

**Neutral Citation No : [2009] NIQB 11**

*Ref:* **MOR7414**

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

*Delivered:* **13/2/09**

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

**QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)**

**Lewis's Application (No.2) (Leave hearing) [2009] NIQB 11**

**IN THE MATTER OF AN APPLICATION BY MARK LEWIS FOR LEAVE  
TO APPLY FOR JUDICIAL REVIEW**

**AND IN THE MATTER OF THE DISMISSAL OF THE APPLICANT BY  
THE NORTHERN IRELAND PRISON SERVICE**

**AND IN A MATTER OF A REFUSAL BY THE DEPARTMENT OF  
FINANCE AND PERSONNEL TO REINSTATE THE APPLICANT  
FOLLOWING A RECOMMENDATION FROM THE NORTHERN  
IRELAND CIVIL SERVICE APPEAL BOARD**

**AND IN THE MATTER OF THE PRISON AND YOUNG OFFENDERS  
CENTRE RULES (NI) 1995**

**MORGAN J**

[1] The applicant joined the Northern Ireland Prison Service in October 1979 as a prison officer and remained in the service until his dismissal on 30 April 2007. His dismissal arose as a result of disciplinary proceedings, commenced on 26 October 2004, alleging that the applicant acted in a manner that was in breach of acceptable standards of conduct under the Northern Ireland Prison Service Code of Conduct and Discipline. It was alleged against the applicant that in breach of the duty of confidence owed by him to the Northern Ireland Prison Service he appeared on and participated in a BBC Spotlight programme which was broadcast on 12 October 2004. The duty of confidence arose from restrictions on communications to the media contained within Rule 115 of the Prison and Young Offenders Centre Rules (NI) 1995.

“(1) Except with the permission of the Secretary of State, an officer shall not directly or indirectly communicate to a representative of the press, television or radio or any other person matters which he has come to know in the course of his official duties.

(2) An officer shall not without the permission of the Secretary of State publish any matter or make any public pronouncement relating to the administration of any prison or to any of its prisoners.”

The applicant launched an application for leave to apply for judicial review in respect of the commencement of the disciplinary process which was dismissed on 21 December 2005 by Weatherup J. He held that the factual matters giving rise to the applicant’s claim should be dealt with within the disciplinary process. Those conducting that process were required to act fairly. A court would rarely intervene before the final outcome of such a process.

### **The background**

[2] In the course of his judgment Weatherup J set out the background to the application before him. I am happy to adopt that background as the starting point in this application.

“[3] The applicant joined the Northern Ireland Prison Service in 1979 and became a member of the Prison Officers Association (POA). He served at the Young Offenders’ Centre at Hydebank and then at HMP Maze before transferring to HMP Maghaberry in 1990.

[4] At HMP Maghaberry the female prison, after the closure of Armagh, was contained in Mourne House, a self-contained unit set in nine acres outside the walls of the main prison. Mourne House closed on 21 June 2004.

[5] In Northern Ireland the POA has an Area committee and branches at Maghaberry, Hydebank Wood, Magilligan and Millisle. Up to 21 June 2004 the Maghaberry branch of the POA operated a ‘male side’ which dealt with the main prison and a ‘female side’ which dealt with Mourne House. In 1993 the

applicant was co-opted as a member of the committee of the Maghaberry branch of the POA (Male Side) and in 1995 he became Secretary and in 1996 he became Chairman. Accordingly prior to 21 June 2004 the applicant was Chairman of the Maghaberry branch of the POA (Male Side) and there was a separate Chairman of the Maghaberry branch of the POA (Female Side).

[6] With the closure of Mourne House on 21 June 2004 the Maghaberry branch of the POA (Female Side) ceased to exist and what had been the Maghaberry branch of the POA (Male Side) became the Maghaberry branch of the POA. This name change was approved by the POA Area committee on 6 August 2004. From 21 June 2004 the applicant was the Chairman of the Maghaberry branch of the POA.

[7] While Chairman of the Maghaberry branch of the POA (Male Side) from 1996 the applicant avers that he conducted numerous interviews with the media including television and radio interviews covering a wide range of issues dealing with matters of concern to POA members. In recent times he had spoken to the media on no less than 41 occasions on both television and radio and in December 2003 had produced a lengthy article for the News of the World newspaper and in all cases was dealing with matters of concern to POA members. On none of those occasions had the applicant sought the permission of the Area Chairman nor had he ever been approached or admonished by the Area Chairman or the prison authorities for speaking to the media without express permission.

[8] The applicant sets out in his affidavit that in January 2002 the Principal Officer in charge of Mourne House and four Senior Officers were tasked to address issues concerning ill-treatment and abuse of female prisoners in Mourne House. The applicant states that in June 2002 this group produced a report to the Governor. Also in June 2002 an article appeared in the Mirror newspaper dealing with the issue concerning ill-treatment and abuse of female prisoners in Mourne House. The Principal Officer and the Four Senior Officers were subject to threats

and they approached the applicant to represent them and the applicant agreed. In September 2003 the Principal Officer informed the applicant that he was going to invoke the Northern Ireland Civil Service 'whistle blowing' policy and the applicant accompanied the Principal Officer to meetings with senior members of the Northern Ireland Office. An investigation was undertaken by the Northern Ireland Office, commencing in April 2004 and conducted by a number of retired police officers. The applicant was interviewed by the inquiry team in September 2004.

[9] BBC Northern Ireland broadcast a 'Spotlight' programme in October 2004 in relation to Mourne House. The applicant and three other prison officers and the Area Chairman contributed to that programme. The applicant states that he spoke to the Spotlight programme as a representative of the POA and as the representative of the Principal Officer and the four Senior Officers who had reported on Mourne House.

[10] Prison Service Headquarters and the Area Chairman of the POA do not agree that the applicant appeared on the Spotlight programme as a representative of the POA. On 13 October 2004 the Area Chairman issued a statement on behalf of the POA referring to the applicant as the "whistle blower" and declaring that he did not speak on behalf of the POA. On 18 October 2004 the Press, Communication and Planning Officer at Prison Service Headquarters wrote to the Area Chairman of the POA with reference to the Spotlight programme and expressed concern that 'we appear to have no formal agreement about the prison matters upon which POA officials may comment, who those officials may be and on what restrictions are applicable to those comments'. A meeting was proposed with a view to reaching a mutual understanding and protocol which would address the issues mentioned.

[11] On 26 October 2004 the applicant was served with the statement of alleged misconduct by Governor Wilson who had prepared the papers at the behest of Governor Longwell.

[12] On 12 January 2005 the Head of Prison Personnel at Prison Service Headquarters wrote to the Area Chairman of the POA and indicated that 'my understanding of your custom of practice arrangement is that you are a sole spokesman for the POA (NI) in terms of communicating with the media. You are the only person authorised to speak to the media unless you delegate authority to one of your POA colleagues. Is this correct?' By a reply dated 13 January 2005 the Area Chairman stated first of all that the applicant was the whistle blower referred to in his statement of 13 October 2004; secondly, confirming that the custom and practice arrangement which POA (NI) had with the Prison Service management is that the Area Chairman is the sole spokesperson for the POA (NI) in relation to communicating with the media unless the Area Chairman delegates that authority to someone else within the Association; thirdly that the Area Committee and all elected officials of the POA (NI) were aware that the Area Chairman is the only person elected to speak on behalf of the POA (NI) unless the Area Chairman delegates that authority to someone else; fourthly that the applicant did not have the authority of the Area Chairman to speak on the Spotlight programme on behalf of the POA (NI) 'as the subject of the programme was incidents which happened in the female branch of the POA (NI) ie Mourne House and not at Maghaberry male branch.' The Area Chairman stated that he had delegated authority to three members of the Mourne House branch to appear on the programme and put over the views of the POA. Those three members had also been the subject of disciplinary proceedings as well as the applicant, but when the Area Chairman confirmed that authority had been delegated to those three members the disciplinary proceedings were withdrawn.

[13] The affidavit of the former Secretary of the Maghaberry branch of the POA (Female Side) avers that the Spotlight programme was solely concerned with matters that occurred in Mourne House and involved Mourne POA officers. The closure of Mourne House and of the Maghaberry branch of the POA (Female Side) did not invest the applicant with

an entitlement to speak on issues that concerned officers he did not represent and in an institution in which he had no official interest. Further the former Secretary reiterates the stated position of the Area Chairman in relation to communications with the media namely, that the Area Chairman is the sole spokesman with power to delegate and that he and two other officers had received authority from the Area Chairman to be interviewed by the Spotlight programme and that the applicant had no such authority.”

[3] Subsequent to that decision there were disciplinary hearings on various dates between 8 March 2006 and 31 January 2007. On that date the Governor find him guilty of two charges. The first was that he, without the permission of the Secretary of State, did directly communicate with the makers and presenters of the BBC Spotlight programme which was broadcast on 12 October 2004, matters which he came to know in the course of his official duties. The second was that he in breach of the duty of confidence owed by him to the Northern Ireland Prison Service, appeared on and participated in a BBC Spotlight programme which was broadcast on 12 October 2004. On 7 February 2007 by way of penalty the Governor recommended dismissal and was apparently influenced in that decision by the fact that the applicant had disclosed the name of a Governor who had carried out a report in relation to allegations of corruption. On the basis of that recommendation the applicant was dismissed on 30 April 2007 for gross misconduct. He exercised his right of internal appeal. The panel considered whether the process was fair and dismissed his appeal on 18 April 2008.

[4] The applicant pursued a further appeal to the Civil Service Appeal Board. It considered whether the applicant had been subject to fair and correct procedures. It noted that the applicant had never been charged with gross misconduct and that there had been no precautionary suspension during the period of approximately 30 months between the charges being laid and the decision to dismiss. The Board accordingly concluded that the penalty was disproportionate. It further found that there were excessive delays, that the applicant had not been informed of the date of the hearing at which the dismissal recommendation was made and that there had been a breach of natural justice. It further considered that it was not persuaded that the Northern Ireland Prison Service had acted consistently in the treatment of the applicant. It recommended as a matter of urgency that the Northern Ireland Prison Service should review its Code of Conduct and Discipline and unanimously recommended that the applicant should be reinstated.

[5] By letter dated 23 September 2008 the Department of Finance and Personnel indicated that it was unable to accept the Board’s recommendation

to reinstate the applicant. That letter invited the Board to assess the degree of any contributory fault on the part of the applicant. By letter of 13 November 2008 the Board communicated its decision on contributory fault. It accepted that the applicant was culpable by appearing on the Spotlight Programme on 12 October 2004 but considered that his culpability was significantly mitigated by his previous numerous communications with the media for which he had not been admonished. It assessed the appropriate deduction at 20%.

### **The application**

[6] The applicant now seeks leave to apply for judicial review of the decision to dismiss, the decision not to reinstate and the compatibility of Rule 115 of the Prison and Young Offenders Centre Rules (Northern Ireland) 1995 with the ECHR. The proposed respondents resist this application on the basis that the applicant still has a further appeal to an Industrial Tribunal pursuant to article 236 of the Employment Rights (Northern Ireland) Order 1996. Within that appeal it will be open to the appellant to deploy arguments in relation to the ECHR (*X v Y* [2004] EWCA Civ 662). For the first named respondent Mr McMillan further submits that the challenge to the Rules cannot succeed because the Rules merely provide a discretionary power to the Secretary Of State which he must use in accordance with the Convention rights. The power is demonstrably legitimate, its aim being to protect the private life of prisoners and staff and good order and discipline within the prison.

[7] I accept that judicial review is a remedy of last resort and where a statutory process of appeal has been provided to deal with matters in dispute the court should be slow to intervene in the exercise of its supervisory jurisdiction before the determination of that appeal. The applicant makes the point, however, that although the appeal has full jurisdiction over matters relating to quantum and contributory fault it cannot provide the applicant with the remedy that he seeks by way of reinstatement. He has presented an arguable case that the decision to dismiss was a disproportionate interference with his right to freedom of expression under article 10 of the Convention and accordingly seeks to pursue a remedy pursuant to section 8 (1) of the Human Rights Act 1998 that he should be reinstated. In those circumstances I will grant leave in relation to grounds xiv, xv and xvi which appear to raise Convention issues in relation to the decision not to reinstate. I consider that the issue of dismissal has been determined by the decision of the Civil Service Appeal Board and accordingly do not grant leave in relation to that issue. I further consider that the submissions of the proposed first named respondent in relation to the compatibility of the Rules with the Convention are well founded and that there is no arguable case that the Rules of themselves are incompatible with the Convention. In those circumstances the case will proceed against the second named proposed respondent only. If the first

named proposed respondent wishes to take part as a notice party it may apply to do so in the usual way.