

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

**IN THE MATTER OF AN APPLICATION BY RODNEY SMITH  
FOR JUDICIAL REVIEW**

**GIRVAN J**

[1] The applicant is a sentenced prisoner serving a term of imprisonment at HMP Maghaberry Prison. He has been in custody since 25 April 2001 and was sentenced to 10 years' imprisonment for armed robbery. This is apparently his seventh custodial sentence. The earliest date for his release is 25 April 2007.

[2] As he was sentenced before 1 March 2004 eligibility for pre-release home leave falls to be assessed under the Pre-Release Home Leave Scheme as modified by an Instruction to Governors emanating from Northern Ireland Prison Service Headquarters and authorised by the Director of Operational Management. Under the Scheme as modified different period leave and eligibility dates apply depending on whether a prisoner is classified as a "star class" prisoner or as an "ordinary class" determinate prisoner.

[3] In September 2003 the applicant claimed to be living in fear for his life as an ordinary prisoner and asked to be transferred to the separated facility. Having been transferred on 1 October 2003, in May 2005 he applied to be reclassified as a star status prisoner claiming that he was entitled to be so reclassified because of his good behaviour. In paragraph 4 of his affidavit he stated that he had not been found to be in breach of any prison discipline whereby such an application might otherwise be refused. On 4 May 2005 his application was refused. The document recording the reasons for the refusal of his application recorded under the class officers comments that he was now on a separated regime and therefore no reports were written by class officers so class officers comments did not apply. Governor Kennedy, the governor who made the decision refusing the application recorded that the application

was refused on the basis that the prisoner had had several periods of imprisonment.

[4] The applicant in his grounding affidavit stated that he believed the prison authorities were unfairly discriminating against him because he was in a special regime because of his fears for his own safety.

[5] Governor Kennedy in his affidavit stated that, contrary to the applicant's assertions in his affidavit, the prisoner did not have a particularly good record as during his period of imprisonment from April 2002. He had 11 convictions on disciplinary charges 7 of these since he was transferred to separated accommodation. The governor appeared to take account of a conclusion that the applicant had taken part in a riot by loyalist prisoners although the applicant was not found guilty on an adjudication relating to that although the applicant was placed on Rule 32 from 15 February 2004 onto 8 March 2004. The governor also took account of his reported poor attitude towards search procedures, of the fact that he was refusing to communicate with staff and that he was rude and abrasive towards new staff. The governor had himself observed his poor attitude during one of his visits.

[6] Although the recorded reasons refer to the fact that he had several periods of imprisonment, the governor said this was just one of many factors considered although it was the most influential factor in refusing the application. The governor's affidavit makes clear that he considered that he was obliged to and in fact did consider the factors set out in prison Rule 9 paragraphs 1 and 2. The applicant had been granted star status following his transfer to Magilligan on 24 November 2001 during a previous sentence. The applicant did not have any disciplinary convictions during that period of imprisonment.

[7] On 6 May 2005 the applicant activated the internal complaints procedure. In due course the matter was reviewed by Governor Eagleson and then on a further review by Deputy Governor Treacy. The decision of Governor Kennedy was upheld. The applicant did not refer in his affidavit to the fact that the Governor's decision was upheld in the complaints procedure.

[8] Section 13(1)(a) of the Prison Act (Northern Ireland) 1953 empowers the Secretary of State to make rules for the administration, regulation and management of prisons. Exercising this power the Secretary of State made the Prison and Young Offenders Centre Rules (Northern Ireland) 1995. Rule 9 of the 1995 Rule provides:

“(1) A prisoner shall be classified in accordance with any directions made by the Secretary of State, having regard to his age, offence, length of sentence, previous record, conduct in prison or

while on temporary release under rule 27 and the requirements of security, good order and discipline at the prison in which they are confined.

(2) A prisoner may be reclassified following a review by the governor taking into account any of the matters set out in paragraph (1)."

[9] It is to be noted that the classification of prisoners is to be "in accordance with any directions made by the Secretary of State." The factors listed in Rule 1 indicate the factors that may come into play in relation to particular classifications. It seems clear that there may be different classifications for different purposes and different factors may be relevant for the purpose of different classifications. For the purposes of the pre-release home leave arrangements for determinate prisoners as modified by the Instruction to Governors prisoners fall to be classified as "star class" determinate prisoners or as "ordinary class" determinate prisoners. In distinguishing between those two classifications the instructions to governors sets out the factors to be taken into consideration. In the case of star class prisoners to qualify a prisoner will qualify if he is serving his first sentence though if his behaviour is unsatisfactory he can be reclassified as an ordinary prisoner even during his first sentence. In the case of other prisoners they will be ordinary prisoners unless they are reclassified as star status prisoners, the determining factor for reclassification being "the good behaviour" of the relevant prisoner. Star class prisoners will be reclassified as ordinary prisoners if their behaviour is unsatisfactory. The approach taken by Governor Kennedy (and by implication the reviewing governors) was that the governor had to make his decision taking account of all or any of the matters listed in Rule 9(1), conduct of the prisoner being only one factor. Had the policy of the Prison Service under directions of the Secretary of the State The Instructions to Governors coming from a senior officer within the Prison Service and hence qualifying as directions of the Secretary of State, if the policy had been intended to leave the question of classification in the context of the home leave scheme for the judgment of individual governors at large taking out of the factors set out in Rule 9(1), it could have so stated in clear terms. Since the policy distinguished between prisoners with a good track record of good behaviour and prisoners with an unsatisfactory record of behaviour the relevant consideration must be the behaviour of the prisoner. No doubt the policy was part of a wider policy to encourage good behaviour amongst prisoners by (inter alia) holding out the incentive of enhanced home leave rights. In individual cases a judgment will have to be made whether a prisoner's behaviour is sufficiently good to merit star class. A period of poor behaviour may be followed by a sufficiently lengthy period of good behaviour to merit reclassification. In deciding whether it does account could be taken of the general attitude and demeanour of the prisoner. In this case the governor approached his task on the basis that he was entitled to take into

account all the factors referred to in Rule 9(1). It is true that he considered that the prisoner's disciplinary record and attitude were poor. He says, however, that the most influential factor was the periods of imprisonment that he had served. It is not clear what decision would have been made if he simply reviewed the conduct and behaviour of the prisoner although having regard to the number of his disciplinary charges it may well be that he would have come to the same conclusion. There is, however, a gap in time between the last disciplinary charge and the present time. The absence of class officer reports in the separated regime may make it more difficult to ascertain ongoing behaviour and attitude but the governor's lines of inquiry would require him to ascertain as best he could the facts of the situation to determine whether the prisoner's behaviour is sufficiently good now to merit star status.

[10] The terms of the home leave scheme as modified by the instructions to governors is compatible with Article 8 of the Convention for it lays down a relatively simple and objective set of criteria to determine whether a prisoner merits enhanced home leave rights. Imprisonment of itself inevitably interferes with family rights and a prisoner has no right as such to have home leave. He will be entitled to such home leave as he merits under objectively drawn criteria. Reading the scheme in the way indicated above, the scheme presents no issue of incompatibility with Article 8 provided the governor directs his mind properly to the meaning and effect of the scheme and focuses on the behaviour of the prisoner and makes a fair and objective determination whether the prisoner's behaviour merits reclassification there is no requirement to consider Article 8 since the scheme itself is directed to the aims and purposes of Article 8.

[11] In relation to the issue of lack of candour by the applicant it must be said that his affidavit is indeed less than frank in failing to disclose the number of his disciplinary charges in prison. Paragraph 4 of his affidavit in fact is positively misleading in stating that he had not been found to be in breach of any prison discipline whereby an application for star status might be refused. He also failed to reveal that he had unsuccessfully applied for a review of the decision. This is a less serious breach of a duty of candour since the reviewing governors were clearly approaching the issues in the same way as the deciding governor on the view that was then taken within the Prison Service as to the effect of the Instructions to Governors. At reviews before the court attention was drawn to the fact that these reviews had occurred. In view of the false impression given by paragraph 4 (which must have been intended to be deliberate) I consider that in the circumstances no relief as such should be granted to the applicant in this application. The reasoning in this judgment can be called in aid by the applicant if he seeks to reapply for reclassification. The respondent will be bound to take account of the guidance as set out in this judgment in any further decision made.