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Judgment: approved by the Court for handing down
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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

IN THE MATTER OF AN APPLICATION BY DAVID WILLIAM JOHN DOWDALLS FOR JUDICIAL REVIEW

Before: Carswell LCJ, Nicholson and Campbell LJJ

CARSWELL LCJ

[1] The appellant is a prisoner in HM Prison, Magilligan (the prison), where he is serving a sentence of seven years' imprisonment imposed on 30 November 1999, after he was found guilty by a jury of rape and indecent assault. Although he did not appeal against the conviction, the appellant has maintained his innocence ever since, claiming that the victim consented to sexual intercourse between them. The prison authorities decided not to allow him to go on to the enhanced regime in the prison, for the reasons which we shall set out, and he brought an application for judicial review of that decision. The application was dismissed by Kerr J on 30 May 2002, and the appellant appealed to this court.

[2] The appellant has been detained in the prison since his arrest on 3 December 1999. He has not committed any disciplinary offence since his admission to the prison. In or about April 2001 a new system of classification was introduced in the prison, known as the Progressive Regimes and Earned Privileges Scheme (the Scheme), whereby prisoners are placed in one of three categories, basic, standard and enhanced. The appellant was initially placed on the standard regime, in which all prisoners start, and under which he had the normal conditions and privileges. In September 2001 he was demoted to the basic regime, under which he lost certain privileges and received lower pay for work done, because he declined to take part in an Offending Behaviour Programme (OBP). The prison authorities in November 2001 restored him to the standard regime, on which he has been ever since. They have declined, however, to admit him to the enhanced regime, under which prisoners receive certain privileges not available to those on the standard

regime and higher earnings, on the ground that participation in an OBP is a necessary pre-condition for admission to that regime.

[3] The Scheme defines the conditions for and operation of admission to the enhanced regime as follows:

> "ENHANCED Regime For those prisoners who
>
> - Have caused or pose no discipline or control problem
> - Have a clear disciplinary record for the previous 3 months
> - Have completed or currently participating in Offending Behaviour Programmes
> - Have consistently demonstrated a mature attitude to their time spent in prison custody
> - Have participated in meaningful activities whilst in prison custody
> - Have consistently demonstrated a good working relationship with staff, other professionals and with fellow prisoners
> - Successfully pass Voluntary Drug Test (VDT)
>
> At Basic level a prisoner will have the minimum amount of earnings and privileges.
> Standard offers slightly more privileges than the present regime. Enhanced level offers more privileges and learning than the present regimes.
> The full list of privileges will be available on your landing from your residential officer or personal officer.
>
> HOW YOU ARE ASSESSED
>
> Four `weekly' reports from your personal officer, which will incorporate comments or reports from staff from other areas (your work, visits, gym etc), will be assessed by the Residential S/O and a recommendation made as to whether or not a Regime change is appropriate. If `Yes' then a Residential Report will be completed and a final decision made.

> A move to a higher regime will be based on at least four consecutive reports and favourable recommendations, from your personal officer.
> If your report recommends that you are not suitable for the enhanced regime, you will remain on the standard level until you achieve the required recommendations and endorsements.
>
> Recommendation to move you to the enhanced level must be justified by your continuous exceptional behaviour. Behaviour will be judged on areas such as conduct, personal hygiene, participation in work, education, programmes and attitude to staff and other prisoners.
> It is also a necessity for you to be actively taking part in your sentence management plan to be eligible for the enhanced regime.
> However taking part in the sentence management plan does not automatically qualify you for the enhanced regime."

[4] The relevant OBP in which the prison authorities wished the appellant to take part was a sex offenders' treatment programme. The programme involves prisoners addressing their offending behaviour and its effect upon the victims and examining their own motivation for and attitude to the offences. It is part of the prison's aim of reducing re-offending and engaging with prisoners to encourage them to take responsibility for their development and progress. The appellant has refused to participate on the ground that he denies his guilt of the offences of which he was convicted, whereas the programme requires an acknowledgment of guilt. It is the view of the prison authorities that such an acknowledgment is an essential part of such a programme, an approach confirmed by Laws J in *R v Secretary of State for the Home Department, ex parte Hepworth* (1997, unreported), where he said at page 6 of his judgment:

> "A prisoner who denies some aspects of his sexual offending – perhaps as to some of the details, perhaps the extent to which he says the victim was a willing partner, and so forth – may nevertheless usefully participate in the programme. But one who denies his guilt altogether cannot. It is a premise of the very idea that a prisoner can be brought to confront what he has done that, in essence at least, he admits what he has done. So none of the applicants can participate in SOTP, even if any indicated a willingness to do so."

The prison authorities claim that it is their experience that some prisoners who have hitherto denied guilt come in time to confront their responsibility for their offences and make progress towards a degree of rehabilitation. The prospect of admission to enhanced status is designed to be an incentive to co-operate with the OBPs in this fashion.

[5] The appellant's original Order 53 statement, lodged on 12 October 2001, set out a number of grounds of attack upon the decision of the prison authorities to demote him to the basic regime. After his restoration to the standard regime the application continued, as amended, in relation to their refusal to admit him to the enhanced regime. The argument on the hearing before us centred on two main contentions, that the imposition and administration of the Scheme were (a) ultra vires as being contrary to the provisions of Rules 2 and 9 of the Prison and Young Offenders Centre Rules (Northern Ireland) 1995 (b) in breach of Article 9 of the European convention on Human Rights.

[6] Rule 9(1) of the 1995 Rules provides for classification of prisoners:

> "9.-(1) Prisoners shall be classified in accordance with any directions made by the Secretary of State, having regard to their age, offence, length of sentence, previous record, conduct in prison or while on temporary release under rule 27 and the requirements of security, good order and discipline at the prison in which they are confined."

Along with this provision should be read Rule 10(1):

> "10.-(1) There shall be established at every prison a system or systems of privileges appropriate to the classes of prisoners held there."

Mr McCloskey QC for the appellant submitted that these rules had to be construed in accordance with the general principles set out in paragraphs (*e*) and (*f*), as amended, of Rule 2(1):

> "2.-(1) These rules are made with regard to the following general principles –
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> ***
>
> (e) Each prisoner will be considered individually and where appropriate

will be able to contribute to decisions regarding how he spends his time while in prison;

(f) Facilities and privileges shall be made available to prisoners, individually or as members of a class, without discrimination on the basis of race, colour, sex, language, political opinion, national or other origin, birth, economic or other status;"

He contended that the decision to refuse the appellant admission to the enhanced scheme was not made by reference to any of the factors set out in Rule 9(1), and that if Rule 9(1) were interpreted so as to bring the decision within it that would infringe the principles set out in Rule 2(1).

[7] We are unable to accept this argument. In our opinion admission to the enhanced regime was clearly linked to good conduct in the prison, a factor comprised in Rule 9(1), one facet of which is co-operation by participation in the OBPs. We cannot see that this construction of Rule 9(1) is in any respect contrary to the principles contained in Rule 2(1). The appellant was considered individually, as required by paragraph (*e*), and we do not regard his rejection as being the result of discrimination in any of the respects set out in paragraph (*f*). Nor is it correct to aver that the Scheme was operated so inflexibly as to constitute a blanket policy fettering the exercise of discretion, as appears from Governor Treacy's third affidavit. This consideration of individual differences must inevitably be limited, if the Scheme is to be workable , and, as Laws J observed at page 14 of his judgment in *Ex parte Hepworth,* "There is no principle of our administrative law which says, in a milieu such as this, that there cannot be black-and-white rules."

[8] It was also submitted that the operation of the Scheme was irrational, in that the appellant, though a model prisoner in all aspects of behaviour in prison, was not permitted the benefits of the more agreeable enhanced regime. We could not regard it as irrational of the prison authorities to place some emphasis on requiring prisoners to participate in appropriate OBPs, and if they use admission to the enhanced regime as an incentive to participate that is in our view within the area in which they are entitled to exercise their judgment. Laws J expressed the proper approach in a further passage in his judgment in *Ex parte Hepworth:*

> "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 prisoners' 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 court's 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."

We also agree with the observation of Moses J in *R (Potter) v Secretary of State for the Home Department* [2001] EWHC Admin 1041, where he said at paragraphs 42 and 43 of his judgment:

> "42. There is, to my mind, nothing unfair or inappropriate in requiring a sex offender, guilty of serious sexual offences as these claimants were, to attend an SOTP, even if he denies he is guilty of those offences. It is a key purpose of imprisonment to encourage constructive behaviour by a prisoner and thereby reduce the risk of his reoffending and increase protection to the public. It is, therefore, fair and rational to encourage participation in a course which may reduce risk of reoffending by means of the schemes for providing an incentive to attend such a course and granting privileges to those who undertake such courses.
>
> 43. Prison management is entitled to operate the IEPS and the court is entitled to proceed on the basis that a prisoner, once convicted, is guilty of the offences that form the subject matter of those convictions. A prisoner is not entitled to rely merely upon his assertions of innocence to excuse himself from confronting his offences. Were it otherwise, the system of rewarding those who are prepared to confront their offences would be undermined. One who denies his offence should

> not reap the same rewards as one who is prepared to admit and confront them."

[9] It was submitted on behalf of the appellant that in refusing him admission to the enhanced status regime the prison authorities were in breach of Article 9 of the European Convention on Human Rights. The respondent's counsel submitted, on the other hand, that Article 9 was not engaged and that the only applicable provision was the qualified right contained in Article 10. Articles 9 and 10 read:

> **"Article 9**
>
> *Freedom of thought, conscience and religion*
>
> 1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
>
> 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of pubic safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.
>
> **Article 10**
>
> *Freedom of expression*
>
> 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 of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject 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."

[10] For the purposes of deciding this appeal we shall assume, without deciding the point, that, on the analogy of the ECtHR's decision in *Buscarini v San Marino* (1999) 30 EHRR 208, requiring the appellant to take part in an OBP and acknowledge his guilt might be regarded as requiring him to adopt a belief contrary to his own strong conviction of his innocence. The anterior question, however, is whether the appellant's belief in his innocence constitutes one of the freedoms protected by Article 9(1).

[11] Mr McCloskey cited to us a number of ECtHR decisions, *Kokkinakis v Greece* (1993) 17 EHRR 397, *Metropolitan Church of Bessarabia v Moldova* (2000) 35 EHRR 13, *Serif v Greece* (2001) 31 EHRR 20 and *Hasan and Chaush v Bulgaria* (2002) 34 EHRR 55, in which members of churches had been hindered in various ways from practising their religion, leading in each case to a finding of breach of Article 9. He did not attempt to argue that the present appeal concerned freedom of religion and relied on the reference in Article 9 to freedom of thought and conscience. We consider that in principle his submission cannot be sustained, on the ground that the appellant's freedom to maintain his innocence of the crime of which he was convicted does not fall within the protection of freedom of thought and conscience conferred by Article 9 and his freedom so to maintain has not been impaired.

[12] Such decisions as the parties were able to bring to our attention appear to confirm the view which we have formed. In *McFeeley v UK* (Application no 8317/78) the applicants had claimed special status in prison as political prisoners, seeking to obtain exemption from the rules of the ordinary prison regime. The Government contended that "belief" in Article 9(1) related to the holding of spiritual or philosophical convictions which have an identifiable formal content and did not extend to mere opinions or deeply held feelings about certain matters. The Commission did not in terms accept that contention in the form advanced by the Government, but its finding in paragraph 30 of its decision is consistent with it:

> "30. The Commission considers that the applicants are seeking to derive from Article 9 the right to a `special category status' whereby they are entitled to wear their own clothes and be

> relieved from the requirement of prison work and, in general, be treated in a way which distinguishes them from other prisoners convicted of criminal offences by the ordinary courts. The Commission is of the opinion that the right to such a preferential status for a certain category of prisoner is not amongst the rights guaranteed by the Convention or by Article 9 in particular. Moreover, it considers that the freedom to manifest religion or belief `in practice' as contained in this provision cannot be interpreted to include a right for the applicants to wear their own clothes in prison."

[13] In *Arrowsmith v UK* (1981) 3 EHRR 218 the applicant had been convicted under the Incitement to Disaffection Act 1934 for distributing to soldiers leaflets expressing pacifist views and endeavouring to seduce them from their duty or allegiance in relation to service in Northern Ireland. The European Commission of Human Rights held that pacifism was a philosophy and as such constituted a belief ("conviction") covered by the terms of Article 9. It held, however, that by distributing the leaflets the applicant did not manifest her belief in the sense of Article 9(1) and that her conviction and sentence did not interfere with the exercise of her rights under that provision. Applying the principles in that decision, we do not consider that belief in one's innocence can constitute a philosophy, nor does it come within the types of thought or conscience to which Article 9(1) applies.

[14] The appellant's counsel did not attempt to rely on Article 10 of the Convention and it is not necessary for us to discuss whether that provision is applicable to the present case. It does appear, however, that the requirement that the appellant should take part in an OBP and acknowledge his guilt could readily be justifiable under the proviso contained in Article 10(2) if that Article does apply.

[15] For the reasons we have given we shall accordingly dismiss the appeal.