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*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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McAree's (Stephen) and Watson's (Patrick) Application [2010] NIQB 79

IN THE MATTER OF AN APPLICATION BY STEPHEN McAREE AND PATRICK WATSON FOR JUDICIAL REVIEW AND IN THE MATTER OF A DECISION OF THE NORTHERN IRELAND PRISON SERVICE

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TREACY J

Introduction

[1] The applicants are both sentenced prisoners presently detained at HMP Magilligan in the Harm Reduction Unit ("the HRU").

[2] By these judicial reviews they both seek relief, including certiorari, against the decision of the Northern Ireland Prison Service ("the respondent") transferring them to the HRU. Both applications were heard on the same date. I heard McAree first. The basis of the decision I have come to has the same effect in both cases and I accordingly do not intend to separately rehearse the facts in Watson. For the purposes of delivering judgment I have in the title conjoined the applications. Mr Sayers appeared for the first applicant and Mr Hutton for the second. Mr McGleenan appeared for the Respondent in both applications. I am indebted to all counsel for their excellent skeleton arguments and their skilful exposition in oral submissions.

[3] The first applicant also raised some additional challenges relating to an alleged breach of his right under Art9 ECHR to manifest his religion and of his right to education under Art2 of the First Protocol ECHR and his right to respect for personal development under Art8 in respect of alleged adverse interference to his studies. The primary focus of the case remained the attack on the alleged procedural unfairness of the transfer decision.

[4] In respect of their HRU transfer the applicants sought to challenge the decision as procedurally unfair principally by reason of the respondent's reliance

upon and non-disclosure of the intelligence material underpinning the impugned decision.

Transfer to the HRU

[5] In his first affidavit sworn on 16 April 2010 the applicant deposed that prior to the impugned transfer he was housed in normal residential accommodation and was permitted association in the normal manner. He had achieved Enhanced status, was in the third year of an Open University Degree and in the second year of an A level art course and was also studying music and computers.

[6] On Monday 22 March 2010 the applicant was advised by Governor Roxborough that intelligence was held indicating that he was involved in anti-social behaviour within the prison. He was then moved to the unit referred to as the HRU in Halward House.

[7] On Tuesday 23 March the applicant attended a case conference attended by a number of Governors. At this conference he was told that it was believed that he was at the very top of a drugs ring from which he was making a lot of money. He denied these allegations and avers that he could do nothing more than say that they were not true since nothing specific was put to him.

[8] He was told at this conference that he was required to undertake a course involving acknowledgement of the harm of drugs use and that it was not known how long he would be in the HRU. He refused to do the course on the basis that he had done nothing to justify being required to do it and he was concerned that taking part in such a course would appear to involve an admission of guilt.

[9] In unchallenged averments he stated that his regime status has now been reduced from Enhanced to Standard and has been told that it is a disciplinary offence to try to talk to prisoners outside the HRU.

[10] The applicant deposes that he is of the Roman Catholic faith and that since his transfer he has not been permitted to attend Mass. On being advised that he was not permitted to attend Easter Sunday Mass he complained and was told that attendance at Mass was not a right and that he could speak to a Priest instead. On Good Friday, 2 April 2010, he spoke with Father O'Hagan who he says told the applicant that contact with a Priest – which would occur only on the request of a prisoner – did not fulfil the Roman Catholic obligation to attend Mass.

[11] By letter dated 30 March 2010 the applicant's solicitors McCann & McCann wrote to the Governor at Magilligan Prison raising concerns about the applicant's education, attendance at Mass and contending that the requirements of procedural fairness had not been observed in the decision to transfer the applicant to the HRU.

[12] By response dated 2 April 2010 the respondent stated as follows:

"Management at Magilligan Prison are in receipt of confidential information from many and varied sources which lead us to conclude that Stephen McAree is engaged in selling Class A and other illicit drugs within prison.

This serious antisocial behaviour is having a serious detrimental effect on prisoners throughout the Magilligan estate, many of whom are vulnerable and unable to pay for their illicit drug usage.

Management have a duty of care to all prisoners, especially those who are vulnerable and susceptible to any form of harm caused by other prisoners.

Stephen was moved to Halward House to enable him to undergo programmes designed to reduce his risk of harming others. He will be given every opportunity to prove his bona fides and it is our desire that he will return to normal residential location as soon as possible.

The decision by management to move Stephen to Halward House is reasonable, proportionate and necessary to stop him causing harm to other prisoners and does not impinge on his human rights. He will be given every opportunity to address this aspect of his unacceptable behaviour.

Stephen is free to practise his religion and has access to the Roman Catholic priest on a weekly basis. Attendance at Mass is not a right and can be withdrawn from prisoners whose behaviour is not compatible with good order and discipline.

Management will ensure that any educational pursuits that Stephen is engaged in will not be compromised by him residing in Halward House."

[13] D/G Glendinning has sworn three affidavits in these proceedings. In his first affidavit he avers that he has specific responsibilities for security, prison discipline and resettlement activities and has been involved in the transfer of a number of prisoners from the main prison population to the HRU.

Background to HRU and Transfer Procedure

[14] From his first affidavit it appears that the applicant was one of eight prisoners who were transferred from the general accommodation at Magilligan to the HRU in late March 2010 with the applicant being transferred on 22 March. He explains in his first affidavit the background to the HRU in the following terms:

> **3. The HRU is a new initiative introduced at HMP Magilligan in an effort to address the very serious problems which arise both within the prison and outside with respect to anti-social behaviour and supply of illicit drugs. Notwithstanding elaborate security and detection measures the use and abuse of illegal and prescription drugs continues to present a serious challenge to the management of HMP Magilligan.**
>
> **4. In addition to the problems which arise from the consumption of such drugs, the importation of such materials into the prison also generates instances of bullying and extortion both inside and outside the prison. Examples of such conduct include prisoners being compelled to import drugs into the prison upon return from home leave, family members being threatened for failure to make payments outside the prison in order to settle drug "debts" in the prison, as well as instances of serious assault and self-harm. It has come to the attention of senior staff at HMP Magilligan that such instances of anti-social behaviour are not random in nature but are part of a loosely structured but organised system of drug importation.**
>
> **5. Efforts to address this problem are ongoing within the prison. The HRU is part of this initiative. It was established to allow prison staff to move prisoners who were considered to be engaging in anti-social behaviour to a specialist unit where they could address this anti-social behaviour before being returned to the general population. Halward House is a newly built accommodation block. It is regarded as the best accommodation in the Prison in that prisoners have in-cell sanitation. The general environment is light, airy and regarded as a safe environment for prisoners and staff. It currently houses eight inmates. All have access to a cross-**

trainer and sit-up apparatus and the use of a large exercise year for at least one hour per day.

6. Prison Service have established a procedure for transferring a prisoner to the HRU. The prisoner is brought to an interview room in his residential block. The interview will be conducted in the presence of the residential manager and the prisoner will be informed by a Governor that he is to be transferred pursuant to Rule 9(4) of the Prison Rules with immediate effect. The Governor will then read a statement to the Applicant advising him of the reasons for his removal. I beg leave to a copy of the Procedure document Governor Roxborough used on 22nd March 2010 when he interviewed the Applicant prior to his removal to the HRU."

[15] The Procedure document referred to by D/G Glendinning at para 6 is in the following terms:

"PROCEDURES FOR THE GOVERNOR PLACING A PRISONER ON HALWARD 2

1. **The prisoner will be brought to an interview room in his residential block. In the presence of the residential manager, the prisoner will be informed by the Residential Governor, Duty Governor or other appropriate governor that the prisoner is to be transferred under Prison Rule 9(4) to Halward 2 with immediate effect.**

2. **The governor will outline the reasons for the prisoner's removal to Halward 2 by making the following statement directly to the prisoner:**

   'Management at Magilligan Prison are in receipt of information which leads us to believe that you are engaging in antisocial behaviour which is causing harm to other people.

   You are now being transferred under Prison Rule 9(4) to reside in Halward House.

   On your arrival in Halward House, you will be interviewed by the residential manager who will explain what will be expected of you whilst you reside in Halward.

> ***A multidisciplinary case conference will be convened as soon as possible to consider the most appropriate way of enabling you to stop engaging in further antisocial behaviour. You will be invited to attend the case conference to contribute to the proceedings and allow your views to be heard."***

[16] At para 7 of his affidavit the D/G referred to the anti-social case conference which was convened on the following day, 23 March 2010 at which the applicant attended. He chaired the meeting which was also attended by a prison psychologist, a representative from the Probation Board, Governor Roxborough, Governor McGrady and Senior Officer Barr. There were no members of the Independent Monitoring Board ("the IMB") at that conference.

[17] The D/G exhibited a copy of the record of this case conference which records the case conference membership and then has a box entitled "Details of anti-social behaviour" and within that box in manuscript D/G Glendinning has written "Engaged in Drug Dealing". In the next and final box which is entitled "Agreed Interventions Plan" D/G Glendinning has written "Stephen refused to accept any responsibility, completely denied any involvement in drug dealing and refuses to engage in any programmes."

[18] Referring to the case conference of 23 March the D/G stated at para 8:

> **"At the case conference I advised the Applicant that the reason for his removal to the HRU was the belief, based on information from a number of sources, that he was involved in anti-social behaviour and, specifically, that he was involved in dealing in illicit drugs within the prison. I invited the Applicant to respond to this information. He refused to accept any responsibility for anti-social behaviour, he denied any involvement in drug dealing. I asked if he would be prepared to engage in any educational programmes to address anti-social behaviour which would facilitate his return to normal residential accommodation. He refused to engage in any such programmes."**

[19] At this juncture I interpose to observe that I granted leave in this case on 27 April 2010 and fixed the date for hearing of the judicial review for 22 June 2010. Whether in response to the grant of leave or not the respondent conducted a further case conference. The case conference of 7 May was chaired by D/G Glendinning. Two members of the Independent Monitoring Board ("IMB") were present. Mr McNicholl, Psychologist attended as did Prison Officer Stewart, Senior Officer

Magee from the Offender Management Unit and Trevor Barr, the Senior Officer in Halward House.

[20] The minute of that meeting is exhibited to his affidavit and after noting those who were present states as follows:

> **"Governor:**
>
> **The purpose of today's case conference is to review the circumstances as to why you are being housed in the Harm Reduction Unit in Halward House.**
>
> **I will now give you the gist of the information which leads management at Magilligan to believe that your are engaged in anti-social behaviour which is causing harm to other people. After I give you this information I will invite you to make representations to me as to why I should review the decision to house you in the Harm Reduction Unit. I will keep an open mind and consider what you have to say.**
>
> **Please listen carefully to what I am about to tell you. All of the following information is stated in written intelligence reports received from various sources, internally and externally, since November 2009.**
>
> 1. **Along with another prisoner, you are regarded as being a major drug dealer within the prison.**
> 2. **You displayed threatening behaviour towards an *officer* by saying that you would 'beat the head off somebody'.**
> 3. **You threatened a prisoner going on home leave to coerce him into bringing back Heroin from his home leave.**
> 4. **You are selling Heroin to other prisoners in Magilligan Prison.**
> 5. **Prisoners owe you money for drug debts and these debts are paid via various means outside the prison.**
> 6. **Since your move to the Harm Reduction Unit, along with other prisoners, tension among prisoners on the wing you left has reduced significantly.**
> 7. **You were identified as one of three prisoners who carried out an assault on another prisoner.**
> 8. **You used threatening language to a *member of staff* during a search.**
> 9. **You were identified as a ring leader in inciting other prisoners to intimidate staff on the wing.**

I now invite you to make representations to me as to why I should review my decision to house you in the Harm Reduction Unit and I will consider what you have said and *respond in due course.*

McAree's Responses:

- **It's all nonsense – if it was true why was I not charged for threats against staff/prisoners.**
- **You refused to give me information when I asked 6 weeks ago – today is just for the Court hearing that's coming up.**
- **How can I rebut these allegations – I have no chance.**
- **I at the mercy of your discretion [sic].**
- **When I have spoken to staff about this they are shocked.**
- **I have never been part of selling drugs in this prison.**
- **I don't bully or threaten.**
- **There's only been one incident that I have been involved in with an officer here and that was over a personal dislike.**
- **I don't want to be here – I want to do my education.**
- **I am quiet on the wing and staff reports are impeccable.**
- **The allegation regarding drugs is a lie.**

The Governor asked Prisoner McAree if he used drugs, to which he replied, "Yes, occasionally, but I do not sell drugs, nor have I been selling drugs."

The Governor concluded by reminding Prisoner McAree that he is not being housed in the Harm Reduction Unit as a punishment but for his own good and as a means of helping him reduce his risk of causing harm to others."
[I have substituted numbers for bullet points in respect of the gist for ease of reference and added emphasis].

[21] The applicant has asserted at para 6 of his second affidavit that the record of the second case conference is neither accurate nor complete. He says he made a note of his responses to the nine points read to him by the D/G. He then sets out the responses he avers he made and attributes certain specific comments to D/G Glendinning in response to the applicant's representations. D/G Glendinning in his second affidavit states that he has no recollection of the applicant writing anything down during the meeting and that the applicant has attributed several specific comments to him in which he asserts he did not make. Beyond that he does not appear to take issue with the substantive content of the applicant's account.

[22] At this point I observe that on 22 March 2010 the applicant had been advised that he was involved in anti-social behaviour and that was why he was being moved to the HRU. On 23 March at the case conference he was told that it was believed he was at the very top of a drugs ring. In the letter of 2 April 2010 to his solicitors he was told that the management at the prison were in receipt of confidential information "from many and varied sources which lead us to conclude that [the applicant] is engaged in selling Class A and other illicit drugs within the prison." However, by the time of the second case conference the nature of the allegations which were being relied upon had been expanded in the manner set out in the "gist".

Non-Disclosure of the Intelligence Material

[23] In his first affidavit the D/G deals with the non-disclosure of the intelligence material to the applicant and he avers as follows:

> **"12. Although there is a substantial body of intelligence material which indicates that the applicant has been involved in the use and supply of illicit drugs within the prison, this material could not be shared with the applicant because of the risk that the sources of that material could be identified or that the manner in which it was obtained could lead to the identification of a source. I carefully considered in consultation with the Security Governor at Prison Service Headquarters and the Security Manager in Magilligan, the extent of the information which could be shared with the applicant and provided him with the gist of that information on 7 May 2010. At the conclusion of the case conference I advised the applicant that he was not being held in the HRU for any punitive purpose but rather as a means to help him avoid any further anti-social behaviour and the attendant risk of causing harm to others."**

[24] At para 14 of his first affidavit D/G Glendinning stated:

> **"In the present case I had regard to the amount of information that could be provided to the applicant without placing any source or method of intelligence gathering at risk. I discussed this issue with the case conferences on 4 April and 7 May 2010.** *[I am not sure what the reference to the case conference on 4 April refers to].* **In light of those discussions I attempted to provide the applicant with as much information as I could to**

allow him to make meaningful representations in response."

Scrutiny of the Intelligence Material

[25] In response to issues which were raised by the Court in the course of the hearing on 22 June D/G Glendinning swore a third affidavit commenting specifically on the scrutiny afforded to the intelligence materials which were relied upon in relation to the prisoners including the applicant who were transferred to the HRU in March/April 2010. He avers as follows:

> **"3. It may be of assistance if I describe in broad terms the mechanism for collating intelligence within the Northern Ireland Prison Service. Intelligence materials are recorded by prison staff on documents called Security Information Reports (SIR's). These reports are the originating unsanitised document and may relate to any relevant events such as an observation of a particular prisoner, a report of a conversation, a report of a monitored telephoned call, a report of a complaint from a prisoner or relative or any security related matter. The sources of the information are diverse and can be from both inside and outside the prison.**
>
> **4. The SIRs are then passed to the Security Department (in this case at HMP Magilligan) who then transfer the contents of the SIRs onto a computer database. The information is then analysed and evaluated by a trained officer, where necessary the information is brought to the attention of the Security Manager and the Governor.**
>
> **5. All intelligence reports are graded using the 5X5X5 system which assesses the reliability of the source and the accuracy of the information. This system of grading is used by all UK prisons, police, and other law enforcement agencies providing for a common and consistent level of assessment.** [The deponent does not set out the grade of the intelligence relied on].
>
> **6. In the case of each of the prisoner's transfer to the HRU I was provided with the SIRs from the database for the period from November 2009 onwards. This was the case with both Prisoner McAree and Prisoner Watson. On examining the SIRs from the database I was able to see the narrative content of the**

information passed into the system from prison officers and the analysis of that information by the security department.

7. In the case of Prisoners McAree and Watson I can confirm that I saw the SIRs prior to their transfer to the HRU. At that time I had not discussed the extent of the material which I could disclose to prisoners with the Head of Security Information Branch at Prison Service Headquarters, Governor Pat Gray. Accordingly, I afforded the prisoners a bare outline of the material. I was particularly concerned about the content of some of the SIRs, not necessarily relating to either McAree or Watson, which related to detailed information from outside the prison. In particular I was concerned to learn of arrangements for the payment of drug debts, owed to prisoners who were selling drugs in the prisoners, by family or friends depositing money into external accounts.

8. I had therefore carefully examined the SIRs for each of the prisoners prior to the first case conference. In the period prior to the second case conference I discussed the intelligence material with Governor Gray. I was not specifically exploring the authenticity of the intelligence material with Governor Gray because we had both seen the SIRs and could make a ready evaluation of the source and content of the material. Rather I was seeking his approval for the extent of the material that could be disclosed to the prisoners. I am not a Security Governor and there are aspects of intelligence to which I am not fully privy. For that reason I deferred to Governor Gray on the issue of extent of disclosure. He authorised me to make disclosure in precisely the terms recorded in the minutes of the case conferences. Governor Gray and I were not involved in the scrutiny of the authenticity of the intelligence materials because this was an issue on which I had already reached a considered view based on the SIRs from the database.

9. When I attended at the case conferences on 7 May 2010 I held a file for each of the prisoners under review. The file contained the SIRs from the database for each prisoner from November 2009 onwards. I did not make copies of those SIRs and I did not provide copies to the members of the IMB in attendance, nor did they seek copies. It would not be the case that

originating intelligence documents are copied or further disseminated for reasons of the serious risks involved in identifying sources, methodology or techniques involved in reporting the information. I also had a note of the gist of the information cleared by the Security Governor at Headquarters which I read to the prisoner.

10. I am aware that an issue has arisen as to whether I subjected the intelligence materials to 'anxious scrutiny'. That is not a phrase I would routinely use however, I can say that I carefully considered the original source reports and the related security commentary in relation to both McAree and Watson. I was satisfied that the reports were true and reliable. In the case of McAree there were a number of different sources of information indicating involvement in the illicit trade in drugs within the prison. In the case of Mr Watson there were fewer sources but I was still satisfied that the documents indicated a significant degree of involvement by him also.

11. I did not distribute the SIRs to the other members of the case conference nor did I provide them to the two IMB members who were there in a monitoring role. If the IMB members had raised any query about the intelligence material I had them in my possession at the case conference and would, in the absence of the prisoner, have permitted them to examine the SIRs. I am aware that the IMB members are familiar with these types of intelligence reports from the discharge of their function with respect to Rule 32 restrictions of association.

12. I am advised that the Court has enquired as to whether any greater detail can be afforded with respect to some aspects of the gist which were clear for dissemination at the hearing on 7 May 2010. In the case of Mr McAree the applicant was told that there was intelligence that:
(i) he had displayed threatening behaviour towards an officer;
(ii) he was one of three prisoners who had carried out an assault on another prisoner;
(iii) he had used threatening language to a member of staff during a search.

13. I have reviewed the wording of the 'gist' I gave at the case conference on 7 May 2010 and I do not believe I can elaborate further."

[26] The applicant in his submissions contrasted the contents of para 12 of his first affidavit set out above and paras 8 and 9 of the third affidavit. Whereas in para 12 of his first affidavit he says he carefully considered in consultation with the Security Governor and Security Manager the *extent* of the information which could be shared with the applicant paras 8 and 9 (the applicant submits) indicate that the issue of the extent of the information which could be shared was delegated to the Security Governor in the manner set out in those paragraphs.

The Role of the IMB

[27] At para 9 of his first affidavit D/G Glendinning referred to the membership of the case conference on 7 May 2010 and the fact that there were two members of the IMB present. The respondent's skeleton argument at para 18 emphasised that the applicant had been provided with information in a context where the material was "subject to oversight by the Independent Monitoring Board at a meeting chaired by a Senior Governor". And again at para 9 of the same skeleton argument the respondent pointed out, in reference to the case conference on 7 May 2009, that the meeting was attended by two members of the IMB. The respondent thus sought to pray in aid as a countervailing safeguard to the lack of disclosure to the applicant the fact that there were two members of the IMB present at the case conference on 7 May *and* that the undisclosed material was subject to oversight by them. In fact this material was not subject to such oversight by the IMB.

[28] Indeed the Chair of the IMB, Brian Collins, has averred that they perceived their role as one of "passive monitoring of the procedure". At para 4 of his affidavit he refers to the specific statutory role of the IMB prescribed in detail in the amendments to Rule 32[1] of the Prison and Young Offender Centre Rules (NI) 1995.

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[1] (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 [independent monitoring board]-

(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 [independent monitoring board] 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 [independent monitoring board] under this rule.

(2D) Unless it is not reasonably practicable, a member of the [independent monitoring board] 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 [independent monitoring board]:

(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 [independent monitoring board] 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 [independent monitoring board] 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 [independent monitoring board] for the purpose of safeguarding national security;

(b) its inspection by the [independent monitoring board] would, or would be likely to prejudice the administration of justice;

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

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

(2I) If the [independent monitoring board] 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 [independent monitoring board] 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 [independent monitoring board] 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.

He points out that in the context of Rule 32 monitoring "the IMB can call for the scrutiny of materials where such materials are relied upon by the prison authorities to justify the restriction of association of a particular prisoner." And in contradistinction to the role described in the Rule 32 context he stated (at para 6) that the IMB were in attendance in a monitoring role, didn't attend to take part in any deliberations or to assist in the making of any determination and that he did not considerate it "appropriate" for the IMB to go beyond such a monitoring function save in those cases where they were empowered by statute to perform a specific role as in the case with Rule 32 segregation.

The Parties Submissions

[29] The applicant submitted that he was not afforded a sufficient measure of procedural protection to satisfy the requirements of fairness because of the non-disclosure to the applicant of the intelligence material and the respondent's reliance upon it in making the impugned decision. They also contended that the evidence provided no indication that the representations made by the applicant in response to the purported "gist" were in fact considered.

[30] The respondent emphasised the context of the decision under challenge being one of internal prison management, that he had been provided with a sufficient "gist" of the information as could be provided , that he had been provided with that information in circumstances where the material was subject to oversight by the IMB and was given an opportunity to make representations which he did make.

Context

[31] The respondent is undoubtedly correct that the context of the present application is that the Court is concerned with an important aspect of prison administration and management concerning a decision to move a prisoner who is suspected of serious drug related criminality to another part of the prison estate for the reasons so effectively set out in D/G Glendinning's first affidavit above.

[32] Rule 9(4) of the Prison and Young Offender Centre Rules 1995 provides that:

> **"Prisoners may be located in such part of the prison as the Governor may determine by reference to their classification and any other factors which he may decide to take into account; and may subsequently be transferred to other locations in the prison either in groups or as individuals."**

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(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.

[33] I agree with the respondent that this power which was being exercised in this case confers on the prison governor a broad empowering discretion as to the placement of prisoners upon their committal and thereafter until their release. Rule 9(4) underpins and must inform any assessment of procedural fairness in the exercise of that discretion. It is common case that the concept of fairness is context sensitive and involves a degree of elasticity. The present case concerned the requirements of procedural fairness applicable not to a trial or other adversarial process but to a decision concerning prison management.

[34] The respondent's description of the specialist unit in which the applicant is housed is set out at para 5 of D/G Glendinning's first affidavit (see para 14 above). Being placed in this unit nonetheless has consequences for the prisoners concerned in terms both of the restrictions on association with other prisoners beyond those in the unit (now numbering eight) and the immediate reduction from Enhanced to Standard regime. Moreover the removal is not time limited and is not necessarily subject to periodic review.

Applicable Legal Principles

[35] The presumptive requirement of sufficient disclosure to enable meaningful and focussed representations is well known. A useful summary of the principles is contained at para 7-057 and para 7-058 of ***de Smith's Judicial Review***[2]**.** Para 7.059 of ***de Smith*** recognises that to the general requirement of sufficient disclosure there are exceptions including where disclosure would be injurious to the public interest or where disclosure is sought of sensitive intelligence information.

[36] Situations arguably analogous to the present case have been considered in ***Re John Thompson's Application*** **[2007] NIQB 8** and ***Re Hart's Application*** **[2009] NIQB 57**[3] and in ***Re Wilson's Application*** **[2009] NIQB 60**. All three cases concerned issues of prison management: in ***Hart,*** a decision to impose restriction of association[4], and in ***Thompson*** and ***Wilson***, decisions relating to the placement of a prisoner within the prison estate[5].

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[2] "7.057 - If prejudicial allegations are to be made against a person, he must normally … be given particulars of them before the hearing so that he can prepare his answers. The level of detail required must be such as to enable the making of "meaningful and focused representations". In order to protect his interests, the person must also be enabled to controvert, correct or comment on other evidence or information that may be relevant to the decision and influential material on which the decision-maker intends to rely; including, in certain cases, disclosure of representations or information provided by third parties".
7.058 - If relevant evidential material is not disclosed at all to a party who is potentially prejudiced by this, there is *prima facie* unfairness, irrespective of whether the material in question arose before, during or after the hearing".

[3] Which both considered principles developed in *Re Conlon's Application* [2002] NICA 35 and *Re Henry's Application* [2004] NIQB 11.
[4] Under Rule 32 of the Prison and Young Offenders Centre Rules (Northern Ireland) 1995.
[5] Governed by Rule 9(4) of the Prison and Young Offenders Centre Rules (Northern Ireland) 1995.

[37] It is difficult for an applicant to respond in any detailed or meaningful way to allegations that he has been involved in drugs when the information that is relied upon cannot be disclosed to the person affected. Of course it is that handicap which gives rise to considerations of whether countervailing safeguards are available and whether fairness requires their deployment. In answering that question the Court must be careful not to over judicialise administrative procedures connected with prison management. Accordingly, Art6 cases such as ***AF*** **[2009] UKHL 28** and other cases engaging adversarial rights are not of much assistance in this context. Even in Rule 32 cases disclosure may not be possible but the decisive role of such undisclosed material does not of itself render the decision unfair. In Rule 32 cases the statutory supervisory role of the IMB may itself be attenuated if the material cannot be disclosed to the IMB. The genuine inability to disclose material on public interest grounds does not necessarily impair the fairness of the decision in a prison management context.

[38] In ***Re John Thompson's Application*** **[2007] NIQB 8**, Weatherup J considered fairness in the context of de-selection from the Foyleview Resettlement Unit at HM Prison Magilligan:

> **"Fairness in this context would involve in the first place that there must be information which is judged to be reliable upon which it might be determined that there are grounds for removal and de-selection of the prisoner. Secondly the information must be available to be assessed by the governor making the decision that the prisoner should be removed and de-selected. Thirdly the gist of the concern should be disclosed to the prisoner. Fourthly the details of the information and the sources of the information should be protected to the extent that that is considered necessary in the interests of the complainants. Fifthly the independent scrutiny by the governor should include anxious scrutiny of the information available and the risks to informants" [23].**

[39] And in a Rule 32 case Weatherup J at paras 18 – 20 of ***Hart*** said:

> **"In circumstances where sufficient information cannot be disclosed a countervailing requirement of procedural fairness concerns the scrutiny of the intelligence material relied on in the making of the decision. Where sufficient information cannot be disclosed to a prisoner the right to know and to respond to the adverse case is diminished. To restore the balance of procedural fairness it is necessary to provide for a system of scrutiny of the information**

> **that cannot be released to the prisoner. Thus *Henry's Application* [2004] NIQB 11 provided for the requirements of procedural fairness in such circumstances, in that case under the former rule 32 scheme involving the Board of Visitors. First of all there must be anxious scrutiny of the information by those charged with making the decisions to restrict association, whether as Governors in the prison or at Prison Service headquarters. In addition those with a supervisory role, who are now represented by members of the IMB, must have access to the information and be able to subject it to such scrutiny as they consider necessary.**
>
> **... If a decision maker is to take account of intelligence information that will not be disclosed to a prisoner then the decision maker must become familiar with and scrutinise the intelligence information and nor merely rely on a general report that there is intelligence of drugs or bullying or threats, as the case may be."**

Where disclosure is subject to constraint by reason of other interests the decision maker is required to make a *judgment* as to the extent to which the provision of information should be limited in order to protect the rights of others. And this is an area in which the decision maker must be accorded a discretionary area of judgment [see ***Hart*** at para 12].

Fairness analysis

[40] Regarding the crucial case conference on 7 May the applicant does not appear to have been given any or sufficient advance warning. At that conference the prison governor read from a written summary and outlined the nine matters upon which the respondent relied. It would have been much preferable if the applicant had been notified a reasonable time in advance that this conference was being called and informed of its purpose and provided with a copy of the document which was going to be read to him. In principle, the material which can be disclosed should be disclosed to the prisoner in advance of the conference/hearing at which he is going to be given the opportunity to make representations. This will enable the prisoner to consider the material in advance and if need be to take legal advice in respect of the contents. Disclosure in this manner will also avoid the possibility of a multi-disciplinary conference having to be postponed to give the prisoner adequate time to study the materials and take such advice as he requires. Not only was it not provided in advance it was not even provided to him at the conference itself – it was simply read to him. I do not consider that this was, in the circumstances, a satisfactory method of proceeding. It may create difficulties for prisoners in assimilating the information. Insufficient notice of the hearing and of the "gist" may

further impair the opportunity to make meaningful representations. Proceeding in this manner, if not justified, can also generate a perception of unfairness. There has been no explanation as to why no advance notice was given to the applicant of the conference or of its purpose or why he wasn't provided with a copy of the 'gist' either at all or before the conference itself. This is exacerbated by the fact that the material upon which the respondent originally indicated they were relying was considerably expanded upon in the 'gist'.

[41] The Court is invited by the respondent to rely on the 7 May conference as a bona fide discharge of the in context requirements of fairness. Plainly on the respondent's case this meeting was an important scheduled multi-disciplinary event with, unlike the first conference, two members of the IMB present who, the respondent had contended, echoing Weatherup J's comments in ***Hart*** at para 18, had an oversight role in relation to the withheld material. To secure the attendance of the prison officers, psychologists and IMB members at this conference would have required a not insignificant degree of organisation and pre-planning and prior notice. The conference appears to have been convened for a purpose which was not foreshadowed in the procedures document. Despite the importance that the respondent invests in this conference it is remarkable that no notice was given to the applicant that such a conference was to be convened or the purpose of such a conference.

[42] In respect of the "gist" the D/G averred that no further information could be supplied to the applicant or indeed to the Court. I have reservations about this. Merely by way of example paras 2 and 8 of the "gist" refer to allegations that he displayed threatening behaviour towards an officer and that he used threatening language to a member of staff. It is not immediately obvious why it would not have been possible for further details of those matters to be disclosed since they involve allegations of indiscipline towards prison staff.

[43] The undisclosed intelligence material was scrutinised by the respondent in terms of its *authenticity* and although not referred to in the first affidavit, in his third affidavit D/G Glendinning indicated his satisfaction that the information relied upon was *true* and *reliable*. It is also clear that he was not relying on some general report. The grading of the intelligence has not been disclosed. The material relied upon came from "many and varied sources" leading the prison authorities to conclude that the applicant was engaged in selling Class A and other illicit drugs within the prison.

[44] The IMB was not present at the first conference but it was at the second. The respondent in its written argument relied on the IMB's presence at the second case conference ***and*** its oversight role echoing the kind of procedural safeguard the court had in mind in ***Hart.*** As a result of the affidavit evidence now furnished it has been established that they did not subject the material to oversight It has not been explained why this was so. The 7 May conference was subsequent to the grant of leave. Whether this inspired the change in composition of the membership of the

conference is a matter of conjecture. Their involvement and the respondents original attribution of an oversight role made it structurally closer to a Rule 32 case. Whatever the reason for their involvement their presence and their alleged oversight role in respect of the withheld material was deployed by the respondent to resist the judicial review. Since the IMB was present and assuming that their presence was not intended as a mere fig leaf upon which reliance could be placed (as it was) to defend the judicial review, oversight by the IMB could have provided a simple, expedient and valuable safeguard. The erroneous attribution of and reliance upon an oversight role that the IMB did not discharge and which they thought inappropriate is unsatisfactory. It may at least demonstrate a recognition of the need for such a countervailing safeguard to be available in non disclosure HRU removals as in Rule 32 removals.

[45] There is no indication in the minute of the meeting of 7 May that the respondent, having received the applicant's representations, considered them and took them into account. The D/G had indicated that a decision would be given in due course. No decision was in fact issued by the Governor other than the decision that is implied by the continuation of the applicant's transfer to the HRU. No decision was provided to the applicant at the meeting on 7 May and as Mr Collins has pointed out in his affidavit at para 10, the Governor had indicated that he would consider what had been said and would provide a decision to the applicant. That did not occur. No explanation has been advanced for the failure to do that which the Governor said he would do.

[46] In light of the above analysis and the accumulation of concerns I am satisfied that the hearing of 7 May 2009 must be considered procedurally inadequate and unfair to the applicant. When the parties have had the opportunity to study the detail of the judgment I will discuss with Counsel the precise Order required in the circumstances.

Attendance at Mass

[47] So far as the discrete issue of attendance at Mass is concerned the Deputy Governor averred at para 14(b) that he did not accept the applicant's contention that the restriction on attending Mass was made without justification. He states that the applicant was expressly told that his transfer to the HRU was as a result of their belief that he was involved in drug dealing within the prison. And he then states:

> **"The movement and transfer of drugs between prisoners occurs most frequently at times and places where prisoners congregate in large groups. For that reason prisoners transferred to the HRU are restricted in accessing situations where prisoners gather *en masse*. Regrettably, it has been the experience of Senior Management within HMP Magilligan that attendance at Mass is one of the instances used to transfer contraband materials between prisoners. For**

that reason the prisoners in HRU are not permitted to attend Mass within the prison population".

[48] He then deposes to the efforts that had been made to facilitate the applicant's manifestation of his religious beliefs pointing out that prior to the grant of leave the prison service attempted to reach an agreement with their Prison Chaplain, Father O'Hagan, whereby he would say an additional Mass on Sunday for the small cohort of prisoners in the HRU. He then continues:

> **"Father O'Hagan initially agreed to do so but because of practical difficulties which arose with his own duties as a Diocesan Priest he was unable to attend. I had secured an arrangement with Father O'Hagan wherein he would attend at the HRU at 9.00am on Sunday mornings in order to celebrate Mass with the prisoners therein before going on to celebrate a further Mass with the main prison population at 9.30. This arrangement was subject to Father O'Hagan's other duties as he is not an employee of Northern Ireland Prison Service and he cannot be compelled to make adjustments to the existing provision. I have been advised that on Sunday 23 May 2010 when Father O'Hagan arrived to conduct Mass at Halward House he was confronted by three prisoners who subjected him to hostile abuse about his alleged co-operation with the prison authorities and about arranging alternative Mass. Two prison officers witnessed this scene ...**
> **(e) Father O'Hagan has also offered to conduct pastoral visits with any of the prisoners held in the HRU who so request."** [He then provides details of the extent to which the applicant availed of pastoral visits].

[49] D/G Glendinning swore a second affidavit dealing with this issue:

> **"On 23 May 2010 the Roman Catholic Chaplain attended at Halward House to conduct a religious service for the inmates in the HRU at approximately 0900 hrs. He was approached by a number of inmates, including the applicant, and subjected to behaviour which he described as hostile. As a result of this incident Father O'Hagan has rescinded his offer to provide Mass in Halward House for the HRU inmates. This is a decision taken by the Chaplain in light of the conduct of the applicant and others. Neither I nor the Northern Ireland Prison Service can compel the Chaplain to conduct an additional religious service for these prisoners."**

[50] He then refers to a signed statement by Father O'Hagan detailing the background to these events. He also exhibited a report on the incident from Officer Thom who was present at the scene on the morning of 23 May. In Father O'Hagan's statement he says he has been a Chaplain at the prison since 1996 and that he has never before "had to endure such an intimidating barrage of abuse. The offer of Mass on a Sunday morning in the HRU is hereby rescinded."

[51] D/G Glendinning also received a report on this incident from Officer Thom who was present at the scene on the morning of 23 May 2010.

Article 9

[52] The applicant contended that his removal to the HRU constituted an unlawful interference with his Art 9 right to manifest his religion as a Catholic. He contended that the restriction on attending the celebration of Mass by the Prison Chaplain constituted an interference with his Art 9 rights.

[53] The right to manifest religious belief is not an absolute right. Art 9(2) provides:

> **"Freedom to manifest ones religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in the democratic society in the interests of public safety, for the protection of public order, health or morals or for the protection of the rights and freedoms of other."**

[54] Rule 56 of the Prison and Young Offender Centre Rules (NI) 1995 provides:

> **"All prisoners shall be allowed to practice their religion to the extent compatible with good order and discipline."**

This Rule is entirely compatible with the Convention and no submission to the contrary has been made by the applicant.

[55] In my view the respondent made sufficient efforts to ensure that the qualified right to manifest religious belief was not unduly circumscribed by the transfer of those prisoners to the HRU. Provided the Court is satisfied that any interference with the manifestation of beliefs is "prescribed by law" and is "necessary in a democratic society" in pursuance of the legitimate aims set out in Art 9(2) then there is no breach of the Convention. On the facts of this case the applicant has been relocated for a legitimate purpose relating to the maintenance of good order and discipline in the prison and significant efforts have been made to facilitate him and others in the HRU in attending at the celebration of Mass.

[56] I have already referred to the incident that occurred on 23 May 2010 when Father O'Hagan attended the HRU to celebrate Mass with the applicant. And I have sent out above the statement of the Priest and the Prison Officer who was a witness to the incident which developed. As Mr McGleenan observed in his skeleton argument, the statement of the priest indicated that the applicant was less concerned with upholding the first precept of the Catholic Church than the pleadings in the case might indicate.

[57] The decision of the Chaplain to withdraw his offer to provide Mass for the applicant is attributable directly to the applicant's inappropriate conduct and that of the inmates who accompanied him on 23 May.

[58] I therefore agree with the respondent's submissions that any restriction on the applicant's right to manifest his religion is in accordance with Rule 56 of the Prison Rules and can be justified by reference to Art 9(2). Furthermore, the extent of the restrictions placed upon the applicant is his own fault given that the efforts made to ensure that he could attend Mass were frustrated by his own actions. Accordingly I dismiss the challenge based on Art 9.

[59] The applicants claim of adverse interference with his studies in alleged breach of his Convention rights was only faintly advanced during submissions and no substantive relief has been claimed in the Order 53 statement. The applicant has not established any breach.

Conclusion

[60] Accordingly I dismiss the first applicants convention based claims. In the case of both applicants their challenge to the procedural fairness of the hearing on the 7th May is upheld.