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*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY JOSEPH LOCKHART FOR JUDICIAL REVIEW

TREACY J

INTRODUCTION

[1] The Applicant, a restricted life sentence prisoner at HM Prison Maghaberry ("Maghaberry"), applies for judicial review of decisions of the Northern Ireland Prison Service (i) not to refer proposals for a programme of temporary release to the Secretary of State for determination and (ii) to refuse a programme of temporary release in his case.

BACKGROUND

[2] The Applicant is serving an automatic life sentence with a tariff component of six years, imposed at Derby Crown Court on 12 May 2003 in respect of an offence of armed robbery (a form of life sentence that could not have been imposed in this jurisdiction).

[3] The Applicant was transferred to Maghaberry from England at his request under the Crime (Sentences) Act 1997 ("the 1997 Act"). The Order effecting this transfer was made on 2 August 2004.

[4] Pursuant to various legislative provisions the responsibility for the Applicant, whilst in prison, falls in part to the prison authorities in England and partly to the Northern Ireland Prison Service ("the NIPS"). Thus the question of his release following service of tariff is a matter for the Parole Board of England and Wales whereas the question of, inter alia, temporary release is a matter which is determined within Northern Ireland.

[5] As part of the review of life sentence prisoners in HM Prison Maghaberry, there are Multi-Disciplinary meetings, which consider, inter alia, any recommendations for temporary release. The Applicant's case was considered by the Multi-Disciplinary meeting on 2 February 2006 when a programme of temporary release was recommended.

[6] The conclusions of the meeting were forwarded to the Parole Board in England and Wales. On 28 March 2006 the Parole Board considered the Applicant's case concluding that the risk of violent re-offending on his part was high. It also doubted that there could be any conclusion about risk reduction until the Applicant had completed Cognitive Self Change Programme ('CSCP'). No recommendation was made to the Secretary of State concerning the Applicant. Its full reasons were as follows:

> **1. Mr Lockhart is currently serving an automatic life sentence imposed in May 2003. His life sentence tariff was set at 6 years and expires in 2009. He was convicted of an offence of armed robbery, which occurred when he and a co-defendant entered a betting shop and forced the staff to have over cash (£2,700); they were both wearing balaclavas and Mr Lockhart was holding a gun. Mr Lockhart has an extensive record of previous convictions, among which are included many offences of burglary and offences of violence; he has served two sentences of youth custody for previous shop robberies. He has also in the past been the victim of so-called sectarian 'punishment' shootings in Northern Ireland which have affected his legs.**
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> **2. From an early age Mr Lockhart has been immersed in violence and alcohol; he has denied the use of drugs. Early in custody he completed ETS and a victim awareness course. He was then transferred, in August 2004, to Maghaberry prison in Northern Ireland for the remainder of his sentence.**
>
> **3. Mr Lockhart has behaved well in prison and it is noted that he has completed anger, alcohol and drug awareness courses. He is not engaged, or about to become engaged, on CSCP.**
>
> **4. The panel commends Mr Lockhart for the work which he has done and for his positive attitudes now towards offence-related coursework and to risk reduction. The panel notes the ACE risk as medium risk of re-offending within 2 years. However, the panel would assess his present risk of violent re-offending as high**

and they would doubt that there could be any conclusion about risk reduction until he has completed CSCP and until, following course report and assessment, there has been time to make an informed decision about risk. The panel also recommends that work continue with Mr Lockhart with the aim of reducing the likelihood of relapse into substance abuse on his return to the community.

5. The panel therefore makes no recommendation to the Secretary of State on the occasion of this review. They would recommend that, for the next review, there should be available the CSCP report and assessment, a report of any relapse prevention coursework and a full psychological risk assessment.

6. The panel has noted the intentions of the Northern Ireland Prison Service concerning the future management of Mr Lockhart. They comment however that it is not for them either to agree with or to comment upon those proposals and that they have, therefore, restricted themselves to their powers of review under the appropriate English and Welsh legislation."

[7] The NIPS operates a policy called the Pre-Release Home and Resettlement Leave Arrangements for all Sentenced Prisoners ("the Scheme"). This is the policy which generally applies to determinations as to whether or not a sentenced prisoner should be granted temporary release.

[8] Paragraph 5.2 of the Scheme deals with the question of eligibility to apply and in particular it confirms that the eligibility date for life sentenced prisoners, in cases where a tariff has been set, will be no earlier than 12 months prior to the tariff expiry date.

[9] The 12 month period can be extended up to a period of 3 years. This extension can be granted by the Prison Governor taking into account the recommendations of the Life Sentence Review Commissioners ("the LSRC").

[10] The Applicant is not subject to the scrutiny of the LSRC[1]. As a restricted prisoner on transfer from England, his release is a matter for the Parole Board of England and Wales. Accordingly, it was not possible for the

[1] The LSRC have no involvement in the case of a prisoner such as the applicant: article 10(4)(b) of the Life Sentences (NI) Order 2001 restricts the definition of transferred life prisoners to those transferred in pursuance of certain orders or warrants, including "an order made by the Secretary of State under paragraph 1 of Schedule 1 to the Crime (Sentences) Act 1997 *where the transfer is an unrestricted transfer* for the purposes of Part II of that Schedule".

LSRC to make any recommendation regarding the extension of the 12 month time limit to permit the application of the Scheme to the Applicant.

[11] Mr Max Murray, Director of Operations of the NIPS, has stated at para.14 of his affidavit that the absence of any input from the LSRC does not prejudice the Applicant as he is still entitled to apply for temporary release under Rule 27 of the Prison and Young Offender Centre Rules (Northern Ireland) 1995 ("the Prison Rules").

[12] On 22 May 2006 Mr Murray received a submission from the Lifer Management Unit ("LMU") in Maghaberry requesting Ministerial approval for an ongoing programme of temporary release of the Applicant.

[13] According to Mr Murray Rule 27 was the relevant provision to be applied to consideration of a decision to grant temporary release to the Applicant. He averred that this discretion under Rule 27 is exercised by Prison Service Headquarters on behalf of the Secretary of State and that accordingly the request for Ministerial approval dated 22 May 2006 came to him as Director of Operations, to reach a conclusion.

[14] He avers that he considered the recommendations of the LMU together with the full contents of the documents submitted to him but he did not consider that it was suitable or appropriate that the Applicant be released even temporarily. In his decision letter dated 4 July 2006 sent to Governor Cromie he stated, inter alia:

> **"● it is considered that any earlier release (with effectively only 3 years served) would erode public confidence and raise serious concerns on public safety given that he is only half way through his tariff period; and**
>
> **● there is no positive recommendation by National Offenders Management Service (NOMS) in relation to either parole, or to move to open conditions."**

[15] Following correspondence with the Applicant's Solicitors a letter was sent to the Applicant's Solicitors dated 18 August 2006 confirming his reasons for refusing temporary release.

THE APPLICANT'S SUBMISSIONS

[16] The Applicant's skeleton argument at para.14 submitted as follows:

> **"When considered with reference to an unrestricted transfer life sentence prisoner as a comparator, the arrangements provided by the Northern Ireland Prison Service for determination of applications for pre-release home and**

resettlement leave are less favourable to a restricted transfer life sentence prisoner. No objective justification exists for such disparity. Such less favourable treatment amounts, it is submitted, to a breach of article 14 ECHR taken together with article 5 ECHR and article 8 ECHR".

[17] At the hearing Mr Larkin QC developed the matter by abandoning any reliance on Article 5. His oral submissions focussed on an alleged free-standing breach of Article 8 without recourse to Article 14. This approach was not foreshadowed in the Order 53 Statement which (consistent with the later Skeleton Argument) claimed a breach of Article 14 read together with Article 8. Mr Larkin confirmed that notwithstanding the focus of his oral submissions he was still relying on Article 14 read together with Article 8.

[18] It was also contended that the decision of NIPS not to refer proposals for a programme of temporary release to the Secretary of State and the decision by NIPS to refuse a programme of temporary release was unlawful and ultra vires in that, it was said, the *Carltona* principle does not apply in respect of temporary release in the case of a restricted transfer life sentence prisoner. In respect of the "*Carltona* argument" Mr Larkin relied upon his Skeleton Argument and reminded the Court that the absence of any oral submissions on this issue was not to be taken as an indication of any adverse view by his client of the merits of the point much less a perceived abandonment thereof.

[19] The only free-standing public law ground of challenge (confirmed orally) was that adumbrated at para.3(c) of the Order 53 Statement to the effect that in refusing temporary release the NIPS took into account an irrelevant consideration namely the fact that there was "no positive recommendation by National Offenders Management Service (NOMS) in relation to *either parole* or to move to open conditions".

THE RESPONDENT'S SUBMISSIONS

[20] Relying, inter alia, on *In Re Griffin* [2005] NICA 15 (13 April 2005) and the later decision of Weatherup J in *In Re Cunningham* [2006] NIQB 59 (13 September 2006) the Respondent challenged the Applicant's submission that there had been any interference with Article 8 whether read alone or together with Article 14. As far as the Applicant's contention that there had been a breach of Article 8 read together with Article 14 the Respondent mounted a detailed challenge to the ability of the Applicant to demonstrate prohibited discrimination within the meaning of Article 14.

[21] The Respondent relying, inter alia, on *Re Henry's Application* [2004] NIJB 11 and *Chief Constable of the West Midlands Police, R (on the application of) v Gonzales & Ors* [2002] EWHC 1087 (Admin) (30 May 2002) submitted that the *Carltona* principles were clearly engaged and properly applied.

[22] And as to the challenge based on the assertion that the Respondent had taken into account an irrelevant consideration the Respondent maintained that Rule 27 of the Prison Rules does not proscribe the sources of advice which Mr Murray was entitled to consider in his decision-making process and that he was entitled to rely on the views of the Parole Board as one of the matters which informed his decision not to grant the Applicant temporary release.

CONCLUSIONS

[23] Article 8 of the Convention provides that:

> **"(1) Everyone has the right to respect for his private and family life, his home and his correspondence.**
>
> **(2) There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."**

[24] Article 14 of the Convention provides that:

> **"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground 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".**

[25] The LSRC have no involvement in the case of a restricted transfer life sentence prisoner as a result of which, it was submitted, he could not avail of an extension to his leave eligibility date. This, it was said, is in contrast to the facility which is available (by virtue of para.5.2 of the Scheme) to a life sentence prisoner whose case does fall within the remit of the LSRC. It was submitted that a restricted transfer life sentence prisoner was therefore "unable" under the NIPS policy to have an extension granted either by the Parole Board or by any body within the Northern Ireland system. In para.14 of the Skeleton Argument it was submitted that when considered with reference to an unrestricted life sentence prisoner as a comparator the arrangements provided by the NIPS for pre-release home leave are less favourable to a restricted life sentence transfer prisoner. Although at para.14 of his Skeleton Argument the Applicant's claim was that there was no objective justification for such disparity and that therefore such less favourable treatment (it was submitted) amounted to a breach of Article 14

taken together with Article 8 the oral submissions focused on a free-standing Article 8 breach. At the heart of the submission grounded on Article 8 whether read alone or together with Article 14 was the alleged absence of the facility to avail of an extension to the Applicant's leave eligibility date under para.5.2 of the Scheme.

[26] The Applicant's submission however must fail as it overlooks the clear evidence in this case. As a restricted life sentence transfer prisoner the Applicant cannot, under para.5.2 of the Scheme, avail of an extension to his leave eligibility date. This is because of the absence of any input from the LSRC. But as Mr Murray has averred at para.14 of his affidavit, the absence of such an input "does not prejudice the applicant as he is still entitled to apply for early release under the provisions of Rule 27 …". Moreover, at para.21 of the same affidavit Mr Murray has averred that despite the absence of any recommendation by the LSRC (thus preventing the application of para.5.2 of the Scheme) there is still a mechanism to enable consideration of the temporary release of a restricted life sentence prisoner who has between 3 years and 12 months to serve before the expiry of his tariff. This mechanism is Rule 27. Also at para.22 of his affidavit he averred that when considering the Applicant's position under Rule 27 he took into account "all of the same matters which would have been considered under the pre-release scheme … This included the recommendations and views expressed by the Parole Board of England and Wales".

[27] I consider that on the facts that these averments are fatal to any claim based either on Article 8 or Article 8 read together with Article 14. As far as Article 8 is concerned one asks rhetorically "what is the interference"? The Scheme and Rule 27 are undoubtedly intended, inter alia, to **advance** rather than interfere with Article 8 rights. Indeed, the restricted transfer of the Applicant was no doubt similarly intended to enhance analogous rights.

[28] The operation of the Scheme has been the subject of consideration in a number of recent cases which were relied upon by the Respondent in support of the proposition that there has been no interference with the Applicant's Article 8 rights. I also consider that, based on these authorities, this argument is well founded.

[29] In *Cunningham* Weatherup J stated as follows:

> **"[15] Restrictions on private and family life are necessary incidents of lawful custody, however any restrictions do not remove such right to respect for family and private life as may be compatible with the lawful deprivation of liberty, see Daly v Home Secretary [2001] 2 WLR 1622. When assessing the obligations imposed by the article 'regard must be had to the ordinary and reasonable requirements of imprisonment and to the resultant degree of discretion which the national**

authorities must be allowed in regulating a prisoner……..' per Kerr LCJ in Griffin's Application at paragraph 25.

[16] … At paragraph 34 the Court of Appeal [in *Griffin*] stated:

> **'Without reaching any final decision on the matter, it appears to us that there is a strong argument available to the respondent that the 2004 scheme does not infringe Article 8 rights of prisoners sentenced *after* the scheme came into force. Certainly in the present case we have concluded that Article 8 has been engaged solely because the entitlement that would have been available to the applicant was reduced." (Italics added)**

[17] … I accept the respondent's argument in the present case, and the preliminary view of the Court of Appeal in Griffin's Application, that there has been no interference with the applicant's Article 8 rights.

[18] However the Court of Appeal did regard a home leave scheme as an aspect of a prisoner's article 8 rights. Home leave ought to benefit family and private life. The old and new home leave schemes advance article 8 rights. It was the *reduction* in entitlement to home leave, *as a sentenced prisoner*, that amounted to an interference with article 8 rights. …"

[30] Having regard to the ordinary and reasonable requirements of imprisonment and the resultant degree of discretion which the national authorities are permitted in regulating a prisoner and having regard to the further consideration that the Scheme and Rule 27 are both comparable mechanisms intended to advance rather than interfere with the right to respect for private and family life etc I consider that the claim based on Article 8 is not well founded. I also consider that there has not been any less favourable treatment since by comparable mechanisms the same result can be achieved.

[31] Even if one were to generously assume that there had been less favourable treatment (and that this had been on grounds prohibited by Article 14) I consider that the said treatment is objectively justified since the LSRC should not be asked to provide a recommendation regarding a restricted transfer life sentence prisoner when he is not someone who will ever fall within the auspices of the LSRC's statutory role.

THE *CARLTONA* ARGUMENT

[32] Mr Larkin QC relied on his Skeleton Argument, inter alia, at para.29 where it was submitted that in the limited number of cases involving

restricted transfer prisoners the application of the *Carltona* principle was excluded. This argument was not developed in Mr Larkin's principle oral submissions nor was it abandoned. I reject this submission and I think I can deal with it fairly but succinctly.

[33] The *Carltona* principle is that:

> **"In the administration of government in this country the functions which are given to ministers (and constitutionally properly given to ministers because they are constitutionally responsible) are functions so multifarious that no minister could ever personally attend to them … The duties imposed upon ministers and the powers given to ministers are normally exercised under the authority of the ministers by responsible officials of the department. Public business could not be carried on if that were not the case. Constitutionally, the decision of such an official is, of course, the decision of the minister. The minister is responsible. It is he who must answer before Parliament for anything that his officials have done under his authority, and if for an important matter he selected an official of such junior standing that he could not be expected competently to perform the work, the minister would have to answer for that in Parliament'. However: 'Lord Greene MR contemplated that, in devolving authority to take decisions on his behalf, the Secretary of State would only be answerable to Parliament, but it is conceded that, at least in recent times, such a course of action would also be susceptible to judicial review'.**

[34] Although the *Carltona* principle may be displaced by a contrary intention in a particular act (see *ex p Oladehinde* [1991] 1 AC 254: see pp300, 303) I do not accept the Applicant's argument that it has been displaced in this case. On the contrary, there has been a series of cases which have recognised the application of the *Carltona* principle specifically in the prison context within Northern Ireland e.g. *In Re McKernan* [1983] NI 83 and *Re Samuel Henry's Application* [2004] NIQB 11. I am satisfied that the exercise of the power of temporary release can properly be undertaken by officials on behalf of the Secretary of State. Indeed, if the Applicant's arguments were correct it would lead to the anomalous result that decisions regarding temporary release of restricted transfer prisoners would require to be taken personally by the Secretary of State whereas in all other cases, on the Applicant's argument, they could be taken by his officials.

IRRELEVANT CONSIDERATION

[35] Mr Murray's decision was taken, inter alia, because he considered that any earlier release (with effectively only 3 years served) **would erode public**

confidence and raise **serious concerns on public safety** and the fact that there was no positive recommendation by NOMS in relation to either parole or a move to open conditions. The Parole Board had concluded, as set out at para.6 above that the risk of violent re-offending on the part of the Applicant was high and doubted that there could be any conclusion about risk reduction until the Applicant had completed Cognitive Self Change Programme ("CSCP"). At para.25 of his affidavit Mr Murray stated that the views of the Parole Board confirmed his view that there were serious concerns on public safety grounds attaching to the release of the Applicant.

[36] Rule 27 does not proscribe the sources of information and advice which Mr Murray was entitled to consider in making his decision. Although the Parole Board did not have the power to grant the Applicant temporary release their view that the Applicant presented a risk of violent offending was plainly a matter which Mr Murray was entitled to have regard and take into account. The decision of the Parole Board not to make any recommendation regarding the parole of the Applicant (or a move to open conditions) was based upon, inter alia, risk. Mr Murray was entitled to rely on the views of the Parole Board as one of the matters which informed his decision refusing the Applicant's temporary release.

[37] The Applicant has therefore not established any of his grounds for judicial review and the application is dismissed.