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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 PATRICK LEONARD FOR JUDICIAL REVIEW OF DECISIONS OF THE NORTHERN IRELAND PRISON SERVICE

DEENY J

[1] The applicant is a serving prisoner in HMP Maghaberry. He was given leave on 10 September 2004 to bring these proceedings seeking to quash the decision of the Prison Service to detain him in that prison in separated conditions which were said to be contrary to the "Compact for Separated Prisoners: An Explanatory Booklet" of February 2004. Following serious disorder in the prison a review of arrangements was carried out which culminated in the Steele Report. On foot of that prisoners in Maghaberry, who considered themselves at risk of physical harm because, in particular, of their association with either Republican or Loyalist factions were given the option of having separate accommodation. This was contrary to the general practice of integrating prisoners in the prison system. On or about 4 March 2004 this applicant was interviewed with other prisoners and provided with a copy of the Compact, as I shall refer to it. He was invited to sign the Compact but declined to do so. Nevertheless he did wish to be transferred to the separate accommodation which in his case was Roe House.

[2] Mr Liam McCollum QC, who appeared with Mr Christopher O'Rawe for the applicant, contended, in his cogent and succinct argument, that on examination of the affidavit and exhibits it could be seen that the terms of his detention were in breach of that Compact. He submitted that such a breach constituted a breach of the legitimate expectation of the prisoner and furthermore a breach of his rights under Article 8 of the European Convention on Human Rights. He did not pursue an earlier contention in the papers that there was a breach of Article 3 of the Convention.

[3] Mr Bernard McCloskey QC appeared with Mr Peter Coll for the respondent. He took a preliminary point that the Compact itself had been

and was being further reviewed and this matter was really of academic interest only and on foot of the decision of the House of Lords in R v Secretary of State, ex parte Salem [1999] 1 AC 450 and that of Kerr J in Re Nicholson's Application [2003] NIQB 30 and my own decision in Re Hughes' Application [2006] NIQB 27 I should not hear the matter. However, Mr McCollum submitted that the key issue of whether or not the prisoner was unlocked in accordance with the Compact with, to a lesser extent, some connected issues, is still ongoing and that the matter ought to be tried. I therefore rejected the respondent's application.

Legitimate Expectation

[4] The applicant relied on the line of cases commencing with the Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374 and including my own decision in Re Neale and Others [2005] NIQB 33 in support of his contention that the applicant had a legitimate expectation to be treated in accordance with the Compact in law and that this had not occurred. In Neale and Others, particularly at paras. 34 to 38 I sought to identify the essential factors of this recent and evolving development in our public law. To summarise the applicant would need to establish:

(a) a clear and unambiguous representation made to the applicant by the decision maker;

(b) that the representation was made to one or a few people giving the promise or representation the character of a "contract" per Lord Woolf in R v North and East Devon Health Authority ex parte Coughlan [2000] 2 WLR 622, [2000] 3 All ER 850;

(c) that while reliance and detriment were not essential factors (per Laws LJ in R v Secretary of State for Education ex parte Begbie [2001] WLR 1115), it was an important aspect of any assessment of fairness which "will normally be required in order for the claimant to show that it would be unlawful to go back on a representation" per Schiemann LJ in R (Bibi) v Newham LBC [2002] 1 WLR 237. The applicant did not claim that detriment had been established in this case. It will always be an important factor to take into account if it is present.

[5] If there was a representation it is clear it was made to a relatively small group, in this case, the applicant and some 20 other Republican prisoners who choose to go to Roe House. I consider that that requirement could be said to be met here. With regard to the third near-requirement of reliance the facts are these. As its name suggests the Compact was intended to convey a quasi agreement between the Prison Service and the prisoners who wished to be separated for their own safety. However, this applicant, apparently in common with the great majority of other prisoners being separated, declined

to sign the Compact, although invited to do so. Given that the doctrine of legitimate expectation has been said by Lord Justice Bingham in R v Board of Inland Revenue ex parte MFK Limited [1990] 1 All ER 91 p. 110(J) to have something of the character of breach of contract this would seem to tell against the applicant here. On the other hand it is clear that he was shown this document and, indeed, had it explained to him by a prison governor before he elected to move to Roe House. Governor Martin in his affidavit of 13 October 2004 says this happened before he moved there whereas the prisoner thought he had already moved but he does say that he applied for the accommodation on the arrangements "set up in consequence of the Steele Report and the Compact Scheme for Separated Prisoners – An Explanatory Booklet." I am inclined to the view therefore that there may be at least sufficient reliance here for the applicant to argue that he may be entitled to inclusion in one of the three categories of legitimate expectation identified by Lord Woolf in Coghlin's case, although the applicant's refusal to sign may be relevant to the decision of the court. I bear in mind that these three categories are not "hermetically sealed" as Laws LJ had said.

[6] The crux of the matter does therefore turn on the nature of the representation to the applicant and whether there was a breach of that by the Prison Service. I turn to the document with that in mind. I observe that of course it is described as an explanatory booklet. It is not a Rule or set of Standing Orders made under the Prison Act. In the executive summary the second paragraph opens:

> "The Northern Ireland Prison Service has developed a prisoner compact which makes clear the routine and facilities available to separate prisoners and what will be required of them in return."

In this case, as I mentioned, the applicant would not sign this on his part. The respondent says that he has been guilty of three breaches of discipline while there, although they seem minor. They also alleged that he is one of a number of Republican prisoners seeking to bring a mirage of applications and petitions as part of an orchestrated campaign and they refer to certain evidence in support of that.

[7] As part of the introduction para. 1.3 states the following:

> "This booklet explains what separated conditions are and what is expected of you. It is not a legal contract (*my* underlining) but a way of describing what the Northern Ireland Prison Service will try to provide you with (*my* underlining) and what you must do if you were living in separated conditions."

Section 2 deals with the objective of normally integrating prisoners but the willingness to accommodate prisoners who "think that they would be safer in separate conditions." "If you application is approved for separation we will continue to strive to provide the same opportunities to you." (Para. 2.4).

[8] Mr McCollum relied particularly on the daily routine which begins at para. 6.1 and carries on the two subsequent pages. He was to contend that this was not complied with. However, the actual words of 6.1 are, I consider it, important:

> "The typical daily routine is described below. The timings are approximate and may vary from day to day."

[9] One has to say that the use of this language consistently indicates more ambiguity and less clarity than was found on the facts in Re Neale and Others. It seems closer to the representations of the revenue in the MFK and Preston cases. Counsel placed considerable reliance on the words in paragraph 5.1:

> "You will be unlocked for set periods each morning, afternoon and evening, except Sunday evening when all prisoners in Maghaberry are locked in their cells."

The applicant contends that this part of the Compact has not been adhered to. However the word "will" must be seen in the context of the other passages referred to. Furthermore it is followed by a long list of things which may be permitted by the authorities. I am far from convinced that, read in context, it is a clear and unambiguous representation giving rise to legitimate expectation.

Evidence

[10] This is a case in which there is undoubtedly a conflict of evidence to a not insignificant extent in the affidavits of the applicant and respondent. I remind myself that in judicial review proceedings it is normally for the applicant to prove that the grounds for intervention are made out rather than for the defendant to prove they are not. The onus of proof is on the applicant, as Lord Brightman said in R v Birmingham City Council, Ex p. O [1983] 1 AC 578 at 597. That the burden of proof is on the applicant remains true in law today. See eg. Supperstone and Goudie, 2nd Edition, paras. 17.8-17.9. While accepting both the legal position as thus stated and the existence of conflicts Mr McCollum sought to argue that there were perhaps three matters of which one was of substance where the applicant had proven his case, on the balance of probabilities. I find his subsidiary points are de minimis and not made out. His point of possible substance was on the basis that the applicant was not

unlocked contrary to paragraph 5.1 of the Compact on alternate evenings. However I have to balance against that the affidavit of Governor David Eagleson. In paragraph 6 of his affidavit of 15 October 2004 he said that on a "bad day" evening "he will be given the opportunity to use the telephone, acquire hot water and make a light snack." The main difference in routine from the prisoner's point of view is that one day they are offered two periods of association/exercise, and on the next day they are offered one. These days alternate between the Loyalist and Republican landings. Furthermore I have to take into account paragraph 7(v) where he avers that the lockup times do vary "but this is more often to provide a more lax prison regime than the converse. However, circumstances do dictate that on occasion lockup times will vary unfavourably for prisoners such as when a search of a landing is being undertaken, or there is an incident elsewhere in the prison which requires the attendance of staff." It seems to me that evidentially therefore the plaintiff has not discharged the burden of proof in this case of showing any real breach of the Compact.

[11] In any event any perusal of the lengthy affidavits in this case, into which I need not go into any detail, brings home the reality of the conduct of a prison. The primary duty of the Prison Service is to keep the prisoners in custody. Not all prisoners co-operate in that objective. Inevitably the actions of some will impact from time to time on the normal running of the prison. The Prison Service should not therefore be in a position where they are compelled to follow some rigid routine set out in a non-statutory document as though it were a matter of law, when that might compromise their efforts to retain prisoners in custody and, indeed, to prevent physical harm caused by one prisoner on another or by prisoners on the staff.

[12] The applicant also relied on Article 8 of the Convention. Even if one accepts that the applicant's rights are here engaged, it seems to me, having read the papers, that the actions and decisions of the Prison Service herein were reasonable, proportionate and necessary. I say that having taken into account the considerable submissions, both oral and written made on behalf of both parties. There is no human right as such to be unlocked from one's cell for seven hours a day as opposed to five. One is reinforced in these conclusions both in regard to legitimate expectation and the application of the Convention by remembering that appellate courts have stressed the relevance of resource considerations in deciding whether a public authority has been in breach of its duty. While the courts will act in the appropriate case, the courts will also be mindful that the public purse is not bottomless and that public servants do have to take resource implications into account. In the circumstances it does not seem to me either necessary or appropriate to go into the minutiae of the daily routine of the applicant in Maghaberry Prison. He did not sign the Compact. It is not intended to be a legally binding document. He did not act to his detriment, but rather benefited from association with those whom he felt comfortable. He has not satisfied the

court that there is any breach of any consequence of the Compact scheme. The Prison Service actions are proportionate and necessary in the circumstances.

Strip searching

[13] It is convenient to deal with the applicant's second application in this judgment also. The applicant contends that the search policy and regime which applies to him as a sentenced separated Republican prisoner accommodated in Roe House, HMP Maghaberry, as previously stated, infringes his rights under Articles 3 and 8 of the Convention. He complained that he was strip searched as a matter of routine and not in response to any specific security alert. He averred, which appears to be right, that no unauthorised article had been ever found on his person. Counsel helpfully referred to a number of the leading European decisions including Van der Ven v The Netherlands and Lorse v The Netherlands both of which judgments were delivered on 4 May 2003. He submitted that the searching of the applicant, partially naked, was a breach of both his Article 3 and Article 8 rights. He relied on the judgment of Girvan J in the Karen Carson case. He acknowledged that Governor Eagleson in paragraph 11 of the relevant affidavit flatly contradicted the applicants claim to rectal searches but he pointed out that the governor did not himself say that he conducted such searches but was merely the director of the relevant department.

[14] I heard submissions in turn then from Mr McCloskey. His reply to the last point was that the governor as the relevant director of inmate services was well placed to comment on these matters. The applicant had not named any particular officers as conducting rectal searches and therefore there was no particular officer who could be asked to swear an affidavit contradicting the applicant. The governor was the appropriate person. It is also the case that the applicant has not sought to put in affidavits from any other prisoners supporting his claims in this regard.

[15] I have already dealt above with the position which exists here ie. that the applicant carries the burden of proof which he must discharge. I find here that he has not discharged the burden of proof on him of showing degrading elements in the searches by way of humiliating positions or rectal examination. I am reinforced in that conclusion by the absence of any complaints about such matters. The applicant made very many complaints to the governor. There was no reference to degrading searches amongst them nor in the letters carefully drafted by his solicitor.

[16] I nevertheless have to consider whether the strip searching itself constitutes a breach of his convention rights. Mr McCloskey referred to the full consideration of these issues following the decision of Girvan J. He pointed out that no physical touching was permitted although the hair and

mouth were looked at. A male prisoner must stand with his legs apart while the lower half of his body is observed but it is not touched. As indicated above it was denied that the prisoner was required to adopt embarrassing positions. He pointed out that there was no rejoinder affidavit to Eagleson's denial.

[17] The purposes of the searches were to detect the smuggling of harmful or illicit objects, to prevent such smuggling and to deter it. That could be drugs but could be other matters, such as ammunition. The fact that the applicant himself had not been caught smuggling anything was irrelevant. If the prison authorities did not carry out widespread searching of this kind such smuggling of dangerous or harmful items would not be prevented. The most prominent prisoners would and could use other prisoners to smuggle in items for them. By definition a significant number of people in the prison were men of violence whose threats might well carry weight with many other prisoners. While the court was not told the nature of the conviction or the length of sentence which Patrick Leonard was serving it was told that he was a member of a group of dissident Republicans. The point was made that such persons are not members of an organisation which has announced let alone observed a ceasefire or engaged in decommissioning. Reference was made to the distant but not too distant past in Northern Ireland prisons where prison breaks and violent deaths occurred. Quite recently there was still extensive violence and property damage occurring in this very prison, as was referred to in the respondent's documents. Furthermore drugs overdoses were frequent and two deaths had occurred in the eighteen months before the hearing.

[18] Mr McCloskey pointed out that the issue of searching seemed to raise no exceptional concern on the part of the prisoners generally. A document apparently found in the applicant's own cell and clearly written by somebody who was coordinating a campaign of obstruction, he said, on the part of dissent Republicans, acknowledged strip searching as an inevitable part of being a prisoner while alleging that the amount of the searching was "OTT" i.e. over the top. No external body or Board of Visitors or medical experts or other source of information had been called in aid by the applicant in support of his contention.

[19] I note that the respondent's two documents do not expressly prohibit the external inspection of the rectum but it only seems to exist to the extent referred to above i.e. the external observation of the lower part of the body. There is a requirement that the search should be conducted in a "dignified and restrained manner".

[19] I cannot be satisfied in the way that I need to be that strip searching is being abused here in the way in which it is done, for the reasons set out above. Certainly it was clearly accepted by counsel for the respondent,

rightly in my view, that such searching should not be done in a way to degrade or humiliate the prisoner. It should only be conducted to the extent necessary for preventing the commission of criminal offences. Indeed there can be no doubt that where there is an interference with a Convention right the actions of the public authority should be the minimum required. Likewise the prison authorities should keep under review the number of strip searches. It may well be that if order increases and criminality diminishes within the prison population the extent of such strip searching in terms of its frequency could be reduced. However this seems to me a matter, so far certainly as this case is concerned, within the margin of appreciation of the Prison Service.

[20] Counsel also relied on the dicta of Lord Bingham at paras. 28-31 and of Lord Hoffman at para. 66-68 in R (On the Application of Begum Begum) v Denby High School [2006] UKHL 15. However I do not think it is necessary for me to go into that or the considerable volume of other authorities drawn to the court's attention, as it has not been shown that the current searching practice of the Prison Service with regard to the inmates of Roe House, and the applicant in particular, is disproportionate or unnecessary. The applicant therefore does not succeed either in regard to his case on searching or his case in regard to the implementation of the Compact.