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*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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D's Application (Leave Stage) [2010] NIQB 93

AN APPLICATION BY D
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF A DEPUTY GOVERNOR OF HM YOUNG OFFENDERS CENTRE HYDEBANK WOOD

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TREACY J

Introduction

[1] This is an application for judicial review of a decision of a Deputy Governor of HM Young Offenders Centre Hydebank Wood ("the YOC"). The decision under challenge is the respondent's decision dated 17 July 2009 cancelling a period of temporary leave previously granted to the applicant in respect of the period 17-20 July 2009.

[2] The applicant challenges the procedural fairness of the decision-making process and in particular the non-disclosure of intelligence material and reliance upon it by the respondent in making the impugned decision, the alleged insufficiency of such material as was provided and also the alleged failure of the decision-maker to sufficiently scrutinise the intelligence material to counter-balance the disadvantage to which the applicant was subject by reason of non-disclosure.

Background

[3] The applicant was committed to the YOC on 29 July 2008 having received a four year sentence and a two year custody probation order for theft, hi-jacking, robbery and possessing an offensive weapon. He was subsequently released and discharged from custody on 30 October 2009.

[4] Prior to sentencing the applicant was detained on remand but in the summer of 2008 he was admitted to bail in order to take part in the Challenge for Youth Programme in Castlewellan Forest Park.

[5] The applicant had applied for and been granted periods of temporary release under the *pre-release home and resettlement leave arrangements for all sentenced prisoners* ("the scheme"). This scheme's statutory underpinning is to be found in Section 13(1)(c) of the Prison Act (NI) 1953 and Rule 27[1] of the Prison and Young Offender Centre Rules (NI) 1995.

[6] The scheme makes it clear that temporary release is a privilege not a right and that the overriding consideration in the decision whether to grant it is the risk of reoffending and harm to the public (see paras2 and 3 of the applicable scheme).

[7] The applicant was granted three periods of temporary release during July 2009 namely

(i) 3 July 2009;
(ii) 7-10 July 2009; and
(iii) 17-20 July 2009.

In each case the purpose of the periods of leave was to enable the applicant to partake in "outward bound" type courses with Challenge for Youth.

[8] At approximately 0800 hrs on 17 July 2009 the applicant went to the reception area of the YOC to sign out, as was required when availing of temporary release. However, at this time he was informed by Deputy Governor Alcock that he was not to be released. He was not informed why his period of temporary release had been suspended.

[9] DG Alcock has averred that on the day in question, 17 July 2009, the Hydebank Wood Security Department Principal Officer informed him that in the course of ongoing security operations within the establishment it had come to their attention the day before that the applicant was involved in the supply of drugs in Hydebank Wood. DG Alcock avers that he queried with the Principal Officer the *extent* and the *quality* of this information and was satisfied in his response to those queries that the information was "serious and reliable". In this context I note that DG Alcock has worked in the Northern Ireland Prison Service for 26 years, the past 11 of which have been at Governor grade. In addition to Hydebank Wood he has also served in HMP Maze, HMP Maghaberry and Prison Service Headquarters. He has averred that throughout his careers his roles and responsibilities have focussed on operational security/intelligence related matters and that he was at the time of his

[1] "(2) A prisoner may be temporary released under this rule for any special purpose or to enable him to have medical treatment, to engage in employment, to receive instruction or training or to assist him in his transition from prison to outside life."

affidavit currently accountable for all aspects of security within Hydebank Wood and had responsibility for liaising with law enforcement agencies with regard to public protection issues.

[10] The Deputy Governor decided that in light of the information made available to him, the threat to the establishment, to good order and discipline within the establishment, the risk posed by drugs activity both to prisoners and staff, combined with concerns regarding the risk that the applicant might pose to other young people participating in the Challenge for Youth Scheme had he been released, that he could no longer stand over the temporary release. Accordingly he ordered the Security PO to attend at the reception centre and inform the applicant that he could not be released.

[11] At para 15 of his affidavit he avers as follows:

> **"I further directed the security department to investigate the matter further and see what further information could be obtained regarding the applicant and his involvement with the supply of drugs. Accordingly, it was my view that it would be appropriate and indeed preferable to simply inform the applicant at that stage that he was not to be released and that reasons would be given in due course. I wished to have as much information available as possible and set out the reasons in light of same at that stage. Also, in light of the ongoing nature of the security operation, which had a wider application than merely the applicant himself, I was not satisfied at that stage that I could safely provide information regarding the reasons for the cancellation of the temporary release to the applicant without jeopardising the ongoing security operation, and revealing evidence/intelligence gathering techniques."**

[12] On 21 July 2009 the applicant wrote to DG Alcock and Governor Treacy seeking reasons for the failure to grant him temporary release. By letter dated 23 July 2009 the Deputy Governor indicated in response:

> **"... that Hydebank Wood Security Department have informed me, and more importantly *evidenced* to my satisfaction, that during this period you were involved in drug supply to Hydebank Wood."** [Emphasis added]

[13] The Deputy Governor has averred at para16 that by the time of this response he had been provided with "further information regarding the applicant and his

activities, which in effect confirmed that which I had already been told by the security department."

[14] In addition to writing a letter on his own behalf the applicant instructed Campbell and Caher Solicitors in relation to this matter who on 27 July 2009 wrote to the NI Prison Service ("NIPS") seeking written reasons for the refusal of his temporary release. By letter dated 6 August 2009 they were advised that the applicant had been provided with written reasons on 29 July 2009 in the form of the letter from DG Alcock dated 23 July 2009 set out above.

[15] Having had sight of this document the applicant's solicitors then wrote on 11 August 2009 seeking the basis for the conclusion that the applicant was involved in drug supply and details of the evidence upon which such a conclusion was based noting that no opportunity to refute the allegation had been afforded to the applicant and submitting that the decision was in breach of the requirements of natural justice.

[16] By letter dated 26 August 2009 Residential Governor Patterson indicated that he had:

> **"... discussed your letter with the Deputy Governor, who is responsible for security at Hydebank Wood, and he is content with the standard of evidence against your client. As other parties are involved we are not prepared to divulge any further evidence other than what the Deputy Governor has stated in his letter to your client."**

The letter repeated that the applicant "... has been involved in drugs supply to Hydebank Wood".

[17] By letter dated 9 September 2009 the applicant's solicitors wrote to NIPS in accordance with the pre-action protocol set out in the judicial review practice note. A response to this was received under cover of a letter dated 28 September 2009 from NIPS enclosing a letter dated 28 September 2009 from DG Alcock which purported to provide a "gist" of the information relied upon. So far as material it stated:

> **"A number of inmates' phone calls were monitored between July 2009 and September 2009, including your own, which confirmed that you were involved in drug trafficking in Hydebank Wood.**
>
> - **Within the centre your movements were monitored, and reports were submitted, confirming that you were associating with known drug traffickers.**

> • **On 4 July you were adjudicated upon for failing a breathalyser test on your return from the outside scheme, and found guilty under prison rules to this offence. Ordinarily this offence alone would have precluded you from continued attendance at an outside scheme. Subsequent phone monitoring between yourself and third parties confirms your misuse of alcohol in relation to this offence."**

The letter concluded with the following confirmation from DG Alcock:

> **"I stand by that decision and trust that now that you are more fully informed you will understand the reasons for my decision."**

[18] In response to some issues raised by the Court DG Alcock filed a further affidavit. In this he averred that on the morning of the 17th when the information was relayed to him the PO confirmed that he had personally listened to the information, confirmed it reliability and pronounced himself "entirely satisfied" with the information. Moreover, before he wrote the letter of 23 July DG Alcock personally scrutinised the information gathered by the security department which involved him actually listening to the relevant phone calls. Having undertaken this task he was satisfied that the applicant was involved in the supply of drugs in Hydebank. He also scrutinised the intelligence reports regarding the applicant's movements within the prison.

The Parties Submissions

[19] In summary the applicant submitted that in breach of the requirements of procedural fairness that there had been insufficient disclosure. This was evidenced, for example, by the provision of the more expansive gist in September. It was also contended, relying principally on the decision in ***SOS v AF*** **[2009] UKHL 28,** that decisive undisclosed material could not be relied upon by the decision-maker. Furthermore, it was contended that the applicant was not permitted an opportunity to make representations about the adverse information to be taken into account before the impugned decision was confirmed. Relying on a number of authorities, in particular ***Hart*** **[2009] NIQB 57** the applicant also contended that there had been no or insufficient inquisitorial scrutiny of the intelligence information in an effort to counter-balance the procedural disadvantage to which the applicant was subject.

[20] The respondent submitted that the requirements of procedural fairness were complied with. The exigencies of the situation on 17 July precluded disclosure before the impugned decision but it was submitted the requirements of procedural fairness were met expeditiously post-decision. The applicant was provided with a gist, elaborated upon in due course to the extent that, in the Governor's judgment, the circumstances allowed. Moreover, the respondent continued, the applicant was free

to make representations written or oral at every relevant stage. It was submitted that the respondent had subjected the information to scrutiny and did not simply accept it unchallenged.

Discussion

[21] The guiding principle as to what fairness requires will be dictated by the circumstances ("the ***Doody*** test") **[*Doody* [1994] 1 AC 531, 560D]**. It is common case that the concept of fairness is context sensitive and involves a degree of elasticity. The present case concerns the requirements of procedural fairness applicable not to a trial or other adversarial process but to a decision concerning prison management namely temporary release under Rule 27 and the associated scheme.

[22] The presumptive requirement of sufficient disclosure to enable meaningful and focussed representations is well known. A useful summary of the principles is contained at para.7-057 and para.7-058 of ***de Smith's Judicial Review*[2]*.*** Para 7.059 of ***de Smith*** recognises that to the general requirement of sufficient disclosure there are exceptions including where disclosure would be injurious to the public interest or where disclosure is sought of sensitive intelligence information.

[23] I reject the contention that material which has been properly withheld on public interest grounds cannot be relied upon by the decision-maker in the Rule 27 context. This submission is contrary to the decision of the Court of Appeal in ***Conlon's Application* [2002] NICA 35**, ***Henry's Application* [2004] NIQB 11** and ***In Re Hart* [2009] NIQB 57.** I rejected a similar submission in ***Re McAree & Watson* [2010] NIQB 79.** At para.37 of that judgment I stated:

> **"It is difficult for an applicant to respond in any detailed or meaningful way to allegations that he has been involved in drugs when the information that is relied upon cannot be disclosed to the person affected. Of course it is that handicap which gives rise to considerations of whether countervailing safeguards are available and whether fairness requires their deployment. In answering that question the Court must be careful not to overjudicialise administrative procedures connected with prison management. Accordingly,**

[2] "7.057 - If prejudicial allegations are to be made against a person, he must normally … be given particulars of them before the hearing so that he can prepare his answers. The level of detail required must be such as to enable the making of "meaningful and focused representations". In order to protect his interests, the person must also be enabled to controvert, correct or comment on other evidence or information that may be relevant to the decision and influential material on which the decision-maker intends to rely; including, in certain cases, disclosure of representations or information provided by third parties". 7.058 - If relevant evidential material is not disclosed at all to a party who is potentially prejudiced by this, there is *prima facie* unfairness, irrespective of whether the material in question arose before, during or after the hearing".

> **Art6 cases such as *AF* [2009] UKHL 28 and other cases engaging adversarial rights are not of much assistance in this context. Even in Rule 32 cases disclosure may not be possible but the decisive role of such undisclosed material does not of itself render the decision unfair. In Rule 32 cases the statutory supervisory role of the IMB may itself be attenuated if the material cannot be disclosed to the IMB. The genuine inability to disclose material on public interest grounds does not necessarily impair the fairness of the decision in a prison management context."**

[24] Moreover, as stated in ***McAree*** at para39, after having referred to the decisions of ***In Re Thompson*** **[2007] NIQB 8** and ***Hart*** the Court stated:

> **"Where disclosure is subject to constraint by reason of other interests the decision-maker is *required to make a judgment* as to the extent to which the provision of information should be limited in order to protect the rights of others. And this is an area in which the decision-maker must be accorded a discretionary area of judgment [see *Hart* at para12]".**

[25] It follows therefore, contrary to the applicant's argument, that a fair and legally unimpeachable decision concerning prison management can be made on the basis of material undisclosed to the applicant. The fact that the material cannot be disclosed gives added importance to the need for the decision-maker to carefully scrutinise the material relied upon. In ***McAree*** the scrutiny of intelligence material relied upon in making decisions to transfer prisoners to the Harm Reduction Unit (HRU) is set out at para25 and involved examination of the security information reports (SIR's) which includes the narrative content of the information passed into the prison system and the analysis of that information by the security department. Moreover, as appears from the same paragraph all intelligence reports are graded using the 5 x 5 x 5 system which assesses the reliability of the source and the accuracy of the information. This system of grading is used by all UK prisons, police and other law enforcement agencies.

[26] In the present case DG Alcock has extensive experience in the field of operational security/intelligence related matters. When furnished by the security department PO with the information that the applicant was involved in the supply of drugs in Hydebank he did not simply accept this information at face value but scrutinised it. Given his experience he was well placed, it would appear, to conduct such an exercise. As he put it at para12 of his unchallenged averment in his first affidavit he queried with the principal officer "the *extent* and the *quality* of the

information and was satisfied in response to those queries that the information was **serious** and **reliable**".

[27] Moreover, as appears from para15 of the same affidavit he directed the security department to investigate the matter further and see what further information could be obtained regarding the applicant and his involvement with the supply of drugs. And as previously noted by the time of his response on 23 July 2009 to the applicant's correspondence he had been provided with *further* information which confirmed what he had already been told by the security department.

[28] Against that background Ground 3(d)(v), to the effect that the Deputy Governor had failed to engage an inquisitorial scrutiny of the intelligence information, is not made out.

[29] The operative allegation grounding the impugned decision, was the information that the applicant was involved in drug trafficking – which he has always denied. The initial information leading to the impugned decision was apparently confirmed by further information provided by the security department following DG Alcock's direction to investigate the matter further. He has confirmed that for operational reasons (at para18 of his affidavit) he could not provide more detailed information in relation to the reasons as to do so would have jeopardised ongoing law enforcement and anti-crime operations and reveal intelligence/evidence gathering techniques and targets in the specific context of the YOC. However, in September in answer to the pre-action protocol letter, he furnished further information in the form of the gist described above. At para19 of his affidavit he expressed himself satisfied "at that stage" that he could safely provide some further degree of information regarding the reasons for his decision.

[30] It does not, in my view, follow from the provision of the more expansive gist in September that the earlier disclosure was procedurally inadequate. DG Alcock has explained in his letter and confirmed at para19 of his affidavit why he felt able to make some further disclosure. In essence however the operative allegation had not changed – involvement in drug trafficking. The applicant had previously taken the opportunity of making representations in his letter of 21 July, *inter alia,* denying involvement. In my view the applicant was provided with sufficient reasons to enable him to understand why his temporary release had been revoked and to afford him the opportunity to make representations as he did under cover of letter dated 21 July. DG Alcock has explained at para19 why, in his judgment, it was possible in September 2009, some two months having expired since the impugned decision had been taken, for him to make further disclosure. The further disclosure reveals that the source of the information regarding the applicant's alleged drug trafficking came from the monitoring of a number of inmates' phone calls including his own, that his movements within the YOC were being monitored and reports submitted which apparently confirmed that he was associating with known drug traffickers. DG Alcock has deposed on oath that he could not provide more detailed information at the relevant time as to do so would have jeopardised ongoing operations and reveal

intelligence/evidence gathering techniques and targets. [See also paras.7 - 9 of his second affidavit].

[31] I conclude, in light of the foregoing, that no procedural unfairness has been established either as to the *extent* of disclosure or its *timing* both of which inevitably involve exercises of judgment.

Conclusion

[32] Accordingly, for the above reasons the application for judicial review must be dismissed as none of the grounds relied upon by the applicant have been established.