

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY ROBERT JAMES HUGHES
FOR JUDICIAL REVIEW

WEATHERUP J

The application

[1] The applicant is a prisoner at HMP Maghaberry and seeks judicial review of two decisions of the Northern Ireland Prison Service. The first is the decision to detain the applicant at HMP Maghaberry and not to transfer him to HMP Magilligan. The second concerns the failure to provide appropriate work and education opportunities.

The background to the transfer issue

[2] The applicant was sentenced to six years imprisonment on 20 June 2003. The procedure for locating sentenced prisoners is described by the Chairman of the Allocation Committee at Prison Service Headquarters. Upon sentence the applicant was sent to Lagan House at Maghaberry, which is described as a transition house for newly sentenced prisoners, where assessments are made on risk, health, education, probation and welfare needs. A prisoner would have a committal interview with the Governor within days of his arrival. High-risk category prisoners are retained at Maghaberry. Magilligan is categorised as a medium/low security prison. Prisoners to be retained at Maghaberry undergo a four-week induction programme before being allocated to another house at Maghaberry. Prisoners being considered for transfer to Magilligan are referred to the Allocation Committee, usually within two weeks of sentencing.

[3] The applicant was admitted to the Maghaberry induction programme. On 19 August 2003 he was moved to Bann House Maghaberry where he has remained.

[4] The applicant wishes to be transferred from Maghaberry to Magilligan. He states in his affidavit that he has made the prison authorities aware of his wish to transfer although it is not stated in what manner he expressed that wish to transfer. The applicant avers that in mid-August 2003 he was informed by a prison officer that he was being moved to Magilligan. He describes various steps that were taken in preparation for the transfer. However, he was then told by the prison officer that his transfer had been cancelled. The applicant says that the reasons he was given by the prison officer for this cancellation related to the applicant facing a further criminal charge and facing a charge against prison discipline. He refutes those reasons and contends that he has not been given a proper reason for the cancellation of his transfer to Magilligan.

[5] Prison Service Headquarters deny any knowledge of the applicant having been informed by a prison officer that he would be transferred to Magilligan. The applicant dates the event as mid-August 2003 and this date corresponds with a letter from the applicant's solicitor of 18 August 2003 referring to the cancelled transfer. The respondent asserts that the applicant's name was not considered by the Allocation Committee at any time prior to September 2003. However, by September 2003 there were accommodation pressures at Maghaberry and it became necessary to screen sentenced prisoners with a view to possible transfer to Magilligan. At the Allocation Committee meeting on 8 September 2003 the applicant's name appeared on a schedule of prisoners as a candidate for transfer. The Chairman of the Allocation Committee avers that as the applicant was a high-risk category prisoner his name should not have appeared on the schedule and there had been an administrative error. In any event on 8 September 2003 the Allocation Committee decided that the applicant was not a suitable candidate to transfer to Magilligan. However, the applicant would not have been aware that his name had appeared on the schedule presented to the Allocation Committee on 8 September 2003 and was not informed of the outcome of the meeting.

[6] The result is that the Chairman of the Allocation Committee confirms on affidavit that neither on 8 September 2003 nor at any other time was a decision made to transfer the applicant to Magilligan, and if any prison officer told the applicant that he was being transferred to Magilligan that officer was not acting with the authority of the Allocation Committee.

[7] The applicant rejected the respondent's assertion that high-risk prisoners were not transferred to Magilligan. He identified two prisoners he described as high-risk category prisoners who had been transferred to Magilligan. The Chairman of the Allocation Committee confirmed that the two named prisoners were transferred to Magilligan on 18 July 2003 during the "dirty" protect campaign by dissident republicans. This was stated to be a

short-term measure in an attempt to lessen the operational pressures at Maghaberry and both prisoners were later returned to Maghaberry.

[8] The applicant then provided through his solicitor a list of the names of six other prisoners who were said to be high risk category prisoners who had also been transferred to Magilligan. Counsel for the respondent has taken the position that the respondent will not proceed to confirm or deny the security status of any list of prisoners submitted by or on behalf of the applicant. However Counsel did confirm that all the prisoners who had been named by the applicant were transferred in accordance with the allocation policy.

[9] More fundamentally, the applicant does not accept that he is a high-risk category prisoner. The applicant's status is not under challenge in these proceedings and I deal with the matter on the basis that the applicant has high-risk status.

The applicant's grounds on the transfer issue

[10] The applicant's grounds are:

- (a) the applicant's substantive legitimate expectation that he would be transferred to Magilligan because of the statements of the prison officer in mid-August 2003;
- (b) alternatively the applicant's procedural legitimate expectation, as a result of the statements of the prison officer, that he would be informed of any considerations adverse to his transfer and would be entitled to make representations and would be given reasons for not being transferred;
- (c) procedural unfairness by reason of the failure to disclose adverse considerations and permit representations in relation to the refusal to transfer;
- (d) failure to give adequate reasons for refusal to transfer;
- (e) taking account of the failure to provide appropriate work and education, the failure to transfer to Maghaberry is disproportionate.

Legitimate expectation

[11] Legitimate expectation may arise from a promise or a practice by or on behalf of the decision maker. In this case the applicant relies on the statement of the prison officer as a promise that created a legitimate expectation. Prison Service Headquarters have been unable to identify any prison officer as having informed the applicant that he was to be transferred to Magilligan. I proceed on the basis that the applicant was so informed. The applicant contends that the prison officer would have had actual or ostensible authority to notify the applicant of a transfer to Magilligan. The Allocation Committee did not make any decision to transfer the applicant to Magilligan at any time.

The only conclusion to be drawn from an acceptance of the evidence of the applicant and of the respondent is that a prison officer misinformed the applicant, presumably deliberately, that he was entitled to a transfer to Magilligan. Any prison officer who notified the applicant that he was to be transferred had no authority to do so. The "legitimacy" of an expectation requires an objective approach and one aspect of that approach involves consideration of the "legitimacy" of the promise or practice on which reliance is placed. In the circumstances the actions of the prison officer cannot entitle the applicant to the benefit of a transfer that the appropriate authority has not authorised, nor can they ground any procedural legitimate expectation.

[12] It is to be hoped that this matter will be fully investigated and appropriate action taken in the light of the results of that investigation.

Procedural fairness and reasons

[13] Further the applicant relies on procedural unfairness and lack of reasons for his transfer. I approach this issue, not on the basis that he was informed of a transfer by the prison officer, which I have found did not in the circumstances create any entitlement on the part of the applicant, but on the basis that he has not been transferred. The reason he has not been transferred is that he is a high-risk category prisoner and Magilligan is a medium risk/low risk security prison. It is unfortunate that the applicant's solicitor did not receive such a straightforward explanation in reply to his correspondence. However that reason has now been given and the applicant does not qualify for transfer. Those transfers of high risk prisoners that have occurred arose in special circumstances outlined by the chairman of the Allocation Committee and do not create any entitlement to transfer on the part of the applicant. As he does not accept that he is a high risk prisoner there is an issue to be resolved but it is not an issue that arises in these proceedings. Accordingly the applicant has not established any grounds for Judicial Review in relation to the transfer to Magilligan.

The background to the work and education issue

[14] The applicant states that he has not been offered any work or education provision. He applied for courses in English, History, Mathematics and Computers. There have been staffing problems in the prison. Overtime working in the prison involved additional voluntary hours for which officers were not paid but received time off in lieu. By reason of various difficulties affecting prison officers they have not worked additional voluntary hours since April 2003. One consequence has been that staff are not available in the education department classrooms and the workshops. The applicant's computer course is classified as a work request and for staffing reasons the workshops are closed. The history course is usually held in evening classes in the education department classrooms that are presently closed. The applicant

was assessed as entitled to receive essential skills classes in literacy and numeracy, which would be held in the education department classrooms although these are now closed. However, the education department has used its fulltime teaching staff to hold such classes in the prison houses. The applicant is attending the essential skills classes on a reduced scale in improvised accommodation.

[15] The applicant has been employed as an orderly with the bin party since January 2004 although it is disputed whether he works one or two hours a day or as little as twenty minutes every day or two. He spends time on wing-based handicrafts, can attend the gym one or two hours a day for five days a week and may attend the library every week or two. An aspect of the staffing difficulties has concerned the new regime for separated prisoners which has now been finalised, with prisoners moving to the new accommodation on 8 March 2004. Staff training was then ongoing and was to be completed within four weeks. Minor refurbishment of the education and workshop facilities will be completed in April 2004, and the respondent estimates that, thereafter, work and education provision will return to normal levels as soon as practicable. Evening education will re-commence at the start of the academic year in September 2004.

The applicant's grounds on the work and education issue

[16] The applicant's grounds in relation to the provision of work and education are:

- (a) that the facilities provided have not complied with Prison Rules 2 and 51 to 54;
- (b) the limited facilities have involved a breach of Article 8 of the European Convention;
- (c) there has been a failure to give adequate reasons for the lack of work and education.

The Prison and Young Offenders Centre Rules (NI) 1995

[17] Rule 2 sets out general principles as a guide to the interpretation and application of the Rules. Prisoners will be encouraged to use their time constructively - (d); prisoners will be considered individually and contribute to decisions on how to spend time - (e); facilities will maintain links with families and assistance will be given to prepare for eventual release - (i); information will be given to assist in making use of facilities given - (k).

[18] Part V of the Rules deals with Work, Education and Recreation. Rule 51 deals with Work and provides:

“(1) Work of a useful nature or other purposeful activities shall be provided to keep prisoners actively employed during their normal day.

(9) “work” includes employment in the ordinary service of the prison, in prison occupational services and participation in vocational training.”

Rule 52 deals with Education and provides:

“(1) Every prisoner who expresses interest in participating in education shall be permitted to do so to the extent practicable; special attention shall be made to prisoners with problems of illiteracy or innumeracy.

(2) Programmes of educational classes covering as wide a range of subjects as practicable shall be arranged at every prison.”

Rule 53 deals with Handicrafts and Hobbies and provides:

“As far is practicable reasonable facilities shall be allowed to prisoners who wish to practice handicrafts or other hobbies.”

Rule 54 deals with Libraries and includes:

“(2) As far is practicable, and subject to the requirements of security, control and good order, prisoners shall be allowed to go to the library and choose their books and other items there.”

Rule 55 deals with Exercise and Association.

[19] Rule 51(1) refers to work or “other purposeful activities”. I interpret Rule 51(1) as requiring the prison authorities to provide for the prisoners “work”, which includes the activities described in Rule 51(9). Alternatively the prison authorities should provide “other purposeful activities”, which may include the provision of education, handicrafts, hobbies, libraries, exercise and association and any other purposeful activities. Further, the requirement is to keep prisoners actively employed “during their normal day”, which must extend over a reasonable period of their normal day. During the course of the past year it is not apparent that such work or other purposeful activities have been provided during such periods.

[20] The reasons for the limited provision of work and education facilities at the prison over the past year are related to the staffing difficulties that have been encountered. The staffing difficulties have resulted from issues about security of prison staff and the sickness levels of prison staff. These matters led to the loss of the additional voluntary hours worked by prison staff. The staffing difficulties have been compounded by an increased prison population and the consequences of the Steele recommendations on the separation of prisoners. The first priority for the deployment of prison staff has been the general security of the prison. The result has been that prison staff have not been available to operate the workshops or the classrooms in the Education department.

[21] The respondent was not under any general duty to give reasons to the applicant for the limitations in the provision of facilities. The applicant did not make any formal request for such reasons. The reasons have been set out in the affidavit evidence filed on behalf of the respondent. In any event the applicant could not have failed to be aware that the difficulties that were being experienced were related to staffing.

[22] The applicant contends that limited staff resources cannot be taken into account in considering the position of the prison authorities. In R v Sefton Metropolitan BC, ex parte Help the Aged [1997] 4 All ER 532 it was held that, in the failure to perform a statutory duty to provide accommodation for an elderly person in need of care and attention, the limited financial resources of the local authority was no excuse. In the present case the difficulties embrace concerns about industrial relations and changes in the prison regime as well as the allocation of staff, rather than a lack of resources. In any event the facilities provided for in the Rules do not give rise to private law remedies for breach of statutory duty, although they can give rise to public law remedies. In considering the provision of these facilities in the public law context of the present case I propose to take into account the reasons advanced by the respondent for the facilities presently provided.

[23] The provision of education, handicrafts, hobbies and libraries is qualified to the extent that such provision is "practicable". The provision of education under Rule 52(1) is "to the extent practicable" and the programmes of classes are to cover as wide a range of subjects "as practicable". The staffing problems that have been encountered have not rendered it practicable to undertake the normal regime of education when prison officers are not available to provide the necessary security cover. The qualification of practicability applies in the circumstances that have prevailed in the prison over the past year.

[24] Rule 52(1) specifies that special attention shall be paid to prisoners with problems of illiteracy or innumeracy. That would appear to apply to the

applicant who has been assessed to receive essential skills classes in literacy and numeracy. Although the staffing problems have resulted in the closure of the education department classroom, the teaching staff at Maghaberry have continued the essential skills programme in alternative accommodation that is less than satisfactory. In the difficult circumstances prevailing it appears that special attention has been paid to illiteracy and innumeracy. In any event I am satisfied that practicability also qualifies the special attention to be paid to illiteracy and innumeracy and such measures as have been applied have been to such an extent as it practicable in the circumstances.

[25] Access to handicrafts and hobbies under Rule 53 are also stated to be "as far as practicable". The applicant has been able to avail of those facilities, although as he has stated they are undertaken at his own expense and are such that they can only maintain attention for limited periods of time. In the applicants case they are not such purposeful activities as would, in conjunction with available work, satisfy Rule 51. Access to the library under Rule 54 is also stated to be "as far as practicable" and with the present staffing arrangements has been limited to once or twice a fortnight. The facilities have been provided as are practicable in the circumstances outlined above.

[26] The provision of work or other purposeful activities is not qualified by practicability. The requirement to provide work or other purposeful activities during the normal day has not been satisfied.

Article 8 of the European Convention

[27] The applicant contends that the lack of facilities involves a breach of Article 8 of the European Convention. Article 8 relates to the right to respect for private and family life and provides as follows:

"(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 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."

[28] The applicant contends that the restricted regime fails to respect his private life. The applicant retains those rights that are not necessarily removed by reason of imprisonment. Access to the applicant's work, education and recreation is necessarily removed by his imprisonment and

replaced by the facilities available in the prison. There are positive and negative obligations arising under Article 8. If it is assumed that the requirements of Rule 51 to provide work or other purposeful activities during the normal day engage Article 8 then a failure by the prison authorities to comply with such obligations would have to be justified. I have stated above that the requirement to provide work or other purposeful activities during the normal day has not been satisfied. The restrictions on work arose from the allocation of prison officers to general duties in the interest of security rather than providing security cover in the workshops. This was a matter of allocation of staff resources on the basis of the prevention of disorder and crime and the protection of the rights of others. It arose in the context of staffing difficulties. I would hold that, if the actions of the prison authorities amounted to an interference with the applicant's right to respect for his private life, the actions were justified as reasonable and proportionate in the circumstances for the purposes of Article 8(2) of the Convention.

[29] Similarly, if it is assumed that Rules 52 to 55 impose obligations to provide the other facilities and engage Article 8, I have stated above that the facilities have been provided as far as practicable so that Rules 52 to 55 have been satisfied. In the circumstances the actions of the prison authorities in this regard would not involve any lack of respect for the applicants private life. In any event I would hold that any such interference would be justified on the same basis as applied to the provision of work.

[30] The arrangements for the provision of work and education are returning to normal as outlined at paragraph [15] above. The relief sought on behalf of the applicant is a declaration that the provision of facilities during the past year has not accorded with the Rules. I have stated above that during the period of staffing difficulties since April 2003 there has not been the provision of work or other purposeful activities during the normal day such as would satisfy Rule 51. As the respondent recognises the shortcomings of the present arrangements and is in the process of restoring normal facilities I do not propose to make a declaration.