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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 LIAM MULHERN FOR JUDICIAL REVIEW

WEATHERUP J

The application

[1] This is an application by a prisoner at the Young Offenders Centre, Hydebank Wood, for Judicial Review of the decision of a Governor on 1 August 2002 to refuse access to the YOC, for the purposes of consultation with the applicant, to Ms Orla Shields, a para-legal employed by the solicitors engaged by the applicant.

[2] The Northern Ireland Prison Service anti-drugs strategy includes the use of what is described as a passive drugs dog. The dog passes round visitors to the YOC for the purpose of detecting drugs by scent. When the dog sits down that is a positive indication that it has detected drugs.

The background

[3] The applicant was remanded in custody to the YOC on 9 August 2001 charged with scheduled offences. The applicant was receiving legal advice in relation to an application for bail and in preparation for his trial and was also receiving legal advice in respect of disciplinary adjudications held before the Governor in the YOC. Ms Shields attended two legal visits with the applicant in July 2002 without incident. At a third legal visit on 22 July 2002 the passive drugs dog was in use. Ms Shields states that she is genuinely afraid of dogs and has been so since she was a child. This fear manifests itself physically when she is confronted by a dog in that she will be extremely afraid, she will shake, she will jump away from the dog and will scream with fear on occasions.

[4] On 22 July 2002 Ms Shields reluctantly agreed to try and comply with the passive drugs dog test. She was frightened by the dog and was shaking and upset and the dog handler pulled the dog away. She was told that she had failed the test as the dog had given a positive indication. Ms Shields challenged the test result with the dog handler and Senior Officer McIlwaine. She then undertook a closed visit with the applicant. A closed visit prevents physical contact between the prisoner and the visitor. There is a factual dispute as to the terms of the conversation that took place between Ms Shields and SO McIlwaine before she availed of the closed visit, and that will be considered below.

[5] Ms Shields attended a fourth legal visit at the YOC on 1 August 2002. Upon being informed that the passive drugs dog was on duty Ms Shields asked to avail of a closed visit without having to complete the passive drugs dog test. However Ms Shields was required to undergo a passive drugs dog test in order to be admitted to the YOC and as she felt unable to undergo the test because of her fear of dogs she was not admitted to the YOC on 1 August 2002.

The arrangements made on 22 July 2002

[6] The factual dispute concerning 22 July 2002 related to the arrangements for Ms Shields future visits to the YOC. Ms Shields describes her conversation with SO McIlwaine as follows –

> "He explained the requirement of his closed visit and indicated that in future if I wanted to see the applicant again without passing the drugs dog, then a closed visit was the only option open to me. I indicated that if the prison would not exercise their discretion to allow me an open visit in future it would be my intention to go straight to a closed visit in future. He agreed that this was feasible. I was left with the impression that in future I could come to the YOC and take a closed visit without having to resort to the drugs dog procedure."

SO McIlwaine's version was as follows –

> "Miss Shields stated that if in the future her fear of dogs meant that she could not pass the passive dog then she would only be able to have closed visits with her client. I agreed that if she could not pass the dog search without receiving a positive

> indication then she would only be permitted closed visits in future.
>
> I have read the applicant's averments at paragraph 8 of her affidavit. At no time did I suggest that Miss Shields could bypass the dog for future visits."

In response Ms Shields stated –

> "I would advise that the officer did not use the words `without a positive indication' when advising me of arrangements for legal visits in the future. I was left with the clear indication that in future I could go straight to a closed visit without passing the dog."

[7] I am satisfied that Ms Shields had the impression that she could avail of closed visits without being involved in the passive drugs dog test and I am satisfied that SO McIlwaine did not intend to convey to Ms Shields that she could bypass the passive drugs dog test.

Control of admission to the YOC

[8] Control of admission to prison is provided for by Rule 49 of the Prison and Young Offenders Centre Rules (Northern Ireland) 1995 which provides –

> "(1) No person may enter the prison without the governor's permission unless he is entitled to do so.
>
> (2) Any person entering or leaving the prison may be stopped examined and with their consent searched.
>
> (3) Any person who does not consent to being searched may be denied access to the prison."

[9] As a result of a review of visiting arrangements that began in 1998, a consultation document was produced in 1999 that included consultation with the Law Society and the Bar Council, new security procedures were introduced at HMP Magilligan in 2000. The changes to identification procedures where challenged by way of Judicial Review in *McCrory's Application* [2001] NIQB 19 where Kerr J dismissed the application. Of the operation of Rule 49 Kerr J stated –

> "It is, in my opinion, clear that the Governor may, under this rule, require those wishing to gain entry to submit to certain procedures in order to be permitted to enter the prison. Provided they are not unreasonable or disproportionate, he may impose such conditions of entry as appear to be necessary."

The applicant's grounds

[10] The applicant's grounds for judicial review are as follows –

(1) A fixed policy operated at Hydebank amounted to a fettering of discretion as to admission to the YOC.

(2) The application of the policy to the applicant's legal adviser was Wednesbury unreasonable.

(3) The requirement that the applicant's legal adviser submit to the passive drugs dog test was a breach of Article 8 and Article 6 of the European Convention and Rule 100 of the Prison Rules.

(4) The applicant had a legitimate expectation that his legal adviser would be admitted to a closed visit on 1 August 2002.

The policy on the use of the drugs dog

[11] The issue arises as to whether there was a fixed policy operating at the YOC that all visitors had to undergo the passive drugs dog test. On 1 August 2002 Ms Shields spoke to Senior Officer Hutton who she says stated that it was the policy of the prison to require visitors to pass the drugs dog. Ms Shields asked to speak to the Governor and SO Hutton went to see the Governor and on his return he informed Ms Shields that the policy of the prison did not permit the Governor to exercise discretion in regard to the passive drugs dog test.

[12] SO Hutton states that the policy was that all visitors including legal visitors must pass by the passive dog. He explained his conversation with Governor Craig as follows –

> "I explained the situation to him and was instructed that the Centre policy was, as I thought, that all visitors must pass by the drugs dog."

[13] Governor Craig, who made the decision of 1 August 2002 not to admit Ms Shields to Hydebank, states that while the normal procedure would be to require all visitors to pass the passive drugs dog the Governors do have authority to consider exceptions to the policy where appropriate. On 1 August 2002 he states that he considered whether to make an exception for Ms Shields and decided that in the circumstances it was not appropriate to do so.

[14] The applicant's solicitor wrote to Governor Craig on 2 and 5 August 2002 objecting to Ms Shields being required to pass the passive drugs dog and asking for appropriate arrangements to be put in place to accommodate Ms Shields in further legal visits. In a reply dated 7 August 2002 from Governor Chirgwin it was stated –

> "All persons entering the Centre to make use of the visiting facilities are required to pass by the passive dog. This procedure is included to ensure as far as is possible, a measured response to the ongoing attempts to smuggle into the centre non prescribed drugs and other unauthorised articles. To ensure that we do not discriminate against any person or group, everyone using these facilities is subject to this procedure. This includes members of the legal profession."

[15] Ms Shields had experienced difficulties with the passive drugs dog in other penal institutions earlier in 2002. As a result of correspondence from the applicant's solicitors to the Governor HMP Magilligan on 24 and 25 April 2002 by which they sought to make arrangements to accommodate Ms Shields, a response was sent by Prison Service headquarters dated 26 April 2002 that stated –

> "You will be aware that with only one entrance into the visits complex, contact with the dog is inevitable for all visitors. This can only be avoided if the dog is absent or if particular exemptions are made. The practice operated currently is that there are no exemptions."

[16] The Governor has a discretion as to the conditions of entry and may impose such conditions as are not unreasonable or disproportionate. A condition may be imposed to which there will be no exceptions provided that is not unreasonable or disproportionate to take such a position in the circumstances. However in the present case the Governor who made the relevant decision to require Ms Shields to submit to the passive drugs dog test

states that that decision was not made on foot of a fixed policy to require all visitors to submit to the passive drugs dog test but rather in the exercise of a discretion by which he determined that in the circumstances he would require Ms Shields to submit to the passive drugs dog test. Accordingly it is necessary to determine whether Governor Craig simply imposed a condition to which there were no exceptions or exercised a discretion to impose the requirement as a condition of entry.

[17] It is clear that while Governor Craig states that he was exercising a discretion SO Hutton believed that there was a fixed policy requiring submission to the passive drugs dog test and Governor Chirgwin was of the same opinion. The earlier letter from Prison Service headquarters did relate to HMP Magilligan and did contemplate exemptions, although there were none in operation at Magilligan at that time, so this response is of limited assistance in relation to the policy at Hydebank some months later.

[18] The applicant objects to reliance on Governor Craig's affidavit in this regard on the basis that it represents an attempt to correct, add or alter the previous reasons of the decision-maker. Reliance is placed on *R v Secretary of State for the Home Department (ex parte Lillycrop)* [1996] EWHC Admin 281. On the issue of affidavit evidence supplementing a decision letter, Butterfield J stated at paragraph 35 –

> "Accordingly we conclude that where evidence is proffered to elucidate, correct or add to the reasons contained in the decision letter a court should examine the proffered evidence with care, and should only act upon it with caution. In particular, a court should not substitute the reasons contained in proffered evidence for the reasons advanced in a decision letter. To do so would unquestionably raise the perception, if not the reality, of subsequent rationalisation of a decision that has not been properly considered at the time."

[19] In the present case there was not the formality of a decision letter. However there is the averment of Ms Shields that on 1 August 2002 SO Hutton returned from Governor Craig to inform her that the policy of the prison did not permit the Governor to exercise any discretion. Further, there is the statement of SO Hutton that he was instructed by Governor Craig on 1 August 2002 that the centre policy was that all visitors must pass by the passive drugs dog and that Ms Shields was so informed by SO Hutton. So Governor Craig's affidavit does seek to correct the reasons offered by SO Hutton for Governor Craig's decision. In the circumstances the reasons must be examined with care and only acted on with caution.

[20] I accept the descriptions of the conversation between Ms Shields and SO Hutton after SO Hutton had spoken to Governor Craig. The descriptions of that conversation are in essence the same, namely that there was a fixed policy requirement to pass the drugs dog. However there are radically different interpretations by SO Hutton and Governor Craig as to their conversation about Ms Shields. In view of the elaborate outline of decision-making presented by Governor Craig I conclude that in the circumstances SO Hutton misunderstood the position. The applicant has not established that a fixed policy was operated by Governor Craig or that he did not exercise a discretion as to the requirement that Ms Shields undertake the drugs dog test.

Wednesbury unreasonable

[21] As I find that a fixed policy was not applied it is not necessary to consider whether such a policy would be unreasonable or disproportionate. However it remains necessary to consider whether the particular decision in exercise of the discretion was unreasonable or disproportionate. The applicant contends that the decision was unreasonable in that, if visitors are only to avail of a closed visit, no useful purpose is served by requiring such visitors to pass the drugs dog. In addition the applicant contends that the Governor took into account a mistaken view of the facts, namely his belief that Ms Shields had passed the drugs dog on a previous occasion.

[22] In making his decision Governor Craig took account of all the circumstances, but was influenced by certain factors in particular. First, the use of the passive drugs dog was a critical element in the Prison Service's anti-drugs strategy. Secondly, the drugs dogs are not intimidating and no other adult visitors have been affected by the use of the dog. Thirdly, Ms Shields had been able to pass the drugs dog in the past in order to gain admission to a prison. Fourthly, there were alternatives such as video conferencing between solicitor and client, and other solicitors in the firm who could have completed the legal visit. Fifthly, there was a pressing need not to undermine the overall policy.

[23] The second factor seems to call into question Ms Shields reaction to the drugs dog but there has been no direct challenge to the genuineness of the condition described. I proceed on the basis that Ms Shields has a genuine phobia as she described. The third factor is the mistaken fact, as Ms Shields had not passed the drugs dog to enter a prison. Governor Craig states that even disregarding the mistaken fact that Ms Shields had passed the drugs dog in order to gain entry to a prison, his decision would have been the same, so this factor can be left out of account.

[24] At the heart of this dispute is the requirement that a visitor who is unable to pass the drugs dog should nevertheless do so when the visitor is prepared to avail of a closed visit. On the need to pass the drugs dog for the purposes of a closed visit Governor Craig states –

> "Closed visits are a fallback and second line of defence against drug smuggling in particular. It should not be thought that the Prison Service would regard any weakening of the dual safeguards represented by the systems such as would be involved in the removal of a need for a visitor to pass the passive drugs dog procedure to be appropriate, save in exceptional circumstances or where resources are unavailable for one reason or another."

[25] The approach of the prison authorities was described as a "belt and braces exercise" and it is apparent that the prison authorities do not wish to promote the easy option of a closed visit as a means of avoiding the drugs dog. The approach in effect makes no allowance for visitors with a genuine phobia about dogs. Such visitors may in effect be physically unable to comply with the condition that they pass the drugs dog. The prison authorities may well be concerned about the abuse of such an exception but any visitor claiming exemption on such grounds would have to satisfy the prison authorities that they qualified for consideration as an exemption. It is unusual for persons to have such a severe reaction, as Governor Craig has no experience of any other such case. If there were to be doubts about the genuineness of such a phobia then presumably medical evidence or some other form of verification could be required to confirm the condition.

[26] What is the purpose of preventing closed visits to those who cannot submit to the drugs dog? It appears to be an apprehension that such an exception would undermine the anti-drugs strategy. However the exercise of the discretion should enable genuine cases to be dealt with without undermining the overall strategy. The existence of a discretion does require that there will be exceptions, and that does not in itself undermine the strategy. It is not sufficient answer that there is the alternative of video conferencing facilities as the video represents a lesser form of consultation, as otherwise it would be sufficient for the purposes of all legal visits.

[27] In the human rights arena the consideration of unreasonableness is subject to heightened scrutiny. In the exercise of a purported discretion whether to apply a condition of entry to the YOC, in circumstances where the visitor cannot comply with the condition, and where the scheme is not undermined merely by exceptions being made, and where it is not apparent why it would undermine the system by making an exception in such

circumstances, I am satisfied that it is unreasonable to insist on the application of the condition. The prevention of a closed legal visit to those with a genuine phobia for dogs is in effect preventing that legal visit taking place. I am satisfied that such an approach is Wednesbury unreasonable.

Article 8 of the European Convention

[28] The applicant contends that the requirements imposed on Ms Shields amounted to a lack of respect for the applicant's private life contrary to Article 8 of the European Convention. 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 be interference by a public authority with the exercise of this right except 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."

[29] The concept of private life was considered by the ECtHR in *Niemietz v Germany* [1992] 16 EHRR 97 which involved the search of a lawyer's office on foot of a warrant. The search was found to constitute an interference with rights under Article 8 and to impinge on personal secrecy to an extent that was disproportionate so there was a breach of Article 8. The ECtHR stated that respect for private life must comprise to a certain degree the right to establish and develop relationships with other human beings and there was no reason in principle why private life should be taken to exclude activities of a professional nature, as it in the course of their working lives that the majority of people have a significant opportunity of developing relationships with the outside world (paragraph 29).

[30] While the concept of private life may extend to professional relationship, and hence to lawyer and client, it was the private life of the lawyer that was in issue in *Niemietz*. In *McCrory's Application* [2001] NIQB 19 concerning the identification procedures for legal visitors to HMP Magilligan it was the client who was the applicant relying on interference with private life under Article 8. The respondent did not argue that the solicitor-client relationship was incapable of engaging Article 8, but contended that there

had been no violation of Article 8 (page 8). Kerr J held that the measures that had been introduced were justified and that there was no breach of Article 8.

[31] In the present case the respondent contends that Article 8 is not engaged. In *Nietmietz v Germany* the ECtHR found that to interpret the words "private life" as including certain professional activities would be consonant with the essential object and purpose of Article 8, namely to protect the individual against arbitrary interference by public authorities. Further it was stated that such an interpretation would not unduly hamper the State, which would retain its entitlement to "interfere" to the extent permitted by Article 8(2), and that such entitlement might well be more far reaching where professional activities were involved than would otherwise be the case (paragraph 31). If the private life of an applicant can in principle extend to developing relationships with the outside world in a professional setting it must be equally valuable to do so for the client as for the lawyer. I am satisfied that Article 8 is engaged.

[32] The obligation under Article 8 is to "respect" the applicant's private life, and in the present context to respect the lawyer-client relationship in the setting of legal consultation in a prison. The respondent introduced measures that resulted in Ms Shields and the applicant being unable to undertake a legal visit, and the measures thereby impinged on the professional relationship. As the measures went beyond simply imposing limitations on personal consultation, and some such limitations would be a necessary incident of the imprisonment context, and amounted to a prohibition on any personal consultation, they represent a lack of respect for the relationship and the applicant's private life. This amounts to interference with the exercise of the applicant's right to respect for his private life and must be justified under Article 8(2).

[33] The measures introduced by the respondent are in accordance with the law and clearly pursue a legitimate aim. The issue is whether the measures are necessary in a democratic society, for which purpose they are required to be proportionate to the legitimate aim. In considering the changes in identification procedures in *McCrory's Application,* Kerr J stated (page 8) that it cannot be the case that a solicitor, because of his own particular sensibilities would be entitled to refuse to submit to reasonable security requirements, and thereby bring about a breach of his client's Article 8 rights. Kerr J considered the nature of the objection to the measures and the level of obtrusiveness involved. It was considered that many of the objections that were made appeared to relate to the dignity of the legal profession rather than any legitimate claim to privacy. Further the level of obtrusiveness was found not to be substantial.

[34] In the present case the objection goes beyond the particular sensibilities of the applicant's legal adviser, as it involves a physical inability

to comply with the requirement. Had the applicant's legal adviser suffered from a physical disability that prevented compliance with a requirement for admission to a visit, the character and effect of any restriction would have been stark. The applicant's legal adviser had the equivalent of a disability. If the disability was in doubt the response should have been to require objective verification. Further the level of obtrusiveness has been substantial as the applicant's legal adviser was unable to comply with the requirement so that the denial of access was total.

[35] The total denial of access was not necessary in the circumstances. The applicant's legal adviser could have been afforded a closed visit. The respondent refused a closed visit in the present case in the interests of maintaining the integrity of the anti-drugs strategy. The respondent has not established how that integrity would have been undermined by the refusal of access to a legal adviser who was unable to comply with the entry condition before availing of a closed visit, other than to suggest that others might seek to follow the same course. The applicant's legal adviser and the others who sought to follow the same course would have to satisfy the Governor that they qualified for consideration by establishing good grounds for not having to submit to the passive drugs dog test. I am satisfied that the denial of access to Ms Shields in the circumstances was a disproportionate response to the legitimate aim.

Article 6 of the European Convention

[36] The applicant contents that the refusal to admit Ms Shields to the visit amounted to a breach of his fair trial rights under Article 6 of the European Convention. Article 6 provides that –

> "1. In the determination of a civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.
>
> 3. Everyone charged with a criminal offence has the following minimum rights –
>
> (b) to have adequate time and facilities for the preparation of his defence;
>
> (c) to defend himself in person or through legal assistance of his own choosing …"

[37] Fair trial rights under Article 6 include the right of access to a court. To refuse a prisoner permission to contact a solicitor is to hinder the prisoner's right of access to the court and is capable of amounting to a breach of Article 6. *Golder v United Kingdom* [1975] 1 EHRR 524, paragraph 26.

[38] The applicant's right of access to the court is not directly affected by the measures applied to Ms Shields. There were alternative means of consultation through the video system and alternative legal representatives available from the firm instructed by the applicant. While there is evidence that access to a preferred legal advisor has been inhibited I am not satisfied that the applicant's access to a court has been inhibited.

Rule 100 of the 1995 Rules

[39] The applicant contends that there has been a breach of Rule 100 of the Prison and Young Offenders Centre Rules (Northern Ireland) 1995. Rule 100 provides –

> "1. An untried prisoner shall receive –
>
> (a) all possible assistance with any application which he may wish to make to be released on bail; and
>
> (b) all possible assistance and facilities to enable him to exercise his legal rights in connection with his trial."

[40] In particular the applicant at this time was making a bail application and Rule 100 requires that he shall receive "all possible assistance". Assistance with a bail application must include arrangements for legal consultation. Having found that the restrictions have been shown to be unreasonable and disproportionate it follows that the applicant has not received all possible assistance.

Legitimate Expectation

[41] Finally the applicant claims a legitimate expectation that he could have participated in a closed visit with Ms Shields on 1 August 2002, based on the undertaking of SO McIlwaine on 22 July 2002. Without repeating the exchanges between Miss Shields and SO McIlwaine, and while accepting that Ms Shields understood that she could avoid the drugs dog and attend a

closed visit, I am also satisfied that SO McIlwaine did not give an undertaking to that effect.

[42] Further the applicant claimed a legitimate expectation of a closed visit without passing the drugs dog, based on the terms of a consultation document prepared by the Northern Ireland Prison Service in 1999 on the review of security arrangements for visitors to the prisons. On page 2 of the consultation paper it was stated that visitors might have the option of taking a closed visit if they did not wish to submit to searching. The respondent contends that this was a discussion paper and the policy adopted by Hydebank was that discussed above. This aspect of the consultation paper was not adopted and cannot give rise to a legitimate expectation.

[43] For the reasons appearing above I find that the decision to refuse the applicant's legal adviser a closed visit with the applicant was unreasonable and disproportionate and not in accordance with the requirement in the prison rules to provide all possible assistance to untried prisoners in the making of bail applications. A declaration will be made in such terms.