Neutral Citation No: [2018] NIQB 60	*Ref:* **McC10716** **[**
Judgment: approved by the Court for handing down (subject to editorial corrections)*	***Delivered ex tempore : 30 July 2018***

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY BRENDAN McKEE
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

-V-

NORTHERN IRELAND PRISON SERVICE

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MCCLOSKEY J

Compassionate Temporary Release and Judicial Review

[1] Applications by sentenced prisoners for the facility commonly known as Compassionate Temporary Release ("CTR") are commonplace. Typical scenarios are a proposed hospital visit to be with a seriously ill or dying family member or attendance at the funeral or wake of such a person or to attend a child's First Holy Communion ceremony. Equally commonplace are judicial review challenges to negative decisions.

[2] The Court's experience in the present case and in other recent cases is such that some general guidance is considered both timely and essential.

[3] In the first place, the act of submitting to the prison authorities an application for CTR should be notified promptly to the Judicial Review Office ("JRO"). This will be easily accomplished in cases where the prisoner has instructed a solicitor. However, it not infrequently occurs that applications of this kind are submitted by the prisoner concerned without the involvement of any legal representative. In all such cases, the recipient of the application should take immediate steps to alert the JRO, either directly or through the usual legal representative, attaching the CTR application.

[4] Strenuous efforts must be made in every case to ensure that the Court receives all relevant documentary materials. These include in particular the application submitted, any accompanying attachments, the impugned decision and the most significant documents identified expressly or by implication therein. The prison authorities should be particularly alert to certain realities. These include the strong

possibility that the prisoner will not have retained either a copy of the application submitted or any accompanying documents. This kind of omission can be easily rectified via the mechanism proposed above and the response decision letter. These matters are of critical importance as they enable the Court to conduct the exercise, an important one in virtually every case, of juxtaposing claims and assertions made in the Applicant's affidavit evidence with the contents of relevant underlying documents. This is especially desirable in cases where the challenging prisoner makes the familiar averment that the decision maker failed to take specified matters into account.

[5] Alertness on the part of all concerned, in particular the prisoner and/or any legal representative, to "real world" considerations is essential. These include, in every case, the need for the decision maker and any official advising or informing him to conduct appropriate enquiries with a view to examining and verifying the contents of the prisoner's application and in due discharge of the public law duty of being properly informed. Time is also required to ensure that the ensuing decision is of an appropriate quality and standard: this, properly analysed, is a solemn public law duty. These time constraints are unavoidable in a context where the proposed event will, in most cases, be scheduled to occur within a very few days.

[6] These latter considerations underscore the need for the early alert highlighted in [3] above and the corresponding requirement that any judicial review challenge be instituted with the maximum expedition. Proactive, informative and continuous liaison with JRO personnel by both parties is indispensable at all stages.

[7] In high speed litigation situations of this kind, the Court will be alert to the practical limitations which may influence and constrain the litigation product. Certain kinds of omission or error may qualify to be forgiven. However, practitioners must be particularly alert to the requirements governing the form and content of affidavits prescribed by Order 41 of the Rules of the Court of Judicature. Above all there must always be strict compliance with Rule 5, which provides:

> "*An affidavit may contain statements of information or belief with the sources and grounds thereof.*"

[8] This is especially important with regard to affidavits sworn by a solicitor purporting to rehearse the client's instructions or other factual matters. Non-compliance with this fundamental requirement of the Rules is most unlikely to be excused. Furthermore, in the vast majority of cases its practical effect will be to weaken the prisoner's legal challenge.

[9] While the practice of the Judicial Review Court makes provision for the reception of draft affidavits, this facility should be viewed as wholly exceptional. Two particular observations are apposite. First, it is difficult to conceive of any circumstances in which this facility will be extended to a solicitor's affidavit. Second, it being understandable that in certain cases the prisoner's affidavit cannot be sworn

due to time and related practical constraints, the solicitor's affidavit must [a] contain a full explanation for this and [b] contain suitable averments sufficient to reassure the court that all appropriate steps and precautions have been taken to vouchsafe the accuracy and reliability of the contents. The reason for this caution and restraint lies in the great importance which this court has consistently attached to the solemnity and gravity of affidavits having the status and effect of properly sworn evidence. To view the regulatory requirements governing affidavits as some kind of (mere) formality is to indulge in misconception of a fundamental kind.

[10] Fluctuation and evolution are not uncommon in this sphere of litigation. One of the most important lessons for legal representatives is alertness to the need, in appropriate cases, to proactively and speedily invite the prison authorities to take into account any new or revised information and to review the initial decision in the light thereof.

[11] Judicial time and resource are at a premium in every case of this kind. Judges frequently have to deal with these cases out of hours. They dutifully and willingly do so. Practitioners must be on standby from the earliest possible hour to receive very short notice of a scheduled Court listing. They must also bear in mind that every case of this kind interrupts the judicial schedule which, as everyone should know, extends well beyond visible sitting commitments. Hence the convenience of the court will invariably be paramount.

[12] There are certain other considerations of a prosaic nature. While the Judicial Review Practice Note makes clear that it is not the function of JRO personnel to print electronic documents for the Judge some flexibility, in the interests of expedition and procedural fairness, is usually possible in urgent cases of this kind. This dispensation must never be abused. Additionally, the Court will almost invariably give an oral judgment. This entails an inalienable duty on the part of practitioners to conscientiously make a detailed note of all that the Judge says. Furthermore, without judicial prompting or direction, the exercise of forwarding both parties' practitioners' agreed text of the oral judgment to the JRO, normally within at most three hours of conclusion of the hearing, should be undertaken as a matter of course.

[13] In any case where the time constraints are such that the only viable option open to the Court is judicial adjudication on the papers, it will be appropriate, as it was in the present case, to invite the parties' representations on this possibility. Order 53, Rule 3(3) expressly empowers the Court to consider and determine an application for leave in chambers. A hearing, whether *ex parte* or *inter-partes,* is not made obligatory. It is of course the practice of the High Court in this jurisdiction to refuse leave to apply for judicial review only where the Applicant has been afforded the opportunity of an oral hearing conducted in such manner as the Court may consider fair and appropriate. However, this is not necessarily an inalienable element of every litigant's right to fair judicial adjudication, it being trite that context is the critical determining factor in this respect. The reach of the overriding objective – in Order 1 Rule 1A – and the breadth of the Court's case management powers,

reposing in its inherent jurisdiction (as to which see Ewing v Times Newspapers [2010] NIQB 65 at [10] – [11] especially) should not be underestimated in this connection. Such powers could conceivably extend to permitting oral renewal of an application for leave refused on the papers upon good and sufficient grounds – such as, merely by illustration, the availability of important documentary or other evidence which could not with reasonable diligence have been provided at an earlier stage.

The Applicant's Challenge

[14] The short factual outline which follows is uncontentious. The Applicant is a sentenced prisoner with a substantial criminal record. His younger brother, sadly, died on 26 July 2017 (Thursday). The Applicant submitted an application for CTR the following day (Friday), seeking the facility of temporary release to attend his brother's funeral, scheduled for 31 July (Tuesday). The weekend intervened. At around midday on 30 July 2018 (Monday), the Applicant's legal representatives became aware that the application had been refused. Counsel was instructed and papers constituting a judicial review challenge were forwarded electronically to the JRO approximately four/five hours later. As Duty Judge, I convened an *inter-partes* hearing at 8pm. An oral judgment refusing leave to apply for judicial review was given and the hearing ended at around 9pm.

[15] Properly analysed, the prison governor's decision letter proffered a single reason for refusing the application, namely the Applicant was "*assessed as posing a high likelihood of reoffending*". This was supported by adequate particulars which clearly have a satisfactory basis in evidence such as pre-sentence reports, prison reports and the Applicant's criminal record. The governor further noted that the Applicant had very recently failed a mandatory drug test, had been the subject of one "*adverse report*" and, evidently by reason of his conduct, had failed to take advantage of his eligibility to progress from standard prisoner status to enhanced prisoner status.

[16] The governor then turned to consider the question of whether the aforementioned risk could be adequately managed, specifically by the mechanism of a handcuffed prison officers' escort. The letter continues:

> "*Providing a staff escort is not precluded but must be looked at in each case given the individual set of circumstances and other factors such as staff safety (fixed date, time, location and unknown attendees) and the Article 2 rights of Prison Officers.*
>
> *The threat to NIPS staff is currently severe province wide from groups that will use any opportunity and means to attack staff while outside a prison with the intention of causing death or serious injury. The time and location of the funeral is predictive, the congregation is unknown and*

> *we must take into account recent events surrounding your mother's home location, wildly publicised in the media.* ***This provides an inability to deliver controlled measures to ensure health and safety of both staff and yourself.***"
>
> [Emphasis added.]

The Court was provided with an internet news report illuminating the prison governor's reference to "*recent events*". This entailed, in short, a threat by men claiming to be UFF emissaries demanding that the Applicant's mother abandon her home and the smashing of the building's windows. The Court was informed, without challenge, that the house is located in a predominantly Loyalist part of the Oldpark area of North Belfast.

Conclusions

[17] Each of the Applicant's grounds of challenge is to be evaluated through the prism of the well established test for leave, namely whether there is an arguable case fit for further and more detailed enquiry by the Court and possessing a reasonable prospect of ultimate success. In high speed litigation context such as the present, many Judges have a tendency to conduct a more elaborate enquiry at the leave stage than in other cases. One of the practical consequences of this is that the Court becomes progressively informed of the legal merits of the challenge, together with the associated factual matrix, and the grant of leave may be more difficult to secure as a result.

[18] The Applicant's central grounds of challenge and the Court's reasons for rejecting them may be summarised thus:

(a) The suggestion that the prison governor erred in law in taking into account the information and factors set forth in [14] –[16] above is manifestly without merit. All of this material was patently relevant and, furthermore, formed part of the discharge of the prisoner governor's duty to prison officers under Article 2 ECHR/Section 6 of the Human Rights Act 1998. The further suggestion that the information rehearsed is unsubstantiated is characteristic of the bare assertion which frequently occurs in cases of this kind and, moreover, is made in the legal vacuum of no legal rule or principle requiring substantiation to be demonstrated.

(b) In a context where there was no evidence that the Applicant had any established, active or regular family life with his brother, the prison governor, generously in my view, made an assumption to this effect in the Applicant's favour. This opened the legal door to an assessment of interference with this protected Convention right flowing from the

impugned decision. The legitimacy of the aims which the governor sought to further and protect, namely the protection of the public and of prison officers, is plainly beyond plausible dispute. The governor gave serious consideration to the only mechanism realistically at his disposal, namely a handcuffed and armed prison officers' escort, and rejected this on rational grounds. There is no semblance of disproportionality in either his reasoning or conclusion on this issue.

(c) The suggestion that the governor should have considered some other, unspecified mechanism involving supervision and control of the Applicant at the funeral was advanced in a complete evidential vacuum. Insofar as it was seriously contended that the governor should have put his imagination to work on this issue and embarked upon a journey of pure conjecture and speculation, this is manifestly unsustainable.

(d) The contention that the prison governor fettered his discretion is confounded by the evidence. The relevant passages in the impugned decision are an appropriate mix of the general (on the one hand) and the specific and particular (on the other). Every case will be inevitably fact sensitive and the governor was alert to address his mind to the factually sensitive context of the Applicant's case.

(e) Finally, the Applicant contends that the governor failed to take into account specified facts and factors. These have no, or no adequate, evidential foundation and, in two of the four respects, relating to the Applicant's prison record, are contradicted by clear statements in the governor's letter. The other two factors – the availability of an unidentified person to accompany the Applicant and the Applicant's willingness to abide by any conditions imposed – suffer from lack of evidential foundation and draw attention to the importance of alertness to the decision in Re SOS' Application [2003] NIJB 53 at [17] – [19] in every judicial review case wherein practitioners formulate as a ground of challenge an assertion that specified matters were disregarded by the decision maker. The alternative characterisation of this discrete ground invokes the Wednesbury irrationality principle with commendable, but hopeless, optimism. It cannot be logically contended that the decision maker failed to "*give appropriate weight to*" asserted facts and factors devoid of evidential foundation.

[19] The hallmarks of the impugned decision letter of the prison governor are care, clarity, logic and adequate particularity. The decision comfortably withstands challenge to the extent that the Applicant's case falls measurably short of the leave threshold.

[20] Valiant though the efforts of Ms Herdman (of counsel) were, I did not consider it necessary to call on counsel for the proposed Respondent (Ms McDermott).

[21] Leave to apply for judicial review is refused accordingly. Being informed that the Applicant is an assisted person, the usual Order for taxation will follow and, in the absence of an application for costs by the proposed Respondent, there shall be no order as to costs *inter – partes.*