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(subject to editorial corrections)*

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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRLAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

McCartney's Application [2008] NIQB 127

AN APPLICATION BY
THOMAS McCARTNEY FOR JUDICIAL REVIEW

WEATHERUP J

[1] This is an application for judicial review of a decision of the Prison Service of Northern Ireland made on 27 August 2008 that the applicant, a sentenced prisoner at HMP Magilligan, should receive only closed visits until 2 November 2008. By closed visits was meant that the visitor and the applicant would be physically partitioned from each other so as to prevent personal contact between them. Mr Sayers appeared for the applicant and Ms Murnaghan for the respondent.

[2] The applicant applied for leave to apply for judicial review on 8 September 2008 and claimed interim relief suspending the decision to impose closed visits. The proposed respondent objected to the grant of leave and interim relief on the basis that the impugned decision had been made because the applicant had been involved in receiving smuggled drugs during prison visits. In the circumstances the application for leave was adjourned, no interim relief was granted, the proposed respondent was required to file an affidavit seeking to justify the decision and in order to achieve a speedy resolution of the issues a rolled up hearing took place to address both leave and the substance of the application.

[3] The background, as set out in the applicant's affidavit, indicates that he is a prisoner at HMP Magilligan. On Saturday 2 August 2008 he received a visit from his father which was interrupted by two prison officers. The visit was terminated on the basis that he was suspected of having received an unauthorised article in the course of the visit. He was strip searched and placed in an observation cell and not permitted to return to his own cell. No article was discovered.

[4] The applicant was charged with the disciplinary offence of possession of an unauthorised article. At adjudication on 11 August 2008 the applicant denied the charge. Video evidence was available of the conduct of the applicant and his father. The adjudicating Governor found that the applicant had been in possession of an unauthorised article.

[5] Meanwhile on 4 August 2008 an application had been made by prison staff to Prison Service headquarters to impose restricted visits on the applicant. On 6 August 2008 a member of headquarters staff decided to impose closed visits pending the adjudication of the applicant. After review on 13 August 2008 it was decided that the applicant's father would be banned from visiting for three months and subject to closed visits for three months and all other visitors would be subject to closed visits for six months. The applicant had been receiving regular visits from his father, his six year old son and his grandmother. By letter of 27 August 2008 the Prison Service set out concerns in respect of the applicant's father and confirmed that he was to be prohibited from visiting for three months followed by a period of closed visits for three months. The letter also indicated that the period of closed visits in respect of all other visitors for six months had been reviewed and had been reduced to three months ending on 2 November 2008.

[6] The application for judicial review does not seek to challenge the decision in so far as it relates to the applicant's father, but rather as it relates to visits by the applicant's son and grandmother, by imposing closed visits until 2 November 2008.

[7] The applicant's grounds for judicial review, as amended by the applicant, deal with two broad matters namely that the decision was not in compliance with the requirements of the Instruction to Governors and further that the decision amounted to a breach of the Article 8 right to respect for private and family life as being unnecessary and disproportionate.

[8] The Prison and Young Offenders Centre Rules (Northern Ireland) 1995 at Rule 67, 68 and 73 relate to restriction of visits.

67(1) Except as provided by statute and in these Rules, a prisoner shall not be permitted to communicate with any person outside the prison, or that person with him, without the authority of the Secretary of State.

(2) Notwithstanding paragraph (1) above, and except as otherwise provided in these Rules, the Secretary of State may impose any restriction or condition, either generally or in a particular case, upon the communications to be permitted between a prisoner and other persons if he considers that the restriction or condition to be imposed-

(a) does not interfere with the convention rights of any person;

or

(b) (i) is necessary on any of the grounds specified in paragraph (3) below;

- (ii) reliance on the grounds is compatible with the convention right to be interfered with; and
- (iii) the restriction or condition is proportionate to what is sought to be achieved.

- (3) The grounds referred to in paragraph (2) above are-
- (a) the interests of national security;
 - (b) the prevention, detection, investigation or prosecution of crime;
 - (c) the interests of public safety;
 - (d) securing or maintaining prison security or good order and discipline in prison;
 - (e) the protection of health or morals;
 - (f) the protection of the reputation of others;
 - (g) maintaining the authority and impartiality of the judiciary;
- or
- (h) the protection of the rights and freedoms of any person.

(5) Subject to paragraph (2) above, the governor may at any time, having regard to circumstances obtaining or expected to obtain in the prison, suspend all or any visits for such period as the Secretary of State may approve.

(6) Subject to paragraph (2) above, the Secretary of State may require that any visit, or class of visits, shall be held in facilities which include special features restricting or preventing physical contact between a prisoner and a visitor.

.....

73(5) If there are reasonable grounds for suspecting that anyone visiting a prisoner is bringing in or taking out any article for an improper purpose, or contrary to the rules and regulations of the prison, or that his conduct may tend to subvert discipline or good order, the governor may suspend his visit and remove him from the prison.

- (8) Without prejudice to any other powers to prohibit or restrict entry to prisons, the Secretary of State may prohibit visits by a person to a prison for such periods of time as he considers necessary if the Secretary of State considers that such a prohibition is-
- (a) necessary on any of the grounds specified in rule 68A(4); and
 - (b) is proportionate to what is sought to be achieved by the prohibition.

The grounds specified in Rule 68A(4) are -

- (a) the interests of national security;
- (b) the prevention, detection, investigation or prosecution of crime;
- (c) the interests of public safety;
- (d) securing or maintaining prison security or good order and discipline in prison;
- (e) the protection of health and morals;
- (f) the protection of the rights and freedoms of any person.

[9] The relevant provisions in relation to the decision to impose restricted visits on the applicant's son and grandmother were therefore Rule 67(6) requiring the decision to be made by the Secretary of State. Under Rule 67(2) the decision should not involve interference with a Convention right (in the present case the right to respect for private and family life under Article 8). Alternatively the decision must be necessary under one of the Rule 67(3) grounds, with reliance being compatible with the right and the restriction being proportionate.

[10] Instruction to Governors, IG20/07, issued on 21 November 2007 bears the title "Procedures for Applying for Visiting Restrictions on Prisoners and their Visitors" and includes the following -

"When the Governor is satisfied that allowing a prisoner or visitor to visit in normal open conditions poses a threat

- to security, discipline and good order of the prison,
- to the safety of any person

he may seek the agreement of either the Deputy Director of Operations, his deputy, the Duty Director, or the Head of Establishment Support Branch (ESB) to impose visiting restrictions." (paragraph 2)

.....

"Given the potential engagement of ECHR Article 8 rights when considering visiting restrictions it is essential that **both** the prisoner and his/her visitor(s) are advised that restrictions are being sought and invited to make representations." (paragraph 4)

"Prior to making any application for visiting restrictions to Headquarters :-

- a. the prisoner should be interviewed by a senior officer or governor and told what is proposed and why.
- b. during the interview the prisoner should be invited to make representations as he wishes.
- d. a record of the interview must be kept and provided to the decision maker.” (paragraph 5)

.....

“In addition the restriction may not necessarily endure for the stipulated period and will be subject to periodic review. The Governor may, at any time during the course of a restriction, apply to Headquarters to modify or lift the restriction.” (paragraph 7)

[11] The respondent’s affidavit was sworn by Governor Craig, based at Prison Service Headquarters. He refers to the applicant serving a sentence of nine years’ imprisonment for offences that include possession of Class ‘C’ controlled drugs and possession of Class ‘A’ controlled drugs. As a result of the incident of 2 August 2008 the applicant’s father was arrested and a file has been sent to the Public Prosecution Service. This was the second incident in which the applicant’s father was found to be in breach of the requirements for visitors in that on 21 June 2008 he was found to have dropped a wrap of tablets in the visiting area and a piece of suspected cannabis resin was found in his locker. He was also arrested on that occasion.

[12] On 4 August 2008 Governor Craig received an application from Senior Officer Hayter, the officer in charge of the visits area at HMP Magilligan, for restricted visits to be applied to the applicant. Governor Craig refers to the matters that he took into account, namely Rule 78 and Rule 67, the guidance issued in the form of Instructions to Governors IG20/07, the applicant’s record of visits, the applicant’s core details in order to consider whether his index offence pointed to the possibility that he might be involved in the distribution of drugs, the outcome of the applicant’s voluntary drug tests, which had all been negative, and the applicant’s representations referred to in an e-mail from the Senior Officer.

[13] Governor Craig made a provisional decision on 6 August 2008 and he considered that the applicant and his father had a complete disregard for visiting protocols and procedures and that their actions constituted a threat to the maintenance of security, good order and discipline in the prison and, accordingly, he imposed closed visits pending the outcome of the adjudication. The adjudication

was completed on 11 August 2008 and Governor Craig's colleague, David Wilson, reviewed the applicant's case and decided on 13 August 2008 that, other than in relation to his father who was banned for visiting for three months followed by three months closed visits, the applicant was to have closed visits for a period of six months.

[14] The rationale for the decision was stated to be that it would alleviate any pressures on the applicant to accept unauthorised articles and would reduce the risk of any further incidence of smuggling. The applicant made an internal appeal and a solicitor's letter was forwarded on behalf of the applicant and as a result the matter came back to Governor Craig. Governor Craig reconsidered the case and on 27 August 2008 decided that the restriction on the applicant's father would not be altered and the period of closed visits with other visitors would be reduced from six months to three months, which would expire on 2 November 2008.

[15] Governor Craig stated that he gave careful consideration to the impact of the closed visits on the applicant's young son and grandmother and he concluded that it was appropriate to continue to impose the closed visits as it would obviate the risk that the applicant's visitors could be pressurised into passing unauthorised articles. He considered that there was a real risk that the child and the grandmother could have been pressurised in this way. He stated that it was commonplace for children to be exploited in order to facilitate the smuggling of contraband into the prison, and he said that the problem of visitors secreting contraband on children is such that special attention is paid to searching children to reduce this risk.

[16] In the reconsideration he also took account of the applicant's Article 8 rights and those of his visitors and he concluded that there was a legitimate aim in reducing the illegal importation of drugs into the prison, and that the interference was necessary and proportionate in the interests of securing discipline and good order as well as preventing disorder and crime within the prison. Further, he stated that there was not a formal system of monthly review of closed visiting restrictions, but that he was amenable to reviewing the situation at any stage had the applicant advised of any significant changes in his circumstances.

[17] The Instruction to Governors constitutes guidance only and does not involve mandatory requirements in respect of which any non-observance could be said to constitute unlawful action. However parts of the Instruction may contain matters that are otherwise mandatory requirements. An instance would be the identity of the decision maker who could lawfully make the decision on behalf of the Secretary of State, who is the designated decision maker under the Rules. Paragraph 2 of the Instruction to Governors, issued on behalf of the Secretary of State, provides that the decision to restrict visits has to be made by specified persons at headquarters. The decision of 27 August 2008 that is under challenge in this judicial review was made by Governor Craig. A further affidavit from Governor Craig establishes that he made the decision as Head of Establishment Support Branch and the Court was informed that he was also the deputy to the Deputy Director of Operations at Prison

Service Headquarters. In either capacity Governor Craig was an authorised decision maker under paragraph 2 of the Instruction to Governors.

[18] Further, while representing guidance only, the Instruction may contain matters that would otherwise represent the requirements of procedural fairness in the circumstances. Paragraph 4 provides for representations from the prisoner and the visitors. Paragraph 5a provides for the interview of the prisoner, paragraph 5b provides for representations by the prisoner and paragraph 5d provides for a record of the interview to be provided to the decision maker. I am satisfied that procedural fairness required that the applicant be afforded an opportunity to make representations to be considered by the decision maker, either before or, where circumstances demanded, after the decision.

[19] Dealing first with the visitors, the son and the grandmother (and indeed any other visitors) were not afforded an opportunity to make representations. Mr Sayers very properly conceded that it was not practicable to require consultation with all visitors in the event of a restriction on all visitors and that that not something that would arise in the present case.

[20] The position in relation to the applicant is different because the guidance specifies that a prisoner should be interviewed by a Senior Officer or Governor and invited to make representations and that a record should be kept of the interview. There was a dispute about whether or not the prisoner had been interviewed. The respondent relied on an e-mail of 4 August 2008 sent to Prison Service Headquarters which indicated that the applicant was asked by Senior Officer Smyth how visit restrictions would impact upon him and he was recorded as replying that his father was due up in two weeks and that he would like to have open visits with him. The entry is typed as "son" and amended in pen to "father". There was not any explanation for that amendment.

[21] While the Instruction refers to an "interview" these are not circumstances in which to expect strict formality in relation to the provisions. The guidance refers to an interview with a senior officer. The email confirms that the applicant was asked by a senior officer about the restrictions and how they would impact on him and the applicant made a response which was recorded and included in the e-mail of 4 August which went to the decision maker. On the other hand there should not be encouragement for an over-casual approach to the manner in which these representations are obtained, but the applicant was interviewed in the sense that his views were sought and obtained and recorded and relayed. This was sufficient for the requirements of procedural fairness in the circumstances.

[22] The Instruction provides for the recording of the prisoner's representations and that they be relayed to the decision maker. Again it is not necessary to be over-prescriptive about the interpretation of that part of the guidance. The essence would be that a record should be provided to headquarters. Procedural fairness would require that the decision maker should be made aware of the nature of the prisoner's

representations. A written record would be evidence of the representations. A note of the applicant's comments was provided to headquarters in the form of the e-mail. Whether a record of the interview was kept is perhaps a different matter and it is not known whether or in what manner any formal record of interview was kept. If there is another record it presumably states little more than that which appears in this e-mail, as the applicant does not contend that the email version of his exchanges with Senior Officer Smyth is incomplete. The decision maker was aware of the applicant's representations and that was sufficient for the requirements of procedural fairness in the circumstances.

[23] Paragraph 7 of the guidance provides for periodic review of the decision. Apparently the equivalent guidance to prison staff in England provides for monthly review, but that does not apply in Northern Ireland where there is no specified period of review. Again procedural fairness would require that all such decisions be capable of review as circumstances demanded. Governor Craig dealt with this issue in his affidavit by stating that there would be a review of the decision if an applicant were to advise Governor Craig of any significant change in his circumstances. Accordingly the prisoners are expected to apply for review of the decision, presumably by raising the matter in the prison to be referred to headquarters.

[24] The text of the guidance states that there will be periodic review, which certainly implies that it is not necessarily a matter to be triggered by the applicant. The guidance appears to contemplate a reference from the Governor to headquarters, whether triggered by the applicant or by staff within the prison. Again, recognising that this is guidance only, it would be desirable if working practices reflected the terms of the guidance. A reflection of the guidance would involve a system of periodic review that takes place whether or not the prisoner gives notice of a change of circumstances. Just how that is put into practice is a matter for the prison authorities.

[25] There is a further issue arising under paragraph 2 of the Instruction. It is provided that the application for the restriction on visiting to Prison Service Headquarters should be made by "the Governor" being satisfied that the restriction is required. Other parts of the Instruction refer to the recommending Governor. It appears that the application to Prison Service Headquarters is not the sole preserve of the governing Governor and may be made by an officer of the rank of Governor. The present case involved an application by a Senior Officer rather than a Governor. While the Instruction amounts to guidance only it would be desirable to adhere to the specified procedures in relation to the identity of the parties who are involved. However there is otherwise no legal requirement as to the identity of the party who should make the application to headquarters. Ultimately the essential requirement concerns an authorised decision maker, a requirement that was satisfied in the present case.

[26] Article 8 provides for the right to respect for private and family life as follows.

“(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.”

[27] A prisoner retains those rights that are not necessarily removed by reason of imprisonment. Receiving visitors is clearly restricted as a result of imprisonment. In the present case there has been a further restriction in the manner in which visits would otherwise be conducted. In Watson’s Application [2002] (unreported) Kerr J did not accept that the imposition of closed visits engaged Article 8. I am prepared to assume, without deciding, that there was an interference with the applicant’s right to respect for private and family life for the purposes of Article 8. When there is interference with a qualified right it must be established by the public authority that the interference is legally permitted, serves a legitimate aim and is proportionate.

[28] The kind of restriction imposed in the present case is legally permitted under the 1995 Rules. There is an overlap between consideration of the requirements of Rule 67(6) and Article 8, where the former is drafted in terms that reflect the qualified rights under the European Convention. I will consider the issues in relation to justification for an interference under Article 8(2) and then consider how that translates into justification under Rule 67(6).

[29] Governor Craig specifies the legitimate aim as alleviating pressure on the applicants to accept unauthorised articles and to deal with the risk of the illegal importation of drugs into the prison. This corresponds with the specified aims under Article 8(2) of the prevention of crime, the protection of health and the protection of the rights and freedoms of others.

[30] The issue becomes that of proportionality. A summary of the approach to proportionality was set out in Christian Institute’s Application [2007] NI 86 at paragraph 83 which (deleting reference to a “legislative” objective which is not the present context) requires consideration of-

- (1) The overarching need to balance the interests of society with those of individuals and groups.
- (2) The recognition of the latitude that must be accorded to legislative and executive choices in relation to the balance of public and private interests.
- (3) The objective being sufficiently important to justify limiting the fundamental right.

- (4) The measures designed to meet the objective being rationally connected to it, that is, the measures must not be arbitrary, unfair or based on irrational considerations.
- (5) The need for proportionate means being used so as to impair the right or freedom no more than necessary to accomplish the objective, that is, that the measures are the least intrusive, in light of both the objective and the infringed right. _ The Court should consider whether the measures fall within a range of reasonable alternatives, rather than seeking to ascertain whether a lesser degree of interference is a possibility.
- (6) The need for proportionate effect in relation to the detrimental effects and the advantageous effects of the measures and the importance of the objective.

[31] The interference must be rationally connected and involve proportionate means and proportionate effects. The applicant contends that there was no need to impose restrictions on the applicant's grandmother and son and in any event the son is only a young boy and there are special searches that are made in relation to child visitors. On the other hand the respondent contends that there are real risks in relation to drugs in prison, that visitors may can bring drugs into the prison, that visitors could be pressurised to bring drugs into prison, that prisoners could be pressurised to accept imported drugs, that items could be passed between visitors as well as between visitors and prisoners, that the applicant has a history of connection with drugs and has been adjudicated for importation of an unauthorised article into the prison. In essence the applicant has had restrictions imposed on visitors who have not been found to have been engaged in trafficking into the prison and the respondent nevertheless identifies the applicant and his visitors as presenting a real risk of drugs being passed into the prison.

[32] The adjudication of the applicant is not the subject of this judicial review challenge. The applicant has been identified as being involved in the importation of an unauthorised article into the prison. The circumstances are such that the unauthorised article was passed to the applicant during a visit and was secreted in his person so as to be irrecoverable by prison staff. There are reasonable grounds to suspect that the unauthorised article concerned drugs by reason of the circumstances concerning the applicant's father on that and a previous occasion. There are reasonable grounds to suspect that the applicant has been connected with the presence of drugs in the prison on more than one occasion in recent times. The applicant's visitors are a source of risk of further importation. Whether or not the applicant is the user of those drugs or can demonstrate that he has passed a drugs test is beside the point. I am satisfied that the restriction is not arbitrary or unfair or based on irrational considerations.

[33] The applicant's visits from his son and grandmother have not been suspended. Rather the restriction is on physical contact between the applicant and the visitors. It is limited to a period of three months and will expire on 2 November.

It is liable to variation if warranted in the circumstances. I am satisfied that the restriction involves proportionate means and has proportionate effects.

[34] This translates into the application of Rule 67(6) where the Secretary of State may restrict the applicant's visits if he considers that the restriction does not interfere with Article 8. This the Secretary of State considered to be the case, but as stated above I have assumed that the restriction involved such interference. In that event three conditions have to be satisfied under Rule 67(2). First, that the restriction must be necessary on permitted grounds, which in this case are the prevention of crime, securing or maintaining good order and discipline in prison, the protection of health and the protection of the rights and freedoms of others. Second, that reliance on the grounds is compatible with Article 8, which in this case involves a coincidence of permitted grounds under Article 8 and Rule 68A(4) where securing or maintaining good order and discipline, on the facts of this case involving the control of importation of drugs, may be seen as an aspect of the prevention of crime. Third, that the restriction must be proportionate, which, as stated above, I am satisfied to be the case.

[35] The application for judicial review will be dismissed.