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

Delivered: **24/01/2015**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

McAree (Stephen) Application [2015] NIQB 5

IN THE MATTER OF AN APPLICATION BY STEPHEN McAREE FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

DEENY J

[1] This is an application by Stephen McAree currently a sentenced prisoner at Her Majesty's Prison, Maghaberry. He seeks judicial review of a decision of a Governor of that prison to refuse him temporary release to visit his sister. His sister has been very seriously ill for some time and a recent medical report from a General Medical Practitioner has said that her demise is imminent. Therefore, on the basis that she is critically ill, he wishes to be released from custody to spend some time with her before she passes away. The applicant seeks a declaration that the decision of the Governor was disproportionate and a breach of Article 8 of the European Convention of Human Rights and, further, orders of certiorari to quash the Governor's refusal and of mandamus to direct him to release the applicant.

[2] The court has had the benefit of a helpful written argument by Mr Devine of counsel and his helpful oral submissions and also responding oral submissions from Mr Corkey of counsel and they and their solicitors are to be commended for expeditiously bringing this matter before this court as a matter of urgency today, Saturday 24 January.

[3] The test in relation to such forms of judicial review with regard to the rights under the European Convention has evolved over the years. It is clear that it is no longer simply a Wednesbury test of deciding whether the decision maker had overlooked a relevant consideration or had taken into account an improper

consideration or had acted wholly irrationally or unlawfully in breach of established law or procedure. It goes beyond and it goes indeed further. Mr Devine helpfully referred to the leading case of the R v Governors of Denbigh High School [2007] 1 A. C. 100 and in particular to the judgment of Lord Bingham at paragraphs 29 and 30 in which he was dealing with the decision of the Court of Appeal from which he differed:

> "… it is clear that the court's approach to an issue of proportionality under the Convention must go beyond that traditionally adopted to judicial review in a domestic setting. The inadequacy of that approach was exposed in Smith and Grady v The United Kingdom [1999] 29 EHRR 493, paragraph 138, and the new approach required under the 1998 Act was described by Lord Steyn in R (Daly) v Secretary of State for the Home Department [2001] 2 AC 532, paragraphs 25-28, in terms which have never to my knowledge been questioned. There is no shift to merits review, but the intensity of review is greater than was previously appropriate and greater even than the heightened scrutiny test adopted by the Court of Appeal in R v Ministry of Defence, ex parte Smith [1996] QB 517, 554. The domestic court must now make a value judgment, an evaluation, by reference to the circumstances prevailing at the relevant time: Wilson v First County Trust Ltd (No: 2) [2004] 1 AC 816, paragraphs 62-67. Proportionality must be judged objectively, by the court: R Williamson v Secretary of State for Education and Employment [2005] 2 AC 246, paragraph 51 as Davies observed in his article cited above ["Banning the Jilbab (2005) 1:3 European Constitutional Law Review 511]: "The retreat to procedure is of course a way of avoiding difficult questions". But it is in my view clear that the court must confront these questions, however difficult. The school's action cannot properly be condemned as disproportionate, with an acknowledgement that on reconsideration the same action could very well be maintained and properly so."

[4] I take into account the succeeding paragraphs 31 and 32 but I also take into account the comment of His Lordship to be found at paragraph 34. It will be recalled that in this case their Lordships upheld the right of the school to ban a particular form of Islamic dress, although the school did allow other forms. At paragraph 32 Lord Bingham said:

"It would in my opinion by irresponsible of any court, lacking the experience, background and detailed knowledge of the head teacher, staff and

governors, to overrule their judgment on a matter as sensitive as this. The power of decision has been given to them for the compelling reason that they are best placed to exercise it, and I see no reason to disturb their decision."

There are remarks to like effect elsewhere in the judgment of the court including that of Lord Hoffman.

[5] Mr Devine, of course, cited Article 8 to me and for the avoidance of doubt I shall read it:

> "Article 8 - right to respect for private and family life
>
> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

[6] For completeness I observe that Mr Devine also helpfully referred me to two decisions of my brethren in similar applications for prisoner release. In one, David Smith's Application [2014] NIQB 50, Treacy J delivered a short judgment in which he decided to release the prisoner. I observe, however, that the release dates in his case were much shorter than in the present case, i.e. the man was due to be released four months after the application for a temporary release and he was to be eligible for home leave only two months after the application for temporary release. Furthermore, His Lordship does not say whether or not Mr Smith was serving a sentence for crimes involving violence which I consider a relevant consideration.

[7] My attention has also been helpfully drawn to the decision of Stephens J in Re McGlinchey [2013] NIQB 5 or at least certain extracts from this judgment at paragraphs 15-18 and I respectfully agree with the comments he makes there which I feel are justified by the citations from the decision of the House of Lords to which I have referred i.e. that there remains either, in Lord Hoffman's phrase at paragraph 68 of Denbigh, an area of judgment for the decision maker or a margin of appreciation, as Mr Justice Stephens put it. In my view that does not involve any kind of deference but it does involve the recognition, as Mr Corkey put it, that there is no right of appeal to this court from every decision of a Governor. It remains a process of judicial review albeit of review to a greatly heightened level than before and a review where the court does carry out an evaluation.

[8] Bearing these dicta in mind I then turn to the decision which Mr McAree seeks to have quashed. I do not think I need go through the matter in absolute detail and I have taken into account all the helpful submissions of counsel but I will seek to summarise it in this way. The very strong point in favour of Stephen McAree's application, as stressed by his counsel, is that, quite remarkably, while awaiting trial on the charges for which he is presently serving a sentence he was repeatedly released on bail by His Honour Judge McFarland who ultimately was the sentencing judge and, Mr Devine points out, by three of his colleagues. I observe that once he had been given one temporary release and had returned to custody, because he was remanded in custody, it is really not that significant that other judges followed the learned Recorder in the same path. He had some 15 of these releases in all; four of them were after conviction but before sentencing. Mr Corkey points out that on the last occasion he was actually unlawfully at large because he was two hours late in returning to the prison.

[9] So here the court let him out apparently to visit this seriously ill sister and Mr Devine goes as far as to say the Governor is really disregarding that leadership and that indication from the judiciary as to what could properly be done with Stephen McAree. First of all, he [the Governor] does not overlook it because it is expressly recorded and then indeed the information provided [by the Governor] gave some more detail about that, so in Wednesbury terms it has not been overlooked but nevertheless the Governor refuses the decision and he sets out a number of reasons [for so doing]. First of all, Mr McAree was sentenced on 14 November 2014 to a determinate custodial sentence of 4 years and 6 months for two counts of robbery and common assault. His earliest release date therefore is not until 12 April 2016 and he does not become eligible for the Pre-release Home Leave Scheme, where he might be let out overnight from time to time, until 12 October 2015. Therefore, says the Governor, he has not been tested in any form of unaccompanied temporary release during the sentence period to date. I observe that particular point would not be of enormous importance because he did get pre-release leave when serving an earlier sentence in 2011 and appears to have returned to prison. The risk of absconding is heightened, says the Governor, because he is not due for release until 12 April 2016 and by implication he might be tempted to abscond. But I accept for the purposes of this application, technically for leave but also substantively for relief and run as a rolled-up application in the circumstances, in case unhappily this lady was to pass away in the next 48 hours, the implication seems to me, as somebody being obliged to review this matter in a very careful way, that even though Mr McAree might leave the prison with the best of intentions, knowing that he was to return for another 15 months or so might cause him to not return as he is meant to do.

[10] Mr Corkey drew attention to the fact that the man has a high ACE score which is the assessment made by the prison for the risk of re-offending; so there is a high risk of re-offending. Furthermore, as the Governor goes on he is assessed adversely on the ROSH score i.e. he poses a significant risk of serious harm to others. Furthermore, he has had three adjudications since coming into prison, the most

recent being on the 12th of this very month when he failed a drugs test. Mr Devine draws attention to the nature of the two drugs: buprenorphine and benzodiazepine as some mitigation of that but nevertheless it is a breach of prison rules clearly and I do not have sufficient information to discount it as merely innocuous. While the Governor, in what seems to be an earlier text of this letter, an incomplete text, thought Stephen McAree had not fully engaged in the sentencing plan he now accepts that he in fact had done so. In the Governor's conclusion which I have to adjudicate upon he says the following at paragraph 9:

> "You were involved in a fight with another prisoner on 28 December during which you armed yourself with a snooker cue and some snooker balls."

[11] Mr Devine invites me to disregard that because there has not been a formal conviction or adjudication in the prison on that but bearing in mind the dicta of Lord Bingham I do not think it is right to do that; this is what the Governor is clearly being told by one of his own officers. Given my duty to hold a heightened form of review are there other relevant factors? Well Mr Corkey draws attention to the probation report on this man prepared for the sentencing by the judge. The judge sentenced him to a determinate custodial sentence of 4 years and 6 months with 50% in custody and 50% on licence. It seems the prisoner has some 74 previous convictions going back over 30 years. He is now 46 years of age and these convictions, a number of them, are similar to the ones for which he is serving his sentence, assaulting elderly men using public lavatory facilities and stealing from them. One such gentleman suffered a fractured rib in the process.

[12] Furthermore, he has, as I have said, committed such robberies in the past and in one case one of the elderly victims died, leading, apparently, to a conviction for manslaughter. So this is a man who has a record of violence in the past and a record that he does not seem to have grown out of. It is undoubtedly the case on the papers before me that he has abused drugs and alcohol in the past. I return to the Governor's decision and he recites the relevant rules and he says at page 3 of his letter:

> "Consideration has then been given to an accompanied release by a family member, or a probation department member, or a chaplain or a solicitor. However, none of these persons have custodial training and have no authority to prevent any attempt at absconding. Given the concerns mentioned I have no confidence that you would abide by any terms or conditions imposed. Given all of the issues highlighted above, you would have to be escorted in handcuffs by prison officers to (the address where the sister of McAree lives in Belfast)."

[13] Mr Devine, wisely in the light of information from the police and other information, accepts that it would not be a reasonable application to ask me to order the Governor to send prison officers there because they would be at risk in that particular locality. So what he in effect is asking me to do is to find that the Governor was making a disproportionate decision in refusing to release the prisoner. I am applying the modern test; he does not have to reach the level of saying it was a decision that no reasonable Governor should have reached but I still do have to allow a measure of discretion, or an area of judgment as Lord Hoffman put it, [in the context of Article 9] to the decision maker. It seems to me that I could not make a finding adverse to the Governor in reaching this conclusion. It is a reasonable and proportionate finding. It is conceivable, I accept, that somebody else bearing in mind the history of repeated releases on bail might take a different decision.

[14] This bail situation is not exactly the same as now because on those occasions the family member who followed him had gone surety, for a modest sum of money, £250 it seems, which would have been a restraint to Mr McAree. Furthermore, Mr McAree was awaiting trial and ultimately, after conviction, sentence on these two counts of robbery; they would have been, perhaps, restraining factors on him. It is true that if he did go on temporary release now without officers handcuffed to him he would know that he might be prosecuted for being unlawfully at large if he did not return but it is fair to say that neither counsel was saying that was by any means a matter of certainty that that would happen. So it is not exactly the same factual situation as was presented to the learned county court judges. In any event it is not a decision which I feel able to describe as disproportionate or unlawful and therefore I grant the application for leave in the circumstances but I refuse substantive relief.