

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY PATRICK GALLAGHER
FOR JUDICIAL REVIEW

MORGAN J

[1] On 19 June 2001 the applicant was found guilty on charges of rape, indecent assault and gross indecency. He was detained in custody and sentenced on 9 November 2001 to a period of 12 years imprisonment. He appealed and on 2 December 2004 the Court of Appeal quashed the convictions on the basis that the trial judge had not properly directed the jury. He was admitted to bail pending a retrial. On 22 September 2005 he was subsequently convicted of the charges by a jury and returned to custody and on 17 November 2005 he was sentenced to a term of imprisonment of 12 years. Having regard to the periods of time already spent in custody by him he is due for release on 7 April 2008.

[2] When he was originally convicted the arrangements for pre-release home leave were governed by an instruction to governors issued on 21 September 1998. The instruction noted that all determinate sentenced prisoners were eligible to be considered for temporary release under the scheme provided that they met criteria based upon the time actually to be served continuously in custody. The latter phrase was defined in an important note contained within the instruction.

"The phrase "continuously in custody" means held in custody, **without any break**, between committal by a court on remand and final discharge. (Temporary release during the currency of sentence **does not** constitute a break but High Court bail granted prior to sentence for any reason, except for compassionate reasons, **will break** the continuity of custody)." (emphasis in original)

There then followed a table setting out eligibility dates for prerelease home leave and periods of leave for various periods of continuous custody.

At the time of his original conviction the applicant was facing a period continuously in custody of 72 months.

Time to be served (Continuous custody)	PRHL Eligibility Date	Period of leave
3 months but less than 6 months	1 month prior to EDR	2 days
6 months but less than 12 months	3 months prior to EDR	4 days
12 months but less than 24 months	6 months prior to EDR	21 days
24 months but less than 48 months	12 months prior to EDR	26 days
48 months but less than 72 months	18 months prior to EDR	30 days
72 months or more	24 months prior to EDR	34 days

[3] On 1 March 2004 a new home leave scheme was introduced which has subsequently been subject to amendment. It applies to all prisoners whose period of continuous custody commenced after 31 December 2004. In respect of the sentence passed upon the applicant in November 2005 that scheme would have entitled him to eight days home leave and six days resettlement quota during the six-month period prior to his estimated date of release. That was materially less generous than the periods to which he would have been entitled under the 1998 scheme.

[4] On 2 May 2006 the applicant's solicitors wrote to the Governor requesting that the applicant's parole eligibility should be considered under the 1998 scheme. On 18 May 2006 the Governor replied refusing that request. On 6 July 2006 the applicant issued these judicial review proceedings in respect of that decision. On 15 September 2006 the applicant's solicitors wrote to the Governor asking him to exercise the discretion conferred on him by Rule 27 of the Prisoner and Young Offenders Centre's Rules (Northern Ireland) 1995 to allow the applicant's home leave entitlement to be determined in the same manner as if there had been no break in his period of continuous custody between December 2004 and September 2005. In those circumstances the applicant would have been entitled to 34 days of home leave during a period commencing on 7 April 2006 rather than a period of 26 days home leave commencing on 7 April 2007 both calculated under the 1998 scheme.

[5] By letter dated 3 October 2006 Prison Service determined that its discretion should be applied so as to permit the applicant to apply for home leave under the 1998 scheme. It declined to calculate his home leave eligibility date as if there was no break in custody firstly because it asserted that this clearly was not the case and secondly because to do so would provide the applicant with preferential treatment over other prisoners who

either had no break in custody or who had a break in custody and subsequently had their home leave eligibility dates and quotas adjusted accordingly.

[6] The applicant relied on the decision of the Court of Appeal in *Re Martin Griffin* [2005] NICA 15. In that case the applicant had been arrested on 20 November 2001 and released on bail on 26 November 2001. He was subsequently convicted of manslaughter on 31 October 2003. He was sentenced to four years imprisonment and as a result was required to serve one half of the four-year sentence less seven days representing the period that he was in custody in 2001. His home leave entitlement was governed by the September 1998 instruction. In that version of the scheme transitional arrangements provided that those who were eligible to avail of home leave before 31 December 2004 would continue to be considered under the 1998 scheme whereas others would fall to be considered under the less generous 2004 scheme. Since the applicant became eligible for home leave on 23 April 2005 under the 1998 scheme this transitional arrangement applied to him. The Court of Appeal noted that at the start of his sentence the appellant would have been eligible for periods of home leave of greater duration than those which were now available to him under the revised arrangements. It considered that the proposed reduction in the amount of home leave that the appellant might otherwise have expected to receive constituted an interference with his rights under article 8 of the convention. It concluded that no justification for such an interference had been established. It then made clear at paragraph 34 of its judgment that its conclusion that article 8 had been engaged was solely because the entitlement that would have been available to the applicant was reduced.

“[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.”

[7] For the applicant it was submitted that his break in custody between December 2004 and September 2005 should not be taken into account because his admission to bail was consequent upon the error of the trial judge in directing the jury properly. Secondly it was suggested that the reference to the applicant receiving preferential treatment violated the principle that prisoners should be dealt with on an individual basis. Thirdly it was asserted that there had been an interference with the applicant's article 8 rights which was disproportionate.

[8] The Court of Appeal recognised in Griffin the force of the argument that the 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 prisoner's right to a private and family life. It rejected the challenge that was made in that case to the lawfulness of the 1998 scheme. The sentence which determines the applicant's date of release is that passed in November 2005. It happens that the pronounced period of the sentence in November 2005 is the same as that pronounced in November 2001 but that might not have been the case had the applicant met the charges on the retrial in a different way or been acquitted in respect of any of the counts. The applicant had enjoyed a period of almost 10 months on bail prior to the sentence in respect of which he is serving his period of imprisonment and there is no challenge to the calculation of the time to be served continuously in custody if this period is properly taken into account. There was a change to the home leave to which the applicant originally became entitled as a result of his conviction on 19 June 2001 but the reason for that change was his subsequent admission to bail in December 2004 and his conviction in September 2005. The application of the same scheme to these different circumstances does not in my view constitute an interference with the applicant's article 8 rights. I express no view as to whether the application of the new scheme to these different circumstances would have involved a breach of the applicant's article 8 rights.

[9] It is contended that the 1998 scheme should have been applied without reference to the period that the applicant spent on bail because the Court of Appeal concluded that the trial judge had not directed the jury properly in the original trial. This was drawn to the attention of Prison Service by the applicant's solicitors in their letter of 15 September 2006 and considered by Prison Service in its letter of 3 October 2006. In particular it was suggested that this misdirection constituted a breach of the applicant's right pursuant to

article 6 of the convention to a fair trial. The precise nature of the breach was not specified and I am not inclined to accept that there was such a breach. In considering whether the right to a fair trial guaranteed by article 6 of the convention and common law has been breached it is necessary to look at the trial process as a whole. That includes the appeal process. In my view when one does so it is clear that in this case the misdirection per se cannot found an argument for a breach of article 6.

[10] It is also clear from the letter of 3 October 2006 that Prison Service closely examined the applicant's personal circumstances and the effect upon him of the different home leave schemes and the impact of his period of bail commencing on 2 December 2004. As a result it concluded that the applicant's circumstances were such as to cause Prison Service to exercise its discretion to calculate the applicant's entitlement to home leave on the more generous 1998 basis. It is clear that this exercise of discretion was with a view to enlarging the opportunity of the applicant to enjoy time with his family. In exercising that discretion I consider that the respondent was entitled to take into account that a decision to ignore the bail period prior to the sentence in September 2005 would have been to treat the applicant more favourably than those who had such a period taken into account under the scheme although I entirely accept that such a factor could not of itself be the sole determining factor. The evidence does not suggest that it was in this case.

[11] In the circumstances I do not consider that the applicant has made out any basis for this challenge and I dismiss the application.