

**Neutral Citation No. [2014] NIQB 118**

*Ref:* **STE9433**

*Judgment: approved by the Court for handing down  
(subject to editorial corrections)*

*Delivered:* **31/10/2014**

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

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**QUEEN'S BENCH DIVISION**  
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**Kane's Application (Leave stage) [2014] NIQB 118**

**IN THE MATTER OF AN APPLICATION BY JOSEPH KANE FOR LEAVE TO  
APPLY FOR JUDICIAL REVIEW**

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**STEPHENS J**

[1] This is an application for leave to apply for Judicial Review of a decision of the prison service to only permit the applicant to attend at Roselawn Cemetery tomorrow Saturday for the service there before the cremation of his grandmother but to refuse his application to attend at the Holy Cross Church for the funeral mass earlier in the day.

[2] I start this short *ex tempore* judgment by emphasising, as I have done on previous occasions that Article 8 ECHR is engaged. The grieving process and funerals of family members are at the deep core of human existence and the matter is

to be approached extremely seriously. I have also in *Marion McGlinchey's application for judicial review* [2013] NIQB 5, set out extensively the legal tests which I will not repeat now but rather will incorporate in this short judgment.

[3] The Article 8 right is a qualified right, see Article 8(2). The interference with the right to respect for private and family life has to be:

- (a) in accordance with law,
- (b) it has to pursue a legitimate aim, and
- (c) it has to be necessary in a democratic society.

[4] This last question of being necessary in a democratic society requires consideration as to whether the decision is proportionate and strikes a fair balance between the competing public and private interests. The argument in this case concentrates on the issue of proportionality, it being accepted that the interference is in accordance with law and is in pursuit of a legitimate aim. The concept of proportionality requires the reviewing court to assess the balance which the decision-maker has struck; not merely whether it is within the range of rational or reasonable decisions. The concept of proportionality in this case also requires attention to be directed to the relevant weight accorded to the interests and considerations. However, the intensity of that review will depend on the subject matter in hand. In law context is everything.

[5] Along with the concept of proportionality goes that of the margin of appreciation, frequently referred to as deference or, perhaps more aptly, latitude. The primary decision-maker on matters of policy, judgment and discretion is the Northern Ireland Prison Service. A public authority should be left with room to make legitimate choices, the width of latitude and the intensity of the review which it dictates can change depending on the context and the circumstances.

[6] This Court has to form a view as to what a proportionate response would be and then to allow a degree of appreciation to the prison service who are the decision makers, recognising that it is not this Court's decision but the decision of the prison service as to whether the applicant should be released.

[7] I have been assisted by the letter from the governor dated 31st October 2014, which sets out a number of risk factors and a number of mitigating factors and a risk assessment in the prison. The decision of the prison service was that the applicant is to be accompanied by prison officers to Roselawn though they will be in plain clothes and there is no need for the applicant to be handcuffed. I have inquired as to why it was thought necessary for the applicant to be accompanied by prison officers to Roselawn, given that he had complied with bail in the past and given that he had complied with compassionate bail in the past, indeed he had complied on six occasions. The concern of the prison authorities is in relation to drugs and in that respect at present there is a *prima facie* case that the applicant failed a drug field test on 17 October 2014 and that he had cannabis in his possession. Accordingly the prison service has a concern about the chances of drugs being brought back into the prison if he is unaccompanied by prison officers either at the funeral mass or at Roselawn. That is, of course, a real concern for any prison authority, which have responsibilities not only for the applicant but also for the interests of other people inside the prison. There are, of course, precautions that can be taken upon the return of a prisoner to prison but experience has demonstrated that those precautions are not always effective and drugs do enter the prison despite those precautions. So accordingly the balance that the prison service has struck was that he should be accompanied in order to guard against that risk. I agree with that decision in view of the recent failure of the drug field test. Not only do I consider that it is within the margin of appreciation of the prison service but I positively agree with it.

[8] In effect that disposes of this application insofar as it is appropriate for the applicant to be accompanied by prison officers then they in turn have Article 2

rights. Article 2 is an unqualified right. The security risk to prison officers has to be taken into account.

[9] Before leaving this application, I would say that a balance has to be struck in general terms between allowing a person to participate with his family in the grieving process and the countervailing public interests. That balance is one which, in my view, is within a relatively large margin of appreciation for the prison service. Certainly facilitating attendance at Roselawn would ordinarily, I consider, be a satisfaction of the Article 8 rights if there is any impediment to attending the actual church service itself. I emphasise that although I have not received any submissions in relation to the degree of the margin of appreciation, I consider that there is a relatively wide margin of appreciation for the prison service. Accordingly, in any event, I refuse leave on the basis that the decision in this case was within the margin of appreciation of the prison service.

[10] Before I leave this case, I would repeat what I said in relation to previous applications. The first is that there are a number of these applications being brought. They are always brought at the last moment. That is because there needs to be a decision making procedure by the prison service and that takes time. Inevitably if the funeral arrangements are not planned to allow the prison service sufficient time then the judicial review application has to be brought on an emergency basis. The method of taking the pressure of time off is to make sure that the funeral is planned to take place at a time that will enable the prison service to make its decision and if necessary or appropriate for it to be challenged. I would encourage some structure being put in place to ensure that the prison service calculate how much time they require and they inform applicants immediately that the funeral should be planned to coincide with that time scale so that one does not have emergency judicial review application being brought, as here, the day before the funeral takes place.

[11] The second matter that I would repeat is to again encourage the prison service to anticipate that they may have to deal with similar judicial review applications at

short notice and under pressure of time. That they should prepare now by gathering together a bundle of the decided cases, any relevant authorities and have a skeleton argument which could be adapted for use in any future case. I have suggested that the skeleton deals with the margin of appreciation to the prison service under article 8 ECHR and also the circumstances in which mandamus might be issued as opposed to quashing the decision and requiring a different governor to reconsider.

[12] I refuse the application for leave to apply for judicial review of the decision of the prison service to only permit the applicant to attend Roselawn Cemetery.