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**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

**QUEEN'S BENCH DIVISION**
**(JUDICIAL REVIEW)**

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**IN THE MATTER OF AN APPLICATION BY GLEN WINCHESTER FOR JUDICIAL REVIEW**

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**WEATHERUP J**

## Progressive Regimes and Earned Privileges

[1] Prisoners with enhanced status enjoy additional privileges. The applicant is a prisoner at HMP Maghaberry. He attained enhanced status but on 7 December 2001 the applicant lost his enhanced status as a result of his failure to undergo a drugs test. The applicant's enhanced status was eventually restored on 6 March 2002 but the applicant has proceeded with this application for judicial review to obtain certain declarations in relation to the operation of a scheme known as "Progressive Regimes and Earned Privileges" (PREPS).

[2] PREPS was introduced on 20 November 2000 and was revised in May 2001. There are three levels of prison regime. First there is basic status "for those prisoners who through their behaviour and attitude demonstrate their refusal to comply with prison rules generally and/or co-operate with staff." Secondly there is standard status "for those prisoners whose behaviour is generally acceptable but who may have difficulty in adapting their attitude or who may not be actively participating in a sentence management plan." Thirdly there is enhanced status "for those prisoners whose behaviour is continually of a very high standard and who co-operate fully with staff and other professionals in managing their time in custody. Eligibility to this level also depends on full participation in sentence management planning."

[3] A prisoner is first given standard status. There is provision for advancement from standard status to enhanced status through a system of weekly reporting by prison officers. A prisoner must receive four consecutive recommendations which are endorsed by the senior officer and the prisoner must be actively taking part in the sentence management plan. There is also provision for appeals against decisions as to status whereby a prisoner may appeal a decision in writing to a governor using a specified appeal form. The revised PREPS issued to prisoners in May 2001 indicated that it was the intention to introduce at a future date a form of drug testing as part of the criteria for a prisoner to obtain and remain on enhanced regime.

[4] In November 2001 HMP Maghaberry introduced a voluntary drug testing programme. A prisoner information sheet dated 12 November 2001 gave details of the programme and stated –

> "The test procedure is voluntary and you will not be placed under any pressure to engage in the process. **However, failure to fully comply with any aspect of the procedure or receiving a positive test will result in you remaining on standard regime (or returning to standard regime for those currently enhanced).**"

## Drugs testing the applicant

[5] On 7 December 2001 the applicant was selected to undergo a drug test under the voluntary drugs testing procedure. This involved him being taken to the punishment segregation unit where the tests were carried out and being requested to provide a urine sample. The applicant was unable to do so as he had been to the bathroom a short time previously and he explained this to the two prison officers supervising the testing. He complained by affidavit about the procedure in that he was not given sufficient water to drink and that two prison officers were watching and that it was not appropriate to have to sit in the punishment cells in between attempts to provide a sample. One of the two prison officers conducting the test recorded the applicant as arriving at the unit at 0850 complaining about having to undergo a drugs test although he signed the requisite consent form. He was unable to provide a sample and at 0905 was provided with a third of a pint of water in a cup. He made a further attempt to provide a sample at 0945 and was told that he could have more water but he left the unit without providing a sample. The applicant was found to have failed the drugs test and he was reduced to standard status from 7 December 2001. There were differences between the applicant and the prison officers as to some of the facts and circumstances surrounding the test on that day.

[6] The applicant completed a "Prisoner Request/Complaint" form on 11 December 2001 whereby he made a request to speak to the governor dealing with his sentence management programme. He did not complete the PREPS appeal form. The governor was not immediately available to respond to the applicant's request/complaint in relation to the sentence management plan and the applicant spoke to a Senior Officer about the test. He was advised that there was nothing he could do about the drugs testing procedure and that he should wait the necessary period and put himself forward again for enhanced status.

[7] The applicant did seek the restoration of enhanced status and on 3 February 2002 he was called for a second drugs test. Again the applicant could not provide a sample. At 0900 the applicant was due to have a visit with his brother and niece and he states that he was told that he could take the visit and return to the unit to complete the test but that he must not wash. One of the two prison officers conducting the test on 3 February 2002 stated that the applicant arrived at the unit at 0830 and was unable to provide a sample and was provided with a bottle of water. At 0900 the applicant was informed that his visit had been called and he was still unable to provide a sample. He was told that he could wash and change and return to the test after the visit but he did not wish to do so. Again the applicant was found to have failed the drugs test and he remained on standard status. Again there were differences between the applicant and the prison officers as to some of the facts and circumstances surrounding the test on that day.

[8] The applicant states that he completed a Prisoner's Request/ Complaint form in relation to his treatment on 3 February 2002. Because of the difference between the applicant and the prison officers as to whether the applicant could have returned to the unit after his visit the Governor acting as drugs coordinator at HMP Maghaberry ordered that the applicant be given a further opportunity to provide a sample for a drugs test. Accordingly on 27 February 2002 the applicant was requested to provide a sample for a drugs test for a third time and on that occasion the procedure was completed successfully and the sample tested negative. The applicant was restored to enhanced status on 6 March 2002.

## Drugs testing of prisoners

[9] A system of drugs testing of prisoners is justified under Article 8(2) of the European Convention on Human Rights as being necessary for the prevention of disorder or crime.

In Peters v The Netherlands (Application No 21132/93 decided 6 April 1994) the European Commission on Human Rights declared inadmissible a complaint under Article 8 concerning compulsory urine tests on prisoners. It was found that such tests constituted an interference with the right to respect

for private life under Article 8(1) of the Convention but that they were justified under Article 8(2) on the basis that such interference was necessary for the prevention of disorder or crime. Similarly in Galloway v United Kingdom (Application No 34199/96 decided 9 September 1998) the European Commission found that random mandatory drug tests were justified on the same grounds for the purposes of Article 8(2) of the Convention.

**Issue of general public interest**

[10] The Court has a discretion to hear public law cases involving questions of general public interest, even where the applicant is no longer directly affected by the outcome.

The respondent submitted that the present application has become academic as the applicant's enhanced status was restored on 6 March 2002. The applicant's response was that the application raised questions of general public interest which the Court ought to address and issue an appropriate declaration. The applicant relied on Carswell LCJ in McConnell's Application (Unreported 4 November 1999) at page 7-

> "It is not the function of the courts to give advisory opinions to public bodies, but if it appeared that the same situation was likely to recur frequently and the body concerned had acted incorrectly they might be prepared to make a declaration to give guidance which would prevent the body from acting unlawfully and avoid the need for further litigation in the future."

**The status of prisoners as a civil right for the purposes of Article 6.**

[11] The issue of general public interest identified by the applicant was that the decision as to the status of a prisoner was a management decision that engaged Article 6 of the Convention. The reclassification of the applicant from enhanced status to standard status was said to concern a "civil" right for the purposes of Article 6 so as to give rise to the right to a fair trial of the dispute as to status. However the respondent relied on Brady v United Kingdom [1979] 3 EHRR 297 to the effect that the classification of prisoners does not give rise to a question of civil rights or obligations under Article 6(1). Brady was classified as a category A prisoner in view of the security risk that he was considered to present. The European Commission declared the application inadmissible as the decision of the relevant committee to classify a

prisoner was not a question of civil rights or obligations or criminal charges but an "administrative classification".

[12] The applicant sought to distinguish Brady from the present case on the basis that it concerned an overall security classification imposed by the prison authorities whereas the applicant's status was one which he sought to attain voluntarily and was not simply an "administrative classification" but involved a management decision. Further it was argued that the applicant's reduction in status in the present case gave rise to a contestation and required a determination of a factual dispute as to the circumstances in which the applicant had been unable to complete the voluntary drugs test and retain enhanced status and that such a situation meant that Article 6 was engaged.

[13] I consider that the decision whether the applicant is entitled to enhanced or standard or basic status is an administrative classification in the same manner that a decision as to a security category is an administrative classification. Decisions are made by prison staff and for present purposes there is no valid distinction between administrative classification and management decision. There is no civil right to a particular privilege or status as a prisoner. The grant of enhanced status is an administrative matter relating to additional privileges to which there is no entitlement. Accordingly there is no contestation and there is no determination directly decisive of rights for the purposes of Article 6.

[14] The mere existence of a factual dispute between an individual and a public authority does not give rise to a civil right and the mere existence of the present factual differences between the applicant and the prison officers does not engage Article 6.

**The operation of PREPS and the requirement of fairness.**

[15] While Article 6 is not engaged it is nevertheless necessary that the operation of PREPS should satisfy the requirements of fairness, with due regard being had to the operational difficulties involved in prison management.

[16] The English equivalent of PREPS was considered in R v Secretary of State for the Home Department ex parte Hepworth (Unreported 25 March 1997) which application arose out of prisoners convicted of sexual offences being unable to attain enhanced status if they continued to deny their guilt. By reason of the denial they were not admitted to the sex offender treatment programme and therefore could not satisfy the criteria for enhanced status. Laws J made the following comments about the place of judicial review in relation to such decisions as to status –

> "I should say first that I have some misgivings in principle as regards the privilege cases. They are attempts to review executive decisions arising wholly within the context of internal prison management, having no direct or immediate consequences for such matters as the prisoner's release. While this court's jurisdiction to review such decisions cannot be doubted, I consider that it would take an exceptionally strong case to justify its being done. There are plain dangers and disadvantages in the courts maintaining an intrusive supervision over the internal administrative arrangements by which the prisons are run, including any schemes to provide incentives for good behaviour, of which the system in question here is in my judgment plainly an example. I think that something in the nature of bad faith or what I may call crude irrationality would have to be shown, which is not suggested here."

[17] However, the proper concern that the Court should exercise caution in considering matters relating to internal prison management should not diminish the overall requirement that the Court exercises its supervisory role in a manner that ensures that decisions in relation to the status of prisoners comply with the demands of fairness, impacting as such decisions do on the privileges to be enjoyed during detention. As stated by Moses J in R v Secretary of State for the Home Department ex parte Potter [2001] EWHC Admin 1041 at paragraph 41 -

> "Thus requirements of fairness which are of sufficient flexibility to encompass operational difficulties and problems do provide a standard against which to test the quality of decisions in relation to IEPS [the English version of PREPS]. Fair schemes fairly applied are of importance to the quality of a prisoner's life in prison and to effective management, provided it is appreciated that the courts must be sensitive to those difficulties and alive to the fact that those who manage prisons are better placed to take a wider view of the demands of fairness than an aggrieved prisoner, who must necessarily have a confined perspective."

Incidentally, the operation of the English equivalent of PREPS was also considered by the Court of Appeal in R(on the application of Potter & Others) v Secretary of State for the Home Department [2002] EWCA Civ 334 and the application of Article 6 for which the applicant contends in the present case was not an issue at first instance or on appeal.

[18] There are factual differences between the applicant and the prison officers as to the circumstances of the tests. The resolution of factual disputes is not in general the province of judicial review. In R v Reigate Justices ex parte Curl [1990] COD 66 there was a clear conflict in the affidavit evidence that had been lodged by the parties. The Divisional Court concluded that where there was a conflict of that nature "one has to accept the evidence which stands against the person who has the responsibility of showing that certiorari should lie." That conclusion would be subject to the cross-examination of witnesses, which was considered to be inappropriate in ex parte Curl, involving as it did the deliberations of a lower court. There will now be cases which involve civil matters or criminal charges for the purposes of Article 6 where the approach will require cross examination of witnesses to resolve factual disputes but that is not this case. While there are differences between the applicant and the prison officers there is no obvious factual issue which demands resolution in order to assess the fairness of the treatment of the applicant. In those circumstance to undertake a factual examination in a case involving the fairness of an administrative classification would be unnecessary. Cross examination of witnesses would not be appropriate in the present case and, quite rightly, no such application was made.

[19] While there exist factual disputes between the prisoner and the prison officers in relation to the decision of 7 December 2001, which is the only decision challenged in this application for judicial review, it remains the position that the applicant was unable to complete the voluntary drugs test which was a precondition to his retaining enhanced status. His complaints were that he was not given sufficient water and that he was watched by two prison officers and he had to undergo the tests in the punishment and segregation unit. It is said on behalf of the respondent that too much water is to be avoided although more water is now available than was formerly the case; that while two prison officers are present and the integrity of the test has to be assured the prisoner provides the sample from behind a screen and on occasions may do so in the privacy of the cell in the unit; that the unit is the location of the testing because it is convenient for the purposes of the testing. I am not satisfied that there was any unfairness in the procedures for the drugs testing or in the manner in which the test was conducted.

[20] In relation to events of 3 February 2002 there remains a conflict as to the circumstances in which the applicant attended the visit and did not return for the voluntary drugs test but again I am not satisfied that there was any unfairness in the manner in which the test was conducted.

[21] In any event, having rejected the applicant's general public interest argument about the management decision engaging Article 6, and the applicant having had his enhanced status restored on 6 March 2002, I am satisfied that any issue of fairness in relation to the manner in which either of the tests was conducted has become academic.

## The appeal procedure and the requirement of fairness

[22] However there remains an issue of fairness relating to the applicant's appeal against the removal of enhanced status on 7 December 2001. There has been confusion about the appeal procedure. PREPS "Information for Prisoners" has a section dealing with appeals and provides an appeal form (Form RF10). The applicant appears not to have been aware of this appeal form (despite it appearing in the "Information for Prisoners") and on 11 December 2001 he completed a different form by way of appeal namely Prisoner's Request/Complaint form (Form RC1). In this form he requested to speak to the Governor regarding his sentence management programmes without any specific reference to his loss of enhanced status. In response he was requested to speak to a Senior Officer. He did so and it would appear that he complained to the Senior Officer about his treatment during the drugs test and was informed that there was nothing that could done save that he could put himself forward again for enhanced status after the necessary period had elapsed. As the applicant adopted the approach suggested by the Senior Officer there was in effect no appeal against the decision of 7 December 2001.

[23] In his affidavit the Governor states that had there been an appeal against the decision of 7 December 2001 (and the Prisoner's Request/ Complaint form of 11 December 2001 was not considered to be such an appeal) "the applicant would have had the opportunity to put forward anything he considered relevant to it including the material he has now recorded in his affidavit". It is implicit in the Governor's response that consideration of the applicant's complaints about the test might have led to a direction that he should have a further opportunity to undergo a drugs test without having to wait for the requisite period.

[24] It is apparent that the applicant attempted to appeal against the decision of 7 December 2001. The substance of that appeal was not considered as there was confusion on the part of the prisoner, and also it would appear

on the part of some prison staff, as to the proper course to be taken to secure a substantive hearing. If the Prisoner's Request/Complaint form of 11 December 2001 was not to be treated as an appeal then the Senior Officer ought to have advised the applicant to comply with the proper procedure. After the second test on 3 February 2002 the applicant states that he submitted a further Prisoner's Request/Complaint form and when this was dealt with the Governor gave consideration to the complaint about the testing. In the event the applicant had the opportunity to undertake a further drugs test and had his enhanced status restored on 6 March 2002. If formal procedures are required to be followed and specific forms are required to be used then a prisoner should not be allowed to continue down the wrong procedural route if he is thereby to be deprived of a substantive decision on his appeal.

[25] From the date of the applicant's request/complaint of 11 December 2002 to the second test on 3 February 2002 was almost 8 weeks whereas, when the applicant's second request /complaint was considered, the third test was arranged within some 3 weeks on the 27 February 2002. Had the applicant's first request/complaint been considered in like manner to the second then it too may have resulted in a further test within some 3 weeks. However I cannot be satisfied that an earlier test would have been directed or that the applicant would not have experienced difficulties with that second test as proved to be the case when it did eventually take place. Nor can I be satisfied that enhanced status would have been restored any earlier than 6 March 2002. Accordingly I am not satisfied that any irregularity that arose out of the appeal process in December 2001 had the adverse impact on the applicant of occasioning any delay in the restoration of enhanced status.

[26] The applicant complained about the unavailability of blood tests in order to complete the voluntary drug testing. However the applicant's counsel quite rightly did not proceed with that complaint at the hearing.

[27] The applicant applied for leave to amend the Order 53 statement to include the claim for loss of prison earnings during the period when the applicant was reduced to standard status. That application was adjourned and now that the grounds relied on by the applicant have been rejected the issue of loss of prisoner's earning does not arise and leave to amend is refused.

[28] Accordingly the application is dismissed.