sworn on 13 October 2009. The challenge in this case was to the policy and to the decision of Governor Jeanes set out in his letter dated 30 July 2008 but in determining the application I treat it as a challenge to the policy and to the two decisions of Governor Kennedy dated 28 July 2008 and 13 October 2009.

Background to the policy

[13] In relation to the background to the policy and its initial review I adopt the description contained in the judgment of Morgan LCJ at paragraphs [2]-[4] of his judgment in *Phillips' Application* as follows:-

> "[2] . . . In summer 2007 the Deputy Director of Operations of the Northern Ireland Prison Service instructed Governor Gray to carry out a review of management arrangements for reducing the supply of illegal drugs to prisoners. Governor Gray concluded that the primary method of payment for drugs was through visitors paying money into the dealer's IPC accounts and/or money being paid directly into a prisoner's account who then passed it out to the dealer's visitors. He concluded that the problem was not just restricted to those involved in the drug trade but that vulnerable prisoners were being bullied. Approximately £700,000 had been received for prisoners in the previous year and substantial amounts were then being turned around and passed back out of the account to visitors. In January 2008 Governor Gray recommended severe restrictions on the payment in of monies to prisoners and a prohibition on prisoners passing any money out of the prison to any person. He recognised that there would be individual cases where rigidly enforcing the recommendations may cause hardship and that Governors should have discretion in such cases.
>
> [3] As part of the process of preparing his report Governor Gray attended meetings on 13 September

> 2007, 18 October 2007, 1 November 2007 and 13 December 2007 at which he outlined the approach which he intended to recommend. The meeting in October 2007 was with the Internal Monitoring Board and was attended by a representative of the Prisoner Ombudsman's Office. The other meetings were regular meetings of the Northern Ireland Prison Service Regional Alcohol and Drug Strategy Network and were attended by representatives of Opportunity Youth and those connected with voluntary agencies such as Northlands and Dunleavy.
>
> [4] The effects of the policy were reviewed and considered at a formal review meeting on 4 September 2008. The meeting noted that there was clear evidence of exceptional circumstances being recognised and discretion being used. Governor Kennedy noted that there may be a case for flexibility in dealing with some life sentence prisoners particularly towards the end of their sentences. It was noted that there had been appropriate requests for payment out including one case where an inmate was allowed to pay his landlord as he otherwise would have been evicted from his home."

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Further factual background

[14] Since Morgan LCJ gave judgment in *Phillip's Application* the Prison Service has further refined some of the practical arrangements in relation to the policy. In early 2008 the procurement department in the Prison Service had been researching the possibility of introducing a voucher scheme with various stores and the post office. This scheme would have enabled a prisoner to give a voucher as a gift to family or friends and the recipient could then use the voucher to purchase goods in the store or at a post office. However such a scheme was also considered by the Prison Service to be open to abuse in that vouchers could have been exchanged for cash. It was accordingly rejected by the Prison Service. Instead in September 2009 a scheme was introduced in HM Prison Maghaberry using the Argos catalogue. Under this scheme prisoners can choose items from the Argos catalogue and those items can then be sent to their family and friends. This scheme avoids prisoners being involved in cash transactions but permits them to make gifts to family and friends from that catalogue. There was a period between 14 April 2008 and September 2009 when the Argos scheme was not available to the applicant. For that period the only gifts that the applicant could give to his daughter were birthday cards and items such as boxes of chocolates which could be purchased from the tuck shop. I infer that there was a limited range of gifts which could be purchased

from the tuck shop. That the range in the tuck shop was inadequate to enable prisoners to make appropriate gifts aimed at the individual and personal circumstances of their family members. However since the introduction of the Argos scheme there has only been a very modest interest in it from prisoners. There was no evidence as to any demand for such a scheme from prisoners in general or from the applicant in particular between 14 April 2008 and September 2009. During that period the applicant did not make any application to the respondent for instance to purchase any specific gift for his daughter. There is no evidence that he has used the Argos scheme since its introduction.

[15] The applicant undertakes prison work, receiving a wage of approximately £25.00 per week. The applicant does not spend much on himself and accordingly he is able to save a significant proportion of the modest sums that he earns. He has for years and he wishes in the future to be able to make a gift to his daughter of the money that he saves. He cares very deeply for his daughter. As he is in prison and is likely to remain in prison for a very long period the opportunities he has for developing a relationship with her are very limited.

[16] The applicant contended that he did not receive money from outside the prison but rather that all the money he acquired was earned by him inside the prison. This contention was initially accepted by Governor Kennedy in paragraph 5 of his affidavit sworn on 13 October 2009. However Ms Murnaghan relied on various entries in the applicant's Inmate's Personal Cash account tending to support the conclusion that the applicant had received money from outside the prison. I permitted an adjournment to facilitate further evidence from the applicant and the respondent in relation to this issue. In the event I accept the applicant's explanations in relation to those entries and find that subject to insignificant exceptions all the money acquired by the applicant was earned by him inside the prison.

[17] There was a dispute between the parties as to the function of the proposed payments by the applicant to his daughter. It was common case that they were tokens of the applicant's love and affection for his daughter by way of a gift. That the gifts demonstrate the applicant's enduring commitment to her. That they assist in building and maintaining the emotional bond between the applicant and his daughter. It was also common case that gifts by way of money enabled the applicant's daughter to decide whether to spend the money on for instance the daily necessities of life or some specific item or whether to save it. Accordingly, that the applicant's daughter was empowered to make the decision as to the use to which the money should be put.

[18] The applicant's case was that the payments were for the financial support of his daughter. He states that the payment out of money to his

daughter is "the equivalent of child maintenance". That he saves what he earns in prison to give to his daughter "in order to support her". That "supporting (his daughter) financially by sending her what little monies (he earns) in prison is one of the few ways in which (he can) assist her in practical terms and show (his) support for her". However the applicant's solicitor in correspondence and the applicant in his affidavits have chosen not to state the age, employment, financial or personal circumstances of the applicant's daughter. There is furthermore no information about the daughter's partner. Accordingly the applicant has chosen not to enable the prison authorities or the court to consider the significance to his daughter of this practical assistance or financial support. On the facts of this case I reject the contention that the payments go beyond gifts and tokens of his appreciation and love amounting to emotional support so that they also amount to financial support of significance to his daughter.

[19] The applicant's evidence also ignored the Argos scheme run by the respondent under which he can choose gifts for his daughter from a catalogue. There was no complaint from the applicant as to the range of gifts in the Argos catalogue. The applicant would be able to discuss with his daughter the selection of a gift from the catalogue or indeed leave the decision entirely up to his daughter as to the gift that she wished to select. The Argos catalogue scheme gives a degree of empowerment to his daughter in the selection of the items to be purchased. There is an extensive range of goods at different values which can be selected from the catalogue. There is nothing in the policy that prevents the applicant saving the money that he earns for the purchase of a more expensive item. The applicant has chosen not to explain to the prison authorities or to the court why the selection of a gift, either by him or by his daughter, from the Argos catalogue would not perform the function of enabling the applicant to make gifts to his daughter or indeed to indirectly provide her with financial support in that it would relieve her of the obligation to purchase, for instance, a particular item thereby enabling her to spend her own money on other items or save it. In *Phillip's Application* the applicant had the facility of requesting those who would otherwise pay money into the prison instead to pay the money to his family. In this case the applicant has the facility of paying for a particular item and thereby enabling his daughter to have her own money available that she would otherwise have spent on that item. On the facts of this case I find that there is an adequate range of gifts in the Argos catalogue to perform the function of enabling the applicant to demonstrate his love and emotional support for his daughter by way of gifts and also of indirectly providing financial support for her. That by using the Argos scheme his daughter would still appreciate the fact that the applicant spends the vast majority of his income on her.

[20] In arriving at factual conclusions in this case I also accept that the applicant, if able to give money, could obtain a greater sense of being able to give to his daughter and a greater sense that he has enabled his daughter to

make her own decisions. That this greater sense of giving and greater sense of empowerment would also assist in building and maintaining the emotional bond between the applicant and his daughter. However the extent of these advantages is to be seen in context and in particular in the context of the amount of money involved, the Argos scheme which provides an extensive range of gifts together with a significant degree of empowerment to the applicant's daughter and an ability to provide indirect financial support.

The issues for determination in relation to Article 8 and Article 1 of the First Protocol

[21] There was a large measure of agreement in relation to the appropriate analysis of Article 8 and Article 1 of the first protocol in relation to the factual circumstances of this case.

[22] The parties accepted that the challenge under Article 1 of the first protocol did not add anything to the challenge under Article 8, see the observations of Lord Neuberger in *Miss Behavin' Ltd v Belfast City Council* [2007] NI 89 at pages 115 to 116 and at paragraphs [98] – [103].

[23] The applicant contended that the policy and the decisions interfered both with the applicant's enjoyment of private and family life protected by Article 8 of the European Convention on Human Rights and his right to property protected by Article 1 Protocol 1. The respondent accepted that in each case the policy and the decisions interfered with the relevant right but contended that the interference was justified being in accordance with law and necessary in a democratic society in the interests of the prevention of disorder or crime. The applicant accepted that, in principle, the purpose of restricting the drugs trade, extortion, intimidation and money laundering is a legitimate aim (coming within the prevention of disorder or crime) for the Prison Service to pursue and that the policy and the decisions were related to that legitimate aim. He also accepted that the governor's control over monies which were in his possession on arrival at prison or which were sent to him from outside prison is in accordance with law as set out in rules 17 and 18 of the Prison and Young Offenders Centre Rules (Northern Ireland) 1995.

[24] The points at issue were the applicant's contentions that:

(a) Insofar as the policy and the decision affected money earned inside the prison, which was the money under consideration in this case, there was a gap in the rules and accordingly both the policy and the decisions were not in accordance with law.

(b) The policy was disproportionate in that the legitimate aim could be achieved by placing restrictions on who could leave money in or collect money left out, it failed to allow for prisoners about whom there were no concerns to be treated differently, and it failed to give appropriate weight to Rule 26.11 of the European Prison Rules which provides that:-

> "Prisoners shall be allowed to spend at least a part of their earnings on approved articles for their own use *and to allocate a part of their earnings to their families*." (emphasis added)

(c) The decisions were disproportionate in that there had never been any suggestion that the applicant had been involved in money laundering or the supply of drugs. It being accepted that he was well behaved and had tested free of drugs, he did not receive money from outside the prison and he had not abused the Inmates' Personal Cash Accounts. That the Prison authorities could see quite clearly through the records for his Inmates' Personal Cash Account that the source of the money was his prison earnings. In short that given his own personal circumstances the interference with both his rights under Article 8 and Article 1 of the First Protocol was disproportionate.

[25] I proceed to deal with each of those contentions.

In accordance with law

[26] The applicant contends that there is a lacuna in the Prison Rules in relation to monies earned by the prisoner as opposed to monies brought to the prison by the prisoner or sent to the prison or received by him "from outside the prison".

[27] Rule 17 of the Prisons and Young Offenders Centres Rules (Northern Ireland) 1995 headed "Prisoners' Property on Reception" includes a provision in rule 17(3) that:-

> "Any cash which a prisoner has on reception to prison shall be paid into an account under the control of the governor and the prisoner shall be credited with the amount in the books of the prison."

That rule clearly applies to cash which a prisoner has on reception.

[28] Rule 18 of the Prisons and Young Offenders Centres Rules (Northern Ireland) 1995 is headed "Money and Articles Received at a Prison". Rule 18(1) provides that:-

> "Any money or other article (other than a letter or other communication) sent to a prisoner through the post office or otherwise received at prison shall be dealt with in accordance with the provisions of this rule and the prisoner shall be told how it is dealt with."

Rule 18(2) then goes on to provide that:-

> "Any cash shall, at the discretion of the governor, be –
>
> (a) dealt with in accordance with Rule 17(3); or
> (b) . . ."

[29] If rule 18(1) of the Prisons and Young Offenders Centres Rules (Northern Ireland) 1995 applies to money earned in the prison then under rule 18(2) (a) and rule 17(3) one of the options available to the governor is to pay the money into an account under the control of the governor and the prisoner shall be credited with the amount in the books of the prison. The applicant contends that rule 18(1) does not apply to money earned in the prison because it only applies to cash received "from outside the prison" as opposed to cash earned inside the prison. I disagree. The rule relates to "any money . . . sent to a prisoner *or otherwise received at prison*" (emphasis added). The rule makes no distinction between whether the money is received at prison from outside or internally inside the prison. One method of money being received at prison is if the prisoner works and receives earnings. The prison authority is making payment to the applicant for the work he undertakes and credits his Inmates Personal Cash Account. That payment results in money received at prison and rule 18(1) applies.

[30] In support of his contention that Rule 18(1) only applies to monies received from outside the prison Mr Scoffield relied on *Duggan v. Governor of Full Sutton Prison and Another* [2004] 1 WLR 1010, a decision of the Court of Appeal in England and Wales. However the question raised in that appeal was whether the effect of Rule 43(3) of the Prison Rules 1999 (SI 1999/728), which rules are applicable in England and Wales but not in Northern Ireland, was to impose a trust on monies paid into an account under the control of the governor. Not only was the question at issue different from the question at issue in this case but also the rules under consideration in that case, namely the Prison Rules 1999 differ from the rules applicable in Northern Ireland, namely

the Prisons and Young Offenders Centres Rules (Northern Ireland) 1995. For instance rule 44(1) of the Prison Rules 1999 is the equivalent of rule 18(1) of the Prisons and Young Offenders Centres Rules (Northern Ireland) 1995. Rule 44(1) of the Prison Rules 1999 refers to "any money . . . sent to a convicted prisoner through the post office . . ." whereas rule 18(1) of the Prisons and Young Offenders Centres Rules (Northern Ireland) 1995 refers to "any money . . . sent to a prisoner through the post office *or otherwise received at prison . . .*" (emphasis added to the additional words applicable in Northern Ireland). I do not consider that the decision the *Duggan v. Governor of Full Sutton Prison and Another* assists in relation to the true constructions of rule 18(1) of the Prisons and Young Offenders Centres Rules (Northern Ireland) 1995.

Proportionality of the policy

[31] Maintaining and developing family ties has particular importance as an essential part of rehabilitation of a prisoner back into the community. In general the three key ingredients to the stability of an offender who is to be rehabilitated into the community are a home in which to live, employment and a circle of family and friends, see paragraph [50] of *Callaghan v. Independent News and Media Limited* [2009] NI QB 1. The particular importance of family ties in a prison environment is clearly recognised by the Prison Service for instance being reflected in rule 65 of the Prisoner and Young Offenders Centres Rules (Northern Ireland) 1995 which provides:-

> "(1) Special attention shall be paid to the maintenance of relationships between a prisoner and his family.
>
> (2) Prisoners shall be encouraged and assisted to establish and maintain such relations with persons and agencies outside the prison as may, in the opinion of the governor, best promote the interests of his family and his own social rehabilitation."

[32] I accept that the Prison Service has carefully balanced the considerations which lie at the heart of the policy. It was contended that the legitimate aim of the policy could be achieved by placing restrictions on who could leave money in or collect money left out and that the policy failed to allow for prisoners about whom there were no concerns to be treated differently. I do not consider that these contentions justify any different conclusion to the conclusion reached by Morgan LCJ at paragraph [13] of *Phillip's Application* as follows:-

> "[13] In drawing up the policy the matters to be balanced were the adverse effect on individual prisoners on the one hand and the need to tackle the

> extent of drug abuse within the prison environment which inevitably had an effect upon good order and discipline. There is no doubt that the Prison Service had particular insights into the extent of the drug problem and the effect on the prison population. In such circumstances their evaluation of the balance is always likely to carry considerable weight with the court when considering whether the interference is justified. In this case the policy permitted of exceptions and the evidence indicates that the policy was being applied in a manner consistent with the proper exercise of discretion by the governors."

There are sufficient exceptions in the policy and there is sufficient discretion in the Governors to arrive at a proportionate response in each individual case. Generalised exceptions of the type for which the applicant contends being a vehicle for abuse and bullying of individual prisoners.

[33] The applicant also relies on rule 26.11 of the European Prison Rules to establish that the policy is a disproportionate response to the legitimate aim being pursued. It is recollected that rule 26.11 provides that:

> "Prisoners shall be allowed to spend at least a part of their earnings on approved articles for their own use *and to allocate a part of their earnings to their families*." (emphasis added)

[34] A number of points are made by the respondent in relation to this contention as follows:

> (a) The introduction to the European Prison Rules make it clear that they should be used by Member States in *guiding* their legislation, policies and practices and are *not binding or mandatory* on the respondent.
>
> (b) The European Prison Rules are of broad application across many varying types of regimes in the Member States and so some of the provisions are particularly ill suited for the regime operated by the respondent.
>
> (c) That the application of the italicised part of rule 26.11 is of greater relevance to Member States where there is a genuine need for prisoners to financially support their families whilst they are in prisons. Thus the respondent states that there "are other much less affluent countries within the European Community wherein the issue of

> prisoners continuing to support their families whilst in prison is a genuine reality because of the inadequacy of State benefits for those families. That this is not consonant with the social security system for the United Kingdom and the State here plainly does not expect prisoner's families to be supported financially from the prisoner's allowances." Accordingly the italicised part of rule 26.11 is more appropriate to regimes in Member States where prisoners' families have a genuine financial need.
>
> (d) That the allowances granted to prisoners for working in prison (in accordance with the respondent's Progressive Regimes and Earned Privileges Scheme) are really only of minimal value in the outside world. That accordingly the italicised part of rule 26.11 is more appropriate to regimes in Member States where prisoners earn a substantive wage.

[35] In *Martin v Northern Ireland Prison Service* [2006] NIQB 1 at paragraph [33] Girvan J stated:

> "Furthermore, the article 8 duty will also be informed by the spirit and intent of the EPR which clearly appears to have influenced formulation of the 1995 Rules"

I consider that the formulation and promulgation of the policy and in arriving at the decisions the spirit and intent of the European Prison Rules, so far as they are consistent with the regime in the United Kingdom, has informed the Article 8 duty on the respondent.

Proportionality of the decisions

[36] The applicant contends that the decisions lacked proportionality given his personal circumstances. The respondent contends that generalised individual personal circumstances of prisoners, as opposed to cases of specific hardship, would open the way to bullying and abuse of individual prisoners. In April 2008 when the policy was introduced and on 28 July 2008 when the first decision was made the Argos scheme was not available to the applicant. It became available in September 2009 prior to the second decision on 13 October 2009. Intense scrutiny is required in relation to convention rights and the court is required to look at the balance that was actually struck between the applicant's rights and the need to prevent crime within the prison. Absent the prospect of and within an appropriate time the reality of, a scheme such as the Argos scheme I consider that the balance would have

been disproportionate despite the urgency of addressing crime within the prison. However I consider that the evidence demonstrates that Governor Kennedy looked carefully at all the circumstances surrounding the applicant's requests and was entitled to take into account in examining the extent of any interference with the private or family life the option available to the applicant of saving for and awaiting the introduction of the Argos scheme or its equivalent together with the applicant's ability to make further requests which ability was expressly articulated in the letter from Governor Jeanes dated 30 July 2008 to the applicant's solicitors. A further request could for instance have included the ability to pay for a specific gift out of a catalogue against an invoice. In those circumstances any interference was in my view modest and clearly outweighed by the need to address criminal behaviour within the prisons affecting good order and discipline. I consider, therefore, that the applicant's reliance upon article 8 fails on proportionality grounds.

Consultation

[37] The applicant asserted that there was a duty to consult with prisoners in advance of the introduction of the policy. In support of that contention the applicant relied on one sentence in paragraph [16] of *Phillip's Application* in which Morgan LCJ stated:

> "I accept that the duty of consultation can arise as a result of prior governmental practice or because of a representation that consultation would be provided in advance of a decision being taken (see Judicial Review in Northern Ireland paragraph 7.09)"

The applicant contended that there was a long standing practise of allowing prisoners to make payments out of the prison. Accordingly that there was a prior governmental practice and a duty to consult.

[38] The authority for the proposition set out at paragraph 7.09 of Judicial Review in Northern Ireland by Gordon Anthony is the decision in *Council of Civil Service Unions v Minister for the Civil Service* [1985] A.C. 374. The duty to consult is an aspect of the concept of fairness and in *Bushell & another v Secretary of State for the Environment* [1981]AC 75 Lord Diplock expressed the principle of fairness at 95E-96A

> "… what is fair procedure is to be judged … in the light of the practical realities as to the way in which administrative decisions involving forming judgments based on technical considerations are reached."

In the circumstances of this case I do not consider that there was a duty to consult with prisoners some of whom are involved in criminal activity inside the prison and other who could be abused and bullied as a part of the consultation process.

Conclusion

[39] None of the grounds of challenge are made out. I dismiss the judicial review application.