Neutral Citation No. [2015] NIQB 97 | *Ref:* **MAG9798**

Judgment: approved by the Court for handing down | *Delivered:* **26/11/2015**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

Hart's (Darren) Application [2015] NIQB 97

IN THE MATTER OF AN APPLICATION BY DARREN HART FOR JUDICIAL REVIEW

and

IN THE MATTER OF A DECISION OF THE PRISON SERVICE OF NORTHERN IRELAND

MAGUIRE J

Introduction

[1] This case involves a single point of some general importance in relation to the procedural aspect of the introduction of closed visits for a prisoner held at Her Majesty's Prison Maghaberry or at other prison establishments in Northern Ireland.

[2] In May 2015 the applicant, who was already a segregated prisoner, was told that a decision had been made by a governor rank to place restrictions on his visits. The notice he was given referred to the reason for this (his behaviour) and referred to the restrictions being put in place for an initial period of 2 weeks. The restrictions, the notice went on, were for "the protection of the Article 2 and Article 8 rights of staff, prisoners and others". The notice contained the information that the steps taken were in compliance with Prison Rule 67.

[3] Prison Rule 67 is at the centre of the argument which arises in this case. It is headed "Communications". Rule 67(1) then states:

> "(1) Except as provided by statute and in these rules, a prisoner shall not be permitted to communicate with any

> person outside the prison, or that person with him, without the authority of the Department of Justice."

Rule 67(5) deals with the suspension of visits. It reads:

> "Subject to paragraph (2) above, the Governor may at any time, having regard to circumstances obtaining or expected to obtain in the prison, suspend all or any visits for such period as the Department of Justice may approve."

Rule 67(6) deals with closed visits as the restrictions imposed on the applicant are colloquially known. It reads:

> "(6) Subject to paragraph 2 above, the Department of Justice may require that any visit, or class of visits, shall be held in facilities which include special features restricting or preventing physical contact between a prisoner and a visitor".

[4] It can be seen that Rule 67(6) is the *lex specialis* in respect of closed visits, albeit that 67(5) contains a power of a broader and arguably more draconian nature in the context of visits *i.e.* the power to suspend visits altogether.

[5] A crucial feature of these provisions is, however, that the Rule 67(6) power is exercisable by the "Department of Justice" whereas the Rule 67(5) power is exercisable by a governor subject to oversight by the Department of Justice.

[6] The submission made by the applicant is a simple one and is that as the decision to impose closed visits in this case was taken by a governor that decision breached the terms of the *lex specialis*: Rule 67(6) as it could only be taken under that Rule by the Department of Justice.

Internal Guidance

[7] The reason why the decision was made by a governor in this case is not difficult to find. There is internal guidance which is relevant. This is described as IG07/12 and is headed "Procedures for applying for visiting restrictions on prisoners and their visitors". This guidance was issued on 17 April 2012 and was the operative guidance at the date of the restrictions imposed on the applicant's visits referred to above.

[8] The guidance contains the following passage:

> "If closed visits are recommended the governor may put in place temporary measures and restrictions before a

> decision is taken by EHRESB [Prison HQ]. The governor may delegate authority of [sic] this matter to any governor not below the rank of Governor 4. The period of time should not normally exceed 14 calendar days or if necessary will be pending the outcome of adjudication."

[9] The above explains why a governor made the decision and why the period set initially was one of 14 days.

[10] In respect of the guidance, the applicant argues that it conflicts with the *lex specialis* of Rule 67(6) in that it wrongly invests the power to decide in a governor when the rule places it in the hands of the Department of Justice.

[11] The respondent accepts that a governor rank in the prison is not to be viewed as representing the Department of Justice for the purpose of the Carltona principle. This seems to the court to be an appropriate concession given the recent decision of the Supreme Court in R(Bourgass and Another) v Secretary of State for Justice [2015] UKSC 54.

[12] While the respondent offered the analysis that the Rule 67(5) power could be viewed as subsuming the Rule 67(6) power as the former is a more draconian power, this was not pressed strongly.

[13] The respondent drew attention to a recent Supreme Court decision in Shahid v Scottish Ministers [2015] UKSC 58. In that case Shahid was in segregation for his own protection following threats from other prisoners. His segregation had been repeatedly authorised because of the risk he was at. However, there were procedural defects in the authorisation process which the Supreme Court held rendered the authorisations unlawful. This in turn meant that the relevant periods of segregation had not been effected in accordance with law. Consequently, there was a breach of Article 8 of the European Convention on Human Rights. In any event, the court held that taken together the periods of segregation, some 55 months, had not been shown to be proportionate and breached Article 8 on this basis as well. While the court considered what would be the appropriate remedy, it decided that a declaration was sufficient, principally because the petitioner had suffered no prejudice, in the court's view.

[14] In the course of giving the court's judgment Lord Reed made the following comments when discussing the issue of whether other ways of looking at the issue of non-compliance with the relevant procedure could produce a different result. He said:

> "What is however clear is that any duty arising under the 2006 Rules [the relevant prison rules applying] would be overridden by a conflicting duty imposed by primary legislation. In particular, the governor's duty under

> section 6(1) of the Human Rights Act to protect the safety of prisoners, in accordance with their Article 2 and 3 Convention rights, would override any duty arising from Rule 94 to return a prisoner to mainstream conditions, where that would involve a serious risk to life or limb." (Paragraph 26)

[15] Mr Daly submitted that if there is a defect as regards the identity of the person who made the order in this case and if it should have been an official in the Department and not a governor, nonetheless the reason for the decision was to protect the human rights of staff, prisoners and others (as indicated on the notification of restrictions provided to the prisoner at the time) with the consequence that any defect can be viewed as overridden by the adoption of Lord Reed's approach in Shahid.

[16] Finally, the respondent relied on the general language of Rule 118 of the Prison Rules to support the lawfulness of the restrictions. Rule 118 indicates that the governor shall superintend the conduct of the officers under his authority and has a variety of specific powers.

Assessment

[17] The court's conclusions in respect of the arguments which have been advanced are as follows:

(i) The court accepts that the *lex specialis* in this case is Rule 67(6). This is clearly the provision which the rule maker intended should deal with the issue of closed visits.

(ii) While Rule 67(5) is more draconian in its width – enabling a complete suspension of visits – there was no intention that it would deal with closed visits. If this had been the case, there would have been no need for Rule 67(6).

(iii) It is inescapable that in Rule 67(6) the intention is that the decision should be made by the Department (unlike Rule 67 (5)).

(iv) A governor rank in the prison is not in legal terms an official of the Department and the Carltona principle would not apply to him/her.

(v) Accordingly, the decision was made by the wrong person and was invalidly made.

(vi) The court rejects the view that Rule 118 can save the situation as the precise terms of this rule cannot be stretched to cover this situation.

(vii) The internal guidance, the court finds, was the reason for the error in this case. It is unlawful insofar as it seeks, contrary to the terms of Rule 67, to place in the hands of a governor a power which belongs to the Department *i.e.* the power to impose restrictions – even as a temporary measure.

(viii) In the court's view, the actual decision *vis a vis* the applicant was made under the terms of the guidance albeit that the intention behind it was to protect the human rights of staff, prisoners and others.

(ix) It was, moreover, not part of the factual matrix in this case that the intention had been to take action upon the legal footing of the Human Rights Act section 6 as the notice given to the prisoner cites Rule 67 as the source of the power being exercised.

(x) While there was a breach of the rules in this case and the restrictions were unlawfully imposed and while there will therefore have been a breach of Article 8 of the European Convention on Human Rights on the basis that the imposition of the restrictions was not in accordance with law, the court is of the view that had the matter been put before an official of the Department the same result would very likely have been the outcome. The court therefore does not find that there has been prejudice to the applicant.

Conclusion

[18] In the court's view, the Prison Service should seek, in the light of this judgment, either to provide authority to governor ranks to take a decision of this type if this step is necessary – which would require a change in prison rules – or it should maintain the *status quo* as regards the rules but reconsider the terms of the internal guidance.