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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

IN THE MATTER OF AN APPLICATION BY MARTIN GRIFFIN FOR JUDICIAL REVIEW

Before Kerr LCJ, Nicholson LJ and Campbell LJ

KERR LCJ

Introduction

[1] This is an appeal from a decision of Weatherup J, given on 26 November 2004, whereby he dismissed the appellant's application for judicial review. The appellant is Martin Griffin, a sentenced prisoner currently detained in Her Majesty's Young Offenders' Centre, Hydebank Wood. By his judicial review application the appellant had challenged the decision of the Prison Service fixing his home leave eligibility date (HLED) at 23 June 2005.

Background

[2] We gratefully take the background summary that follows from the judgment of Weatherup J. The appellant was arrested on 20 November 2001 and convicted of manslaughter on 31 October 2003. He was sentenced to four years' imprisonment. His earliest release date is 23 October 2005. After his arrest he spent one day in police custody and six days in custody on remand until his release on bail on 26 November 2001. Under the remission system he will serve one half of the four year sentence, less seven days representing the period that he was in custody in 2001.

[3] Rule 27 of the Prison and Young Offenders' Centre Rules (Northern Ireland) 1995 provides that a prisoner to whom the rule applies may be temporarily released for any period or periods and subject to any conditions. At the time that the appellant was committed to the young offenders' centre following sentence, release for the purpose of home leave was governed by an

instruction to governors of 21 September 1998. Paragraph 4 of this document recorded that the qualifying threshold for admission to the pre-release Home Leave Scheme had previously been dependent on the length of sentence imposed, as pronounced by the court. This meant that no account was taken of the actual period that the prisoner spent in custody. Paragraph 5 stated that with immediate effect all determinate sentence prisoners became eligible to be considered for temporary release under the Home Leave Scheme, provided they met the criteria based on time actually to be served continuously in custody. The phrase 'continuously in custody' was defined as 'held in custody without any break between committal on remand and final discharge'.

[4] The pre-September 1998 position therefore was that prisoners were assessed for eligibility for the home leave scheme by reference to the length of sentence pronounced by the court. After September 1998 eligibility was determined by reference to the time served continuously in custody. The seven days that the appellant served in 2001 do not count as part of the period continuously in custody. The effect of this is that the period of continuous custody in his case is less than 24 months. The scheme provided that those who had been continuously in custody for 12-24 months became eligible six months before their earliest date of release to a period of leave of twenty-one days. Those who were in continuous custody for 24-48 months were eligible twelve months before release for 26 days.

[5] Under the scheme that applied at the time that the applicant was committed to custody he would have become eligible for home leave six months prior to his earliest date of release if he was regarded as falling within the 12-24 month band. On that basis he would have become eligible on 23 April 2005. If he had been regarded as falling in the 24-48 month band he would have been entitled to home leave from 23 October 2004. Having served a period of home leave before Christmas, he would then have been eligible to apply for (and would, in the normal course of events, have been granted) some ten days of Christmas home leave. The appellant contended that this should be his home leave entitlement as he has been sentenced to four years' imprisonment (an effective term of 24 months). In other words, he challenged the right of the prison authorities to determine his eligibility for home leave on a scheme based on time served continuously in custody.

[6] A new scheme was introduced on 1 March 2004. Transitional arrangements for those already serving a sentence at that date were promulgated on 31 July 2004. The import of the change, as it relates to this case, is that those who were eligible to avail of home leave before 31 December 2004 would continue to be considered under the 1998 scheme. All others fell to be considered under the 2004 scheme. The new scheme provided for less generous leave periods and eligibility for home leave did not arise until later in the sentence than under the 1998 scheme.

[7] On 18 November 2004 the Prison Service wrote to the appellant setting out the position about his eligibility for home leave. The letter claimed that the service had considered whether to exercise the discretion available under rule 27. It informed the appellant that it had been concluded that there was no compelling or exceptional reason that would warrant a departure from the new scheme in his case. The decision was taken at Prison Service headquarters, the respondent taking the view that this was a matter to be decided there rather than by the governor of the young offenders' centre.

[8] The appellant criticised the 1998 home leave scheme on the basis of its exclusive reliance on the continuous period of custody served by the prisoner. Because he spent seven days in custody when first charged, before being granted a long period of bail and the continuous period of custody which he is now serving is 24 months minus 7 days he is treated as falling into the '12 months but less than 24 months category' of that scheme. This would have entitled him to 21 days of home leave in the last 6 months of his sentence (*i.e.* from April 2005). The Prison Service's reliance on continuous period in custody, therefore, as the relevant criteria for determining the appellant's HLED and entitlement costs him (i) 15 days of home leave (including Christmas home leave); and (ii) six months of his sentence during which he was not eligible for home leave.

The judicial review application

[9] For the applicant Mr Larkin QC challenged the 1998 scheme because it gave (as does the new scheme) determining weight to a period of continuous custody which, he submitted, invariably penalises those who have been granted bail, thus reducing the prisoner's ultimate period of continuous custody. He suggested that it was absurd that not only can the continuous custody criterion operate against those who are granted bail but it visits a penalty on the timing of bail. If the appellant had been granted bail immediately and served no time in custody before sentence he would not have been penalised. Alternatively, the scheme 'improperly took into account (or gave manifestly excessive weight to) the fact that the appellant was released on bail' after having spent a number of days in custody on remand

[10] Mr Larkin submitted further that the criteria were intrinsically inflexible and erected an unacceptably high threshold for the appellant to cross; it ought to have had a significantly more graduated approach so that persons in the appellant's position were not penalised so heavily. Even if, contrary to this argument, the scheme could be regarded as valid, he contended that the failure of the prison authorities to exercise their discretion to disapply the strict regime set out in the policy and treat the applicant, for instance, as falling within the 24 months continuous custody band was unlawful. It was

submitted that there must be such a discretion having regard to the terms of rule 27 of the 1995 Rules.

[11] The scheme, Mr Larkin suggested, engaged article 8 of the European Convention on Human Rights and Fundamental Freedoms and was disproportionate in the manner in which it treated prisoners in the appellant's position. In this context it was relevant that the application of the 1998 scheme to the appellant caused a further difficulty for him. As his HLED was calculated as being *after* 31 December 2004 under that scheme, he then became subject to the new scheme. This retrospectively reduced the appellant's entitlement further still. He then became eligible for only 5 days of home leave (with a possible 4 days resettlement leave) which must be taken in the last 4 months of his sentence (*i.e.* from June 2005). The net loss to the appellant, as between the approach for which he contended and the approach adopted by the Prison Service, was (i) 31 days of home leave (including Christmas home leave); and (ii) eight months of his sentence during which he was not eligible for home leave.

[12] Finally, Mr Larkin submitted that the Prison Service had erred in concluding that the operation of rule 27 was a matter only for Prison Service Headquarters and could not provide for a 'local discretion' operated by a governor at the establishment in question.

The judge's findings

[13] Weatherup J noted that the respondent had given three reasons in defence of the 'continuous period in custody' criterion. These were (1) the need to restore public confidence; (2) the application of the scheme to prisoners who were unlawfully at large; and (3) consistency and certainty in the operation of the scheme. The learned judge concluded that the first of these reasons constituted a sufficient justification for the scheme under article 8 (2). He decided, however, that neither of the reasons outlined in (2) and (3) qualified as a valid basis for the introduction of the scheme.

[14] In relation to the claim that the scheme was required in order to deal with prisoners who were unlawfully at large the judge said: -

> "The respondents state that there should be an incentive not to abscond and a protection for victims. But it is quite clear that this group who are unlawfully at large could be excluded from the scheme. If there were a pronounced sentence system the exclusion of benefit for those unlawfully at large could be applied. I do not accept that this is a justification for a continuous

> custody approach as opposed to a pronounced sentence approach."

[15] On the purported justification of the scheme on the ground that it was required in order to achieve certainty, the judge said this: -

> "Many varieties of the Home Leave Scheme could have achieved certainty and the pronounced sentence approach would have equal certainty. It is a requirement of any consideration of convention rights that permit interference where necessary in a democratic society, as Article 8 does, that the measures be prescribed by law and that necessarily involves legal certainty. Legal certainty can be achieved in a variety of such schemes and is required in any such scheme and it is no added justification for the adoption of this system to assert that it proceeds on the basis of certainty, unless it represents the only means of achieving such certainty, which I am satisfied is not the case."

[16] Finally, in relation to the issue of public confidence he said: -

> "The respondents consider that there is concern in relation to the grant of immediate home leave upon sentence being imposed. There is described by the respondents a revolving door approach, which it is said has the effect of undermining pubic confidence in the system. The concern is that if a party is in custody and is then granted bail and then sentence is imposed, the pronounced sentence approach may result in the home leave scheme coming into effect upon sentence being passed and as a result undermining confidence in the system. This is said to be particularly so if a party is in custody and is then granted bail and re-offends while on bail and is then taken back and given bail again. When sentenced, a pronounced sentence approach to home leave would involve disregarding the periods in and out of custody and the revolving door approach is said to be evident. The applicant calls for caution in relation to public concern and I exercise caution because I must be alert to the need not to approach a matter such as this merely by reference to some assessment of

> public mood. However it is in general important to recognise the public interest in securing an effective system for the prison service and an effective system for the administration of justice. Adopting any home leave scheme or applying any other aspect of prison service administration engages the public interest in securing the effectiveness of the system, in achieving what it is designed to achieve and ensuring that pubic confidence is not undermined."

The absurdity argument

[17] Mr Larkin argued strongly that the application of the scheme to the appellant's case produced a patently absurd result. Because of happenstance he was penalised. This arose not merely because he had been granted bail but also by reason of the timing of the grant of bail. He suggested that these factors made the case for the exercise of discretion in his favour by recourse to rule 27 overwhelming.

[18] We do not accept these arguments. A scheme such as the present will always involve 'hard cases' at its margins. There will inevitably be instances of prisoners missing eligibility by a matter of days. It is not absurd that this should result; rather it is an inevitable consequence of the adoption of the scheme. What the Prison Service must do is to ensure that an unacceptable anomaly in the application of the scheme is avoided. This can be achieved by resort to the general power in rule 27. What will constitute such an anomaly will, on occasions, call for fine judgment. Although, on one view, the appellant may be regarded as unfortunate to have missed inclusion in the 24 to 48 months continuous custody category because he was granted bail only after seven days in custody, we are not prepared to say that this made his case unduly anomalous.

[19] Mr Larkin highlighted the fact that the appellant would have been entitled to the enhanced home leave provisions if the pronounced sentence scheme had remained in force. This may be true and there may even be a case for saying, as Mr Larkin did, that this demonstrated the superiority of the earlier scheme but these considerations cannot justify the conclusion that the Prison Service was not entitled to amend the scheme nor does it make the application of the scheme absurd simply because a less favourable outcome for the appellant accrues.

The inflexibility argument

[20] Relying on the decision in *Re Herdman's Application* [2003] NIQB 46, Mr Larkin argued that the scheme was intrinsically inflexible in erecting an

unacceptably high threshold for an applicant to cross. Alternatively it had been applied too rigorously and there was a lack of preparedness on the part of the Prison Service to entertain exceptions to it.

[21] Again, we must reject these arguments. The person who took the decision in this case, Ms Stinson, has averred that the Prison Service considered the appellant's case on an individual basis and we have no reason to doubt the accuracy of this statement. She accepted that there could be particular circumstances where it would be necessary to take account of the effect of the implementation of the scheme on individual prisoners who are "just caught" on one side or the other of the scheme's borderline although this would not generally be sufficient to depart from its provisions. Where there would be what are described as "concrete instances of unfairness" it is recognised that a different approach might be required. It was explained that, if the appellant was treated as eligible for inclusion in the 24-48 months continuous custody category there would be "justifiable unhappiness" on the part of other prisoners and there would be an erosion of the policy if step-by-step claims were made in respect of prisoners who were only just outside the scheme.

[22] All of these considerations appear to us to be entirely legitimate. The assessment by the Prison Service of the appellant's case does not partake of an inflexible, unreasonable approach. On the contrary, it is clear that his particular circumstances were considered and a careful examination of his claims to be included in the scheme or, failing that, to have the discretion available under rule 27 exercised in his favour, was undertaken. We do not consider that the scheme is intrinsically inflexible or that it sets unacceptably high requirements. It is in the nature of such a scheme that some means of compartmentalising the various types of prisoner must be devised. We are quite unable to say that the method chosen by the respondent was unnecessarily rigid or demanding.

Article 8

[23] Article 8 of ECHR 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 is 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] For the respondent Mr McMillan argued that article 8 was not engaged in this case. There was nothing, he said, to suggest that the Prison Service had failed *to respect* the appellant's Convention rights. On the contrary, the establishment of a scheme whereby the grant of home leave was provided for betokened a clear acknowledgment of prisoners' right to a family and private life. The implementation of a scheme that had the effect of reducing the amount of home leave did not qualify as a failure to respect that appellant's article 8 rights, he contended.

[25] It has been recognised in the jurisprudence of ECtHR that incarceration on foot of a sentence of imprisonment necessarily involves deprivation of society with one's family and restrictions on one's private life and that these indispensable incidents of prison life will not involve a violation of article 8. When assessing the obligations imposed by the article in relation, for instance, to prison visits, 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's contact with his family - *Silver and others* judgment, Series A no. 61 para. 98. In *Boyle and Rice v United Kingdom* (1998) 10 EHRR 425 ECmHR held that the Convention does not guarantee the right of a prisoner to be released on special escorted home leave and therefore rejected as manifestly ill founded a claim that the denial of such leave constituted an interference with the applicant's article 8 rights.

[26] In the present case, at the start of his sentence of imprisonment, the appellant would have been eligible for periods of home leave of greater duration than those which are now available to him under the scheme as revised in 2004. We consider that this circumstance is of considerable importance in relation to the question of whether article 8 is engaged. While one can recognise the force of an argument that the *de novo* devising and implementation of a scheme for home leave will not engage article 8 since the introduction of a system whereby prisoners will be released during their incarceration could hardly be said to reflect a failure of the prison authorities to respect the prisoners' right to a private and family life, different considerations arise where it is proposed to reduce the amount of home leave that the appellant might otherwise have expected to receive. If the new scheme had not been introduced the appellant could have expected to be granted a certain level of home leave provision. Whether or not the purpose of that home leave was, in the mind of the prison authorities, to fulfil the appellant's rights under article 8, it appears to us that the home leave provision under the 1998 scheme must be regarded as an aspect of the appellant's article 8 rights. During the period that he would have been on home leave under that scheme he would have had the opportunity to restore

and cement ties with his family and to develop his private life. The diminution of that opportunity must involve an interference with his article 8 rights, therefore.

[27] In this context it is should be observed that the claim by the appellant that his article 8 rights were interfered with by the change from the pre-1998 scheme to the scheme that applied at the beginning of his incarceration is, in our judgment, misconceived. At the start of the period of his imprisonment, the appellant's eligibility for home leave was based on the 1998 scheme. That scheme did not fail to respect his right to respect for a private and family life. On the contrary, it mitigated the normal incidents of imprisonment by providing the opportunity to the appellant to avail of home leave if he satisfied certain eligibility criteria. We consider that the 1998 scheme did not interfere with the appellant's article 8 rights. The 2004 scheme did because it curtailed the extent of home leave available to the appellant from that which he was eligible for under the 1998 scheme.

[28] Since, as we have decided, the new scheme interfered with the appellant's article 8 rights, the question arises whether the interference can be justified. For the reasons given by the learned judge, we consider that the proffered grounds of the need for certainty and the requirement to cater for those unlawfully at large cannot justify the interference with the appellant's article 8 rights. Leaving aside the question whether either of these grounds would qualify as a reason provided for under article 8 (2), it is clear, as the judge said, that certainty could be achieved by a means that was less disadvantageous to the appellant and the problem of those unlawfully at large could be dealt with by their explicit exclusion from the home leave scheme.

[29] This leaves the issue of public confidence. Mr McMillan disavowed this as a basis on which the respondent sought to justify the scheme. He suggested that public safety was the basis on which the scheme (if it engaged article 8) could be justified. Mr Larkin pointed out that this approach was somewhat at odds with the respondent's skeleton argument. There it had been argued that that it was "impossible in this day and age to argue that there is no public concern about the operation of the criminal justice system in general and the matters averred to by the respondent specifically".

[30] We do not need to decide whether the impact on public confidence was in fact a basis on which the respondent sought to justify the introduction of this scheme. We are bound to say, however, that if this did not feature in the respondent's thinking, it is surprising that the judge misapprehended the case made on its behalf to such an extent. One is also bound to observe that the disowning of this factor was not apparent with the clarity that one might have expected in the respondent's skeleton argument. Be that as it may, we do not consider that the respondent has provided evidence that the need to

safeguard public safety prompted the amendment of the scheme or, indeed, that this factor warranted such amendment.

[31] We have concluded therefore that the amendment of the scheme involved an interference with the appellant's article 8 rights and that the respondent has failed to justify that interference. In consequence his rights under the convention have been violated by the application of the amended scheme to him.

Rule 27

[32] We do not accept the argument made on behalf of the appellant that rule 27 requires all governors of prisons and young offenders' centres to exercise the power (said to be invested in them by this rule) to decide whether prisoners such as he should be released under the rule. Mr Larkin had argued that since nothing in the rule precluded governors from making such a decision they must be regarded as having that power. We reject that claim. It does not appear to us that, simply because the rule is silent on whether the power may be exercised by governors, it follows that they have that power. In any event, we are satisfied that the Prison Service is entitled to devise a policy that such decisions should only be taken in headquarters in order to aspire to consistency of approach to requests such as that from the appellant.

Conclusions

[33] Since we have decided that the appellant's article 8 rights have been infringed, the appeal must be allowed and his application for an order of certiorari to quash the decision fixing his HLED at 23 June 2005 must be granted. It is necessary to point out that this does not inevitably impinge on the general application of the 2004 scheme. Our decision is taken solely in respect of the appellant's case. We have concluded that the proffered justification in his case did not meet the requirements of article 8 (2) of the convention. Whether sufficient reason is available to the respondent to justify any interference with any other prisoner's convention rights must depend on the facts arising in such a case. If, for instance, it were possible in a particular prisoner's case to put forward justification on the basis that the change was necessary in order to prevent crime or that the earlier scheme was less efficacious in the rehabilitation of prisoners and that re-offending was more likely to occur while it remained in place, a different conclusion might be warranted. But this is not the basis on which the respondent sought to justify the scheme.

[34] In considering other applications, if they arise, the respondent must proceed on the basis that both Weatherup J and this court have concluded that neither legal certainty nor the need to provide for prisoners unlawfully at large will provide sufficient justification for the interference with article 8

rights, if these are engaged. It must also bear in mind the conclusion of this court that the reduction of the home leave that the appellant could have availed of when he was first imprisoned gave rise to an interference with his article 8 rights. It must be clearly understood, however, that we have not decided that article 8 would be engaged in respect of those who have been sentenced to imprisonment after the new scheme was introduced. 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 appellant was reduced.

[35] In light of our conclusion that the respondent has failed to justify (in the appellant's case) the change to the scheme introduced in 2004, it follows that his home leave entitlement must be determined on the basis of the scheme that applied before the change in 2004 had been effected.