

Prisoner – restrictions on wearing of Easter Lily – separated regime – whether distinguishable from integrated regime – Art 10 of ECHR – whether policy compatible with Art 10.

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

Delivered: **09/02/08**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN’S BENCH DIVISION (JUDICIAL REVIEW)

**IN THE MATTER OF AN APPLICATION BY TERENCE DAMIEN
McCAFFERTY FOR JUDICIAL REVIEW**

GIRVAN LJ

[1] The applicant is a sentenced prisoner at HMP Maghaberry (“the prison”). He seeks an order of certiorari quashing an adjudication decision of 19 April 2006 whereby he was awarded three days in a punishment segregation unit for failing to comply with the order required of a prison officer who had required him to remove an Easter Lily which he was wearing on Easter Sunday, 16 April 2006, when he was returning from Mass to his cell. He seeks a declaration that the Prison Service policy regarding the restriction on the wearing of Easter Lilies by prisoners in separated accommodation was disproportionate and contrary to Article 10 of the ECHR.

[2] At all material times the applicant was detained in a part of the prison known as Roe House which houses prisoners from a Republican background who are detained therein under a separated regime. In his affidavit Mr Longwell, the Governor of the prison, states that the purpose behind the establishment of separated conditions is to provide security and safety to the prisoners accommodated therein and to ensure the safety of staff and good order in the prison. So-called “Compact Conditions” are designed to amount to as minimal an amount to an adjustment of the normal prison regime in as minimal way as possible whilst securing the objectives of security and safety in the prison.

[3] According to the applicant's affidavit he attended Mass in Roe House on Easter Sunday, 16 April 2006, wearing an Easter Lily. When he left Mass he was informed that he had to remove his Easter Lily. He claims that this was the first time that prison officers had made it known that objection was being taken to the wearing of the Easter Lily in Roe House. He claims that other prisoners were wearing the emblem without objection. He asserts that he has a right to wear the Easter Lily as an aspect of his Article 10 rights under the Convention. He further contends that the prison policy by permitting the wearing of Easter Lilies in cells but not elsewhere makes no sense, particularly in the separated wing since only other Republicans and members of staff would see the emblem.

[4] The Governor in his affidavit avers that the prison policy is that prisoners can wear Easter Lilies in their cells but they were not permitted to wear them outside their cells. The wearing of regalia and emblems is subject to control within the prison environment through the use of Standing Orders and Prison Service policy. Emblems perceived to be identified primarily with the Northern Ireland conflict must be seen as potentially disruptive and dangerous to the interests of good order and discipline. While it is true that in the context of prisoners, such as the applicant, detained in separated regime premises, prisoners are less likely to come into regular contact with non-Republican prisoners, such as the applicant, the potential for contact could not be ruled out. The restriction on the wearing of emblems which might be inflammatory and, therefore, likely to affect the good order and discipline in the prison still apply. Any relaxation of the rules regarding the wearing of emblems such as Easter Lilies for separated Republican prisoners alone would be detrimental and have an unwelcome impact on Prison Service policy, the imperative of which is to provide as equal and common a set of conditions as possible for detention of all prisoners, irrespective of their background and status. There would be an artificial distinction between separated and normal integrated prisoners' regimes if Easter Lilies were permitted in the separated premises. It is specifically not the intention of the separated regime to allow prisoners held in such conditions to benefit from any enhancements as a result of them being separated prisoners.

[5] Governor Kennedy in his affidavit states that prisoners are not permitted to bring Easter Lilies onto the premises. He was aware that prisoners make their own Easter Lilies out of paper or white cloth. He recognises that on occasions a strict policy is not enforced in situations when governors or officers are faced with intimidation and "conditioning" with the aim of securing de facto agreement to the wearing of the lilies. Prison officers must have a discretion not to inflame any given situation.

[6] In Re Byers [2004] NIQB 23 Weatherup J had to consider the validity of the policy in relation to the wearing of Easter Lilies in the context of the integrated regime. In para. [14] of his judgment Weatherup J concluded that for the purposes of Article 10 “expression” had to be interpreted widely. He was satisfied that the wearing of an emblem could amount to an “expression” of opinion for the purposes of Article 10. Restrictions on expression in the form of wearing of emblems were not a necessary incident of imprisonment. Accordingly the restrictions in the wearing of the Easter Lily amounted to an interference with freedom of expression for the purposes of Article 10(1) and had to be justified under Article 10(2). In paras. [38] and [29] Weatherup J stated:

“[38] The restriction on the wearing of the Easter Lily was in pursuance of a legitimate aim, namely the prevention of disorder and crime by maintaining order and discipline in the prison. The context of the restriction was an integrated prison with necessarily confined conditions housing prisoners from a divided society. The Easter Lily was judged by the prison authorities to have the potential to occasion disorder and to be what the Fair Employment Commission classed as a conflict emblem. Certain emblems are perceived as representing primarily one tradition or another. Certain of those emblems also come to be regarded as representing the unlawful paramilitary activity of that tradition. When an emblem comes to represent conflict rather than simple tradition its character changes. That change occurs when the perception of others is that the emblem primarily represents conflict. To those who adopt such an emblem it may be seen as representing only tradition but it is its general perception that is determinative of its character.

[39] Restrictions on the wearing of emblems are a necessary incident of imprisonment in the interests of good order and discipline. In the context of maintaining good order and discipline in a prison in Northern Ireland those emblems perceived to be identified primarily with conflict must be considered potentially disruptive. The extent of the interference with freedom of expression is limited to the wearing of this particular emblem in the communal areas of the prison where potential disruption would arise. The extent of the risk that the restriction seeks to avoid namely disorder and crime is a significant concern in

the context of a prison. The extent to which a less restrictive alternative might be adopted other than to contend for the absence of any restriction has not been advanced. The proposed alternative is to permit the use of the Easter Lily in the communal areas. If there is to be a restriction the present approach represents minimal interference. In all the circumstances I am satisfied that the restrictions on the use of the Easter Lily are proportionate and are not in breach of Article 10(2)."

[7] The thrust of the applicant's case is that there is a fundamental difference between the position of prisoners in the integrated part of the prison and that of Republican prisoners separately housed in the separated regime in Roe House where there is little or no real contact on a daily basis with non-Republican prisoners. The context accordingly was quite different, it was argued. The ratio of Weather up J's decision was that the restriction was justified in an integrated prison with necessarily confined conditions housing prisoners from a divided society. The extent of the interference with freedom of expression was limited to the wearing of the particular emblem in the communal areas of the prison where the potential for disruption could arise. In the area which is the subject of the separated regime the potential for conflict was minimal and a requirement to remove the lily if the Republican prisoner was going into contact with non-Republican prisoners would be all that was needed to cater for the risk of conflict. The policy is enforced and the separated regime went beyond the minimum necessary to maintain order and discipline.

[8] The Prison Service's argument was that the Prison Service's imperative of minimising the distinction between integrated and separated prisoners and preventing development of Maze style paramilitary control justified the same policy consistently in the separated and the integrated part of the prison. Even in separated conditions it is not possible to ensure complete lack of interaction between prisoners of different backgrounds. There was a need to protect the rights of those (other than prisoners) who may come into contact with a prisoner wearing such an emblem and to ensure a neutral working environment. The limitation in permission to wear such lilies in cells only was a minimal and proportionate restriction in this regard. There was a pressing social need which justified the restriction. Mr Coll, on behalf of the Prison Service, stressed that the court must judge the proportionality of the respondent's policy objectively giving due weight to the experience and knowledge of the Prison Service making its value judgment. He called in aid Lord Bingham's speech in Begum [2006] 2WLR 719 para. 134 where he stated that the court should not over rule in that case the headteacher's staff and governors in the judgment they reached in the sensitive matter of appropriate Muslim dress in the school they were running. Mr Coll did not take issue

with Weatherup J's conclusion in Re Byers that the wearing of an Easter Lily was a restriction in the exercise of a right of freedom of expression which had to be justified.

[9] I entertain some doubt in relation to Weatherup J's proposition that restrictions on expression on the form of the wearing of emblems are not a necessary incident of imprisonment. Those involved in the running of prisons must inevitably lay down parameters for acceptable behaviour amongst prisoners and are entitled to determine canons of reasonable conduct and behaviour which could legitimately include the mode of attire of prisoners. The total or partial exclusion of emblems that have come to be symbols of conflict seems to me to be a legitimate exercise of prison organisation and control, the aim of prison policies of control and organisation being to prevent disorder within the prisons and to ensure as neutral an environment as possible for all prisoners and staff. For my part I would be slow to say that the Prison Service should be restricted in the exercise of its powers and duties of establishing a disciplined prison regime by giving priority to rights of self-expression which a prison service may reasonably consider to be incompatible with good prison control. However for present purposes having regard to Mr Coll's concession I shall proceed on the basis that Weatherup J's formulation of the law in Re Byers was correct.

[10] With that in mind I accept that the competing arguments of the parties are finely balanced. There is force in the applicant's argument that a prisoner in the separated regime is in a different position from prisoners in the integrated section of the prison and certainly passages in Weatherup J's judgment lends support to the argument that the restriction was justified in that case in the communal part of the prison to prevent disorder with the implication that in a separated part different consideration would or might apply. However, in Re Beyers the court was not called on to address the issue which arises in this case. Weatherup J did recognise that the response to political expressions and the wearing of a symbol that has given rise to a general perception that it is a symbol of conflict must be assessed in the context of a prison and the need to maintain order and discipline in such a setting. The overall policy operated by the Prison Service was soundly based. The separated regime introduced a qualification in the prison arrangements at the prison but the Prison Service is entitled to ensure an objectively based system throughout the prison so far as possible. The Prison Service is entitled to take steps to ensure that the inroads into the overall prison system brought about by the separated regime are strictly limited. Applying the same restriction to all prisoners achieves that legitimate policy aim, leaving the prisoners in Roe House with the same rights as other prisoners to wear the Easter Lily in their cells. The Article 10 right is a right "to hold opinions" which is not restricted by the policy and "to receive and impart information and ideas." The prisoners in Roe House are free to exchange and discuss political ideas. Restrictions on the right of wearing a political symbol is a

minimal interference with the Article 10 right justifiable having regard to the contingencies of ensuing an objectively based prison policy. The Prison Service policy represents in my view a balanced and proportionate response and is justified for the reasons put forward by Mr Coll.

[11] In the circumstances I dismiss the application.