

**Neutral Citation No.: [2009] NICA 25**

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*Judgment: approved by the Court for handing down  
(subject to editorial corrections)\**

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**IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND**

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**Donaldson's Application (Christopher) [2009] NICA 25**

**AN APPLICATION BY FOR LEAVE TO APPLY FOR JUDICIAL REVIEW  
CHRISTOPHER DONALDSON**

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**Before: Higgins LJ, Coghlin LJ and Gillen J**

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**HIGGINS LJ**

[1] This is an appeal against the decision of Weatherup J whereby, on 4 April 2008, he refused the applicant's application for judicial review of two decisions of the Northern Ireland Prison Service (the Prison Service) and thereby, it is a renewal before this court of that application for leave. The first decision of the Prison Service relates to the policy of the prison service directing prisoners not to wear Easter lilies outside their cells in the separated wing of HMP Maghaberry. The second decision concerns disciplinary charges being preferred against the applicant for refusing to remove an Easter lily he was wearing on Easter Sunday 2008.

[2] The wearing of emblems has been a contentious issue in prisons for some years. The policy of the Prison Service is to differentiate between two categories of emblems. The first category, such as poppies or shamrocks are permitted, as they are primarily associated with one or other tradition in Northern Ireland. The second category, such as Easter lilies or Orange lilies, are not permitted as, although they are symbols of a particular tradition, they are also regarded as paramilitary symbols of conflict. They are referred to in the case papers as "conflict emblems".

[3] The applicant is a sentenced prisoner who is serving his sentence in the separated wing (Republican) in Roe House HMP Maghaberry. He has been in custody since June 2004 and is serving a sentence of 12 years imprisonment. He is due for release on 2 June 2010. He is held in separated conditions, which means that he and other republican prisoners are confined together and have no contact with any other prisoners who are not republicans. Facilities such as the exercise yard and the gymnasium are used only in the presence of other

republican prisoners. A similar separated system exists for Loyalist prisoners housed in HMP Maghaberry.

[4] It is alleged that on Easter Sunday 2008 the applicant was returning from the exercise yard in Roe House and that an Easter lily was affixed to his outer clothing. He was ordered by a prison officer to remove this emblem but he refused to do so. He was then returned to his cell. Later he was charged with disobeying a lawful order. An adjudication of that charge has yet to be heard. The Reporting Officer's report stated that the applicant came from the dining hall on Roe 4 via the sliding grill en route to this cell. A number of other prisoners were similarly charged and their cases disposed of with punishment imposed.

[5] In his Order 53 Statement lodged on 2 April 2008 the Appellant sought -

- a) a declaration that the policy of the Northern Ireland Prison Service in respect of Easter lilies, namely that prisoners shall be prevented from wearing such lilies in public parts of the prison is unreasonable, unlawful and void insofar as that policy pertains to the segregated republican wings of the prison.
- b) a declaration that the order given to the Appellant on 23 March 2008 ordering him to remove his Easter lily was an order which was unreasonable, unlawful and void.
- c) a declaration that the adjudication of the appellant in respect of the alleged unlawful order, i.e. the order to remove his Easter lily, is unreasonable, unlawful and void.
- d) an interim injunction restraining the respondent from continuing to adjudicate upon the appellant in respect of the proposed adjudication charge until the hearing of this application and/or an interim injunction suspending the effect of any punishment imposed upon the appellant in respect of any such adjudication until the hearing of this application.
- e) an order of Mandamus requiring the Northern Ireland Prison Service to consider the question of republican prisoners in the segregated wing of the prison and their wearing of Easter lilies, in accordance with all proper principles of law and practice, and taking into account all relevant factors.

[6] The grounds on which this relief was sought were set out in the Order 53 statement as follows -

- (a) The impugned policy, namely the policy that prisoners are to be prevented from wearing Easter Lilies in public areas within the prison, is unreasonable unlawful and void, insofar

as it relates to Republican prisoners within the segregated wings of HMP Maghaberry in that:

- (i) the policy represents an undue interference with the Applicant's rights to freedom of expression, particularly his rights to freedom of expression of his political beliefs and cultural identity and the interference is not justified, in that it serves to meet no pressing social need, is disproportionate interference, is grounded upon reasons that are not relevant or sufficient, and is founded upon generalisations not supported by evidence, and the policy represents a violation of the Applicant's rights under Article 10 of the European Convention on Human Rights;
  - (ii) the policy represents a discriminatory policy in that it unjustly differentiates between two analogous comparators, namely the wearing of Lilies and the wearing of poppies by prisoners, on stated grounds that are equally applicable to both, and as such the policy affects (sic) are unjustified difference in treatment which discriminates against prisoners on grounds of their religious, cultural or political beliefs in breach of Article 14 of the European Convention on Human Rights;
  - (iii) the policy being one which operates within the ambit of the exercise of the Applicant's rights under Article 10 ECHR when it is taken together with Article 14 ECHR.
- (b) The order made against the Applicant on 23 March 2008 to remove his Easter Lily was unlawful insofar as it was an application of the impugned policy, insofar as the policy itself was unlawful, for the reasons outline in paragraph 3(a).
- (c) Insofar as the order to remove the Easter Lily was unlawful and based upon a policy which interfered unduly with rights under Article 10 and 14 ECHR the ongoing disciplinary proceedings against the Applicant and any disciplinary sentence imposed are disproportionate interferences and penalties interfering with the Applicant's Convention Rights.

[7] As this is an appeal against a refusal of an application for leave there is no contrary affidavit from the intended respondent. However the applicant's solicitor has exhibited to his affidavit documents used in a previous application, including a replying affidavit from the relevant Prison Governor. The earlier application was Re Byer's Application 2004 NIQB 23 which was heard by Weatherup J. Judgment was delivered on 12 April 2004. In addition

the applicant has sworn an affidavit setting out why the Easter Lily is of significance to him and other persons, as well exhibiting an Explanatory Document entitled 'Compact for Separated Prisoners'.

[8] At paragraph 15 of his affidavit the applicant averred -

"15. I am a person who politically holds Republican views. The Easter Lily is an important Republican symbol commemorating the 1916 Easter Rising and commemorating the Republican dead (from Wolfe Tone onwards) who have died seeking to secure an Irish Republic. I believe that it is appropriate that I as a Republican be allowed to join in this commemoration and express my identity and beliefs in this way. My wish and the wish of Republican prisoners within Roe House is that we should be allowed to wear the Easter Lily within Roe House on Easter Sunday and Monday every year. Prison provides little in the way of opportunity for political expression or engagement and this expression of political identity is particularly cherished amongst Republican prisoners."

[9] The documentation exhibited to the affidavits included much material generated through various computer websites. In very brief summary this referred to various aspects of the history of the island of Ireland with particular reference to the first two decades of the 20<sup>th</sup> century and events leading to the formation of a government in Dublin and the formation of the two political parties, Fianna Fail and Fine Gael. These documents are preceded by a summation entitled 'Rough Explanation' which notes that the Easter Lily was never adopted by either of these two political parties and that, by contrast with the poppy, it did not become popular with these parties ( or generally) but was regarded as a powerful symbol specific to republican politics not advocated by these parties.

[10] The affidavit of the relevant Prison Governor (referred to above) was sworn on 15 September 2003. The Governor averred in paragraph 8 that the reason for the prohibition is the concern held by the Prison Service that good order and discipline within the prison would be endangered if prisoners wore political emblems which might give rise to offence on the part of other prisoners. He continued that if such offence is caused sooner or later it would manifest itself in terms of indiscipline and tension which would disrupt the smooth running of the prison. Exhibited to his affidavit is the relevant portion of the Prison Service Standing Orders. Paragraph 4.12 under the heading 'Personal Possessions - Political literature, Emblems and Photographs',

provides, inter alia, 'Prisoners may not wear political emblems'. Emblems such as Remembrance Poppies and St Patrick's Shamrock are not viewed as political in the sense of being associated with sectarian politics in Northern Ireland and therefore unlikely to give rise to a threat to good order and discipline within the prison. He referred to a Notice to Prisoners, dated 15 March 2000 which provides that emblems that are non-political and non-sectarian, for example, Remembrance Day poppies and St Patrick's Day shamrock, may be worn at the appropriate time by any prisoner. However he averred that a different view was taken of other emblems such as the Easter Lily, the Orange Lily and paramilitary badges, which are all closely linked to the 'conflict in Northern Ireland over recent decades. These were not permitted as they posed a threat to good order and discipline within the prison environment. This approach to poppies, lilies and badges reflected the views of the Fair Employment Commission about emblems that may be worn in the workplace. However a more relaxed approach was adopted to the wearing of Easter Lilies within the confines of the prisoner's own cell and this was permitted as it would not pose a threat to good order and discipline in the prison.

[11] The policy referred to above (and set out in the Governor's affidavit) was considered by Weatherup J in Re Byers' Application. He held that the policy and the restrictions therein were proportionate and, not in breach of Article 10 of the ECHR. Re Byers' Application related to prisoners wearing Easter lilies in the general and non-separated part of the prison.

[12] On 8 September 2003 the Government accepted the recommendation of the Steele Review that republican and loyalist prisoners with paramilitary affiliations should be accommodated separately from each other and from the rest of the prison population, on a voluntary basis within Maghaberry Prison. To that end the Prison Service developed a 'Prisoner Compact', a form of understanding, which makes clear the routine and facilities available to separated prisoners and what will be required of them in return for being permitted to serve their sentence separately from other prisoners. Details of the compact are contained within the explanatory document exhibited by the appellant. It is given to each prisoner who is admitted to the separated unit and explained to him. It is designed to provide a safe regime for both prisoners and staff. As admission to the separated regime is voluntary it may be assumed that the prisoner has agreed to the details of the Compact. The Compact deals with who can go into separated conditions, the routine and regime, the level of privileges available as well as the arrangements for cell checks and searching. Paragraph 14 is headed 'What happens if you break the rules'. Paragraphs 14.1 provides -

"One of the purposes of the Compact is to help you understand what you must do to keep the rules of the prison. It does not list all the rules and if you are in

any doubt about what you can and cannot do you must as a member of staff. If there is evidence that you have breached Prison Rules you may be charged and subject to disciplinary hearing.”

[13] It is clear from this document that the Prison Rules apply in the separated unit and that all separated prisoners are aware of this.

[14] On Easter Sunday 2006 Terence Damien McCafferty, a sentenced prisoner in the separated wing, was returning from a religious service to his cell when he was ordered to remove the Easter Lily which he was wearing. He failed to comply with the order and was awarded three days in the punishment segregation unit for failing to comply with the order. He sought judicial review of the Prison Service policy restricting the wearing of Easter Lilies on the basis that that it was contrary to Article 10 of the ECHR and a disproportionate restriction on his freedom of expression. The facts are set out in the judgment of Girvan J in which he dismissed the application for judicial review. McCafferty claimed that the policy of permitting the wearing of Easter Lilies in cells, but not elsewhere was illogical, particularly as separated republican prisoners only come into contact with other republican prisoners and other non - republican prisoners are not likely to see the Lilies, though they would be observed by prison staff. The Governor of the prison averred in an affidavit that the wearing of emblems and regalia was controlled through Standing Orders and Prison Service Policy. Emblems perceived to be identified with conflict in Northern Ireland were seen as potentially disruptive and dangerous to the interests of good order and discipline. While it is less likely that a separated republican prisoner will come into regular contact with non-republican prisoners, the potential for such contact could not be ruled out. The Governor stated that the purpose of the separated regime was to provide security and safety for the prisoners accommodated there. The conditions contained in the Compact were designed to provide minimal adjustment from the normal prison regime, consistent with the objective of prisoner security and safety. Any relaxation of the Prison Rules relating to Easter Lilies for separated republican prisoners would have an unwelcome impact on Prison policy which was to provide, as far as possible, an equal and common set of conditions for all prisoners. Permitting separated republican prisoners to wear Easter Lilies generally in the separated wing would create an artificial distinction between the two regimes and provide separated republican prisoners with a privilege not enjoyed by other prisoners. This was the factual background and the prison service justification for the policy against which the present application for leave to bring judicial review proceedings was brought. In essence the appellant in the present case is making the same case as was considered by Girvan J in Re McCafferty's Application.

[15] In Re Byers' Application Weatherup J was concerned with the wearing of Easter Lilies within the normal prison or integrated regime. He was satisfied that the wearing of an emblem like an Easter Lily could amount to an 'expression' for the purposes of Article 10 of the ECHR. He also found that restrictions on the wearing of such emblems were not a necessary incident of imprisonment and amounted to an interference with Freedom of Expression as protected by Article 10 of the ECHR. Therefore the policy had to be one prescribed by law and for which there was justification within the terms of Article 10(2). Weatherup J was satisfied that the restriction was prescribed by law under the Prison Act (Northern Ireland) 1953, the Prison and Young Offenders Centre Rules (Northern Ireland) 1995 and the Standing Orders and that they were imposed in pursuance of a legitimate aim namely the prevention of disorder and crime by maintaining order and discipline in the prison. No challenge was made to this finding.

[16] In Re McCafferty's Application Girvan J proceeded on the basis that the general approach of Weatherup J in Re Byers' Application was correct though he expressed some reservations whether or not the restriction on the wearing of emblems was not a necessary incident of prison life. It was submitted in Re McCafferty's Application that there was a material distinction between the two applications ( McCafferty and Byer's cases ) in that McCafferty was housed in the separated republican regime, unlike Byers. and therefore not likely to come into contact with non-republican prisoners and that the concerns relating to the breakdown of good order and discipline were not warranted and could not be justified. It was submitted on behalf of the respondent that it was not possible to guarantee that republican and non-republican prisoners would not come into contact with one another. The restriction was minimal and proportionate to the aim of good order in the prison and the court should acknowledge the expertise and judgment of the Prison Service in determining such matters of policy. Girvan J's conclusions on this issue are set out at paragraphs 9 and 10 of his judgment.

"[9] I entertain some doubt in relation to Weatherup J's proposition that restrictions on expression on the form of the wearing of emblems are not a necessary incident of imprisonment. Those involved in the running of prisons must inevitably lay down parameters for acceptable behaviour amongst prisoners and are entitled to determine canons of reasonable conduct and behaviour which could legitimately include the mode of attire of prisoners. The total or partial exclusion of emblems that have come to be symbols of conflict seems to me to be a legitimate exercise of prison organisation and control, the aim of prison policies of control and organisation being to prevent disorder within the prisons and to

ensure as neutral an environment as possible for all prisoners and staff. For my part I would be slow to say that the Prison Service should be restricted in the exercise of its powers and duties of establishing a disciplined prison regime by giving priority to rights of self-expression which a prison service may reasonably consider to be incompatible with good prison control. However for present purposes having regard to Mr Coll's concession I shall proceed on the basis that Weatherup J's formulation of the law in *Re Byers* was correct.

[10] With that in mind I accept that the competing arguments of the parties are finely balanced. There is force in the applicant's argument that a prisoner in the separated regime is in a different position from prisoners in the integrated section of the prison and certainly passages in Weatherup J's judgment lends support to the argument that the restriction was justified in that case in the communal part of the prison to prevent disorder with the implication that in a separated part different consideration would or might apply. However, in *Re Byers* the court was not called on to address the issue which arises in this case. Weatherup J did recognise that the response to political expressions and the wearing of a symbol that has given rise to a general perception that it is a symbol of conflict must be assessed in the context of a prison and the need to maintain order and discipline in such a setting. The overall policy operated by the Prison Service was soundly based. The separated regime introduced a qualification in the prison arrangements at the prison but the Prison Service is entitled to ensure an objectively based system throughout the prison so far as possible. The Prison Service is entitled to take steps to ensure that the inroads into the overall prison system brought about by the separated regime are strictly limited. Applying the same restriction to all prisoners achieves that legitimate policy aim, leaving the prisoners in Roe House with the same rights as other prisoners to wear the Easter Lily in their cells. The Article 10 right is a right 'to hold opinions' which is not restricted by the policy and 'to receive and impart information and ideas.' The prisoners in Roe House are free to exchange and discuss political ideas. Restrictions on



the right of wearing a political symbol is a minimal interference with the Article 10 right justifiable having regard to the contingencies of ensuing an objectively based prison policy. The Prison Service policy represents in my view a balanced and proportionate response and is justified for the reasons put forward by Mr Coll.”

[17] Before Weatherup J and this court, it was submitted by Mr Hutton who appeared on behalf of the applicant, that Re McCafferty’s Application was wrongly decided. Firstly, he contended that in the case of prisoners a broad interpretation should be afforded to qualified Convention rights such as those protected by Article 10. Secondly, he argued that the restrictions imposed on the wearing of Easter lilies were unnecessary within the confines of the separated wing where there was no opportunity for contact with other non-republican prisoners. Thirdly, he submitted that differences existed between the separated wing and the non-separated wing and consequently they should be treated differently. In the separated wing there was less likelihood of disorder brought about by the wearing of Easter lilies. He contended that the Prison Service sought to justify the similar treatment of each wing with respect to the wearing of emblems, because they wished simply to limit the differences between the two wings within the prison system. This objective he submitted was not a legitimate aim permissible under Article 10 of the Convention.

[18] In referring to the McCafferty application Weatherup J said –

“[8] However there was another theme in McCafferty’s Application, in that the Governor’s affidavit was concerned with the impact on the segregated regime of the wearing of the emblem in the separated conditions. It was stated that any relaxation of the rules regarding the emblems for separated republican prisoners would have an unwelcome impact on the Prison Service policy of providing equal and common conditions for all prisoners. It was said that there would be an artificial distinction between separated and integrated prisoners if Easter lilies were permitted in the separated conditions. It was not the intention of the separated regime to allow prisoners held in such conditions to benefit from any enhancements as a result of being separated prisoners.

[9] Girvan J referred to the decision in Byers Application and noted that the thrust of the

applicant's case in McCafferty's Application was that there was a fundamental difference between the position of prisoners in the integrated regime and those housed in the separated regime where there was no real contact on a daily basis with non-republican prisoners. The Prison Service argument was that the imperative was the minimising of the distinction between integrated and separated prisoners and prevention of the development of Maze style paramilitary control within the separated conditions. Further, it was stated that there was a need to protect the rights of those, other than prisoners, who may come into contact with a prisoner wearing such an emblem of conflict and to ensure a neutral working environment. This was a concern for the staff who worked in the prison rather than the other prisoners.

[10] Girvan J entertained some doubt about the proposition in Byers Application that restrictions on expression in the form of emblems were not a necessary incident of imprisonment. However Girvan J was prepared to accept that position in the light of Counsel for the respondent's concession that he should proceed on the basis that that formulation was correct. Girvan J stated that the competing arguments of the parties were finely balanced and that there was force in the applicant's argument that a prisoner in the separated regime was in a different position from prisoners in the integrated section; that Byers Application did not address the issue of separated conditions; that the Prison Service was found to be entitled to take steps to ensure that inroads into the overall prison system brought about by the separated conditions were strictly limited and that applying the same restriction to all prisoners achieves that legitimate policy aim, thus leaving the prisoners in Roe House with the same rights as other prisoners to wear the Easter lily in their cells. He concluded by stating that restrictions on the right to wear political symbols was a minimal interference with Article 10 rights and was justifiable having regard to the contingencies of ensuing an objectively based prison service."

[19] Weatherup J was satisfied that McCafferty's decision was not wrongly decided and following it, refused the application for leave to bring judicial review proceedings. The appellant appeals against that decision.

[20] The grounds of appeal are –

- (a) That the Learned Trial Judge erred in failing to find the following matters arguable.
  - (i) that the impugned policy, namely the policy whereby prisoners are to be prevented from wearing Easter Lilies in public areas within the prison, is unreasonable unlawful and void, insofar as it relates to Republican prisoners within the segregated wings of HMP Maghaberry in that the policy represents an undue interference with the Appellant's rights to freedom of expression, particularly his rights to freedom of expression of his political beliefs and cultural identity and the interference is not justified, in that it serves to meet no pressing social need, is a disproportionate interference, is grounded upon reasons that are not relevant or sufficient, and is founded upon generalisations not supported by evidence, and the policy represents a violation of the Appellant's rights under Article 10 of the European Convention on Human Rights.
  - (ii) that the impugned policy, represents a discriminatory policy in that it unjustly differentiates between two analogously comparable situations, namely the wearing of Lilies and the wearing of poppies by prisoners, on stated grounds that are equally applicable to both, and as such the policy affects an unjustified difference in treatment which discriminates against prisoners on grounds of their religious, cultural or political beliefs in breach of Article 14 of the European Convention on Human Rights.
  - (iii) that the impugned policy being one which operates within the ambit of the exercise of the Appellant's rights under Article 10 ECHR is discriminatory of the Appellant's rights under Article 10 ECHR when it is taken together with Article 14 ECHR in respect of its differential treatment of prisoners wearing poppies and Easter Lilies.

- (iv) that the impugned policy interfered with the Appellant's rights to freedom of expression under Article 10 ECHR, and that insofar as the impugned policy relied for the justification of the said interference upon the legitimate aim of applying the same restriction to all prisoners, the impugned policy did not rely upon a legitimate aim envisaged or countenanced within the terms of Article 10(2) ECHR.
- (v) that the impugned policy, insofar as it equated to an attempt to apply the same restriction to all prisoners, did so in such a way which imposed a differential detriment upon Republican prisoners accommodated within Roe House, when the otherwise unjustified detriment suffered by those prisoners in the exercise of their rights to freedom of expression was compared to the justified analogous detriment suffered by prisoners in general population within the prison, so that the impugned policy failed, in the context of the Article 10 ECHR rights engaged, to treat like cases alike and different cases differently in a way which was both irrational and which itself violated Article 14 ECHR by being indirectly discriminatory.
- (vi) that the order made against the Appellant on 23 March 2008 to remove his Easter Lily was unlawful insofar as it was an application of the impugned policy, insofar as the policy itself was unlawful, for all the reasons outlined herein.
- (vii) that insofar as the order to remove the Easter Lily was unlawful and based upon a policy which interfered unduly with rights under Article 10 and 14 ECHR the ongoing disciplinary proceedings against the Appellant and any disciplinary sentence imposed are disproportionate interferences and penalties interfering with the Applicant's Convention Rights.

[21] In his submissions Mr Hutton relied principally on Grounds (a)(i), (a)iv) and (a)(v) - (a)(vii).

[22] It was submitted by Mr Hutton that in McCafferty's Application Girvan J regarded the competing arguments as 'finely balanced' and if he erred to any significant degree in balancing the various factors he may have arrived at an inappropriate conclusion. It was contended that Re McCafferty's Application was wrongly decided in three separate areas. First, the

application of similar restrictions on prisoners in separated wings as in non-separated wings (referred to as an objectively based system throughout the prison so far as possible), was not a legitimate aim within Article 10(2) of the European Convention. Restrictions on freedom of expression (of which the wearing of an Easter lily was one) is only permissible where the restrictions are prescribed by law and necessary in a democratic society for one of the purposes set out in Article 10(2). Secondly, the Court erred in its assessment of the extent of the interference with the Article 10 rights of prisoners, in that it underestimated the significance for prisoners of the right to political expression. In the same way as a prisoner's right to family life is given a wide scope (see McCotter v UK European Commission Application 18632/91), so his limited opportunities for political expression should be similarly recognised and accommodated. Thirdly, the reasoning of the decision resulted in an irrational treatment of separated prisoners in contrast to the manner in which non-separated prisoners were treated. Non-separated prisoners are restricted in their political expression in order to prevent disorder, a legitimate Article 10(2) aim. It was submitted that separated prisoners undergo the same restriction without that justification merely to enable the same policy to apply to all prisoners. This, Mr Hutton contended, resulted in discriminatory treatment as between the two groups of prisoners.

[23] Mr D Dunlop, counsel on behalf of the intended respondent, submitted that the application did not seek to challenge the general policy on the restriction of emblems like the Easter lily. Rather it sought to demonstrate that the decision in McCafferty's Application was incorrect. It was submitted that the legitimate aim identified by Girvan J was the need to maintain good order and discipline, which is a legitimate aim under Article 10(2) of the Convention and one which the respondent is best placed to judge. That it is proportionate is recognised by the fact that the restriction applies in communal areas and the applicant is permitted to wear the emblem in the confines of his own cell. The communal areas in the separated wings are not the sole preserve of the prisoners.

[24] Article 10 (1) of the European Convention on Human Rights provides that everyone has the right to freedom of expression, however that right is qualified by the exceptions created in Article 10(2) -

“1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent states from requiring the licensing and broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subjected to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the Judiciary.”

[25] Freedom of expression constitutes one of the essential foundations of a democratic society. Freedom of speech is the most frequently cited, but freedom of expression is a much wider concept and embraces all aspects of imparting and receiving information or ideas. It is regarded as one of the basic conditions for progression of a democratic society and for individual self-fulfilment. It extends to the right to protest, for example, by attendance at a peace camp and to the publication of matters that may shock, offend or disturb anyone who reads it. However it is not unqualified. Remarks that may be regarded as offensive, for example, about a particular group based on race, may not be protected. In this case it is said to extend to the wish to wear an Easter Lily as a demonstration of support for or solidarity with, Irish Republican views. The Easter Lily, unlike the shamrock or poppy, is regarded, along with other items, as an emblem associated with or representing conflict within society.

[26] The respondent does not contest that the wearing of an Easter Lily is a form of expression for the purposes of Article 10 of the ECHR. However the right to freedom of expression is subject to exceptions which must be strictly construed and the need for any restrictions must be established convincingly – see Handyside v UK 1976 1 EHRR 737, Lingens v Austria 1986 8 EHRR 103 and Jersild v Denmark 1994 19 EHRR 1, though it should be observed that the contexts of these decisions were very different. Weatherup J found that wearing an Easter Lily constituted a form of expression. In view of the manner in which this application was presented and opposed I see no reason in this case to differ from that view. However like Girvan J I have reservations as to whether restrictions on the wearing of such emblems is not a necessary incident of imprisonment. I express no concluded view on that in the absence of specific argument.

[27] Article 10(2) ECHR provides that the exercise of the freedom of expression may be subject to formalities, conditions, restrictions or penalties. The formalities, conditions, restrictions or penalties which may be imposed must be such as are prescribed by law and necessary in a democratic society

for one of the stated aims, in this instance for the prevention of disorder. It is not contested in this case that the policy of the Prison Service relating to the wearing of emblems is not prescribed by law, as found by Weatherup J in Re Byers' Application. What is submitted is that the policy is not necessary in a democratic society for the stated aim, namely to prevent crime or disorder. Mr Hutton submitted that the objective of the Prison Service was to maintain a uniform policy throughout the prison and not to prevent crime or disorder and consequently was not within the terms of Article 10(2).

[28] A prison population will include many different individuals from within society. It is also the working environment for prison staff. The fact of imprisonment, often for crimes of violence, requires a controlled environment with rules and regulations applicable to all and applied evenly. In such an environment resentment may stem from privileges afforded to a few. It is therefore necessary that there are rules and regulations that apply to all and it cannot be doubted that the prison service are entitled to set out the parameters of what is acceptable, provided it is reasonable in order to prevent crime or disorder.

[29] Conflict emblems in a divided society where the emblems represent one view or the opposite view are by their nature divisive and have the potential to inflame those who do not agree with them. This must be so particularly where the divisions have led to years of violence, even though a period of relative calm has ensued. Many of those caught up in the conflict from both sides inhabit or have inhabited the prisons. Therefore it is necessary and reasonable that the prison service have a policy about the wearing of such emblems which forms part of its policy to prevent disorder within the prison system and which is uniformly applicable. Does the existence of a separated regime within the prison demand that a different policy be applicable in that regime? I do not think that it does. While the likelihood of contact between those with opposing views may be reduced in a separated unit, it cannot be excluded. Whether in a separated regime or not, there will always be contact with members of staff. The Equality Commission considered such conflict emblems had no place in a working environment and a prison should be no different. As part of its policy to prevent disorder the prison service are entitled to have rules relating to emblems which are applicable throughout the prison. As Girvan LJ stated in Re McCafferty's Application this policy is soundly based.

[30] The wearing of an emblem as a mode of expression is a small element of what Article 10 ECHR is designed to protect. The basic tenets of Article 10 are the rights to hold opinions and to impart and receive information and ideas. None of these matters are restricted by the prison policy. Prisoners are permitted to wear Easter Lilies in their cells. The only restriction is that they may not be worn in communal areas. That restriction in the context of Article

10 is a very minimal interference. It is entirely proportionate to the objective of preventing or maintaining good order in a prison.

[31] Mr Hutton emphasised that in Re McCafferty's Application Girvan J expressed the view that the arguments were finely balanced. He submitted that in those circumstances a change of emphasis in one argument should or could tilt the balance. I do not think the arguments are finely balanced. The case for an objective policy on emblems as part of the necessary aim to prevent disorder within a prison and which is applicable throughout the prison, including separated regimes, is substantial if not more so. In my view the policy which is minimally restrictive, complies with Article 10 of the Convention.

[32] The test to be applied in an application for leave to bring judicial review proceedings is whether there is an arguable case having a realistic prospect of success and which is not subject to a discretionary bar such as delay or an alternative remedy - Sharma v Antoine [2007] 1 WLR 780 at [14(4)]. The appellant's claim is that the policy applied to the wearing of emblems breached his right to freedom of expression under Article 10 ECHR. For the reasons I have given there is not an arguable case with a realistic prospect of success that the appellant's rights have been infringed as claimed and there are no grounds for granting any of the remedies sought.

[33] In appropriate cases challenges to a refusal of leave to bring judicial review proceedings have been treated as appeals rather than a renewal of the application for leave - see Re Bignell's Application [1997] NI 36 and Re Farrell's Application [1999] NIJB 143 and Order 53 Rule 3 and Rule 5(8). That approach can be adopted where all the material relied upon is before this court. That is the position in this appeal and this is an appropriate case in which to adopt that procedure. Accordingly, leave to apply for judicial review is granted and the appeal dismissed on its merits.