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

Delivered: 27/10/2017

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

**IN THE MATTER OF AN APPLICATION BY VINCENT KELLY
FOR JUDICIAL REVIEW**

**AND IN THE MATTER OF A DECISION OF THE NORTHERN IRELAND
PRISON SERVICE DATED 27 FEBRUARY 2017**

MAGUIRE J

Introduction

[1] This judicial review application originally came before the court on an emergency basis on 10 March 2017. The application took the form of a challenge to a decision of the Northern Ireland Prison Service ("NIPS") made on 27 February 2017. That decision ("the impugned decision") took the form of a denial of a request made by the applicant, who is a convicted prisoner, for a period of temporary release to attend his son's Holy Confirmation on 13 March 2017. The Lord Chief Justice dealt with the emergency application and granted leave to apply for judicial review but did not intervene otherwise.

[2] As a result of the above, the applicant was not in fact released to attend his son's confirmation. Ordinarily that would be the end of the matter as the issue as between the parties would usually be viewed as having become academic. However, in view of the fact that the parties had filed affidavit evidence following the grant of leave, the court agreed to hear the substantive judicial review in this case, as there appeared to be a good reason in the public interest exceptionally for doing so. The legal provisions at issue in the proceedings arise regularly for consideration by judges exercising the judicial review jurisdiction and it was thought that it might be of value to consider them in a case where the court was able to provide a judgment without the usual pressure of events which bear down on it when it is dealing with an application which has come before it at very short notice in respect of a period of temporary release which is sought to enable the applicant to attend an event within hours or a day or two of the initiation of the proceedings. In

such cases the judge must make an immediate or almost immediate decision if the exercise is to be meaningful. In these proceedings Mr Summers BL appeared for the applicant and Ms McMahon BL appeared for the respondent. The court is grateful for their well-researched oral and written submissions.

The facts

[3] The applicant's application was for temporary release to attend his son's Holy Confirmation which was to be held on 13 March 2017 at St Paul's Church, Falls Road, Belfast. The decision-maker in respect of the decision to deny the request was the Head of the Licensing, Legislation and Public Protection within the NIPS, a Mr Smyth. Following the grant of leave to apply for judicial review, Mr Smyth filed an affidavit in respect of the applicant's challenge to his decision. In it he disclosed that the applicant currently is serving a sentence of 9½ years for possession of firearms. His earliest date of release is 19 May 2019. He is not entitled to home leave under the relevant scheme until 19 September 2018.

[4] The applicant, it appears, made his application on a *pro forma* document headed "Application for Compassionate Temporary Release". The form used is referred to as a 19/12 07 form. When filled in by the applicant, it provides only basic information about why temporary release was being sought and where the confirmation was to take place and when it was to take place. While there is a box within the form for comments/reasons for the request, it had not been filled in, in this case. The court will comment on the use of this form in due course.

[5] Dealing with the decision-making process, Mr Smyth in his affidavit averred as follows:

"9. By letter dated 27 February 2017 the applicant's request for CTR was responded to.

10. NIPS response explained that the application did not meet the eligibility criteria of any pre-release operated by NIPS.

11. The letter also stated that NIPS can consider if 'exceptional circumstances' exist in the applicant's particular case that would allow him to be granted a period of temporary release; the term 'exceptional circumstances' refers to a predictive situation which could occur resulting in the reason for release being considered a 'special purpose'. The identification of a 'special purpose' under Rule 27(2) may result in NIPS exercising their powers of discretion to permit temporary release.

12. NIPS approach applications for temporary release in two stages – whether a ‘special purpose’ exists on the facts relied on by the prisoner, and risk assessment.

13. In this particular case, NIPS considered that an application as was submitted by the applicant to attend his son’s confirmation, did not, without more, constitute a ‘special purpose’.

14. NIPS do not consider that family events like weddings, birthdays, graduations, etc. fall to be automatically considered as ‘special purposes’. Similarly, religious events such as christenings, baptisms and confirmations, etc. which are a routine part of church life, do not automatically fall to be considered as a ‘special purpose’.

15. However, each individual application is considered on its own particular circumstances, merits and within the context of the information provided to NIPS by the prisoner when seeking temporary release. The prisoner is free to provide whatever information he considers relevant to his application to assist in the decision-making process.

16. Therefore any of the above mentioned events might be considered a ‘special purpose’ warranting the exercise of discretion in favour of a prisoner when the particular context of an application is considered.”

[6] Mr Smyth also indicated that the applicant’s ECHR rights under Article 8 and Article 9 were also considered and taken into account in order to ensure that the outcome was proportionate in the circumstances.

[7] On the issue of “special purpose” Mr Smyth concluded that the application “did not establish” a special purpose. In these circumstances as the special purpose criterion was not satisfied Mr Smyth went on to say that NIPS did not consider it necessary to proceed to the risk assessment stage.

[8] The affidavit of Mr Smyth, notwithstanding the above view, went on to deal with risk assessment, indicating that temporary release may be granted subject to a satisfactory risk assessment. Mr Smyth then sets out the methodology of risk assessment and refers not only to the relevance of risk assessment in the context of

temporary release of a prisoner but also risk assessment in the context of the risks to prison staff which may arise if a prisoner is to be accompanied by staff during a period of temporary release.

The Prison Rules

[9] The ability to release a convicted prisoner on a temporary basis is specifically provided for in the Prison and Young Offender Centre Rules (Northern Ireland) 1995 (as amended). The power so to provide for this eventuality is found in section 13 of the Prison (Northern Ireland) Act 1953. This Act notably deals with some particular situations in which a prisoner may be moved from the prison, such as removals of a prisoner for judicial and other purposes or medical or surgical treatment (see: section 16 (1) and (2)).

[10] The relevant prison rule is Rule 27 which reads as follows:

“Temporary release

(1) A prisoner to whom this rule applies may be temporarily released for any period or periods and subject to any conditions.

(2) A prisoner may be temporarily released under this rule for any special purpose or to enable him to have health care, to engage in employment, to receive instruction or training or to assist him in his transition from prison to outside life.

(3) A prisoner released under this rule may be recalled to prison at any time whether the conditions of his release have been broken or not.

(4) This rule applies to prisoners other than persons -

(a) Remanded in custody by any court; or

(b) Committed in custody for trial; or

(c) Committed to be sentenced or otherwise dealt with before or by the Crown Court.

(5) In considering any application for temporary release under this rule, previous applications,

including fraudulent applications, may be taken into account.”

Schemes for temporary release

[11] The NIPS has over time developed a number of schemes relating to occasions when temporary release may be granted. The most prominent of these schemes, so far as is known to the court, are:

- (i) The compassionate temporary release scheme.
- (ii) The home leave scheme.

[12] The above schemes are devised administratively by NIPS but operate under the legal authority of Rule 27, especially Rule 27 (1): see Re Malcolmson's Application [2003] NI 307 at paragraph [5].

[13] The schemes, in effect, represent NIPS policy dealing with a number of commonly recurring situations. The policies must in themselves be reasonable and consistent with Rule 27 and they must be administered in a way which conforms with the public law principles of not exercising discretion with undue rigidity and, in the context of the substance of the decision reached, not acting unreasonably and, in the context of cases involving human rights, acting proportionately.

[14] None of the schemes, however, are directed at the issue in this case as the nature of the application before the court *viz* temporary release to attend a Holy Confirmation, is not covered by a scheme. It is therefore an oddity that the *pro forma* used by NIPS for the application in the present case was one which is headed “Compassionate Temporary Release” which is a reference to a matter dealt with in one of the schemes, as already noted.

[15] The application here at issue was concerned with temporary release under Rule 27 in a general sense. Rule 27(1), in its terms, provides the NIPS with a wide discretion to grant or refuse a period of temporary release: see, for example, Re Austin's Application [1998] NI 327 at 329. Indeed, it may be said that the terms in which the discretion are cast could hardly be wider.

[16] Rule 27(1), moreover, is plainly intended to operate in an open-ended way. The exercise of discretion is not based on the consideration of a list of statutory criteria. Rather, it seems to the court, use of Rule 27(1) depends on the decision-maker considering those factors which fall to be considered as a result of the operation of public law. These factors will generally be factors which are relevant to the decision which is to be made. Provided the decision-maker addresses relevant factors, and avoids considering irrelevant factors, he or she will be entitled to make his/her decision by a process of giving whatever weight is considered appropriate

to give to each relevant factor and then coming to a conclusion on the question which has to be determined *viz* whether or not to grant temporary release for a period and, if so, whether the release should be subject to conditions.

[17] In the court's view, provided the decision-maker acts in accordance with the above approach, the decision made will be unlikely to attract the intervention of a judicial review judge unless it can be said that the result is unreasonable in the Wednesbury sense (where no human rights issue is involved) or (where human rights issues are involved) the decision can be viewed as disproportionate.

[18] It is therefore the court's view that what should occur in a case like the present case (leaving issues of procedural fairness to one side) is that the applicant should as clearly as possible indicate in his application what the purpose of the period of temporary release is. The applicant should also supply to NIPS any information which he has which sheds light on why he/she feels such a release should be permitted. The applicant might also be wise to try to deal in his application with any issues which he/she is aware of which might be detrimental or potentially adverse to his/her application.

[19] When the application is received the NIPS should consider it and carry out a reasonable enquiry into the request, identify the factors relevant to the case and ultimately assess, balancing the various factors, what the outcome should be, bearing in mind that the outcome must not be unreasonable and must not (in a human rights case) be disproportionate.

[20] The exercise in which NIPS is engaged is about how to use its discretion in a particular case. By law the NIPS is the decision-maker and it must approach its task on a case by case basis by avoiding irrelevant matters and ensuring that it does not allow the exercise of judgment to be dictated inflexibly or rigidly by any one factor.

Application of the above to this case

[21] When the above approach is applied to the decision-making process in the present case, it seems to the court, that the decision-maker has not exercised his discretion lawfully. His errors may be identified as follows:

- (a) Firstly, he has defined his task in terms of Rule 27(2) by concentrating exclusively on it when it would have been better simply to have approached the matter in terms of Rule 27(1). The effect in this case of him acting in this way was that his decision neglects Rule 27(1) which at no stage does he allude to. The decision-maker, in effect, rejected the application on the basis that the request for temporary release was not made for a special purpose. In dealing with the application in this way, the decision-maker has limited his approach to the case in a manner which, in the court's opinion, is in defiance of the terms of

Rule 27(1) which plainly does not anywhere indicate that the discretion to grant temporary release is limited only to cases of special purpose.

- (b) Secondly, and in any event, the decision-maker, though deciding the case on the point already mentioned, seems also to be of the view that even if the purpose of the application had been for temporary release for a special purpose, he would have determined it solely on the question of whether the applicant passed a risk assessment. In this area also, it seems to the court, he is in error. While the importance of the issue of risk to the public cannot be gainsaid, nowhere in Rule 27 does it say that a period of temporary release cannot be granted unless an application has passed a risk assessment. If passing a risk assessment is treated as a mandatory requirement, so that failure in this regard condemns the application to refusal, this will be likely to give rise to the court viewing the decision-making process as being unduly rigid. The correct analysis, in the court's opinion, is that the question of the risk which the prisoner may represent, if released, is a relevant, indeed highly relevant, factor in the context of a decision of this nature but it remains a factor which has to be considered alongside all other relevant factors. In such a consideration the decision-maker is entitled to attribute such weight to this factor as he/she considers appropriate, just as he/she is enabled to do the same with other factors. Ultimately he/she has to overall assess and balance the various factors which are relevant. In effect, he/she must carry out an exercise of determining the weight to be given to factors in favour of temporary release and the weight to be given to factors against temporary release. It is of the essence that the decision-maker makes a rounded judgment in this way. Unfortunately, this does not appear to coincide with the approach taken by Mr Smyth in this case and is inconsistent with the way in which he has explained his decision-making approach.

[22] It follows from the above that the decision-making process in this case was legally flawed. Accordingly the court will set aside the decision which is challenged in this case and grant an order of *certiorari* to quash it.

What is the role of Rule 27(2)?

[23] Part of the problem in this case, it seems to the court, results from the emphasis placed by the decision-maker on Rule 27(2) and his failure to give full attention to the existence of Rule 27(1).

[24] Rule 27(2) is helpful insofar as it identifies the sort of reasons which may give rise to a temporary release. Discretion in favour of such a release according to this sub-paragraph may be granted:

- (i) For any special purpose.
- (ii) To enable the prisoner to have healthcare.
- (iii) To enable the prisoner to engage in employment.
- (iv) To enable the prisoner to receive instruction or training or
- (v) To assist the prisoner in his transition from prison to outside life.

[25] The reasons aforesaid should not be given an unduly narrow interpretation. In particular, the terms of (i) above are, in the court's view, capable of being read broadly to cover a wide range of circumstances, including, at least in some cases, attendance at a religious event. The word 'any' must surely denote an open-ended spectrum of situations and what is or is not a 'special purpose' will depend on all the circumstances.

[26] However the phrase 'special purpose' is interpreted, it seems to the court that the decision-maker at all times should keep in mind the unrestrained width of Rule 27(1). He or she would be best advised not to regard the exercise of determining what is a 'special purpose', in accordance with rule 27 (2), as determinative of the applicant's application. This is another way of saying that the decision-maker, in the court's view, should concentrate on the question of exercising the discretion in the manner required by law. Rule 27(2) does not say that a prisoner can only be temporarily released for one or other of the purposes referred to and, accordingly, the court takes the view that 27(2) is not a provision which should be viewed as limiting the general discretion provided for at Rule 27(1).

[27] The important point overall is that discretion be exercised by the NIPS by considering all relevant matters, excluding from its mind irrelevant matters, and by attributing such weight, if any, to the various factors as it regards as appropriate, and arriving at a result by balancing those factors for and against release, so producing a reasonable or (as the case may be) a proportionate decision.

Latitude

[28] The court finally mentions the issue of the latitude owed to the decision-maker in the context of a challenge by way of judicial review. The power to grant temporary release is invested by law in the NIPS as the prison authority. It is the intention of the legislature that the prison authority (and not the court) is the decision-maker. The court's role is supervisory and, as a general proposition, it will

not be for the court to substitute its view for that of the lawful decision-maker. It is reasonable to suppose that the prison authority has had its decision-making power conferred on it because of its experience in dealing with prisoners on a day to day basis and its accumulated expertise in terms of penal policy and the assessment of risks.

[29] In a Wednesbury case *i.e.* a non-human rights case, the standard which has to be reached before the court should intervene is high *i.e.* the decision must be one so unreasonable that no reasonable authority could have arrived at it. The test already incorporates considerable latitude to be enjoyed by the prison authority.

[30] Where human rights are involved, which often will be the case, the court must police the standard of proportionality but it must bear in mind that in doing so there has been no shift to merits review. In considering what is or is not proportionate, the court will have regard to the area of latitude which the prison authority, for the reasons already given, should enjoy. It is only if the prison authority exceeds that latitude – what sometimes is referred to as going outside its margin of appreciation – that the court should intervene. This aspect has been dealt with in detail in the judgment of Stephens J (as he then was) in Re McGlinchey's Application [2013] NIQB 5 and the court does not consider that there is any need to re-trace that ground in this case. In the present case, the court does not consider that the substance of the decision made was disproportionate or a breach of article 8 or 9 of the Convention.

Conclusion

[31] While the court will issue *certiorari* in this case for the reasons given, its overall advice to decision-makers is that they should concentrate on ensuring that the discretion to release temporarily is exercised in the way described. If it is exercised in that way and the outcome is a reasonable and/or proportionate decision the court will be unlikely to intervene.

[32] Finally the court indicates that a change should be considered in the way in which prisoners are asked to make their applications. Where the prisoner's application relates to the seeking of temporary release outside any of the NIPS tailor made schemes, it seems to the court that the application forms should be designed specifically to deal with this. In such cases the application form should, so far as possible, seek from the applicant the production of the sort of information which will be of value to the decision-maker in making its assessment of the application. Attention should therefore be given to devising a *pro forma* application form which invites answers to questions relevant to the particular type of application being made.

