

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 JOHN BYERS  
FOR JUDICIAL REVIEW

**WEATHERUP J**

The application.

[1] This is an application for judicial review of -

1. The policy of the Northern Ireland Prison Service not to permit the wearing of Easter lilies by prisoners in the communal areas of prisons.
2. The decision of a Governor on 20 April 2003 to order the applicant to remove an Easter lily from his clothing.
3. The decision of a Governor in an adjudication on 23 April 2003 finding the applicant guilty on a disciplinary charge of disobeying a lawful order to remove the Easter lily.

The background.

[2] The applicant is a prisoner at HMP Maghaberry and has been in custody since 4 March 2003. On Easter Sunday 20 April 2003 the applicant wore an Easter lily on his clothing. The applicant describes himself as a man of Catholic religion and due to his political philosophies he commemorates the 1916 Easter Rising every year. He asserts the right to wear an Easter lily to note and commemorate an event of great historical importance to people of his political and cultural background, namely the 1916 Easter Rising.

[3] At 4.00 pm on Sunday 20 April 2003 the applicant was wearing the Easter lily in the cell of another prisoner with two other inmates present. A Prison Officer ordered the prisoners to go back to their own cells. The Prison Officer stopped the applicant and told him to remove the Easter lily. The applicant refused. The Prison

Officer then ordered the applicant to remove the Easter lily and again the applicant refused.

[4] Northern Ireland Prison Service Standing Orders dated 3 July 1997 at paragraph 4.12 states that -

“Prisoners may not wear emblems, nor should they be displayed by prisoners in their cells”.

By Notice to Prisoners dated 15 March 2000 Governor Mogg issued a notice concerning the “Wearing of shamrock on St Patrick’s Day and poppies for Remembrance Day” which stated that -

“These emblems are non political and non-sectarian and will, in future, be permitted to be worn at the appropriate time by any prisoners who wish to wear them.”

[5] The applicant was charged with a disciplinary offence under Rule 38(22) of disobeying a lawful order in that on Sunday 20 April 2003 at 1610 hours he refused to remove an Easter lily from his clothing. Governor Maguire conducted the adjudication on Wednesday 23 April 2003 at 1104 hours. The applicant applied for legal representation or assistance and this was refused. The applicant pleaded not guilty. It was not in dispute that the applicant had been wearing the Easter lily and had been required to remove it before entering the communal area and had refused to do so. In essence the applicant objected to the requirement that Easter lilies should not be worn in communal areas and to the requirement that the applicant should remove the Easter lily. The applicant was found guilty as charged and awarded one days cellular confinement and 28 days loss of privileges.

The 48 hour requirement for the laying of charges.

[6] The applicant raised two preliminary points in relation to the adjudication. First, the Governor did not have jurisdiction because of a breach of Rule 35(1) of the Prison and Young Offenders Rules (Northern Ireland) 1995. Rule 35(1) provides -

“Where a prisoner is to be charged with an offence against Prison discipline, the charge shall be laid in writing before the Governor within 48 hours of the discovery of the offence save in exceptional circumstances.”

[7] Adjudication Form 1126 (details of alleged offence against prison discipline) specifies the date and time of the offence as Sunday 20 April 2003 at 1610 hours. Adjudication Form 1127 (Notice of Report Against Prison Discipline) specifies the date and time of issue of Form 1127 to the applicant as 22 April 2003 at 1505 hours.

Form 1126 specifies that the details were checked by the Governor on 22 April 2003 but does not specify the time at which that occurred. Governor Maguire states that the charge would always be laid before a Governor and approved by him or her prior to the issue of Form 1127 to the prisoner so that the charge must have been laid before the Governor prior to 1505 hours on 22 April 2003. The applicant relied on Price v Humphries (1958) 2 QB 353 on the basis that the burden was on the respondent to prove compliance with the Prison Rules once the issue had been raised by the applicant.

[8] It is apparent that the charge was laid in writing before the Governor within 48 hours of the discovery of the offence as required by Rule 35(1). I reject the applicant's contention that the Governor lacked jurisdiction to conduct the adjudication of the applicant. Assuming without deciding that Price v Humphries applies to prison adjudications I am satisfied that the respondent has established that the Governor had jurisdiction to conduct the adjudication of the applicant.

#### Legal representation or consultation.

[9] The applicant's second preliminary point about the adjudication was that it was unreasonable of the Governor to refuse the applicant legal representation or consultation and thus failed to allow the applicant a proper opportunity to properly present his case contrary to Rule 36(4). At the adjudication the applicant requested a legal consultation with his Solicitor on the basis first of all that he did not understand why Easter lilies were not allowed and secondly he did not understand the charge. The Governor described the charge as straightforward in that a lawful order was given and it was alleged that the applicant refused to obey. The applicant contends that this response assumes that the order was lawful and that the issue was the applicant's refusal, whereas it was the lawfulness of the order or more broadly the lawfulness of the policy that was the issue. The Governor's affidavit sets out how he assessed the application for legal consultation by consideration of various factors, which are in fact the Tarrant Principles. It would appear that the applicant was proposing to engage a solicitor to undertake a challenge to the policy of the prison authorities in the course of the adjudication. An adjudicating Governor could not be expected to review prison policy in the course of a disciplinary hearing. The order given to the applicant was in accordance with prison policy on the issue and was a "lawful" order. The lawfulness of the policy in public law terms will be determined in these proceedings and if the policy was not lawful the adjudication will be quashed.

#### The applicant's grounds.

[10] The substantive grounds relied on by the applicant are that the policy that prisoners are to be prevented from wearing Easter lilies in communal areas within the Prison is unreasonable, unlawful and void in that –

- (i) “The policy represents an undue interference with the applicant’s right to freedom of expression particularly his right 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 applicant’s rights under Article 10 of the European Convention.
- (ii) The policy represents a discriminatory policy in that it unjustifiably 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 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.
- (iii) The policy being one which operates within the ambit of the exercise of the applicant’s rights under Article 10 ECHR is discriminatory of the applicant’s rights under Article 10 when taken together with Article 14.
- (iv) The policy represents a breach of Section 75 and 76 of the Northern Ireland Act 1998 in that by adopting the policy the Prison Service have failed to have due regard to the need of promoting quality of opportunity between prisoners of different political beliefs and have discriminated against a body of prisoners on grounds of their political beliefs.”

#### The right to freedom of expression - Article 10.

[11] Article 10 of the European Convention provides for freedom of expression as follows –

“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.”

[12] Article 10 requires an interference with freedom of expression to be justified by being, first of all, prescribed by law, and secondly, necessary in a democratic society. This necessity will be established where the interference is in the interests of a legitimate aim, is proportionate and the reasons are relevant and sufficient. Handyside v United Kingdom [1976] 1 EHRR 737 and Sunday Times v United Kingdom [1979] 2 EHRR 245.

[13] The applicant contends that the wearing of the Easter lily is an aspect of his right to freedom of expression and preventing the wearing of the Easter lily in communal areas in the prison subjects the exercise of the right to freedom of expression to restrictions and penalties. Accordingly the applicant contends that the burden is on the respondent to justify the interference with the applicant’s right to freedom of expression by establishing that the interference is prescribed by law and that it is necessary in a democratic society for one of the specified purposes.

[14] “Expression” has been interpreted widely. I am satisfied that the wearing of an emblem can amount to an expression for the purposes of Article 10. Restrictions on expression in the form of the wearing of emblems are not a necessary incident of imprisonment. Accordingly the restrictions on the wearing of the Easter lily amount to an interference with freedom of expression for the purposes of Article 10 (1) and must be justified under Article 10 (2).

Prescribed by law.

[15] The Secretary of State for Northern Ireland has a general power to regulate prisons in Northern Ireland under the Prison Act (Northern Ireland) 1953. The applicable secondary legislation is the Prison and Young Offenders Centre Rules (NI) 1995. Standing Orders are made by the Northern Ireland Office Prison Service Headquarters on behalf of the Secretary of State. They are described by an official from Prison Service Headquarters of a mixture of administrative instructions and guidance to Governors concerning for the most part the detail of the operation of prisons and as being subordinate to the Prison Act and the Prison Rules and that they are published and may be accessed by prisoners.

[16] Campbell v United Kingdom (1992) 15 EHRR 137 concerned the reading of prisoner’s correspondence in Scotland. At paragraph 18 the European Court of Human Rights set out the general legal framework in Scotland from the Prisons (Scotland) Act 1952 and the Prisons (Scotland) Rules 1952, and to supplement the Prison Rules and by virtue of the Secretary of State for Scotland’s general jurisdiction over prisons and the various powers conferred by the Prison Rules, the Secretary of State issued instructions to Governors in the form of Standing Orders and administrative circulars. The Standing Orders dealt with powers in relation to correspondence of prisoners. That general legal framework is similar to that which

applies in Northern Ireland. The complaint concerned interference with the applicant's right to respect for his private of family life, his home and his correspondence under Article 8 of the European Convention, which also requires that any interference should be "in accordance with the law". At paragraphs 35 to 38 the ECtHR found the interference was in accordance with the law.

[17] The applicant disputes the practical access that prisoners can obtain to the Standing Orders and the foreseeability of a legal position that involves the discretion of the prison staff as to the application of the rules. Prison Rule 34 prohibits any article in the prison unless authorised by the Governor. Disciplinary offences include being in possession of an unauthorised article and disobeying a lawful order. The permitted emblems were specified in a Notice to Prisoners issued by the Governor. In practice the prohibited emblems were limited to communal areas where the risk to order and discipline would arise. Flexibility in the operation of the restrictions may be desirable. What will be certain to a prisoner is that he is required to obey the lawful orders of prison officers. Contested lawfulness, as in the present case, does not impact on the accessibility or foreseeability of the legal position. I am satisfied that the general legal framework of Act, Rules, Standing Orders and Notices to Prisoners provides for the impugned restrictions in a manner that is prescribed by law within the meaning of Article 10(2).

#### Justification for the restriction.

[18] The relevant legitimate aim relied on by the respondent is the prevention of disorder or crime. The reason for the restriction on the wearing of Easter Lilies is stated by Governor Maguire to be that the wearing of an Easter Lily in communal parts of the prison would be likely to threaten good order and discipline and that accordingly a Prison Officer who apprehends such a threat is acting properly in asking for it to be removed. He refers to an integrated prison such as HMP Maghaberry and the concern that good order and discipline within the prison would be endangered if prisoners wore political emblems which may give rise to offence on the part of other prisoners, and sooner or later this will manifest itself in terms of indiscipline and tension within the prison which would disrupt the smooth running of the prison. The Governor accepts that the wearing of Easter Lilies by a small number of prisoners in public areas of the prison did occur in the past but that "at this time" the wearing of such emblems in communal areas of the prison threatened good order and discipline.

[19] The governor compares and contrasts the Easter lily with other emblems. He emphasises that the approach to a particular emblem is whether the wearing of it would give rise to a danger to good order and discipline in the prison. By this criterion the prison authorities consider that neither the poppy nor the shamrock may give rise to difficulty but the wearing of Loyalist political emblems such as the orange lily or paramilitary badges would be viewed in the same way as the wearing of the Easter lily.

[20] The applicant does not agree with the Governor's assessment. He states that prisoners from his cultural and political persuasion see the poppy as being offensive in much the same way as others might claim the Easter lily to be offensive. He describes it as a misconception to see the wearing of Easter lilies as closely linked to the conflict in Northern Ireland and emphasises the proper significance of the Easter lily as being the connection with the 1916 Easter Rising as a landmark historical event in the history of Irish Nationalism/Republicanism, and playing an important part in the establishment of the sovereign state of the Republic of Ireland. The applicant accepts no distinction between the poppy and the Easter lily, is ambivalent to the position of the orange lily and rejects any comparison with paramilitary badges. It is not in dispute that there is a need to control the use of emblems in a prison environment in the interests of good order and discipline. It is in dispute that the Easter lily should be so controlled. The issue concerns the making of decisions as to the boundary between those emblems that should be controlled and those that need not be controlled.

[21] It is necessary to ascertain whether the restrictions on the wearing of the Easter lily concern a pressing social need, are proportionate to that need and that the reasons for the restrictions are relevant and sufficient. The approach to the use of emblems in prison requires some objective assessment. Their use in prison cannot be determined by those who advocate a particular emblem or those who oppose a particular emblem although their views and likely responses would be assessed and would be taken into account. Nor can the position of the prison authorities on the use of emblems be determinative of the issue. When leave was granted the applicant was invited to provide some objective assessment of the use and status of the Easter lily. That was an exercise that might more appropriately have been undertaken by the applicant when the issue first arose, so as to address the policy of the prison authorities as the primary decision makers. The applicant did refer to the work of Ms Anne Matthews, who has completed a Doctorate by thesis entitled "Woman Activists in Irish Republican Politics 1900-1941". She has undertaken some research on the Easter lily and apparently it was launched in 1926 by Cumann na mBan. She describes the Easter lily as a powerful symbol of Irish Republicanism and that it had proved contentious for two reasons. The main political parties (being a reference to Fianna Fail and Fine Gael) never accepted it as a symbol and it has remained specific to Republican politics. Further the reluctance of Republicans to seek permits to sell the Easter lily led to many arrests which Ms Matthews states created the erroneous impression within the general population that the Easter lily was somehow an illegal symbol.

[22] The Fair Employment Commission has issued guidance on emblems to employers. In the category of emblems best avoided the FEC places emblems or displays which are "directly linked to the community conflict over the past 30 years and/or local politics", in respect of which it is stated that they clearly have the potential to cause disruption to a good and harmonious working environment. Examples that are said to be best avoided include the Easter lily and the orange lily as well as "Ulster Says No" badges, Spirit of Drumcree badges, Bloody Sunday

ribbons and Saoirse ribbons. These emblems are identified with one community but are also identified with the conflict.

[23] The FEC places in a different category those emblems that “tend to distinguish one community from the other in Northern Ireland but are not directly connected with the community strife” and are unlikely to be regarded as creating an intimidating or hostile working environment. This category includes marks of religious observance, crosses, crucifixes, ashes, pioneer pins, Christian Union badges, fainnes and the poppy and the shamrock “when worn with decorum and at the appropriate period.” The parties debated whether the FEC paper intended to use the words in inverted commas to qualify all the emblems listed or only the poppy and the shamrock. Within a prison context it would no doubt be necessary that all emblems be worn with decorum and at the appropriate period.

[24] This is a sensitive and difficult issue and the Fair Employment Commission, in relation to the workplace, has sought to distinguish between on the one hand community emblems that are identified with the conflict and are likely to generate hostility, and on the other hand community emblems that are not directly connected with the conflict and are unlikely to generate hostility. On this approach the Easter lily and the orange lily are potentially disruptive in the workplace and the poppy and the shamrock are unlikely to be so. This is of course an employment based approach but has equal if not greater validity in prison conditions. This provides objective support for the approach of the prison authorities both in relation to the Easter lily and the different treatment of the poppy.

[25] The applicant contends that the respondent’s approach is unjustified in that it involves interference with the party whose conduct had the potential to cause offence, but is otherwise lawful, as opposed to restraining the potentially violent reaction of those who would claim to be offended. The present problem is not new in Ireland as appears from Humphries v Connor (1864) 17 ICLR 1. The plaintiff was walking along the street in Swanlinbar, County Cavan, wearing an orange lily when other persons threatened the plaintiff. The defendant was a Police Inspector who, in order to prevent a breach of the peace and to protect the plaintiff, requested her to remove the emblem, and when she refused the defendant removed the emblem. In proceedings by the plaintiff against the police it was held that the defendant was justified in removing the orange lily to prevent a breach of the peace.

[26] The modern approach to this issue appears in the decision of Bibby v Chief Constable Essex (2000) 164 JP 297. A bailiff attended the shop of a judgement debtor to recover goods and the debtor was uncooperative. The police feared a breach of the peace and arrested the bailiff. The bailiff’s action against the police for assault and wrongful imprisonment was unsuccessful at first instance and the arrest of the bailiff was found to be justified. The Court of Appeal allowed the appeal. Schiemann LJ did not accept the approach of the trial judge because –



“He failed to consider where the threat was coming from. True it is that had the bailiff not been seeking to exercise his rights there would have been no threat to the peace. But in circumstances such as these the threat, insofar as there was one, of violence should have been perceived as coming from the debtor rather than the bailiff. I am prepared to proceed on the basis that the debtor was not verbally threatening violence as such. He was however threatening to prevent the bailiff from doing what he could lawfully do which did not interfere with any of the debtors rights. Implicit in that was the threat to use violence if the bailiff went ahead”. (Page 303H to 304B)

[27] In exercising the common law power of arrest the Court of Appeal stated that the following conditions must be met in relation to the person who is to be arrested-

1. “There must be the clearest of circumstances and a sufficiently real and present threat to the peace to justify depriving a citizen, not at the time acting unlawfully, of his liberty;
2. The threat must come from the person to be arrested;
3. The conduct must clearly interfere with the rights of others and its natural consequences must be violence which was not wholly unreasonable from a third party;
4. The conduct of the person to be arrested must be unreasonable”.

[28] The applicant relies on Bibby v Chief Constable of Essex in support of the contention that, in circumstances where otherwise lawful conduct provokes the threat of violence from another person, attention should focus on the party offering the threat. Accordingly it is contended that the prison authorities should impose restrictions on the party whose reaction is likely to be disorderly and that Article 10 is breached where the response of the prison authorities is to impose restrictions on the party whose conduct is alleged to be offensive.

[29] However the ECtHR has recognised that State authorities may take action against those who, in exercise of the right to freedom of expression, undertake activities that may occasion a breach of the peace. There will not be a breach of Article 10 if the action of the authorities is proportionate. In Steel v United Kingdom [1998] 28 EHRR 603 various protesters objected to field sports, motorway extensions and the sale of fighter helicopters and were arrested and detained. In each case there was an interference with the protesters freedom of expression. In the cases of the field sports and the motorway extension the arrest and detention pursued the legitimate aim of preventing disorder and was found to be proportionate because of the risk to the protestors, by the nature of their actions, and the risk of disorder and violence. In the case of the helicopters the ECtHR was not satisfied that there was

anything in the actions of the protesters that justified fearing that a breach of the peace was likely to be caused.

[30] A further example is Chorherr v Austria [1993] 17 EHRR 358 which concerned a peaceful demonstration against the purchase of fighter aircraft. The applicant was arrested and detained for a breach of the peace. The ECHR found that the nature, importance and scale of the military parade could appear to police to justify strengthening the forces deployed to ensure that it passed off peacefully. Further, it was found that the applicant must have realised that his demonstration might lead to a disturbance requiring measures of restraint, which measures were found not to be excessive. The domestic court had found that the measures employed had been intended to prevent breaches of the peace and not frustrate the expression of an opinion. The ECtHR found no breach of Article 10.

[31] Accordingly, I do not accept the applicant's contention that the prison authorities are required to deal with any potential conflict arising from the wearing of the Easter lily by imposing restrictions on the objectors rather than the applicant. It is a permissible approach to the problem to impose restrictions on the wearing of the Easter lily if those restrictions accord with the requirements of Article 10 (2).

[32] The applicant contends that the respondent failed to produce sufficient evidence to justify the restrictions and accordingly failed to satisfy the burden imposed by Article 10(2). Reliance is placed first of all on Sadik Ahmet v Greece (Application number 18877/91) decided by the European Commission of Human Rights on 4 April 1995. The applicant was convicted of offences that included disrupting the public peace, when he published election literature referring to the Greek Muslim citizens of a region as Turks, so as to incite the population to violence. The ECommHR stated that subject to Article 10(2) the right to freedom of expression

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“..... is applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference but also to those that shock, offend or disturb the state or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no “democratic society.”(paragraph 50)

[33] The ECommHR emphasised the crucial importance of freedom of expression for an elected representative and in an election campaign and concluded in paragraph 53 -

“However, it cannot find that, in the circumstances of this case, and in the absence of clear elements of incitement to violence that the imposition of a prison sentence for the use in public, namely in an election

campaign, of the term “Turk” in respect of the Muslim minority in that area can be reasonably regarded as a “necessary” measure in a democratic society”.

The interference with the applicant’s freedom of expression was found not to be proportionate to the legitimate aim pursued and was not justified under Article 10(2) of the Convention.

[34] In similar vein is Incal v Turkey (9 June 1998) where the applicant was a member of the executive committee of a political party that distributed a leaflet criticising the measures taken by local authorities against illegal trading and squatters’ camps as being a campaign to drive out Kurds. The applicant was convicted and imprisoned for public incitement to commit offences. The State took the position that it had a duty to forestall any attempt to promote terrorist activity by means of incitement to hatred but the ECtHR did not discern anything that would warrant a conclusion that the applicant was in any way responsible for the problems of terrorism in the country or the region and found the conviction was disproportionate to the aim pursued and therefore amounted to a breach of Article 10.

[35] In each case the applicants faced charges concerned with incitement to violence and the ECtHR was not satisfied that there was sufficient evidence of incitement as to warrant conviction and imprisonment. The cases illustrate the importance attached to protecting political expression as an aspect of freedom of expression. In the field of political expression it is no doubt particularly important that there should be tolerance of expression that may be considered offensive. In the present case the wearing of the Easter lily represents an aspect of the applicant’s political expression. The response to such political expression must be assessed in the context of a prison in Northern Ireland and the need to maintain order and discipline in such a setting.

[36] The respondent emphasises this context as involving an integrated prison where community tensions would arise and where restrictions are an inherent part of imprisonment and where the maintenance of good order and discipline is of importance. The separation of prisoners that is being introduced into the prison does not affect this restriction as it only operates in communal areas. The applicant is not a paramilitary prisoner in any event. Silver v United Kingdom (1983) 5 EHRR 347 concerned control of prisoners’ mail and considered whether the interference was necessary in a democratic society for the purposes of Article 8(2) of the Convention. The ECtHR, at paragraph 98, stated that what was “necessary” required regard to be had to the ordinary and reasonable requirements of imprisonment, where some measure of control over prisoners’ correspondence was called for, and such interference was not in itself incompatible with the Convention.

[37] The respondent refers to the ECtHR recognition that there are circumstances where there may be a need for restrictions on expression that others may find

offensive. In Otto-Preminger Institute v Austria [1994] 19 EHRR 34 the applicants produced a satirical film and were charged with disparaging religious doctrines and the film was seized. The ECtHR held that there was no violation of Article 10. The ECtHR noted that the Austrian Courts held the film to be an abusive attack on the Roman Catholic religion, according to the conception of the Tyrolean public, having due regard to freedom of artistic expression where merit as a work of art and a contribution to public debate in Austrian society did not outweigh those features which made it essentially offensive to the general public within their jurisdiction. Further the ECtHR had regard to the fact that the Roman Catholic religion was the religion of the overwhelming majority of Tyroleans and the authorities acted to ensure religious peace in the region and to prevent some people feeling the object of attack on their religious beliefs in an unwarranted and offensive manner.

[38] The restriction on the wearing of the Easter lily was in pursuance of a legitimate aim, namely the prevention of disorder and crime by maintaining order and discipline in the prison. The context of the restriction was an integrated prison with necessarily confined conditions housing prisoners from a divided society. The Easter lily was judged by the prison authorities to have the potential to occasion disorder and to be what the Fair Employment Commission classed as a conflict emblem. Certain emblems are perceived as representing primarily one tradition or another. Certain of those emblems also come to be regarded as representing the unlawful paramilitary activity of that tradition. When an emblem comes to represent conflict rather than simply tradition its character changes. That change occurs when the perception of others is that the emblem primarily represents conflict. To those who adopt such an emblem it may be seen as representing only the tradition but it is the general perception that is determinative of its character.

[39] Restrictions on the wearing of emblems are a necessary incident of imprisonment in the interests of good order and discipline. In the context of maintaining good order and discipline in a prison in Northern Ireland those emblems perceived to be identified primarily with conflict must be considered potentially disruptive. The extent of the interference with freedom of expression is limited to the wearing of this particular emblem in the communal areas of the prison where the potential disruption would arise. The extent of the risk that the restriction seeks to avoid, namely disorder and crime, is a significant concern in the context of a prison. The extent to which a less restrictive alternative might be adopted, other than to contend for the absence of any restriction, has not been advanced. The proposed alternative is to permit the use of the Easter lily in the communal areas. If there is to be a restriction the present approach represents minimum interference. In all the circumstances I am satisfied that the restrictions on the use of the Easter lily are proportionate and are not in breach of Article 10 (2).

#### Discrimination.

[40] The applicant further contends that the restriction is discriminatory on the grounds of his religious and political or cultural beliefs and is in breach of Article 14

of the European Convention taken in conjunction with Article 10. Article 14 provides a right to freedom from discrimination in respect of Convention rights as follows -

“The enjoyment of the rights and freedoms set in this Convention shall be secured without discrimination on any grounds such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

[41] The applicant also relies on sections 75 and 76 of the Northern Ireland Act 1998 as ancillary aspects of the discrimination issue. .

75. - (1) A public authority shall in carrying out its functions relating to Northern Ireland have due regard to the need to promote equality of opportunity between persons of different religious belief or political opinion,

(2) Without prejudice to its obligations under subsection (1), a public authority shall in carrying out its functions relating to Northern Ireland have regard to the desirability of promoting good relations between persons of different religious belief or political opinion.

(4) Schedule 9 (which makes provision for the enforcement of the duties under this section) shall have effect.

76. - (1) It shall be unlawful for a public authority carrying out functions relating to Northern Ireland to discriminate, or to aid or incite another person to discriminate, against a person or class of person on the ground of religious belief or political opinion.

(2) An act which contravenes this section is actionable in Northern Ireland at the instance of any person adversely affected by it; and the court may-

(a) grant damages;  
(b) subject to subsection (3), grant an injunction restraining the defendant from committing, causing or permitting further contraventions of this section.

(3) Without prejudice to any other power to grant an injunction, a court may grant an injunction under subsection (2) only if satisfied that the defendant-

(a) contravened this section on the occasion complained of and on more than one previous occasion; and

(b) is likely to contravene this section again unless restrained by an injunction.

[42] Section 75(4) and schedule 9 provide for enforcement of equality duties through the Equality Commission so the provisions do not contribute to the present application. Further, the terms of section 76 relating to discrimination by public authorities does not add to the remedies claimed by the applicant.

[43] In Sinn Fein's Application [2004] NICA4 the Court of Appeal stated that it was necessary, in order to establish discrimination in any field, to identify comparators, that it is say the persons or bodies by comparison with whom the complainant claimed to have been treated less favourably. The Court adopted the approach of Brooke LJ in Wandsworth London Borough Council v Michalak [2002] 4 All ER 1136, paragraph 20, where four questions were set out, namely -

1. Do the facts fall within the ambit of one or more of the substantive Convention provisions.
2. If so, was there different treatment as respects to that right between the complainant on the one hand and other persons put forward for comparison (the chosen comparators) on the other.
3. Were the chosen comparators in an analogous situation to the complainant's situation.
4. If so, did the difference in treatment have an objective and reasonable justification - in other words did it pursue a legitimate aim and did the differential treatment bear a reasonable relationship of proportionality to the aims sought to be achieved.

[44] In relation to question 1, the facts fall within the ambit of Article 10, being the right to freedom of expression. In answer to question 2, there was different treatment as respects the wearing of emblems between the applicant and other prisoners who wished to wear a poppy. In answer to question 3, the prisoners wearing the poppy were in an analogous situation to the applicant. Question 4 concentrates, not directly on the restriction imposed on the applicant's freedom of expression and whether that can be justified, but rather on the differential treatment and whether that can be justified.

[45] The applicant states that he did not wish or intend to give offence by the wearing of the Easter lily and that he would find it objectionable, but not offensive, for poppies to be worn by others because of his perception of the military symbolism of the poppy. It was recognised, for the purposes of this submission, that restrictions on the wearing of certain emblems could be necessary for the purposes of good order and discipline, provided there was evidence that they were likely to occasion a breach of good order and discipline. It was further recognised that paramilitary badges or symbols of the conflict in Northern Ireland could be subject to restrictions for this reason. However the applicant would place the Easter lily in a different

category to paramilitary badges or symbols of the Northern Ireland conflict and would place it in the same category as the poppy and the shamrock.

[46] The issue is whether the differential treatment between the Easter lily and the poppy bears a reasonable relationship of proportionality to the legitimate aim of maintaining good order and discipline. The approach of the FEC again provides objective support for the prison authorities position in according different treatment to the two emblems. The character of the poppy is not generally perceived as primarily an emblem of the conflict. To the applicant it may be so, as representing British militarism in Ireland, but the FEC places it in the wider arena where it would not be perceived as a conflict emblem. I accept the objective and reasonable justification for the different treatment offered on behalf of the respondent.

[47] The applicant has not established any of the grounds for Judicial Review. The application is dismissed.