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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY STIOFAIN O'DALAIGH FOR JUDICIAL REVIEW

STEPHENS J

Introduction

[1] The applicant Stiofain O'Dalaigh, was serving a sentence at Her Majesty's Prison Maghaberry. His earliest discharge from prison was to be in October 2007 prior to which he had been afforded temporary release. On his return to prison he had been subjected to two periods of restriction of association. During each period he was held in what is called a "dry cell." On the first occasion his association was restricted between 4.00 pm on 20 February 2006 until 10.02 am on 22 February 2006, a period of approximately 42 hours. On the second occasion his association was restricted between 6.30 pm on 4 April 2006 and 9.31 am on 6 April 2006, a period of approximately 36 hours. By this application the applicant challenges the lawfulness of the decisions restricting his association and also challenges the lawfulness of removal of privileges over the same period.

Factual background

[2] On his return to prison on 20 February 2006 the applicant underwent a number of security measures. The first was a strip search. He was then asked to pass by a trained drugs dog. The purpose of this procedure was to enable the drugs dog to identify whether the applicant had been in contact with drugs by means of scent. The aim is to detect attempts by prisoners to bring drugs into the prison by swallowing them in containers or wrappings or secreting them within a body cavity. The applicant stated that as the dog passed him the dog handler pulled aggressively on the dog's lead and advised the officer present that there had been a positive indication. He also

stated that "in fact, at no time did the dog sit down or otherwise make any movement that could be construed as such an indication".

[3] The dog handler, Mervyn Boyd, states that in fact the dog made a positive indication. Ms Doherty, who appeared on behalf of the applicant, accepted that for the purposes of this application the court should proceed on the basis that the drugs dog did in fact make a positive indication in relation to the applicant, see *Re Winchester's application for judicial review* (2002) 1 NIQB 65 at paragraph [18].

[4] After the positive indication the applicant states that he was placed in a holding cell for a short period, subjected to a further strip search and was then taken to the special supervision unit. He was then advised by the governor that his association was to be restricted under Rule 32 of the Prison Rules.

[5] The governor concerned was Governor Andrew Jeane. In his affidavit the governor has given a description of the difficulties facing the prison authorities in relation to drugs. The description is in the following terms:-

> "5. The problem of drugs being smuggled into the prison has been a major one for many years and despite efforts to stamp it out or reduce it by the use of searching and the introduction of drugs dogs to detect the presence of drugs it has continued to worsen. A variety of ways of bringing drugs into the prison have been used by those entering the prison, including prisoners, and a common technique used by prisoners returning to the prison from periods of temporary release is to bring drugs into the prison by swallowing them in containers or wrappings or secreting them within a body cavity. In both cases the drugs are subsequently accessed and then distributed within the prison. To require prisoners to take conventional drugs tests as a way of detecting swallowed or secreted drugs packages is ineffective as such tests are designed only to test for the prisoners' personal use of drugs. Drug dogs, however, are capable of scenting the presence of drugs when carried in the manner above described and where a drugs dog gives a positive indication and a follow up search is unsuccessful in locating the drugs, the likelihood that the prisoner is engaged in the smuggling of drugs into the prison is substantial".

The governor continues in paragraph 6 of his affidavit as follows:

> "Good order and discipline within the prison is endangered if prisoners or others are able to smuggle into the prison undetected illicit drugs and for this reason prison management gives an important priority to the taking of all practicable and reasonable steps to prevent successful smuggling occurring."

[6] Governor Jeane then gave a description of the decision which he made in relation to the applicant. He sets this out at paragraph 7 and 8 of his affidavit as follows:-

> "7. In the applicant's case where no drugs were found on him as a result of a full search it was considered that in view of the positive indication given by the drugs dog there was a substantial likelihood that the applicant was smuggling drugs into the prison in the manner described. Accordingly I decided that in order to maintain good order and discipline it was necessary to restrict the applicant's association for a period of up to 48 hours from 16.00 hours on 20 February 2006 in order to detect and/or retrieve any drugs he may have swallowed or secreted about his person.
>
> 8. In taking the decision aforesaid I paid full regard to the precise circumstances in which the drugs dog had given a positive indication in respect of the applicant and I took into account the normal approach to the operation of Rule 32, the rule used to restrict association, namely that its use should be one only of last resort. However I was of the opinion that in the circumstances hereinbefore described resort to Rule 32 for a limited period was necessary, justifiable and proportionate."

[7] It is then apparent that Governor Jeane spoke to the applicant at 18.30 hours. What occurred is set out in paragraph 9 of his affidavit as follows:-

> "9. Once the relevant facts had been reported to me I went at around 18.30 hours to speak to the applicant and I personally explained to him –
>
> (i) that he was to have his association restricted for a period of up to 48 hours under rule 32; and

(ii) that the reason for the restriction was that the drugs dog had indicated on him on his return to the prison and that the purpose of the restriction was to detect/retrieve any illegal drugs he may have within his system for the purpose of smuggling drugs into the prison.

I also served on the applicant a document explaining what was happening. The applicant refused to sign this document to acknowledge receipt of it. I offered the applicant the opportunity to make representations about or comment on my decision to restrict association. The applicant's response which I noted was that he did not do drugs. I am satisfied that the applicant clearly understood what I was telling him and the reasons for his removal from association."

[8] The applicant was held in what is described as a dry cell. This is a cell without toilet facilities. The cell has a mattress, pillow and a duvet. The applicant was provided with a chamber pot and when used he could ring a bell so that he could dispose of its contents. Accordingly there is a mattress but no bed. There is no other furniture. There is no running water and no washing facilities. There is no integral sanitation. This is in contrast to the applicant's normal accommodation in Roe House, Maghaberry in which all cells had television as well as integral sanitation and drinking water. In addition whilst the applicant was in a dry cell he would have had no access to TV and radio. There is no doubt that the dry cell is a sterile environment.

[9] The facts leading to the second period of restriction of association were similar. The affidavits filed on behalf of the respondents, though from different deponents, being in almost identical terms. The governor involved on the second occasion was Governor Fred Caulfield.

The Power to restrict association

[10] In restricting the applicants association both governors were relying on rule 32 of the prison rules. That rule is in the following terms:-

"32.-(1) Where it is necessary for the maintenance of good order or discipline, or in his own interests that the association permitted to a prisoner should be restricted, either generally or for particular purposes, the governor may arrange for the restriction of his association.

> (2) A prisoner's association under this rule may not be restricted under this rule for a period of more than 48 hours without the agreement of a member of the Board of Visitors or of the Secretary of State.
>
> (3) An extension of the period of restriction under paragraph (2) shall be for a period not exceeding one month, but may be renewed for further periods each not exceeding one month.
>
> (4) The governor may arrange at his discretion for such a prisoner as aforesaid to resume full or increased association with other prisoners and shall do so if in any case the medical officer so advises on medical grounds.
>
> (5) Rule 55(1) shall not apply to a prisoner who is subject to restriction of association under this rule but such a prisoner shall be entitled to one hour of exercise each day which shall be taken in the open air, weather permitting."

[11] Consideration has been given to the basis upon which the power to restrict association should be exercised in the application by *James Taggart for Judicial Review*. In that case Kerr J stated that:-

> "In effect, counsel argued, Rule 32 should not be invoked unless it was the only means of achieving the "statutory objective" of maintaining good order or discipline".

He concluded in that case that:-

> "Removal from association was the only effective means of dealing with the applicant's behaviour".

[12] In the application by *Martin Corden for judicial review* (2004) NIQB 44 at paragraph [9] Weatherup J stated:-

> "The application of Rule 32 is limited to cases where it is "necessary" so it must be judged an essential step in order to achieve the specified purpose. The specified purpose is the maintenance of good order or discipline so it is a step undertaken in the interests of

> control and not as a punishment. In the alternative it may be for the specified purpose of the prisoners' own interests but that is not the present case. The prisoner may be restricted generally or for particular purposes and in the present case the respondent relies on the particular purpose of detecting or retrieving drugs. The governor has to make the initial judgment in relation to invoking Rule 32. The rule is invoked on the basis of necessity and is a measure of last resort."

[13] It is clear that the power to restrict association under Rule 32 is to be exercised as a last resort and should not be undertaken lightly. Mr Maguire, who appeared in this case on behalf of the respondents, accepted, that there was no distinction between last resort and the only effective means of achieving the statutory objective.

[14] The power under Rule 32 to restrict association is discretionary. In addition the Court of Appeal in its judgment in the application by *Charles Conlon for judicial review* (2001) NICA 49 has propounded as a general rule:-

> "… that the governor should at an early stage, but not necessarily before the removal of a prisoner from association, give him where possible and where necessary sufficient reasons for taking that course and afford him the opportunity to make representations about its justification".

Inflexibility

[15] In this case it has been submitted on behalf of the applicant that the respondent has operated an inflexible policy that once there has been an indication by the passive drugs dog that the prisoner's association should be restricted. If there was such an inflexible policy then it would be unlawful. In *R v. North West Lancashire Health Authority ex parte A* [2000] 1 WLR 993 H - 994 C Auld LJ said:-

> "In my view, the stance of the authority, coupled with the near uniformity of its reasons for rejecting each of the applicant's requests for funding was not a genuine application of a policy subject to individually determined exceptions of the sort considered acceptable by Lord Scarman in *Re Findlay* [1985] AC 318. It is similar to the over rigid application of the near "blanket policy" questioned by Judge J. in *Reg. v.*

Warwickshire County Council, ex parte Collymore [1995] ELR 217 at 224-226,

> "Which while in theory admitting of exceptions, may not, in reality, result in the proper consideration of each individual case on its merits."

In that case the implementation of the policy, not the policy itself, was quashed, Judge J considering it unnecessary to decide whether the latter was unlawful. The policy there and that in this case are not so obviously unlawful as that in *R v. London Borough of Bexley, ex parte Jones* [1995] ELR 42, where it effectively admitted no exceptions by reference to individual circumstances. Nevertheless, it has the same basic flaw both in form and application. Leggatt LJ said, at page 55:

> "It is . . . legitimate for a statutory body . . . to adopt a policy designed to ensure a rational and consistent approach to the exercise of a statutory discretion in particular types of case. But it can only do so provided that the policy fairly admits of exceptions to it. In my judgment, the respondents effectually disabled themselves from considering individual cases and there has been no convincing evidence that at any material time they had an exceptions procedure worth the name. There is no indication that there was a genuine willingness to consider individual cases. ""

[16] Ms Doherty invited the court to conclude, adopting the wording of Leggatt LJ that in reality in relation to the applicant and by virtue of an inflexible policy, there was no genuine willingness to consider his individual case.

[17] In support of the proposition that there was an inflexible policy Ms Doherty called in aid a number of propositions. They were as follows:-

(a) Between April 2005 and 9 February 2007 there had been 64 positive indications from the passive drugs dog and all of

the prisoners who received a positive indication were placed on restricted association under Rule 32.

(b) That the governors had closed their minds to the failure of restriction of association in obtaining drugs secreted in prisoners bodies. In both Governor Jeane's and Governor Caulfield's affidavits it is stated that – "Despite the introduction of drugs dogs to detect the presence of drugs the problem of smuggling drugs into the prison has continued to worsen". It is submitted that if the policy was not an inflexible policy then that this failure would have been recognised. Alternatively in exercising their discretion the governors were not taking into account the factor that the combination of a positive indication from the drugs dog and the restriction of association was a method that was failing to produce the desired result.

(c) That the governors in arriving at their decisions were ignoring the applicant's assertion that he was opposed to drugs, had no record of any drug offence and was a republican prisoner. That in Roe House, which accommodates republican prisoners, there had been no drugs found by the prison authorities which was in contract to Bush House which accommodates the loyalist prisoners.

[18] I reject the contention that there was an inflexible policy being operated by the respondent. Each governor has averred that in making his decision to invoke rule 32 in the applicant's case he took into account the applicant's denial of being involved in drugs, did consider the applicant's case individually, and was aware that he was free to depart from the normal policy but concluded that he should not do so in the individual case. The governors were aware that three prisoners who had returned from home leave, had been the subject of a positive indication from the drugs dog, had been placed on rule 32 and had in the event voluntarily produced quantities of drugs to staff at the special supervision unit. Furthermore just because drugs are not recovered from the majority of those placed on rule 32 this does not mean that drugs had not been secreted in the manner described. The decisions made by the governors were made against the background of a worsening drugs problem in the prison. The problem of drugs in prisons is extremely serious potentially affecting the Article 2 rights of other prisoners. In cases of this nature the degree of flexibility in the exercise of the policy might not be expected to vary considerably. If there is a lawful policy in existence then it is to be expected that normally it will be applied. The fact that in this case it ultimately was applied is not evidence of fettering of discretion. Significantly in this case there was no challenge as to the reliability of the drugs dogs. Accordingly there was no challenge to the proposition that "the likelihood that (the applicant) is

engaged in the smuggling of drugs into the prison is substantial." Accordingly it is not surprising that the countervailing circumstances were not matters which were decisive or weighed heavily with the Governors. The basis for the invocation of rule 32 was the indication by the drugs dog. Against that background the applicant has not established by evidence or reasonable inference that the policy has been operated inflexibly in this case. It is not for the respondent to set out the circumstances in which the policy would not be applied but it is possible to envisage such circumstances for instance if the prisoner had been accompanied throughout his home leave by a prison officer in circumstances in which he probably could not have obtained drugs or if the drugs dog had a cold.

The use of a dry cell

[19] It was submitted on behalf of the applicant that Rule 32 only authorises a restriction of association. That it does not authorise the detention of a prisoner in a "dry cell". That the only prison rule which authorises the detention of a prisoner in a "special cell" is Rule 47. This rule gives an express power to temporarily confine a refractory or violent prisoner in a special cell or protected room. Such a special cell/protected room has first to be approved by the Secretary of State. It was submitted that the dry cell in this case had not been approved by the Secretary of State and that the applicant was not a refractory or violent prisoner. Accordingly that the detention of the applicant in a dry cell did not fall within Rule 47.

[20] There is clearly a degree of confusion in relation to the terminology used within the prison. This has been highlighted in the report by HM Inspector of Prisons and the Chief Inspector of Criminal Justice in Northern Ireland which report is dated February 2006. This was a report on an inspection of Maghaberry Prison which inspection took place between 10-14 October 2005. Paragraphs 6.34-6.40 of the report deals with "special accommodation" and it stated that there was "much local confusion surrounding the definitions and uses of the prison's special accommodation". At paragraph 6.37 there is reference to "the definitions of special accommodation contained in the local security manual". I have not been provided with a copy of that manual but it appears to be a manual prepared by the prison authorities.

[21] Mr Max Murray is employed as the Director of Operations in the Northern Ireland Prison Service. Prior to holding that position he worked as a governor rank in all of Northern Ireland's prisons and was also the No 1 Governor of HM Prison Magilligan for 3 ½ years. In his affidavit he has stated that none of the cells in the special supervision unit in HM Prison Maghaberry is a "special cell or protected room" within Rule 47 of the Prison Rules. A special cell or protected room within that rule is a form of accommodation which has been specially constructed to deal with a prisoner who is refractory or violent. That for instance the surfaces are designed to be soft so as to

prevent a prisoner being able to injure himself by throwing himself or part of himself against them. There is such a special cell or protected room in HM Prison Maghaberry health care. There is no such "special cell or protected room" in the special supervision unit. In short he deposes that a "dry cell" is not a "special cell or protected room within the meaning of Rule 47 of the Prison Rules.

[22] The respondents do not rely on Rule 47 for the detention of the applicant in a dry cell. They rely on what they contend is an incidental power consequential upon the matters authorised by Rule 32 and they also rely on Rule 9(4) of the Prison Rules.

[23] In *Re Northern Ireland Human Rights Commission* [2002] NI 236 it was held that a statutory body usually had only the powers conferred on it by statute. However such powers clearly involved such powers as might fairly be regarded as incidental or consequential upon those things which the legislator had authorised. The principle of law as summarised by Carswell LCJ was set out at paragraph 14 in the following terms:-

> "(The Commission) has only the powers conferred by statute upon it, which will include such powers as may fairly (be) regarded as incidental to or consequential upon those things which the legislator has authorised: cf *Attorney General v. Great Eastern Railway Co* (1880) 5 App Cas 473 at 478, per Lord Selborne LC; *Wade and Forsyth, Administrative Law* (7th Edition) p 219. In order fairly to be regarded as incidental, those powers, if not expressly conferred, must be derived by reasonable implication from the provisions of the legislation: *Baroness Wenlock v. River Dee Co* (1885) 10 App Cas 354 at 362-3, per Lord Watson; and cf Lord Macnaghten's remarks in *Amalgamated Society of Railway Servants v. Osborne* [1910] AC 87 at 97."

[24] Consideration was given to the powers which are incidental to or consequential upon Rule 32 by Kerr J in the application by *James Taggart for Judicial Review* (Kerr J 2358/12 March 97). In that case he held that the failure to provide access to a television constituted a withdrawal of a privilege but was a necessary expedient which was inevitably incidental to the applicant's removal from association under Rule 32. He continued:-

> "To be efficacious Rule 32 . . . must be interpreted as allowing a governor to restrain the activities of prisoners or restrict the facilities available to them beyond merely physically isolating them from the rest

> of prison population. Such measures may not be taken solely to punish those who are subjected to Rule 32 or to increase the harshness of the regime. Those measures may be taken, however, where they can shown to be necessary to achieve an effective and manageable removal from association of those inmates who require to be segregated from fellow prisoners."

[25] The power to remove from association under Rule 32 is complimented by Rule 9(4) which provides:-

> "Prisoners may be located in such part of the prison as the governor may determine by reference to their classification and any other factors which he may decide to take into account; and may subsequently be transferred to other locations in the prison either in groups or as individuals".

[26] Miss Doherty initially suggested in argument that the applicant should have been detained in his own cell but then recognised and accepted that the whole purpose of the restriction of association in this case would be defeated if the applicant was in his own cell with running water and toilet facilities.

[27] In this case I find as a fact that the applicant was held in a "dry cell" which is a different type of cell than a "special cell or protected room" under Rule 47. That on both occasions the governors had the authority to hold the applicant in a dry cell incidental to the powers contained in Rules 9(4) and 32. The detention in a dry cell was a necessary expedient to deal with the risk of the applicant concealing or disposing of drugs.

Privileges

[28] During his period in the dry cell the applicant did not have a radio or television and did not go to the gym or the library. In the *Application by Charles Conlon for Judicial Review* Carswell LCJ stated that:

> "When a prisoner is housed in the punishment and segregation unit under Rule 32 he is entitled to all the ordinary privileges available to prisoners, except association with others."

The applicant contends that Rule 32 only allows restriction of association with others and that it does not permit the removal of privileges such as access to a radio or television or use of the gym and library. The applicant further contends that the only way in which privileges can be lost are under Rule 10

of the Prison and Young Offenders Centre Rules (Northern Ireland) 1995. That as no determination was made under Rule 10 that the removal of privileges in this case was unlawful.

[29] In an *Application by Terence McCafferty for Judicial Review* [2007] NIQB 17 Weatherup J dealt with an application for judicial review of the decision of adjudicating governor at HMP Maghaberry to award 14 days cellular confinement, further to a finding that the applicant had assaulted another prisoner. At paragraph (7) he stated:

> "The applicant was awarded 14 days cellular confinement, which is the maximum period of cellular confinement permitted under Rule 39(f). There was a loss of associated privileges, being 16 in total, which included loss of newspapers, books, notebooks, tobacco, telephone, earnings, television, gym and library. It is the loss of these privileges that distinguishes cellular confinement from separation pending adjudication or restriction of association because these privileges continue in the case of a prisoner who is subject to Rule 35 or Rule 32."

Weatherup J was not considering whether there was an incidental power under Rule 32 to remove privileges. Kerr J in an *Application by James Taggart for Judicial Review*:

> "To be efficacious Rules 32 and 9(4) must be interpreted as allowing a governor to restrain the activities of prisoners or restrict the facilities available to them beyond merely physically isolating them from the rest of the prison population."

I reject the contention that the only manner in which privileges can be lost is as a result of a determination under Rule 10. There is an ancillary power in respect of privileges incidental to Rule 32. It is clear that under Rule 32 removal of privileges cannot be for the purposes of punishment and it has to be necessary for effectively addressing the underlying purpose justifying the removal of association.

[30] In relation to the restriction of the applicant's access to a radio and television whilst in the dry cell I accept the evidence of Max Murray, the Director of Operations in the Northern Ireland Prison Service. He stated that:

> "A prisoner who has been placed on Rule 32 having been indicated on by the passive drugs dog, does not enjoy television or radio or have the furnishings in the cell that he would enjoy at his ordinary location. The reason for this is that it is viewed as necessary to the object of restriction of association that the cell the prisoner is kept in contains no items or furniture other than those strictly necessary as the presence of items and/or furniture which are unnecessary presents to the prisoner opportunities to conceal or dispose of drugs which he may have on or within him. It is no part of the reasoning for this state of affairs that the Prison Service is punishing the prisoner."

I am satisfied that the restriction on the applicant's access to a radio and television did not go beyond what was necessary to fulfil the purpose for which Rule 32 was invoked given the opportunities that would otherwise be created for the secretion of drugs.

[31] The gym and the library were available to the applicant if he had asked to use either facility. There is no evidence that the applicant did ask to go to the gym or the library nor has he stated that he was unaware that he could go to the gym or the library. I find that the applicant has not established that these facilities were removed. Regardless of where the applicant is being held within the prison he has to request access to the library.

Article 8

[32] The applicant contends that the decisions in this case were in breach of his Article 8 rights in that he was prevented from establishing and developing relationships with other human beings. A similar contention was made before Weatherup J in the *Application by Martin Corden for Judicial Review* [2004] NIQB 44. At paragraph [44] Weatherup J stated:

> "The applicant's fifth ground of challenge concerns the applicant's right to respect for private life under Article 8. The removal from association interferes with the applicant's relationships with others. In *McFeely v United Kingdom* [1980] 3 EHRR 161 at paragraph 82 the European Commission on Human Rights found that removal from association constituted an interference with a prisoner's right to privacy "to establish and to develop relationships with other human beings, especially the emotional feel of the development of one's own personality."

> Such interference is prescribed by law and in furtherance of the legitimate aim of preventing disorder or crime. The interference must be necessary in that it fulfils a pressing social need and employs means that are proportionate. The applicant contends that the proper balance of public and private interests has not been achieved in the present case. Taking account of the limited scale of the interference and the proper limits that exist on intervention with prisoners suspected of contact with drugs and the reliability of the drugs dogs in generating reasonable suspicion of contact with drugs and the unsuitability of the applicant's proposed alternative of monitoring the prisoner in full association and the absence at present of a suitable alternative in the campaign against drugs and the seriousness of the problem presented by drugs in the prison system, I am satisfied that the measures adopted by the respondent represent a proportionate response to the legitimate aim. Any interference is justified under Article 8.2 of the Convention."

[33] It was suggested to me that whatever evidence was received by Weatherup J as to the operation of the passive drugs dog scheme it has now been shown, some 2 to 3 years later, that in relation to prisoners returning from home leave, the system does not work. That accordingly I should find that there has been a breach of Article 8 in the case before. I reject the factual contention that the system does not work. There have been three drugs finds as a result of the use of the system. I do not consider that the system is a total failure either in finding drugs or in deterring a number of prisoners from using this technique of bringing drugs into a prison. For the reasons expressed by Weatherup J I conclude that any interference is justified under Article 8(2) of the Convention.

Conclusion

[34] I have not been satisfied on any of the applicant's grounds for judicial review. The application is dismissed.