Judicial review – house leave – whether decision unfair – procedural fairness – security assessment – whether prisoner had right to make representations – whether deprived of opportunity to comment on security assessment.

Neutral Citation No. [2005] NIQB 1

Ref: **GIRC5165**

Judgment: approved by the Court for handing down

(subject to editorial corrections)

Delivered: 07/01/2005

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY JOHN SWIFT FOR JUDICIAL REVIEW OF THE DECISION OF THE PRISON SERVICE OF NORTHERN IRELAND

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GIRVAN J

[1] In this judicial review application the applicant John Swift, a sentenced prisoner, challenges a decision by the Prison Service of Northern Ireland ("the Prison Service") refusing him home leave to attend his daughter's First Holy Communion on 29 May 2004. The applicant was sentenced to 13 years imprisonment on 31 May 2002 for possession of explosives with intent to endanger life. He is currently serving his sentence at HM Prison Maghaberry.

[2] On 10 January 2004 the applicant initially sought temporary relief on foot of the Compassionate Temporary Release Scheme to attend the service. He was informed on 28 January 2004 that his application did not fall within the ambit of the Compassionate Temporary Release Scheme because that was designed to allow prisoners the opportunity to visit members of their immediate family who were critically ill or to attend their funerals. The scheme did not extend to Holy Communion. The Prison Service considered the application under the wider provisions of rule 27 under which a prisoner may be temporarily released under the Rules for any special purpose or to enable him to have medical treatment, to engage in employment, to receive instruction or training or to assist him in the transition from prison to outside life. The Prison Service was not persuaded that the reasons given for

temporary release were sufficiently adequate to warrant the exercise of discretion under rule 27. According to the Prison Service letter account had been taken of the impact of Holy Communion on family life in considering the application in the context of Article 8 of the Convention.

[3] On 10 February 2004 the applicant lodged an appeal to the Secretary of State against the refusal. He was asked to give reasons why he believed he should be released to attend the Holy Communion service. Father Gabriel Bannon, the Roman Catholic Chaplin at the prison explained the significance of First Communion for a child in the Catholic tradition.

[4] In its decision letter of 10 May the Prison Service set out the reasons why the Secretary of State refused the application. It was decided that, while acknowledging the family reasons given for the applicant wishing to attend the communion, it did not consider that the event was of such exceptional importance that it warranted automatically temporary release from the prison. When examining the risks attached to any period of release the overriding consideration of the Prison Service was for the safety of the public and it was necessary to carry out a risk assessment. It was noted that the applicant had been sentenced to 13 years and that his earliest date for release would not be until May 2007. The device involved in the offence was a Mark 15 Barrack Buster, the timing of the proposed attack being on Remembrance Day 2000. It was noted that the applicant was a willing participant in driving the person who prepared the device. The serious nature of the offence and intention behind it called into question his suitability for release, the risk of absconding was heighten because he was to remain in prison until May 2007. The police considered him to present a high risk to the safety and security of the state. There was no guarantee that he would refrain from committing further offences or engaging in dissident Republican activity if temporarily released. These concerns were heightened by the continuing terrorist activity of the dissident Republican group. The applicant had denied involvement when interviewed and had shown no remorse in relation to the offence. Consideration had been given to provide an escorted release. However, as this would be to a public place and because of the high risk imposed by the applicant a police presence would be required. This was neither feasible nor practicable and safety concerns for any escort would have to be the overriding consideration.

[5] The applicant's main thrust was an attack on the risk assessment and the manner in which it was carried out without the applicant having an opportunity to comment on it or make representations about it. The respondent did not accept that the risk assessment was the predominant feature on which it refused the application. In his affidavit the applicant stressed that he had pleaded guilty to the offence and thereby took a responsible course of action. He had not been charged with membership of a dissident group. He was in a Republican prison wing for his own safety. He

claimed that he played a secondary role. He asserted that because of the limited additional work and rehabilitation opportunities available to him in the prison he had limited opportunity to demonstrate positive and constructive progress. In the affidavit of William Kirk, on behalf of the respondent it was pointed out that the applicant aligned himself with the real IRA within the prison. He co-accused is currently leader of the Real IRA prisoners there. The applicant claimed to be a Republican prisoner. The respondent was satisfied he played the role of a willing participant in the crime. While the information concerning the risk assessment was communicated to the applicant on 10 May 2004 there was nothing at all to prevent him from addressing the points within the prison or in any correspondence sent by his solicitors. The actual issue within the risk assessment where limited and preferable to the main issue. The applicant did not enter into the correspondence about the decision to raise his objections to the information contained therein. If the respondent was required to disclose risk assessment prior to any decision being taken this would increase the administrative burden and it would also necessarily to lay emergency applications and be likely to prejudice rule 27. The applicant sought leave to challenge the decision on 27 May 2004. The actual decision as noted was on 10 May and would have come to the attention of the applicant around that time. Accordingly he was aware of the views being taken by the Prison Service well before the date of the actual Holy Communion service for which he was seeking temporary release. His solicitors wrote to the Prison Service on 28 May 2004 raising the applicant's objection to the decision. That letter was not received until 1 June and on 2 June 2004 the Prison Service having considered the points made by the applicant it concluded that it was not persuaded that a change in its original decision would be appropriate. The launching of a judicial review leave application and the obtaining of legal aid for that purpose was inappropriate when the applicant in fact had a meaningful opportunity to seek to have the decision reviewed in the light of representations he might want to make, assuming for present purposes that he should have had an opportunity to make representations before being finally refused the chance of temporary release. Although the letter of 10 May expressed the decision of the Secretary of State in response to the appeal the Prison Service was bound to consider any fresh points that could be made on behalf of the prisoner. As noted in fact it did and confirmed his decision on 2 June 2004.

[6] In his application the applicant in effect seeks to challenge reliance on a security assessment in all cases unless the prisoner is given details of the assessment and given an opportunity to respond to it. An applicant such as the present must be decided on its own merits. It would not be appropriate for the court to state wide principles of general application since every case raises its own set of facts and circumstances. As pointed out by Kerr LCJ in *Re Shuker* [2004] NICB 20:

> "It is automatic that what will be required to satisfy the demands of procedural fairness will vary according to the circumstances of the individual case."

In *Re Shuker* the court concluded that there was nothing in the materials to suggest that if the information had been made available an effective repose to it would have been possible. That approach applies in the present case. The letter of decision sets out the security considerations that, amongst other factors, militated against the application for temporary release. Those circumstances, the nature of the crime, the fact that it was a dissident IRA crime, the fact that the applicant was aligned to the Real IRA and that he would present a security risk because of the background to the crime and his connection with the Real IRA were all self evident facts of which the applicant was aware. The applicant in presenting his application was free to put forward his case in the best light ab initio and if he wanted to show a remorseful attitude or claim that he no longer supported the dissident Republican viewpoint he could have said so at that stage. The fact is that he did not. This is not a case of the Prison Service relying on information of a security risk of which the applicant might not be aware. That may or may not make a difference in relation to the demands of fairness in a given case.

[7] The applicant was a sentenced prisoner who after due process had been convicted. His freedom was restricted as a necessary consequence of his conviction and for the purposes of Article 8 the interests of public safety and the prevention of crime were features of relevance in the context of his application for temporary release. Rule 27 affords to the Prison Service a wide discretion to relax the imposition of the prison lifestyle. The Prison Service is entitled to consider the desirability of maintaining a uniform regime within the prison. It has to examine and in this case did examine the merits of the case individually and in context. Due recognition must be given to the margin of appreciation of the prison authority in reaching its conclusion.

[8] In the circumstances the applicant has not made out a case to quash the decision refusing him temporary home leave in the circumstances and the application is dismissed.