Neutral Citation No. [2013] NIQB 87 | *Ref:* **MCCL8946**

Judgment: approved by the Court for handing down | *Delivered:* **04/07/13**

*(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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Re McCrea's (Anthony) Application [2013] NIQB 87 (Leave Stage)

IN THE MATTER OF AN APPLICATION BY ANTHONY McCREA FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

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McCLOSKEY J

FACTUAL FRAMEWORK

[1] The basic facts underlying this judicial review challenge are well documented and are largely uncontentious.

[2] The Applicant is a sentenced prisoner accommodated at Her Majesty's Prison Maghaberry. He challenges a decision to restrict his association under Rule 32 of the Prison and Young Offenders Centre Rules (NI) 1995 (as amended). This provides, in material part:

> "(1) Where it is necessary for the maintenance of good order or discipline, or to ensure the safety of officers, prisoners or any other person 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."

By Rule 32(2), a restriction of a prisoner's association for a period exceeding 72 hours requires the agreement of the Department of Justice ("*the Department*"). The remaining provisions of Rule 32, beginning with paragraph (2)A, establish an elaborate machinery requiring interaction and information sharing with, and imposing responsibilities on, the Independent Monitoring Board ("*the Board*").

[3] The Applicant was committed to prison on 30th March 2011. His anticipated release date is 27th March 2019. He is described as a person with a mental health

disability who suffers from a long standing drug addiction. A letter dated 21st June 2013 from the Northern Ireland Prison Service ("*the Prison Service*") contains the following useful summary:

> "… Your client, from July 2012, following a serious incident within the prison, has been Pathway managed by a multi-disciplinary team. This team consists of a manager from the Prison Safety and Support Team, a Personality Disorder Practitioner, a member of the Offender Management Unit Team and the manager of the Donard Therapeutic Programme …..
>
> This Pathway team regularly discussed your client in regular meetings which he attended and had the opportunity to input [sic]. The Pathway plan agreed at these meetings was progressive …
>
> On 4th June 2013, your client was moved from the Care and Supervision Unit ["**the CSU**"] to the Donard Therapeutic Landing …. Regrettably, a number of incidents and allegations from other prisoners ….. necessitated a return to the Care and Supervision Unit on 14th June 2013. These incidents included an assault on a member of staff when your client sought to obtain non-prescribed medications and an allegation that he had taken another prisoner's medication. Mr McCrea was subsequently tested for drugs on 17th June and failed the test."

This letter also describes the involvement of the Board and the Department. Having referred to the Applicant's prison disciplinary record, it concludes:

> …. Your client …. continues to be Pathway managed by his multi-disciplinary Pathway support team."

[4] A letter dated 2nd July 2013 from the Department Solicitor's Office augments and updates the picture as follows:

> "Two members of staff are currently working on a package which will allow the Applicant to exit the Care and Supervision Unit. It is felt that it is in the Applicant's best interests that this exit package be developed carefully without undue haste as the Prison Service …. needs to ensure that it is providing him with the best possible chance of progression by

> exposing him to as little risk as possible. The Applicant's case is under constant review."

This letter also makes reference to the responsibilities owed by the Prison Service to other prisoners and prison staff. It emphasises:

> "The Applicant has already demonstrated his dangerousness by taking a nurse hostage last year and by recently assaulting another member of staff in an attempt to obtain drugs from a dispensing trolley."

[5] The documentary evidence establishes the following:

(a) The Applicant's transfer from the CSU to "normal" prison conditions was effected on 4th June 2013 and lasted one week only.

(b) On 11th June 2013, a "Pathway" contingency plan in respect of the Applicant was prepared.

(c) The risk factors applying to the Applicant are "*… drug and alcohol misuse, negative peer associations, lack of structure/employment, limited victim awareness, impulsiveness, willingness to use weapons/threats of violence and record of non-compliance … Even within the controlled prison environment he has been prepared to use weapons and engage in violent behaviour to obtain drugs. No insight into victim awareness or drug misuse.*"

(d) On 14th June 2013, the Applicant was charged with the disciplinary offence of having assaulted a prison officer. He was confined in the SSU in consequence, under Rule 35(4).

(e) On 16th June 2013, the Applicant was notified that his association was being restricted under Rule 32 for a period of 72 hours, the stated reason being:

> "You are being placed under Rule 32 conditions today in HMP Maghaberry following a previous incident in Quoile House during which a member of staff was allegedly assaulted."

(f) On 17th June 2013, the Applicant was adjudicated guilty of the aforementioned disciplinary offence. The penalty imposed was a loss of evening association for all purposes, including telephone, for 14 days, suspended.

(g) There is a record of the same date, documenting that a prison Governor spoke to the Applicant, explaining to him why the action had been taken, eliciting a response that he understood and had no questions.

(h) On 18th June 2013, an official of the Department acceded to the Prison Service recommendation that the Applicant's association be restricted for a further period of 7 days in order to safeguard himself and others, given that he "… *has recently started to exhibit drug seeking behaviour and has been self medicating*". On the same date, a prison Governor documented an associated interview with the Applicant.

(i) On 25th June 2013, an official of the Department authorised an extended restriction of the Applicant's association, until 2nd July 2013. On the same date, a prison Governor interviewed the Applicant.

(j) A Prison Service record dated 25th June 2013 states:

> "Tony has been interviewed … he indicated that he wanted to stay safe in the PSU, pending an important meeting with [a named doctor] regarding getting a stable medication regime."

This further recorded that while the Applicant was making some progress, attending the Donard Centre during the day, he became progressively aggressive during the interview.

(k) On 27th June 2013, the Applicant attended a case conference at which he was informed that a "person centred management plan" was being developed and that, following completion, consideration would be given to transferring him to normal prison conditions.

(l) On 1st July 2013, an official of the Department acceded to the Prison Service recommendation that the Applicant's restricted association be extended to 8th July 2013. A prison Governor spoke to the Applicant accordingly, on the same date.

[6] The most recent Prison Service record is dated 1st July 2013. This emanates from the CSU and is described as a review assessment. It records the Applicant's "comments" in these terms:

> "Wants nothing to do with it".

The evidence also contains the Applicant's prison disciplinary record. This documents that since 8th April 2011 (one week following his committal to prison) he has been adjudicated guilty of over 30 disciplinary offences. These have included

damage to prison property, abusive and threatening behaviour, taking another prisoner's medication, the unauthorised possession of medication and disobeying orders.

[7] The evidential matrix is completed by a draft affidavit on behalf of the Applicant which was represented to the Court as having been approved by him. This confirms the history that around July 2012 he held a prison nurse at knife point, using a makeshift implement, in an attempt to obtain drugs. He was prosecuted in consequence and was sentenced to 12 months imprisonment. At about the same time he began a lengthy period of restricted association which, as recorded above, endured until 4th June 2013. According to his draft affidavit:

> "*All parties, including myself, were happy with this arrangement and immense improvements were seen …*
>
> *Early in June 2013 I was returned to the general prison population. Because I tried to snatch a box of prescription medication from a member of staff on or about 17th June I was placed on Rule 32 ….*"

The Applicant expresses a hope that he will be transferred to a specialist unit in England for further therapy. As regards the conditions of his restricted association, he states that he can make phone calls twice daily to whosoever he wishes and has access to books, newspapers, television, radio "*etcetera*". He also enjoys normal visitation rights. He opines that the CSU is having an adverse impact on him and claims that he is "*self harming*" without any description or particulars. He further claims to be "*depressed and suicidal*".

THESE PROCEEDINGS

[8] This application was initiated on 2nd July 2013. It was certified urgent by counsel. The Court convened an immediate hearing, the following day. In the interim, the Department Solicitor's Office wrote, in accordance with the Protocol, to the Applicant's solicitors, by letter dated 2nd July 2013. They are to be commended for the speed of their letter, its content and its attachments. Prior to receipt of these materials, the Court had noted certain discrepancies in the papers filed on behalf of the Applicant, which included an affidavit sworn by his solicitor (only). At the initial hearing, these irregularities were accentuated by the materials provided on behalf of the Prison Service. Moreover, it was acknowledged by counsel that the affidavit sworn by his instructing solicitor was inaccurate. In response to a specific question, the court was further informed that the application had been prepared and the solicitor's affidavit had been sworn in circumstances where no consultation with the Applicant had taken place. The court commented that this manifestly deficient application should not have been lodged. The court's concerns were exacerbated by the information that the application had been prepared with the benefit of public

funding. The proposed Respondent was represented at the initial hearing. Rather than dismiss the application, which was highly irregular and had no discernible vestige of merit, the court determined to adjourn it for a period of two days, for two reasons. First, there was no indication that the Applicant should be faulted personally for the aforementioned shortcomings. Second, the possibility of a fresh application, also supported by public funding, could not be dismissed. As noted above, a draft affidavit on behalf of the Applicant materialised during the adjournment.

[9] The grounds of challenge advanced by the Applicant are irrationality, breach of Article 3 ECHR and breach of Article 8 ECHR. My evaluation of each is as follows:

(a) As the above resume of the evidence demonstrates, there have at all material times been ample grounds and justification for the successive restriction of association decisions of which the Applicant complains. His case has demonstrably been the subject of careful and conscientious consideration by the officials concerned and a judgment has been formed accordingly. In argument, Mr White (of counsel) explained that the gist of the suggested irrationality consisted of the failure of the Prison Service to transfer the Applicant to the specialised unit in England. In effect, this resolves to the contention that this was the only rational course available. This contention resolves to an expression of bare opinion on behalf of the Applicant, has no evidential foundation and is confounded by the evidence before the Court, which documents demonstrably careful consideration and attention to the Applicant's case at all times. There is no discernible tint of irrationality.

(b) As regards the challenge advanced under Article 3 ECHR, Mr White contended that the Applicant was the victim of degrading treatment. It was argued that the Prison Service had resorted impermissibly to Rule 32 for punishment, rather than management, purposes. A breach of a positive obligation to act in the Applicant's interests was further suggested. In common with the first ground of challenge, I conclude that this ground is belied by the available evidence. Furthermore, the unsupported and unparticularised assertion that the Applicant has been self harming, set within the context of all the available evidence, is not credible. I find that his case has been the subject of careful, detailed and frequent attention on the part of the officials concerned. There is nothing in the evidence which brings the Applicant's case even within touching distance of the threshold for proscribed treatment under Article 3 ECHR.

(c) The third ground of challenge advanced was that the impugned decisions infringed the Applicant's right to respect for his private life,

contrary to Article 8 ECHR. The specific argument developed was that the impugned decisions frustrated the Applicant's self development. The evidence, in my view, confounds these claims. I find that the Applicant's interests have been carefully considered at all material times during the period under scrutiny viz since 16th June 2013. Mr White sought to argue that the Rule 32 measure was disproportionate, having regard to the entire history of the Applicant's restricted association. Both the confines of the Applicant's challenge and the limited evidence before the Court preclude any review of the period July 2012 to June 2013. The most that can be said is that this was a factor to which the Prison Service was bound to have regard. It plainly did so. Moreover, the Applicant's draft affidavit describes himself as "*happy with this arrangement*". Placing the focus on the most recent Rule 32 measures, I conclude that the evidence fails to establish, even arguably, the interference of which the Applicant complains. Alternatively, insofar as the threshold for interference is overcome, the requirements of a legitimate aim (in particular, protection of the rights, freedoms, health and safety of others) and proportionality are amply demonstrated by the consideration which has been given to the interests of all concerned, including the Applicant, the steps which have been taken to create conditions in which normal association could be resumed, the limited options available in a prison setting, the scrutiny framework in place – which includes independent oversight - and the limited duration of the intrusions challenged.

[10] It is appropriate to recall that judicial review does not entail a challenge to or an appeal against the merits of the conduct of public authorities. It is, rather, a supervisory jurisdiction which operates within the boundaries of certain well settled principles. The threshold to be overcome at this stage of the proceedings is, by established principle, that of arguability. I conclude that the Applicant's case fails to achieve this standard. Accordingly, his application for permission to apply for judicial review is dismissed.