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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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2016 No. 04/9222/01

IN THE MATTER OF AN APPLICATION BY HUGH PATRICK McCORMICK FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF DECISIONS TAKEN BY A GOVERNOR OF HMP MAGHABERRY

ON 21 MARCH 2017, 22 MARCH 2017 AND FURTHER DECISION OF 23 MARCH 2017 AND 20 APRIL 2017

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COLTON J

Background

[1] The applicant, Hugh McCormick, is a serving prisoner at HMP Maghaberry. He was sentenced to a determinate period of imprisonment of 15½ years (7¾ custody/7¾ licence) on 16 December 2016 having been convicted of an attempted murder which occurred on 2 July 2011.

[2] His early release date is 30 May 2023.

[3] On 21 March 2017 the applicant was removed from his cell on Braid 3 within the prison, and was relocated to the Care and Supervision Unit. His right of association with other prisoners was removed under the provisions of Rule 32 of the Prison and Young Offenders Centre Rules (Northern Ireland) 1995.

[4] This decision was reviewed on 23 March 2017 and 20 April 2017 as a result of which the Rule 32 period was extended by 28 days and subsequently reduced to 14 days. A further review was carried out on 24 April 2017 and it was decided that it was safe to return the applicant to integrated accommodation so that the applicant was no longer subject to a Rule 32 determination.

[5] On 22 March 2017 the applicant's security status was upgraded from Category B to Category A. On his return to integrated accommodation his previously "Enhanced" status has not been reinstated and his status is now "Standard".

History of these proceedings

[6] The applicant initiated judicial review proceedings pursuant to Order 53 of the Rules of the Supreme Court on 21 April 2017 challenging the placement on "Rule 32" and the decision to increase his security status to Category A. The matter was dealt with on an urgent basis and was supported by an affidavit from the applicant dated 21 April 2017.

[7] The respondent replied by way of an unsworn affidavit from the Governor HMP Maghaberry, which was subsequently sworn on 12 May 2017.

[8] Because the Rule 32 procedure had been discontinued the applicant submitted an amended Order 53 statement on 10 May 2017 confining his challenge to the upgrade in his security classification from "B" to "A" and the decision to reduce his regime from "Enhanced" status to "Standard" status. This amended application was supported by a supplementary affidavit from the applicant dated 17 May 2017 in which he also responds to the affidavit from the Governor.

Reasons for the decisions challenged

[9] The factual background to the matter is set out in the Governor's affidavit in the following way:

> "5. Intelligence and information came to light that the applicant, along with other prisoners, had potentially been involved in serious criminal activity both inside and outside of Maghaberry Prison. The intelligence further indicated that a member of staff had become involved in this criminal activity.
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> 6. The relevant intelligence was gathered from various sources including telephone monitoring, security information reports and CCTV. This information was relayed to the PSNI for their consideration. Following consideration by PSNI and meetings between PSNI officers and NIPS staff the PSNI conducted an investigation.
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> 7. In particular the PSNI undertook a search and arrest operation on 21 March 2017. During the course of this operation a serving prisoner officer, who

worked in Braid House was stopped from entering the prison, had his car searched and was arrested by PSNI. This prison officer was subsequently interviewed by PSNI. A follow up search of the prison officer's home uncovered a significant amount of cash, drugs and a number of mobile phones.

8. The PSNI operation also led to the arrest of some of the applicant's family members.

9. Concurrent to the PSNI operation that took place on 21 March 2017 NIPS security staff removed the applicant and other prisoners from Braid House and located them in another area of the prison. Searches were then completed of Braid House.

10. As a result of all of the aforementioned investigative work, intelligence was gathered and is currently held by HMP Maghaberry's Security Department. This information has been shared and scrutinised with senior managers, the Deputy Governor, the Governing Governor, Director of Prisons, the Director General and with senior members of PSNI.

11. On consideration of the intelligence gathered it appeared that serious criminal activity has taken place both inside and outside the prison. Specifically the intelligence relates to the trafficking of illegal substances and articles into the prison and some other criminal activity. It appears that the serving prison officer, who is currently suspended, was being used to traffic such items into the prison.

12. Currently both PSNI and NIPS investigations are still on-going into this matter."

[10] All of the decisions challenged including the Rule 32 decision are obviously related. The Rule 32 decision was primarily based on ensuring the integrity of the investigations being undertaken by NIPS and PSNI and to ensure the prevention of further trafficking of illicit articles into the prison. After a number of reviews including meetings attended by the Independent Monitoring Board it was decided on 24 April 2017 that it was safe to return the applicant to integrated accommodation and thus the Rule 32 decision is no longer the subject matter of a challenge.

The applicant's challenge

[11] The applicant seeks the following relief:

> "An order of certiorari to bring up into this honourable court and quash the decision of NIPS whereby it upgraded the applicant's security classification from 'B' to 'A' and reduce his regime from 'Enhanced' status on which the applicant hitherto had been placed.
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> A declaration that the decision of NIPS to rely on 'intelligence' is unlawful, unreasonable, in breach of the applicant's Article 6 and Article 8 rights and the applicant was denied the legitimate expectation he would be treated with fairness, justice and respect.
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> A declaration that the decision of NIPS to find the applicant 'failed to meet the expectations of an enhanced prisoner' because he is under investigation is unlawful, unreasonable, in breach of the applicant's Article 6 and Article 8 rights, contrary to natural justice and the applicant was denied the legitimate expectation he would be treated with fairness, justice and respect.
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> A declaration that the decision of NIPS to rely on the PBNI assessment of the applicant as being dangerous in determining his security categorisation was unlawful and unreasonable and the applicant was denied the legitimate expectation he would be treated with fairness, justice and respect. …."

[12] At the hearing the applicant was represented by Mr Conor Maguire BL. I am grateful to him for the concise manner in which he presented the case on behalf of the applicant and for the authorities he submitted at my request after the end of the hearing. I am also grateful to Mr Matthew Corkey BL who appeared on behalf of the proposed respondent who, like Mr Maguire, dealt with the issues in a precise and focused manner.

[13] In essence the applicant argues that the Governor has in effect elevated an "on-going investigation" into a de facto finding of guilt or adjudication against him. In particular he focuses on the fact that the applicant has not been told the details of the case which has been made against him and that he has been denied the opportunity to make meaningful representations to the Governor.

[14] He challenges the decision on two broad public law grounds namely:

(a) Procedural fairness which would have required providing sufficient information to the applicant to make appropriate representations and failing to conduct an adequate or proper review of the decision.

(b) Acting unreasonably in the *Wednesbury* sense in that by refusing a proper review or appeal the Governor reached a conclusion no reasonable Governor properly directing himself could have reached on the evidence available.

[15] Although not included in the Order 53 statement, the applicant further contends in his affidavit that there has been disparity of treatment between him and other prisoners who were also the subject matter of the investigation arising from the information which led to the matters about which the applicant complains.

Procedural unfairness

[15] This issue really centres on the information that has been provided to Mr McCormick.

[16] Throughout the course of the Rule 32 procedure the applicant was provided with a "gist" of the allegation against him. It appears from the written records concerning the on-going reviews of the Rule 32 procedure that he was informed that he had been involved in criminal activity both inside and outside of the prison. He was told that the detail of the information was exempt from disclosure under section 29 of the Data Protection Act 1998 ("the 1998 Act").

[17] In relation to the raising of his security classification he was informed by letter dated 22 March 2017 that he was being raised from Category B to Category A and that the decision was "… based on information, and due to an on-going PSNI investigation".

[18] In relation to the change from Enhanced to Standard status when this issue was raised in correspondence by his solicitors on 2 May 2017 the Prison Service responded on 3 May 2017 in the following terms:

> "Enhanced prisoners are expected to demonstrate exceptional behaviour and be fully compliant with instructions and orders. Your client is currently under investigation by the PSNI and NIPS, for reasons you would be aware of, therefore he has failed to meet the expectations of an enhanced prisoner."

[19] These reasons have been expanded in the response to the pre-action protocol letter dated 29 March 2017.

[20] The letter makes it clear that the decision to increase the status is based on the on-going investigations, including the sensitive information received in relation to that investigation.

[21] The letter sets out the purpose of security categories, namely, to ensure that prisoners are held with a level of security commensurate with the threat they pose inside the prison and to the general public and others outside the prison should they escape or abscond from lawful custody.

[22] Reference is made to the sensitive and confidential information received which has resulted in a live and current investigation relating to serious criminal activity both inside and outside HMP Maghaberry.

[23] It is pointed out that the applicant is in prison for a serious offence, attempted murder, with a lengthy sentence. It is argued that the on-going investigations which include the sensitive information received necessitate the increase in security status.

[24] The matter is further dealt with in the affidavit of the Governor to which I have previously referred.

[25] The Governor argues that security categories effectively ensure that prisoners are held with the level of security commensurate with the threat they pose inside the prison and to the general public outside the prison should they escape or abscond from lawful custody.

[26] The affidavit sets out the definition of Category A and Category B prisoners.

[27] He points out that the setting of security categories is carried out by examining information and incidents involving the prisoner's behaviour.

[28] The decision to raise the category was made on foot of the new information gathered in the investigation, combined with the underlying information that NIPS had that was relevant to the applicant's security categorisation. Factors which were taken into account for consideration of assessing that a prisoner is a Category A prisoner include but are not limited to:

- Drug association;
- Risk posed to staff and other prisoners;
- Risk posed to general public escape;
- Escape risk;
- Levels of control exerted over prisoners and/or others;
- Motivation/access to resources to effect an escape.

[29] In paragraph [24] of his affidavit the Governor avers:

> "The intelligence available to NIPS and the liaison with PSNI indicated that the applicant had a history of drug association, his index offence was serious and involved extreme violence, the intelligence available indicated that he had exerted influence over other prisoners/members of staff and the intelligence available to NIPS further indicated that the applicant had access to resources outside the prison that could assist in escape.
>
> In the applicant's case the intelligence and information available to NIPS indicates that the applicant clearly meets the criteria for a Category A prisoner."

[30] As a general rule procedural fairness requires that a prisoner has a right to know and to respond to the reasons for an upgrade in his security category and status. What should be disclosed depends on the context of the decision which is made. Rule 32 decisions that rely on intelligence information was dealt with in this jurisdiction in the case of **Re Hart's Application for Judicial Review** [2009] NIQB 57. In that particular context the right to know was described as a "qualified right".

[31] Weatherup J sets out the principle in his judgment as follows:

> "[11] The approach to the use of intelligence as a basis of removal from association under Rule 32 was considered *Re Conlon's Application* [2002] NIJB 35 and *Re Henry's Application* [2004] NIQB 11. Procedural fairness requires that a prisoner removed from association under Rule 32 has 'a right to know and to respond' to the reasons for his removal. The Governor should at an early stage, but not necessarily before the removal of a prisoner from association, give, where possible and where necessary, sufficient reasons for removing him from association and affording the opportunity to make representations about its justification. Whether this applies to the extension of a period of removal from association depends on the circumstances and comprehensive rules cannot be laid down. The prisoner should be given sufficient information to permit him to understand why it has been decided that he should be removed from association. However in some cases it may not be possible to disclose to the prisoner the

> information upon which the decision is based. That may arise where all or some of the information relied on is based on intelligence. In most such cases the gist of the reasons for removal from association could be given.
>
> [12] What is required in order to comply with the obligation to provide the gist of the reasons for removal? The decision-maker should provide sufficient information, subject to the requirement to protect sources and processes, to enable the applicant to understand the nature of the allegations and to respond. This exercise involves a balance of competing interests between the applicant's right to know and to respond and the right to protection of the person providing the information and the public interest in securing relevant information and the maintenance of good order and discipline in the prison. The starting point is the provision of sufficient information to enable the prisoner to understand the reasons for removal, if so required. Where such 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. The decision-maker must be accorded a discretionary area of judgment in relation to the extent to which the release of information should be limited. If an application requires information or further information in order to understand the reasons for removal then that should be requested."

[32] In this case the court is not dealing with a Rule 32 application but rather with a broad discretion vested in the prison Governor.

[33] It is clear that the decision has been based on intelligence and confidential information suggesting that the applicant has been involved in serious criminal activity both inside and outside of Maghaberry Prison and allegedly involving other prisoners, persons outside the prison and a member of staff. Specifically the intelligence relates to the trafficking of illegal substances and articles into the prison and that the serving prison officer was being used to traffic such items.

[34] The broad sources of the information are set out in the Governor's affidavit. This is precisely the type of information which it may not be possible to disclose to a prisoner. Withholding of the detail of such information can be justified on the basis

of protecting sources of information, the methods of gathering information and for ensuring the integrity of an on-going live investigation.

[35] This is recognised in the authorities dealing with this type of issue. Furthermore it has been given statutory recognition in the 1998 Act. If, for the purposes of this argument, one assumes that the information upon which the Governor has acted comes within the definition of disclosable personal data contained in section 7 of the Act, section 29 provides an exception to any entitlement to disclosure in respect of data processed for the purposes of the prevention or detection of crime or the apprehension or prosecution of offenders.

[36] In relation to Category A assessments I have regard to the line of authorities in England and Wales. The "hands off" approach of the courts was exemplified by the judgment of Cantley J in the case of **Payne v Home Office** when he held that:

> "The full panoply of the rules of natural justice is wholly inappropriate to the classification of prisoners."

[37] This approach was abandoned by the Divisional Court in the case of **R v Home Secretary ex parte Duggan** [1994] 3 All ER 277. In **Duggan**, Rose LJ accepted the argument that allocation for Category A had a direct effect on a prisoner's prospects of release on licence and thus affected the liberty of the subject. In reality, no Category A prisoner would ever be considered suitable for immediate release either by the Parole Board or the Home Secretary. In the circumstances, fairness therefore demanded that the purely administrative process of allocating some prisoners to Category A be subject to a duty of prior disclosure of the gist of every matter or fact and/or opinion relevant to the proposed categorisation decision so that the prisoner could make effective representations to the decision making body. This duty however was expressed to be subject to the requirements of public interest immunity. Thus, the Prison Service is not obliged to disclose any material which might imperil prison security or the safety of informers. The court also held that the initial decision to place a prisoner in Category A could be taken without affording the foregoing procedural safeguards to the prisoner concerned.

[38] Subsequent decisions to **Duggan** focussed on what was required for the purposes of gisting the documents provided by Category A review teams.

[39] The high point in relation to disclosure for Category A reviews was reached in the case of **R (Lord) v Secretary of State for the Home Department** [2003] EWHC 2073. The case concerned a Category A prisoner who had made an application under the 1998 Act for full disclosure of the reports on which the "gist" prepared for his Category A review had been based. He had received a considerable amount of material in respect of his request, but the requested reports had not been disclosed. The claimant applied for judicial review arguing that he was entitled to further disclosure on the grounds that the gist did not accurately represent the views of the authors of the different reports relating to his review and that, further and

importantly, he was entitled to disclosure of the full Category A review reports complied in relation to him, pursuant to the terms of the 1998 Act. During the course of the proceedings Mumby J examined the reports on which the gist in question had been based and considered further evidence indicating that the gist in the case was representative of the content and form of gists being drafted in the years following Duggan which tended to be standardised in their format and formulaic in their terms. Having reviewed the documents Mumby J was highly critical of the gists which he described as "entirely unsatisfactory". The gists in that case omitted, concealed and suppressed vital information that the adverse views on him were not unanimous. Indeed, some of the views in that case were decidedly favourable to him. Unsurprisingly, the court was highly critical of this state of affairs and came to the conclusion that "at a minimum" a gist should:

(a) state in terms whether the views expressed are unanimous or not;

(b) where views are divided, should indicate the numbers of views pro and con; and

(c) set out the gist of each of the reported views.

Thus, when dealing with Category A reviews the court came to the conclusion that a continuation of a classification of Category A called for a high degree of procedural fairness.

[40] As a consequence the practice in the Prison Service in England and Wales is that Category A prisoners are provided with full copies of their review reports on request, subject to the exemptions on disclosure set out at section 29 of the 1998 Act.

[41] The facts of this case however are significantly different. The basis of the decision in this case is clearly intelligence based and relates to alleged serious criminal activity and to an investigation which is ongoing. Information relating to security matters is held on the Prison Information System ("PRISM"). Any security information held on PRISM is held for the purposes of prevention or detection of crime or for the purposes of the apprehension or prosecution of offenders and as such is exempt from disclosure under section 29 of the 1998 Act.

[42] I have some concerns about the adequacy of the gist provided by the Prison Service prior to the service of the Governor's affidavit. The letter of 22 March 2017 simply referred to "information" and "an on-going PSNI investigation". It is not clear that the verbal communication with the applicant during the Rule 32 process gave any further detail. Similarly the response to the pre-action protocol letter provides no further detail on the nature of the information or of the on-going investigation. However the details set out in the Governor's affidavit and in particular in paragraphs 5 to 12 are sufficient to enable the applicant to understand the basis upon which the Prison Service has acted. In the circumstances therefore I

have come to the conclusion that an adequate gist has been provided at this stage in the process.

[43] The applicant is aware of the broad basis upon which the information has been gathered by the Prison Service. He is aware of the nature and seriousness of the allegations that arise from that material. In the letter outlining the decision of 22 March 2017 he was provided with the means to respond to the decision should he wish to do so. Other than through these proceedings he has not in fact responded.

[44] It is important to understand that the decision in relation to security classification is not a judicial decision but rather an administrative process in which the Governor has a wide discretion.

[45] No breach of a particular prison rule or policy has been identified or established. In these circumstances I have come to the conclusion that it is not arguable that there has been procedural unfairness in relation to the particular decision in this case to re-categorise the applicant as a Category A prisoner.

[46] Whilst the affidavit of the Governor does not deal with the issue of Enhanced status it seems to me that identical considerations apply. The decision to change the status is based on the material which has given rise to the security reclassification and he has been provided with a sufficient gist of that information.

[47] I do not consider that there is any procedural unfairness in relation to this issue.

Wednesbury Unreasonableness

[48] Given the nature of the intelligence available to the Governor, the potentially serious criminal activity disclosed and the fact that investigation into this matter is ongoing I do not see that it can be argued that the decision made by the Governor in respect of the applicant's security categorisation and status was unreasonable or unlawful. Such a decision is one clearly within the ambit of reasonableness open to the Governor and entirely reasonable on the basis of the nature of the information available to him.

[49] In my view it is unnecessary for the prison authority to be required to go into the matter further – indeed it would be impractical to do so without compromise to the efficient operation of the prison authority's functions. It is not for the court to second guess the judgment exercised by the Governor in relation to his security category and status based on the information available to him. There is insufficient material to support a finding – even at the level of arguability – that the decision of the Governor is unreasonable in the Wednesbury sense.

[50] For the avoidance of doubt any alleged interference with the applicant's Article 6 or Article 8 rights would clearly be justified.

[51] The applicant makes the case that he has not yet been interviewed or questioned by the PSNI in relation to this matter despite his request that this be done. Obviously, it is not for the Governor to dictate to the PSNI how it should conduct its investigation but it is anticipated by the Prison Service that the applicant will indeed be interviewed by the PSNI. In the interim it is argued that the Prison Service should not conduct a parallel investigation and initiate any disciplinary action or adjudication against the prisoner.

[52] At this stage I do not see how this approach could be considered to be unreasonable.

[53] In relation to the disparity argument I do not see that there is an evidential basis to support any assertion which would justify any interference with the decisions challenged. The applicant suggests that other prisoners who were arrested as a result of this ongoing investigation have had different approaches to their security classification. In response the Governor says that all of the prisoners identified were subject to Rule 32 to some degree and that all prisoners who had their security categories amended upwards remain in the higher categories.

[54] In any event one would expect that there will be different outcomes for individual prisoners depending on their degree of involvement in the alleged unlawful activity. Any disparity is not in fact evidence of illegality in respect of the decision making process and would in fact be the natural outcome of the prison service applying individual considerations to individual prisoners. There is nothing in this allegation which would be sufficient to constitute arguable grounds for judicial review.

Conclusion

[55] It is clear from the above that at this stage I have come to the conclusion that the applicant should not be granted leave to seek judicial review of the decisions challenged. However, this does not mean that the applicant is estopped from bringing a subsequent challenge to an ongoing decision to maintain his status as a Category A prisoner with standard status.

[56] It is imperative that this matter is kept under active review by the Prison Service. The Prison Service must monitor the ongoing investigation and respond to any developments insofar as they impact upon the alleged role of the applicant in any criminal activity. Furthermore, the Prison Service is clearly obliged to conduct an annual review of the applicant's status. According to the Governor this review will be chaired by the NIPS Director of Operations who will consider all relevant up to date information relevant to the risk posed by the prisoner. At that stage the prisoner would clearly be entitled to all relevant up to date information including any reports provided to the Director, the prisoner's prison record, his criminal record, materials from Probation Board of Northern Ireland and any other materials available to the NIPS which are considered by the review. Insofar as this contains

any intelligence or confidential material retained on PRISM then the prisoner must be provided with an adequate gist prior to the review decision.

[57] I therefore conclude that the applicant should be refused leave for judicial review.