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*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **28/03/2007**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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APPLICATION BY LIAM McANOY FOR JUDICIAL REVIEW

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WEATHERUP J

The Application.

[1] The applicant is a prisoner of HMP Maghaberry. He applies for judicial review of a decision of the Governor of HMP Maghaberry of 16 October 2006 removing the applicant from standard regime to basic regime under the "Progressive Regimes and Earned Privileges Scheme" (PREPS). The issue resolves to the scope of Rule 32 of the Prison and Young Offenders Centre Rules (Northern Ireland) 1995 dealing with restriction of association. Mr O'Sullivan appeared for the applicant and Mr Dunlop appeared for the respondent.

Progressive Regimes and Earned Privileges Scheme.

[2] PREPS was introduced on 20 November 2000. There are three levels of prison regime. First there is basic status "for those prisoners who through their behaviour and attitude demonstrate their refusal to comply with prison rules generally and/or co-operate with staff." Secondly there is standard status "for those prisoners whose behaviour is generally acceptable but who may have difficulty in adapting their attitude or who may not be actively participating in a sentence management plan." Thirdly there is enhanced status "for those prisoners whose behaviour is continually of a very high standard and who co-operate fully with staff and other professionals in managing their time in custody. Eligibility to this level also depends on full participation in sentence management

planning." A prisoner is first given standard status. There is provision for advancement from standard status to enhanced status through a system of weekly reporting by prison officers. There is also provision for reduction in status in the event of adverse reports.

Restriction of Association.

[3] The applicant was charged with assaulting another prisoner on 7 July 2006 and further to adjudication in September 2006 the charge was dismissed. On 7 July 2006 the applicant was on standard regime. On 9 July 2006 the applicant was placed on restriction of association under Rule 32 and removed to the Punishment and Segregation Unit. The reason was stated to be "Pending an investigation into an incident that took place in Bann House, Landing 3 on 7/7/06 at 1622 hours". On 10 July 2006 the applicant's restriction of association under Rule 32 was extended for a period of 28 days by the Director of Operations. On 7 August 2006 the applicant's restriction of association was further extended for a period of 14 days by the Director of Operations. The applicant was removed from restriction of association on 18 August 2006.

Anti-Bullying Strategy.

[4] On 18 August 2006 the applicant was interviewed for the purposes of the "Anti-bullying strategy". A "Bullying incident/Monitoring booklet" was completed. The monitoring procedure was explained in the following terms:

> "We have reason to believe that you have been involved in bullying others and your behaviour will be monitored for up to 28 days. If during this period, evidence confirms that you are displaying bullying behaviour, intervention will be planned. Non-corporation with the intervention and/or evidence of bullying behaviour may result in removal from normal location to a dedicated cell. Your file will be discussed at the next Anti-Bullying Board and if there is no evidence to suggest that you are involved in bullying behaviour it is likely that no further action will be taken. Monitoring of your behaviour will start immediately."

[5] Governor Jeanes conducted the interview with the applicant on 18 August 2006 and states that in consideration of the incident which had occurred on 7 July 2006, in order to prevent the applicant from having the opportunity to engage in behaviour amounting to bullying of other prisoners, he specifically informed the applicant on the 18 August 2006 that he should not enter any other prisoner's cell without the permission of a member of prison staff on duty.

[6] The applicant was found in another prisoner's cell without permission on 26 August and on 9 September. The Anti-Bullying Board met on 6 September and extended the applicant's period of monitoring. The applicant was later in another prisoner's cell without permission. On 26 September 2006 he was abusive to staff and received an adverse report. The Anti-Bullying Board met again on 4 October 2006 and further extended the applicant's period of monitoring. The applicant was found in another prisoner's cell without permission on 12 October when he stated that he had been told by a Governor that the anti-bullying monitoring process had been closed. It transpired that the Governor had not so informed the applicant. The applicant received a second adverse report as a result of the events of 12 October.

[7] Under PREPS the receipt of two adverse reports within a period of three months results in reduction from standard to basic regime. Accordingly the applicant was reduced to basic regime on 16 October 2006. The Anti-Bullying Board met for a third time on 1 November 2006 and agreed that the monitoring of the applicant should end. The applicant was returned to standard regime on 5 January 2007.

Academic applications.

[8] The applicant's judicial review challenge relies first of all on procedural impropriety grounds and secondly on illegality grounds. The respondent contends that as the applicant was returned to standard regime on 7 January 2007 the application has become academic. In R v (Salem) v Secretary of State for the Home Department (1999) AC 450 Lord Slynn stated at page 456:

> "In a case where there is an issue involving a public authority as to the question of public law, your Lordships have a discretion to hear the appeal, even by the time the appeal reaches the house there is no longer a lis to be decided which will directly affect the rights and obligations of the parties inter se ….. The discretion to hear disputes, even in

> the area of public law, must however be exercised with caution. Appeals which are academic between the parties should not be heard unless there is good reason in the public interest for doing so, as for example (but only by way of example) when a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future."

[9] Carswell LCJ in the Court of Appeal's decision in Re McConnell's Application [2000] NIJB 116 at 120 quoted Lord Slynn and added –

> "It is not the function of the courts to give advisory opinions to public bodies, but if it is apparent that the same situation is likely to recur frequently and the body concerned had acted incorrectly they might be prepared to make a declaration to give guidance which would prevent the body from acting unlawfully and avoid the need for further litigation in the future. The (Parades) Commission is likely in the ordinary course of events to have to rule on other processions proposing to pass through areas whose residents will object to their presence. If it appeared from the evidence before us that there was a substantial possibility that it would then act in a way that was clearly outside its powers or contrary to its prescribed procedures we might be disposed to make a declaration to that effect."

[10] In Re Nicholson's Application (2003) NIQB 30 Kerr J dealt with a challenge by the applicant prisoner to the award of cellular confinement on adjudication. The applicant had been released on licence before completing the cellular confinement. The dispute was academic between the parties and Kerr J refused to treat the case as an exception to the general rule. He found that the case would have required a detailed examination of disputed facts, and further that the case was highly fact

specific and the circumstances were unlikely to be reproduced. Accordingly the resolution of the issues that arose in that case was unlikely to provide guidance to the Prison Service in future cases.

[11] In Re Todd's Application (2004) NIQB 45 the applicant's complaint concerned the refusal of a Resident Magistrate to hear an emergency ex parte application for a non molestation order. While the dispute had become academic the Court heard the application for judicial review on the basis of the public interest in determining the character of the problem that had emerged in relation to the administration of court business in connection with emergency applications. Ultimately it will be a matter for the Court to decide from case to case whether an application that has become academic between the parties has a good reason in the public interest for proceeding.

[12] Separate consideration is required for the procedural impropriety grounds and the illegality grounds. The applicant's procedural impropriety grounds are that the respondent –

> (i) Failed to inform the applicant at the anti-bullying interview on 18 August 2006 that he was not permitted to enter the cells of other prisoners during association periods.
>
> (ii) Failed to inform the applicant prior to his receiving an adverse report that he was not permitted to enter the cells of other prisoners during association periods.
>
> (iii) Failed to inform the applicant that the decisions had been taken by the Anti-Bullying Board on 6 September 2006 and 4 October 2006 to continue the anti-bullying monitoring beyond the initial 28 day period.
>
> (iv) Failed to accord the applicant a fair hearing prior to removing him from the standard regime and placing him in the basic regime.

[13] There are factual disputes about the notice that was or was not given to the applicant. The applicant contends that he received none of the notices referred to above and the affidavit evidence on behalf of the prison authorities indicates that such notices were given. Even apart from the academic aspect of the application, affidavit evidence in judicial review does not lend itself to the resolution of factual disputes. There is nothing in the papers that calls into question the affidavit evidence of the respondent. There is no basis for undertaking an oral examination of the competing witnesses. The burden is on the applicant to establish the case. The applicant has not established the absence of notice that he was not to

enter other prisoners' cells without permission or that the anti-bullying monitoring had not been extended from time to time. For that reason I proceed on the basis that the applicant was informed of the restriction on association in the cells and that the anti-bullying monitoring had been extended. The complaints of procedural impropriety are rejected.

[14] The applicant's remaining grounds of judicial review are that the decision of 16 October 2006 to remove the applicant from standard regime to basic regime was unlawful in that:

> (i) It was based on two adverse reports to the effect that the applicant had engaged in "in cell association".
>
> (ii) The adverse reports were based on the unlawful restriction of the applicant's association in that none of the safeguards contained in Rule 32 were adhered to.
>
> (iii) The restriction of the applicant's "in cell association" was not authorised under Rule 32.
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> (iv) The Secretary of State's agreement to that restriction of association continuing beyond 48 hours had not been obtained as required by Rule 32(2).
>
> (v) Contrary to Rule 32(2)(A) and (2)(B) a member of the Board of Visitors was not informed within 24 hours of the commencement of the restriction:
>
> > (a) that the respondent had arranged for the restriction of the association of the prisoner; and
> >
> > (b) of the date, time and location of the first review of the restriction of the applicant's association.
>
> (vi) A member of the Board of Visitors was not present at the reviews of the restriction of the applicant's association as required by Rule 32(2)(D).
>
> (vii) The other safeguards contained in Rule 32 were not complied with.

[15] The applicant's case resolves to an issue of the statutory construction of the scope of "association" for the purposes of Rule 32. The applicant contends that "association" in Rule 32 should be widely interpreted so as to include the "in cell association" in the cells of other prisoners. If "association" is to be so interpreted for the purposes of Rule

32 then the applicant contends that the safeguards of Rule 32 would have applied to the restriction that required the permission of prison staff before the applicant entered the cell of another prisoner. This is a discrete point of statutory interpretation and does not involve detailed consideration of facts. This is an issue which is likely to recur as similar restrictions are no doubt imposed in furtherance of the anti-bullying strategy. In any event restrictions on association in the widest sense are no doubt imposed in the day to day management of the prison. Accordingly there is a general interest in resolving the issue as to the powers of the Governor in this regard.

The operation of Rule 32.

[16] To follow the character of the applicant's complaints it is necessary to set out Rule 32 which provides for restriction of association as follows –

> "(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 the Secretary of State.
>
> (2A) The governor shall inform a member of the board of visitors-
>
> (a) that he has arranged for the restriction of the association of the prisoner, and
>
> (b) of the date, time and location of the first review of the restriction of the prisoner's association.
>
> (2B) The governor shall inform a member of the board of visitors of the matters in paragraph (2A) as soon as practicable and in any event no later than 24 hours after the prisoner's association is restricted.
>
> (2C) The governor shall keep a written record of all contact and attempted contact with members of the board of visitors under this rule.
>
> (2D) Unless it is not reasonably practicable, a member of the board of visitors shall be present at all reviews of the restriction of the association of the prisoner.

(2E) The governor shall as soon as reasonably practicable inform a member of the board of visitors:

(a) of any changes to the date, time or location of the first review of the restriction of the association of the prisoner,

(b) the date, time and location of any subsequent reviews of the restriction of association of the prisoner, and

(c) any changes to the date, time or location of any subsequent reviews.

(2F) The board of visitors shall satisfy itself that:

(a) the procedure in this rule for arranging and reviewing the restriction of the association of the prisoner has been followed, and

(b) the decision of the governor to restrict the association of the prisoner is reasonable in all the circumstances of the case.

(2G) In order to satisfy itself of the matters in paragraph (2F) the board of visitors shall be entitled to inspect the evidence on which the governor's decision was based, unless such evidence falls within paragraph (2H).

(2H) Evidence falls within this paragraph if:

(a) it should not be inspected by the board of visitors for the purpose of safeguarding national security;

(b) its inspection by the board of visitors would, or would be likely to prejudice the administration of justice;

(c) its inspection by the board of visitors would, or would be likely to endanger the physical or mental health of any individual; or

(d) its inspection by the board of visitors would, or would be likely to endanger the safety of any individual.

(2I) If the board of visitors is not satisfied of any of the matters set out in paragraph (2F) it shall draw this to the attention of the governor, in writing, who must, review the procedure for arranging and reviewing the restriction of the association of the prisoner, review his decision to restrict the association of the prisoner and take such other steps as are reasonable in all the circumstances of the case.

(2J) The governor must take the steps in paragraph (2I) promptly and in any event within seven days and the board of visitors shall not refer a matter to the Secretary of State under

paragraph (2K) until the governor has taken the steps in paragraph (2I) or the end of the seven days whichever is earlier.

(2K) If after drawing a matter to the attention of the governor under paragraph (2I) the board of visitors is still not satisfied of any of the matters set out in paragraph (2F) it shall draw this to the attention of the Secretary of State in writing.

(2L) If a matter is referred to the Secretary of State under paragraph (2K) he must consider the matter and take such steps as are reasonable in all the circumstances of the case.

(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."

[17] It is not disputed that the applicant was in the cell of another prisoner on a number of occasions and that no permission had been granted by a member of the prison staff. It is not in dispute between the parties that the imposition of a condition that requires permission to enter the cell of another prisoner amounts to a limitation on a prisoner's association and involves being "restricted" in the widest sense of the word. I proceed on the basis that the applicant was informed of the restriction on association in the other cells.

[18] The elements of Rule 32 are, first of all, recognition of what might be called "permitted association", secondly, dual reasons for the exercise of the power, namely good order and discipline or the prisoner's own interests and thirdly, arrangements for restriction of association by the Governor. Fourthly, there are what the applicant describes as safeguards, namely the agreement of the Secretary of State to the extended exercise of the power and the monitoring of the process by the Board of Visitors.

[19] The "permitted association" on the standard regime was described by the applicant as involving the applicant being permitted out of his cell between 10.00 am and 11.30 am and between 5.30 pm and 8.00 pm, during

which times prisoners were permitted to go to the association yard, to use the telephone and to play snooker. In addition the prisoners were permitted to go into other prisoners cells, which the applicant described as "in cell association". Prisoners on basic, standard and enhanced regime have different periods of such "association." When the applicant was subject to monitoring he was housed in his cell and permitted to have association in accordance with the rules of the requisite regime, with the added condition that he might not engage in "in cell association" without permission.

[20] However when the applicant was under Rule 32 from 9 July to 18 August he was housed in the segregation unit and did not enjoy those hours of association. The respondent regards Rule 32 as applying only in those circumstances where the prisoner is removed to the segregation unit. The issue is whether restriction of association for the purposes of Rule 32 is limited to arrangements for the removal of a prisoner to the segregation unit, as the respondent contends, or whether it extends to other arrangements whereby a prisoner might be restricted in his association with other prisoners, as the applicant contends.

[21] Rule 32 only applies 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. Rule 32(2) refers to a prisoner's association "under this rule" which may not be restricted "under this rule" for a period of more than 48 hours without the agreement of the Secretary of State. The terms of Rule 32 appear to contemplate that there may be association that will not be affected by Rule 32 and that there may be restriction of association otherwise than under Rule 32. Thus it would appear that there might be limits on association for purposes other than the maintenance of good order or discipline or a prisoner's own interests and Rule 32 would not apply.

[22] It is apparent that in its widest sense restriction of association may arise in many circumstances where, in the general day to day prison system, a prisoner is required to be in a particular place at a particular time and is thereby limited in his association with other prisoners. The applicant does not seek to apply Rule 32 to all such circumstances but only to those where a particular prisoner is treated in a different manner to other prisoners who are subject to the same regime. So for example the more limited association permitted to prisoners on basic regime than to those on standard or enhanced regime is not said to be an instance where Rule 32 might apply.

[23] The applicant's approach therefore accepts the different restrictions on association that are applied under the different regimes and the different restrictions necessarily imposed on prisoners for the purposes of

the day to day running of the prison, as all being matters to which Rule 32 would not apply. Where Rule 32 does apply, according to the applicant, is not only on removal to the segregation unit but also to any restriction on association that is not also accorded to other prisoners subject to the same regime. Thus, on the applicant's argument, Rule 32 applies to limits on in cell association when such limits are applied to selected prisoners.

[24] The equivalent English Rule is Rule 45, although this refers to "removal" from association rather than "restriction" of association. Livingstone, Owen and McDonald on Prison Law discusses Rule 45 under the heading "Segregation". The English system treats Rule 45 as applying when prisoners are "segregated from normal location." The discussion clearly reflects the equivalent English regime as involving the physical separation of prisoners into a separate unit where they no longer enjoy the association with other prisoners that prevails when they are housed in their own cells. However prisoners separated in this manner are not held in isolation as they may associate with other prisoners in the separated unit. The discussion contemplates that Rule 45 is limited to actual transfer to a segregation unit.

[25] I am unable to accept the applicant's argument as to the scope of Rule 32. I am satisfied that the reference to the Governor making arrangements for the restriction of association applies to those circumstances where a prisoner is removed from his cell and placed in the segregation unit. In such circumstances the safeguards set out in Rule 32 apply. Such segregation clearly requires close monitoring and the safeguards set out in Rule 32 have been introduced to deal with that requirement. Further I am satisfied that the use of the word "restriction" rather than the word "removal" in Rule 32 does not indicate that the rule applies otherwise than upon transfer to the segregation unit. However, while rejecting the applicant's contentions, I am not to be taken to have concluded that Rule 32 can never apply to any restriction of association other than that involved in a transfer to the segregation unit. I would reserve a conclusion on that issue.

[26] A prisoner on whom a condition such as the present is imposed is not without safeguards. He may make a complaint that would be processed in accordance with the Rules. However the requirements of Rule 32 do not apply. The application for judicial review is dismissed.