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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY JOHN MURDOCK FOR

JUDICIAL REVIEW

KERR J

Introduction

[1] This is an application by John Murdock, a sentenced prisoner, for a declaration that the search of his cell by prison officers on 18 June 2002 and in particular the examination of legal correspondence when he was not present was unlawful.

Factual background

[2] In an affidavit filed on behalf of the respondent Mr Max Murray, the deputy director of operations of the Northern Ireland Prison Service, has asserted that a policy of random and regular searches of prison cells is essential to the maintenance of good order and discipline of a prison. If such searches did not take place there would be, Mr Murray claimed, "a real and significant danger" to staff and other prisoners from the acquisition and retention of unauthorised articles including offensive weapons, munitions and explosives. The regime of random searches is also required, Mr Murray contended, to combat the significant drugs problem that exists in Northern Ireland's prisons.

[3] The Prison Service aims to search each prisoner's cell on a regular basis. To be effective searches must take place without notice to the prisoner. But, Mr Murray suggests, the prison authorities seek to respect the right of prisoners to engage in legal proceedings and to correspond confidentially with their legal advisers. To that end a policy was devised in HMP

Maghaberry (where the applicant is housed) whereby prisoners can lodge legal papers with the administration office. The introduction of this scheme was prompted by a previous judicial review application by the applicant. It has been in operation since 1997. When the scheme was implemented the applicant did not proceed with his challenge to the system that had hitherto obtained.

[4] Under the scheme currently in force a prisoner may report to his house officer with his legal papers. In the prisoner's presence these are sealed in a plastic folder with a coded label. If he requires access to his legal papers he will be allowed to retrieve them from the sealed container in the presence of a principal officer. Legal papers secured in this way are still liable to be searched but only in the presence of the prisoner after he has broken the seal.

[5] If a prisoner whose cell is to be searched is in the vicinity of his cell at the time that the search is due to take place he will be asked to go to the cell where he will be searched. If legal papers are in the cell these are examined (but not read) in his presence. They are then either returned to the position in the cell where they were found or given to the prisoner if he wishes to have them. He may take them away while the search proceeds.

[6] If the prisoner is not in the vicinity when the search is due to take place the papers are inspected in his absence. Mr Murray claims that it would be impossible to arrange searches so that every prisoner was present when a search of his cell was to take place. In the year from December 2001 to November 2002, 8430 cell searches were carried out in HMP Maghaberry. Most of these are conducted during the day when prisoners are frequently away from their cells. Mr Murray suggests that if prison staff were required to have prisoners present every time their cells were searched this would significantly reduce the effectiveness of the system of searching since the delay occasioned in summoning prisoners would undoubtedly lead to a number of searches having to be abandoned. Moreover an insistence that prisoners be present while their legal papers are examined would, in Mr Murray's estimation, lead to a substantial rise in the number of prisoners keeping legal papers in their cell. At present most prisoners do not do so.

[7] Officer Hunter and Officer Stewart searched a number of cells including the applicant's at about 10am on 18 June 2002. The applicant was not in the cell or in the immediate vicinity. Mr Hunter examined papers in the cell some of which he believes were legal papers. He did not read the papers. He has been instructed not to read any legal papers. The purpose of the examination was to ensure that no unauthorised article had been placed among the papers. In the event nothing was found.

[8] On discovering that his cell had been searched the applicant submitted a petition to the prison authorities in the following terms: -

> "The House of Lords in *R v Secretary of State for the Home Department ex parte Daly* [2001] UKHL 26 said that it was unlawful for [*sic*] routinely excluding all prisoners whilst their privileged legal correspondence, held by them in their cells, was examined by prison officers during the course of cell searches.
>
> I should be grateful if you would advise me as to when the Northern Ireland Prison Service will implement this judgment."

[9] The applicant's solicitors also wrote to the Prison Service on 29 August 2002 and 11 September 2002 making inquiries about the search of the applicant's cell and the policy relating to searches generally. On 11 September 2002 the Prison Service replied. The following are the relevant passages from the letter: -

> "
>
> - Staff examined your client's legal papers in accordance with prison rule 72 (4) and standing order 5.3.5.
>
> - The information that I have received informs me that the legal documents were examined to detect any unauthorised article, but they were not read.
>
> - Prisoners are routinely excluded from their cells during searches, but they may take their legal documents with them following the examination of same.
>
> - Legal correspondence is routinely examined but not read during cell searches.
>
> - As stated your client may take his legal documentation with him while his cell is being searched or alternatively there is a secure storage facility available in each residential area for such documentation."

The judicial review application

[10] For the applicant Mr Larkin QC submitted that the approach of the Prison Service to the search of prisoners' cells was clearly in breach of the guidelines laid down in *R v Secretary of State for the Home Department ex parte Daly* [2001] 3 All ER 433. The 'irreducible core' of the guidance provided by *Daly*, Mr Larkin said, was that inspection of legal documents should take place in the presence of the prisoner.

[11] Mr Maguire for the respondent argued that *Daly* was distinguishable. In that case the prison authorities had introduced a blanket policy that required that prisoners should not be present during cell searches including those where legal documentation was examined. No such policy existed in Northern Ireland. Rather here there are specific measures designed to protect the confidentiality of the documents.

The decision in *Daly*

[12] On 31 May 1995 the Home Secretary introduced a new policy governing the searching of cells occupied by convicted and remand prisoners in closed prisons in England and Wales. The new policy contained the following provisions: -

> "17.70 Staff must not allow any prisoner to be present during a search of living accommodation…
>
> …
>
> 17.72 Subject to paragraph 17.73, staff may normally read legal correspondence only if the Governor has reasonable cause to suspect that their contents endanger prison security, or the safety of others, or are otherwise of a criminal nature. In this case the prisoner involved shall be given the opportunity to be present and informed that their correspondence is to be read.
>
> 17.73 But during a cell search staff must examine legal correspondence thoroughly in the absence of the prisoner. Staff must examine the correspondence only so far as necessary to ensure that it is bona fide correspondence between the prisoner and a legal adviser and does not conceal anything else."

[13] It should be noted that before the House of Lords Mr Daly confined his challenge to a single aspect of the policy: the requirement that a prisoner may

not be present when his legally privileged correspondence is examined by prison officers. He contended that a blanket policy of requiring the absence of prisoners when their legally privileged correspondence was examined infringed his rights both at common law and under ECHR. Lord Bingham of Cornhill concluded that the policy infringed the prisoner's common law right to legal professional privilege – see paragraph 16 of the report. He then considered whether there was any justification for this infringement in the following passages: -

> "[18] It is then necessary to ask whether, to the extent that it infringes a prisoner's common law right to privilege, the policy can be justified as a necessary and proper response to the acknowledged need to maintain security, order and discipline in prisons and to prevent crime. Mr Daly's challenge at this point is *directed to the blanket nature of the policy*, applicable as it is to all prisoners of whatever category in all closed prisons in England and Wales, irrespective of a prisoner's past or present conduct and of any operational emergency or urgent intelligence. The Home Secretary's justification rests firmly on the points already mentioned: the risk of intimidation, the risk that staff may be conditioned by prisoners to relax security and the danger of disclosing searching methods.
>
> [19] In considering these justifications, based as they are on the extensive experience of the prison service, it must be recognised that the prison population includes a core of dangerous, disruptive and manipulative prisoners, hostile to authority and ready to exploit for their own advantage any concession granted to them. Any search policy must accommodate this inescapable fact. *I cannot, however, accept that the reasons put forward justify the policy in its present blanket form.* Any prisoner who attempts to intimidate or disrupt a search of his cell, or whose past conduct shows that he is likely to do so, may properly be excluded even while his privileged correspondence is examined so as to ensure the efficacy of the search, but *no justification is shown for routinely excluding all prisoners,* whether intimidatory or disruptive or not, while that part of the search is conducted. Save in the

> extraordinary conditions prevailing at Whitemoor before September 1994, it is hard to regard the conditioning of staff as a problem which could not be met by employing dedicated search teams. It is not suggested that prison officers when examining legal correspondence employ any sophisticated technique which would be revealed to the prisoner if he were present, although he might no doubt be encouraged to secrete illicit materials among his legal papers if the examination were obviously very cursory. *The policy cannot in my opinion be justified in its present blanket form.* The infringement of prisoners' rights to maintain the confidentiality of their privileged legal correspondence is greater than is shown to be necessary to serve the legitimate public objectives already identified. I accept Mr Daly's submission on this point." (Emphasis added)

[14] The outstanding feature of the policy that Mr Daly found offensive – and the feature that Lord Bingham found could not be justified – was its blanket nature. The prisoner officer was *required* to exclude the prisoner when the examination of the legal documents was being conducted. This procedure was bound to erode the prisoner's confidence that the confidentiality of his legal papers was observed.

[15] Lord Bingham drew support for his conclusion from a report of the Prisons Ombudsman. That report had examined the practice at HMP Sutton where a procedure had been developed to meet the wishes of prisoners who objected to the searching of their legal documents in their absence. There if the prisoner objected to his legal documents being searched in his absence the search team place the documents in a bag, seal the bag using a numbered reception seal and give the prisoner a copy of the seal number. The bag was left in the prisoner's cell while the search was being carried out. When the prisoner returns, he checks the seal on the bag to ensure that it has not been tampered with and the documents are searched in his presence. Lord Bingham referred to this practice apparently with approval, observing that, "it does not appear that this procedure gave rise to difficulty in practice".

[16] Two essential interests require to be protected. The first of these is the intrinsic need for confidentiality for legal documents. The second – and complementary – interest is that the prisoner should be confident that the confidentiality of the documents will not be compromised. It was because these interests were not protected by the new policy of the Home Secretary in *Daly* that it was condemned. This is the background against which Lord

Bingham made the remarks in paragraph 22 of the report on which Mr Larkin crucially relies.

[17] At paragraph 22 Lord Bingham said: -

> "Although, in response to a request by the House during argument, counsel for Mr Daly proffered a draft rule which might be adopted to govern the searching of privileged legal correspondence, it would be inappropriate for the House to attempt to formulate or approve the terms of such a rule, which would call for careful consideration and consultation before it was finalised. It is enough to indicate that any rule should provide for a general right for prisoners to be present when privileged legal correspondence is examined, and in practice this will probably mean any legal documentation to avoid time-wasting debate about which documents are privileged and which are not. But the rule must provide for the exclusion of the prisoner while the examination takes place if there is or is reasonably believed to be good cause for excluding him to safeguard the efficacy of the search, and the rule must permit the prison authorities to respond to sudden operational emergencies or urgent intelligence."

[18] I do not construe this passage as laying down a universally applicable precept that the prisoner must be present on every occasion that his legal papers are examined. If another means can be devised whereby the critical confidentiality of the documents can be preserved and the prisoner can be confident that he has the opportunity to ensure, if he wishes to do so, that the documents are not read, then the essential interests of the prisoner can be protected.

[19] I consider that the applicant had the opportunity to ensure that a search team would not read his legal papers by lodging them in the administration office. I do not consider therefore that the present policy of inspecting papers to ascertain that they do not contain illicit material unwarrantably interferes with the applicant's right to confidentiality of his papers. If the applicant is concerned to ensure that his papers remain confidential he can easily achieve this by lodging the papers. The application for judicial review must be dismissed.