Neutral Citation no [2004] NIQB 9 | *Ref:* **WEAA4526**

Judgment: approved by the Court for handing down | *Delivered:* **03/02/2004**
(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 KIERAN MATTHEWS

FOR JUDICIAL REVIEW.

WEATHERUP J

The Application

[1] This is an application for a judicial review of a decision of the Governor of HMP Magilligan made on the 29th August 2003, by which the Applicant was deselected from the Foyleview regime that operates at the prison.

The Foyleview Regime

[2] The Applicant has been in custody since the 8th March 2002 and is a sentenced prisoner whose earliest date of release is the 7th June 2004. He holds enhanced status. Admission to the Foyleview scheme entitles enhanced status prisoners to additional privileges in the pre-release phase, including additional home leave and outside working. Counsel for the respondent described this scheme as the nearest thing in Northern Ireland to an open prison.

[3] On admission to the Foyleview scheme the applicant was required to sign a contract that set out the conditions of his engagement in the scheme. There is

an introductory stage by which prisoners are introduced to the scheme through the Foyleview Annex, and once they have completed the introductory stage they are introduced into Foyleview Resettlement Unit. The Applicant signed the contract for admission to the Foyleview Annex on the 31st March 2003, and having successfully completed the introductory scheme, he was then admitted to the Foyleview Resettlement Unit and signed that contract on the 15th April 2003.

[4] The criteria for admission to the scheme include being a star prisoner; being in the last eighteen months of sentence; being within three months of the home leave eligibility date and having enhanced status. The conditions make clear that the prisoner must retain enhanced status while he is in Foyleview and should he be reduced in status he will be removed from Foyleview. Accordingly, the conditions specify that should he be found guilty of an offence against discipline or receive two adverse reports, he could be downgraded in status, and that would make him ineligible to remain in the Foyleview Resettlement Unit, and as a consequence he would be returned to the normal prison.

[5] It is also part of the contract that the prison authorities make specified commitments to the prisoner and the prisoner makes specified commitments to the prison authorities. Included in the prisoner's commitments, at paragraph 12, is the warning that "Failure to comply with some or any of the conditions may result in you being deselected from the Unit and returned to the mainstream of the prison".

[6] Further, insofar as prisoners are finally admitted to an outside working scheme, they enter into a Code of Conduct for Foyleview Inmates Working in the

Community. The applicant signed this Code on the 2nd August 2003. Condition 3 of the Code specifies –

> "I must not accept any reward (monetary or in kind) for any work performed outside the prison and must not return to Magilligan with any foodstuffs, magazines, cigarettes or any other items".

In addition, the Code concludes –

> "I fully understand these rules and understand that a breach of these rules could result in my deselection from Foyleview".

In the event it was this provision that was relied on to remove the applicant from Foyleview.

The Background

[7] The Applicant commenced his involvement in the working out scheme on the 12th August 2003. He returned to prison that day in possession of a key ring torch that he had obtained in the shop where he was working. As a result he was suspended from Foyleview on 13th August 2003. There was a standard form completed by a prison officer, who proposed that the applicant be deselected from Foyleview, and the Governor considered the proposal on the 28th August. The applicant's deselection from Foyleview was approved. Accordingly, he was returned to the normal prison regime. His enhanced status was unaffected.

However he lost the additional privileges that attach to being a prisoner in Foyleview, including the additional home leave.

[8] The applicant sets out in his Affidavit that his task in the workshop had been to steam and iron clothes at the back of the shop. Among items in a basket he was working with was a broken key ring. In the course of the day he took the key ring out of the basket and was swinging it on his finger. When he returned to Magilligan later that day he placed his hand in his pocket and realised that he had inadvertently brought the key ring out of the shop. He immediately informed the Prison Officer who was accompanying him back to the prison and he gave the key ring to that Prison Officer.

[9] The Prison Officer's version of events is different. In his Affidavit, Prison Officer McLaughlin states that on the afternoon of the 12th August 2003 he collected the prisoners who were on work placement outside the prison and transported them back to the prison. In the course of the prisoners return to the prison, each prisoner is searched. In advance of the search, he asked all the prisoners who were standing together if anyone had anything on them which they shouldn't have and which they wished to declare. No one declared anything. He then commenced searching each prisoner. The Applicant was the last prisoner to be searched and he stood with his arms raised and his fists clenched. Prison Officer McLaughlin noticed something in one of the Applicant's hands and asked him to open it. At that stage the Applicant stated "Maybe I should have given you that" and handed over a small torch key ring.

[10] The Applicant's Counsel submits that the above account is inconsistent with a statement that had been made by the Prison Officer on the 12th August 2003, when he reported the incident. In that statement, Prison Officer McLaughlin records the matter as follows "On arrival at the main gate the prisoners were offloaded for a vehicle and rub down search. During this search prisoner H266 Matthews produced to me a torch key ring. I asked him where he got it and he replied, "From -------- shop"."

[11] It is not appropriate in judicial review proceedings undertaken by evidence on affidavit to engage in a process of resolving disputed factual issues. It is for an Applicant to make out his case on whatever grounds he wishes to establish. There is a conflict between the accounts that are given by the Applicant and by the Prison Officer. I do not accept that there is an inconsistency between the two versions that have been given by Prison Officer McLaughlin. The later version elaborates on the first version but is not inconsistent. I would accept that the Applicant's possession of the key ring was inadvertent. I am not satisfied that he volunteered the torch until such time as it became apparent to him that discovery was inevitable in the process of the search.

The Applicant's Grounds

[12] The Applicant's grounds for judicial review are first, that the Governor had improperly applied a blanket policy of deselection for all breaches of conditions and secondly that the Governor imposed a disproportionate penalty upon the Applicant which resulted in the loss of work parole and home leave

privileges, thereby acting in breach of the requirements of Article 8 of the Convention to respect the Applicant's private and family life.

Blanket Policy or Discretion

[13] The Applicant contends that the Respondent operated a blanket policy of deselection of prisoners from the Foyleview for any breach of the conditions. The Code does specify that a breach of conditions "could" result in deselection. It is apparent that there is discretion under the Code as to the penalty that may be imposed for any breach of conditions.

[14] I am satisfied that the action that was taken against the Applicant was based on condition 3 of the Code and not on the general conditions relating to a breach of discipline or to the presence of two adverse reports which may have affected his status as an enhanced prisoner so as to lead to his deselection from the scheme.

[15] Did the Governor exercise discretion or did he treat the matter as one where he should operate a blanket policy? The decision to deselect was taken by Governor Edgar. Governor Edgar states in his Affidavit, at paragraph 3, "…any failure to adhere to the standards required will generally result in deselection. One of the objectives of the Foyleview regime is to create an environment in which the onus is placed on the prisoner to exercise much greater decision making autonomy both within the unit and when outside it on work placement, than would be the case in any other regime within the prison". He states, in relation to the actual decision, that he considered whether any other sanction

would have sufficed and was of the clear view that deselection was the appropriate course, as any lesser reaction would have actually undermined the philosophy underpinning the Foyleview regime and could have sent prisoners entirely the wrong message.

[16] Governor Edgar states that his decision did involve him considering whether any other sanctions would suffice in the circumstances. Is the deselection proposal form consistent with Governor Edgar's stated approach? The form was completed by Prison Officer Walker on the 13th August 2003, he being the officer to whom Prison Officer McLaughlin reported his find. Prison Officer Walker proposed deselection on the basis that the Applicant was in possession of a prohibited article on return from the outside work party. There was an interview with the prisoner on the 13th August and the form records his statement as to what happened. It is recorded that he happened to go to the toilet and he put the small key ring into his pocket and on his return to the prison he realised that he had it and immediately gave it up. The matter was then referred to a Principal Officer who stated that no one had implied that the Applicant intended to steal the item, but he stated that it was the responsibility of the inmate not to bring items into the prison.

[17] The matter was then processed by the Governor on the 28th August 2003. The form indicates that the Applicant was present when the decision was made. It is stated that the inmate should be afforded an opportunity to read the comments and that was availed of, according to the form, and the Applicant had no comment to make. The form then provides an option for the Governor,

"Deselection to proceed: Yes or No". The Governor opted for yes and he gave his reason "The prisoner had in his possession property i.e. (torch) belonging to ------ -- shop".

[18] The approach set out in the form does confirm the Governor's statement that he was exercising a discretion in the case even though it is apparent that it is an exceptional case where the authorities would not impose a sanction of deselection.

[19] In consideration of all these matters, it is clear that the scheme involves a discretion on deselection and the Governor exercised a discretion and did not apply a blanket policy of deselection of the Applicant.

Disproportionate Penalty

[20] The Applicant contends that in any event deselection is a disproportionate penalty. It is argued that Article 8 of the European Convention is engaged in this case. Article 8 provides

> "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 it is necessary that 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 right to the freedom of others".

[21] The Applicant contends that Article 8 is engaged in relation to his right to respect for family life and that there was unjustified interference by deselecting him from the Foyleview scheme and thereby reducing his entitlement to home visits.

[22] The respondent does not accept that the Applicant's right to respect for family life is engaged. The right to respect for family life in relation to prisoners has been considered in McCotter v The United Kingdom (1st September 1993). A prisoner had been refused a transfer from England to Northern Ireland, which was his home. It was stated by the European Commission (paragraph 1) that-

> "…in the context of prisoners or other persons who are detained, the concept of 'family life' must be given a wider scope than in other situations. Prisoners generally have limited means of contact with the outside community and of maintaining relationships with family members. 'Family life' for prisoners is inevitably restricted to visits, correspondence and possibly some form of communication such as telephone calls. Emotional dependency between for example, parents and adult children, or siblings is even enhanced in these circumstances".

[23] The Commission concluded that the complaints must be held as falling within the scope of Article 8 paragraph 1. The Commission referred to its constant case law, according to which separation of a detained person from his family and the resulting hardship were the inevitable consequences of detention. Two of the Applicants were sisters of the prisoner and were entitled to visit the Applicant. They had visited him rather infrequently, no doubt because of the separation between Northern Ireland and England, but the Commission found that having regard to all the circumstances, the refusal to transfer the prisoner to Northern Ireland disclosed no lack of respect for the Applicant's family life within the meaning of Article 8.

[24] The issue has been further considered in Potter v The Secretary of State for the Home Department [2001] EWHC Admin 1041. That case concerned the equivalent of the Northern Ireland 'Preps' scheme, which in England is called Incentives and Earned Privileges scheme, whereby the Applicant, a sexual offender, challenged a decision refusing him admission to the scheme because the Prison Service did not regard him as eligible to attend a sex offenders treatment programme because he maintained denial of guilt for his offences. In relation to the application of Article 8 it was argued that the right to respect for family life enshrined in Article 8 guarantees as many family visits as are reasonably practical, consistent with the practical exigencies of managing a prison. Thus it was said that if it was practical to permit three visits per month to an enhanced status prisoner, so it must be for those on standard or lower status. The Court stated (at paragraph 75) -

> "It is true that Article 8 does have application to prisons. The fact of imprisonment justifies restriction on access to the family (see Boyle v United Kingdom [1988] 10 EHRR 425 at paragraph 68 – 74). But it is not correct to assert that practical considerations afford the only justification for restriction of visits.
>
> "The very fact of conviction and imprisonment, designed in part for punishment, provides justification for restriction and access to the family as a significant aspect of punishment".

In relation to the particular scheme it stated that (at paragraph 77)

> "…the IEPS acts as a means of encouraging the objectives of imprisonment and by a system of rewards which mitigate the effects of punishment. It is therefore justifiable to increase access to the family as a reward and reduce access as a penalty. No infringement of Article 8 has been demonstrated".

[25] Re Murdoch's Application [2003] NIQB 24 concerned the limits on visits for prisoners who were married to each other. In that case, the Respondent accepted that Article 8 was engaged and that there had been interference with the Applicant's right to respect for family life. The Applicant's argument was that the refusal to allow more than one visit per month was disproportionate. Kerr J stated (at paragraph 18) –

> "It is inevitable that imprisonment will bring about a restriction on the prisoner's private life. The context for the examination of whether a particular restriction is proportionate, must be that imprisonment, to be effective, necessarily involves curtailment of those incidents of life that are freely available to those who do not commit crime. It follows that each restriction does not have to be justified on an individual basis according to whether it is impractical not to allow the particular freedom claimed".

Kerr J concluded (at paragraph 20) that

> "……the framework in which the selection of the proportionate response has to be chosen is not that canvassed by the Applicant, viz. whether the particular request can conveniently be accommodated. The background against which the claim of lack of proportionality must be viewed it is that the loss of particular freedom is - and should be - a concomitant of imprisonment".

[26] In relation to proportionality the Applicant relies on Shaylor [2002]All E R 477. The three conditions that have to be satisfied in relation to proportionality are, first that the objective justifies interference, secondly, that the steps taken are

rationally connected to the objective and not arbitrary and thirdly that there is minimum interference with the rights affected.

[27] I would approach the circumstances of the case as follows. First the Applicant's complaints fall within the scope of Article 8 paragraph 1 of the Convention. Secondly, restriction on family access is an inevitable consequence of a sentence of imprisonment. Thirdly, it is justified to operate a system of reward so as to increase family access if specified conditions are satisfied, and to remove those privileges to increased family access if the specified conditions are not satisfied. Fourthly, the application of proportionality depends on the context. The present context must be that the loss of family access is an inevitable consequence of imprisonment. The context is not based on the possibility of an alternative sanction involving less interference with family access; clearly that could have been achieved. The context is not based on the practicality of allowing additional family access; clearly that could have been achieved. The Foyleview system must be based on a fair balance that does not impose an excessive burden on the Applicant, and the loss of the Applicant's privileges in the circumstances of a breach of conditions has to be viewed in the context of loss of family access being the inevitable consequence of imprisonment. Accordingly, I do not accept the Applicant's contention that the authorities are obliged to apply the minimum sanction in relation to interference with the family rights.

[28] In deciding whether or not a fair balance has been achieved in that context and in the circumstances, the following matters are taken into account.

First of all, the Applicant had notice of the rules for working in the community and had signed up to those rules.

Secondly, it is apparent from the rules that the possession by prisoners of unauthorised items is an important issue, as it is specifically identified in the conditions, as are the consequences. Further, the possession of unauthorised articles would, in any event, be well known to prisoners, as it is provided for in the prison rules as a disciplinary matter.

Thirdly, there is an obligation on the prisoners, and it is made clear to them in the conditions of their engagement in the Foyleview scheme and in other schemes, that they must meet certain standards in order to gain certain privileges and they will lose certain privileges if they fail to meet the standards.

Fourthly, it is made known that there is a risk of loss of the Foyleview privileges even if there are no disciplinary charges and no adverse reports.

Fifthly, it is apparent that there was a discretion exercised as to the sanction to be applied and there was no automatic deselection for possession of an unauthorised item.

[29] On considering the context and all the circumstances I am satisfied that the sanction that was applied in this case was justified, fair and proportionate and accordingly I dismiss the application for judicial review.