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(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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JOHN NEALE, JOHN DARRAGH, JOHN SULLIVAN AND JASON MURRAY, APPLICANTS FOR JUDICIAL REVIEW OF DECISIONS BY THE GOVERNOR OF HM PRISON MAGILLIGAN AND THE NORTHERN IRELAND PRISON SERVICE

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DEENY J

Facts

[1] These four applications relate to the introduction of a new scheme by the Northern Ireland Prison Service which led to a reduction in home leave eligibility for the four applicants before the court. John Neale was represented by Mr David O'Sullivan. John Darragh was represented by Mr Barry McDonald QC with Mr Hutton. John Sullivan was represented by John Larkin QC with Mr Torrens. Jason Murray was represented by Mr Larkin QC with Mr O'Sullivan. Mr David McMillan appeared for the respondents in each case.

[2] All four of these applicants are serving prisoners who received at the time of their committal to the prison a written document which stated, inter alia, the date on which they would first be eligible for home leave and the amount of home leave they would be eligible for. It was contended that this can be properly described as a clear and unambiguous representation to the prisoner. At the time it was given it was in accordance with the prevailing policy of the prison regarding home leave. It was lawfully given by the Prison Service at that time.

For illustration one looks to Exhibit JD1 to the affidavit of John Darragh where a form is exhibited entitled "Home Leave Eligibility". It records his sentence date as 16 January 2004 and his Home Leave Eligibility date as "3/2/05. No. days: 26". It was submitted that this is a clear representation that he will be eligible for home leave from 3 February 2005 of potentially 26 days. The applicant so interpreted it, correctly, at that time.

[3] The Prison Service now purports to resile from that representation because they wish to apply new home leave arrangements to prisoners who were sentenced before 1 March 2004 but whose earliest eligible date had not occurred before 31 December 2004. That includes the four applicants before the court although I was informed there would be other prisoners in a similar position.

[5] An important part of the respondents' case is that the representation was not unambiguous because the scheme as promulgated on 1 March 2004 alerted prisoners such as the applicants to the real possibility that they may in fact not be able to continue to enjoy the benefits of the old scheme. In support of that Ms Stinson in an affidavit of 21 December 2004 exhibited the relevant circular, entitled "Pre-Release Home and Re-settlement Leave Arrangements For All Sentenced Prisoners". I set out Section 11 of this document in full:

> "11. Implementation date and transition arrangements
>
> The revised arrangements will take effect from 1 March 2004 and will effect all prisoners sentenced on or after that date. The new arrangements will also be applied to all life sentence prisoners already sentenced before 1 March 2004.
>
> Further consideration is being given to transitional arrangements to apply at a future point for prisoners sentenced before 1 March 2004. While determinate sentence prisoners, sentenced before 1 March 2004, may continue to avail of the leave quotas and eligibility periods available under the old scheme, the underlying principles and operating procedures specified under the new arrangements will, once implemented, be applied when considering all leave applications."

[5] She averred that this had been placed on the landings for the prisoners to see. This was expressly denied by the applicant Neale in his second affidavit who said that the only thing that had been placed for the prisoners was an extremely brief notice of the new scheme. No application was made by either the applicants or the respondent to cross-examine these persons upon their conflicting versions but I did hear submissions.

[6] The point was made and validly made that Ms Stinson was not speaking of her own knowledge. She had been informed of this by persons in the Prison Service. Nor did she state the source of her information and belief save to say in her affidavit of 15 February 2005 that the Prison General Office had so confirmed. In that second affidavit she exhibited a notice to all

prisoners which was put on notice boards. It does not appear to refer to the fact that prisoners sentenced before 1 March 2004 might have their days of leave reduced. It does say: "This notice has relevance for all inmates and not just those sentenced after 1 March 2004," but goes on to refer to other aspects of the scheme.

[7] As indicated above the circular exhibited by her at JS3 to her first affidavit does include the sentence at the end of the first paragraph of section 11: "Further consideration is being given to transitional arrangements to apply at a future point for prisoners sentenced prior to 1 March 2004."

[8] Mr Woods in his affidavit on behalf of the respondent purported to exhibit the same document in his second affidavit of 11 February 2005. However it was evident on reading it that it was a draft version of the document which had been published on the Prison Service website and which excluded the sentence just above. The respondent was then given leave to introduce a second draft affidavit from Mr Woods in which he purported to exhibit the correct circular. Oddly enough, however, in this the key sentence is present in Section 11 but is part of the second paragraph and one word in the sentence has been altered. Furthermore there are other differences of a minor kind of layout and nomenclature in this version. It differs, therefore, from the version to be found at JS3 at p 59 of the trial book of John Neale.

[9] It does appear, therefore, that there are 3 versions of this circular circulating in the Prison Service. Given the absence of any sworn memory from any prison officer that the correct one was given to prisoners nor any document instructing that to be done, especially as this was only a year ago, it could not be said that the respondent had demonstrated that the correct circular was in fact conveyed to the prisoners. I am not satisfied that it was.

[10] Furthermore, I am not sure that any prisoner presented with a 10 page document on the notice board to be shared with his colleagues would immediately rush to correctly divine the import of this particular sentence for him, if he was sentenced before 1 March 2004. I consider therefore that the Prison Service did not put prisoners fairly on notice in March 2004 that the new scheme might well effect the rights of prisoners sentenced before 1 March 2004.

[11] In any event the publication of the new circular is to be compared with the dates of committal of the 4 applicants. The revision of this circular had been under consideration for some 3 years by the Prison Service. By definition they knew that when a prisoner was committed to their custody he was given not only his ultimate release date in the light of any sentence imposed by the court less any right to parole coupled with any period he had served in custody on remand but he was also given the earliest eligible date

for home leave and the maximum period of that home leave. Both those latter factors were to be altered by the scheme. It seems surprising that it did not occur to somebody in the period leading up to the publication of the scheme that they should attach a notice to that committal form warning prisoners that they did not have any entitlement to and could not rely on the earliest eligible date or the duration of home leave.

[12] The reason for that omission would appear to stem from the fact that those most involved in the drafting of the circular had formed the view that the scheme would not be retrospective in effect. It would only apply to prisoners after the date on which it was published, which in the event was 1 March 2004. Therefore there was no need to warn prisoners of this eventuality because it was not intended. Prisoners sentenced before the new scheme was circulated would enjoy the benefits of the old scheme. Prisoners sentenced thereafter would be covered by the new scheme.

[13] In the event, however, as averred by Ms Stinson and as appears from the documents exhibited to the affidavit of Mr Woods, the Director General of the Prison Service Mr Peter Russell in a memorandum of 20 February 2004 took the view that there should be some transitional arrangement. I will return to his justification for so doing in due course but I do note that neither he nor his subordinates then took the step of warning those being committed to prison over the coming months that they might well be subject to a new scheme rather than the one currently in place.

[14] There can be little doubt that the Prison Service itself was in a state of some uncertainty about this. The applicant John Darragh lodged at the hearing, without objection from the respondent, a document entitled "Notice to Prisoners HMP Maghaberry. Subject: Pre-release Home Leave and Resettlement Leave; date of issue 4 May 2004." It acts as a summary of the new scheme but it clearly conveys that prisoners sentenced prior to 1 March 2004 will continue to apply for home leave "under the old quota and procedure" with the exception that they are required to detail the reason for the period of home leave requested. I quote further:

> "The new quota applicable to prisoners sentenced after the 1 March 2004 is detailed in a table on page 2 of this notice".

One has to say that this seems to reiterate the representation to prisoners sentenced before 1 March 2004 that their leave entitlement dates and days would not be affected by the new scheme.

[15] In the events rumours began to circulate in July and August 2004 that the right to the more generous and earlier leave under the old scheme was under question. The applicant Sullivan was expressly reassured by a prison

officer in August 2004 that his leave would not be affected which indicates that there had been a failure of communication within the Prison Service. However when the solicitors for several of these applicants wrote in due course they were informed in September 2004 that the new scheme was being applied to their clients. Judicial review proceedings were then initiated.

[16] I am satisfied that clear and unambiguous representations were made to the applicants about both the date on which they became eligible for home leave and the extent of that home leave, and that no caveat was entered at the time of committal, nor any effective caveat until some five months after the new scheme was introduced.

[17] The applicants contend that they had therefore a substantive legitimate expectation that they would become eligible for home leave on the dates on which they had been given on coming into the prison and that their eligibility could extend to the number of days set out in the form which had been given to them eg 26. If the new scheme applies to them, as the Prison Service currently rules, then they are only eligible at a significantly later date and to a significantly lesser number of days. I therefore consider it appropriate to turn in a moment to consider the relevant authorities on substantive legitimate expectation.

[18] The argument of Mr O'Sullivan on behalf of John Neale (who was committed to prison on 16 January 2004) was primarily in line with the main thrust of the submissions of counsel for the other applicants. His secondary argument was that he had a legitimate expectation based on the fact that a circular was placed on the website of the Prison Service in March 2004 and remained there until November 2004 which was in a form which did not include any reference to the transitional arrangements and the possibility that those sentenced before 1st March 2004 might be removed from the old scheme. (See Exhibit JN3 to the affidavit of John Neale of 3 November 2004).

This contention was not supported by the other counsel for the applicants.

It was gravely undermined by the fact that prisoners are not allowed to have access to the internet and this prisoner indeed was unaware of the presence of the circular until after his solicitors discovered it on or about 2 November 2004. It seems to me the fact that it had not been communicated to him before that date means that he had not relied on it. He was not aware of it. Although reliance has been held not to be an essential requirement of legitimate expectation it seems to me a wholly inappropriate extension of the applicability of legitimate expectation to include such a document not seen by the prisoner at all and I reject this submission.

Substantive Legitimate Expectation

[19] The remarks of Simon Brown LJ, as he then was, in R v Devon County Council Ex parte Baker [1995] 1 All ER 73 at p88 are of relevance. He sought to establish broad categories of legitimate expectation.

> "(1) Sometimes the phrase is used to denote a substantive right: an entitlement that the claimant asserts cannot be denied him. It was used in this sense and the assertion upheld in cases such as R v Secretary of State for the Home Department Ex p. Khan [1985] 1 All ER 40, (1984) 1 WLR 1337 and R v Secretary of State for the Home Department Ex p.arte Ruddock [1987] 2 All ER 518 (1987) 1 WLR 1482. It was used in the same sense but unsuccessfully in, for instance, R v The Board of Inland Revenue, Ex p. MFK Underwriting Agencies Limited [1990] 1 All ER 91, (1990) 1 WLR 1545 and R v Jockey Club, Ex p. RAM Racecourses Limited [1990] (1993) 2 All ER 225. These various authorities show that the claimants' right will only be found established when there is a clear and unambiguous representation upon which it was reasonable for him to rely. Then the administrator or other public body will be held bound in fairness by the representation made unless only its promise or undertaking as to how its power would be exercised is inconsistent with the statutory duties imposed upon it. The doctrine employed in this sense is akin to an estoppel. In so far as the public body's representation is communicated by way of a stated policy, this type of legitimate expectation falls into two distinct sub-categories: cases in which the authority are held entitled to change their policy even so as to affect the claimant, and those in which they are not. An illustration of the former is R v Torbay BC Ex p. Clesby [1991] COD 142, of the latter Ex p. Khan".

His second, third and fourth categories are all of a procedural nature.

[20] It is noted that in the instant cases there was a clear and unambiguous representation to the applicants as to the date upon which they would become eligible for home leave and the amount of home leave to which they would become eligible. It is not contended here that that representation was contrary to the statutory duty of the prison service. On the contrary it is

expressly averred that those representations were correct and in accordance with policy at the time they were given. Is the change of policy entitled to supersede the "clear and unambiguous representation"?

[21] This issue was addressed in R v Secretary of State for the Home Department Ex p. Khan, above, where the majority of the Court of Appeal in England came to the following conclusion.

> "Where a member of the public affected by a decision of a public authority had a legitimate expectation based on a statement or undertaking by the authority that it would apply certain criteria or follow certain procedures in making its decision, the authority was under a duty to follow those criteria or procedures in reaching its decision, provided that the statement or undertaking in question did not conflict with the authority's statutory duty. Thus, where the Secretary of State undertook to allow a person to enter the United Kingdom if certain conditions were met he could not resile from that undertaking without affording interesting persons a hearing and then only if the overriding public interest required it." (pp41 and 48g).

[22] Assistance can be gained, it seems to me, from decisions relating to another branch of government, the Inland Revenue Commissioners, while bearing in mind that there are of course differences . The chief of these is that taxpayers are likely to have acted upon assurances given by the Inland Revenue. Save in the case of Mr Darragh the only detriment claimed by the applicants here is the shock or emotional disappointment of discovering that they would only become eligible for leave 6 months later than they thought and for a shorter period, although in this day and age such psychological disappointment or upset would be compensated in certain areas of the law, such as employment.

[23] I refer to the speech of Lord Templeman in Preston v Inland Revenue Commissioners [1985] AC 835 at 866 – 867:

> "In principle I see no reason why the taxpayer should not be entitled to judicial review of a decision taken by the Commissioners if that decision is unfair to the taxpayer because the conduct of the Commissioners is equivalent to a breach of contract or a breach of representation. Such a decision falls within the ambit of an abuse of power for which in the present case judicial review is the sole remedy and an appropriate

> remedy. There may be cases in which conduct which savours of breach of conduct or breach of representation does not constitute an abuse of power, there may be circumstances in which the court in its discretion might not grant relief or judicial review notwithstanding conduct which savours of breach of contract or breach of representation. In the present case, however I consider that the taxpayer is entitled to relief by way of judicial review for 'unfairness' amounting to abuse of power if the Commissioners had been guilty of conduct equivalent to a breach of contract or breach of representations on their part."

[24] The passage above was cited by Bingham LJ as he then was in <u>R v Board of Inland Revenue Ex p. MFK Limited</u> [1990] 1 All ER 91 at p 110j.

> "If a public authority so conducts itself as to create a legitimate expectation that a certain course will be followed it would often be unfair if the authority were permitted to follow a different course to the <u>detriment</u> of one who entertained the expectation, particularly if he acted on it. If in private law a body would be in breach of contract in so acting or stopped from so acting a public authority should generally be in no better position. The doctrine of legitimate expectation is rooted in fairness. But fairness is not a one-way street. It imports the notion of equitableness, of fair and open dealing, to which the authority is as much as entitled as the citizen. The Revenue's discretion, while it exists is limited. Fairness requires that its exercise should be on the basis of full disclosure. Counsel for the applicants accepted that it would not be reasonable for a representee to rely on an unclear or equivocal representation. Nor, I think, on facts such as the present, would it be fair to hold the Revenue bound by anything less than a clear, unambiguous and unqualified representation."

[25] Applying that dictum in this situation one notes it would be unfair to allow an authority to follow a different course "particularly" if the taxpayer had acted on the representation. That reinforces what seems clearly to be the law ie that detriment is not an essential part of substantive expectation although it is a relevant consideration, as is reliance, in assisting the court in deciding what view to take.

[26] It seems to me that the current running through all these cases draws a clear distinction between some casual statement on the part of a public authority or one of its employees and the making of a clear and unambiguous representation. If one hands a prisoner a document clearly stating the date upon which he would be eligible for home leave and the number of days of home leave for which he will be eligible it seems to me that the Prison Service is making a clear and unambiguous representation.

[27] That may be contrasted with the error on the part of Ms Stinson's predecessor in placing the "draft" circular with the unamended section 11 on the Prison Service website lacking any reference to transitional arrangements. One must express surprise that no one in the prison service noticed this because it is averred and not denied that it remained on the website until November of the same year. It can only have reinforced the belief of those officials who, no doubt in good faith, were communicating to the prisoners, either on arrival in the prisons or after enquiry, the dates upon which they became eligible for leave and the extent of that leave. I was informed that the prisoners were not permitted to have access to the internet but no doubt prison officers are and a reading of the unamended Section 11 would clearly lead them to believe that these applicants were entitled to the benefit of the old 1998 scheme rather than the scheme published in March 2004.

[28] The leading authority on which the counsel for the applicants relied was R v North and East Devon Health Authority Ex p. Coughlan [2000] 2 WLR 622, CA; [2000] 3 All ER 850. In the judgment of the court Lord Woolf MR, as he then was, considered that there were three possible outcomes for the court in the circumstances to the question of Lord Scarman in Findlay v Secretary of State for the Home Department [1984] 3 All ER 801 at 830, [1985] AC 318 at 338:

> "But what was their legitimate expectation?"

Lord Woolf's category (a) would involve the public authority being only required to bear in mind its previous policy or other representation, giving it the weight it thinks right, but no more, before deciding whether to change course.

His category (b) would mean that the court may decide that the promise or practice induces a legitimate expectation of, for example, being consulted before a particular decision is taken. Here it is uncontentious that the court itself will require the opportunity for consultation to be given unless there is an overriding reason to resile from it.

His category (c) was where:

> "the court considers that a lawful promise or practice has induced a legitimate expectation of a benefit which is substantive, not simply procedural, authority now establishes that hereto the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power. Here, once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy." (Para 57 of judgment).

[29] The applicants here have a strong case for saying that they have a legitimate expectation within Lord Woolf's category (b) ie to be consulted about the retrospective nature of the new policy. Although there were consultations with a wide range of people, including prisoners apparently, about the policy in general, there does not appear to have been consultation with the prisoners particularly affected by the retrospective approach to the new policy. That in itself would appear to ground the claim for certiorari in this case. But the applicants are anxious not to be confined to that category, for fear, no doubt, that the same end result would still occur even after consultation.

The applicants maintain they fall into category (c) under Lord Woolf's definitions.

[30] I observe that at paragraph 59 of the judgment Lord Woolf considered that:

> "Most cases of an enforceable expectation of a substantive benefit (the third category) are likely in the nature of things to be cases where the expectation is confined to one person or a few people, giving the promise or representation the character of a contract."

That view would coincide with that of Lord Justice Laws in R v Secretary of State Ex for Education and Employment Ex p. Begbie [2001] WLR 1115 where he considered that representation was more likely to be enforceable if made to a smaller number of people on discrete facts "with no implications for an innominate class of persons".

[31] The judgment in Coughlan was considered by Coghlin J in Re T's Application for Judicial Review [2000] NI 516 and In the matter of an application by Maurice Morrell and Gregory Campbell for Judicial Review [Unreported, 16 January 2002). As he said in the latter case the doctrine of substantive legitimate expectation "appears to have successfully completed

the transition from legal heresy to that of legal orthodoxy." In the case with which he was therein dealing, involving two ministers of a particular party in the administration at Stormont he thought: "the stage is sufficiently small and the number of players sufficiently limited to bring the case within Lord Woolf's third category."

[32] In his submissions Mr David McMillan for the respondent relied on Findlay, referred to above. He acknowledged that the prisoners had a Woolf category (a) right. However the dictum then must be read in light of the considerable body of subsequent authority, both at first instance and on appeal. He also relied on R v Secretary of State for the Home Department Ex p. Hargraves [1997] 1 All ER 397. The same might be said of that decision, which did indeed relate to prisoners. In any event it can be distinguished because the prisoners were not told about the policy in the way that they were in the applications before me.

[33] The test put forward by the Court of Appeal in Coughlan's case was considered by a differently constituted Court of Appeal in R (Bibi) v Newham LBC [2002] 1 WLR 237. But as Schiemann LJ said, delivering the judgment of the court at para 34:

> "Without refinement, the question whether the reneging on a promise would be so unfair as to amount to an abusive power is an uncertain guide."

I have also considered the consideration of this topic and Coughlan's case by Kerr J, as he then was, In Re Treacy and Macdonald's Application (2002, unreported) at pages 47-52. In considering the role of the court in this matter I note the conclusion of the learned judge at page 52:

> "It seems to me that where a public body creates in the mind of an individual an expectation of the nature involved in the case of Ms Coughlan (as Lord Woolf put it, something akin to a contract), fairness demands that it should not be permitted to resile from its undertaking without having to justify that change of course before an independent arbiter. Such a decision is quite unlike the vast majority of executive or administrative decisions. In this type of case, the decision maker has promised to do one thing, thereby generating in the minds and plans of those who are affected by it the expectation that it will be fulfilled. When the decision maker subsequently resiles from the previously expressed firm commitment and proposes to frustrate the expectation which had earlier been created, it would be

> anomalous and repugnant to all notions of fairness that the decision maker should be the sole judge of whether it was reasonable to do so, subject only to scrutiny or challenge on the grounds of irrationality."

[34] I venture to draw the following factors from the authorities as those relevant to either a decision maker contemplating going back on an earlier promise or a court dealing with an application relating to such a situation.

(1) For substantive legitimate expectation there must be a clear and unambiguous representation made to the applicant by the decision maker. (Bingham LJ, as he then was, in Ex p. MFK Limited 1990 1 All ER 91, 110).

Simon Browne LJ, as he then was, in Baker's case thought that if there was such a representation the public body would be held to it unless it was inconsistent with the statutory duties imposed upon it. However that seems to be the high water-mark for applicants in these cases and does not, if taken in isolation, reflect the subsequent jurisprudence.

(2) The representation should be made to "one or a few people giving the promise or representation the character of a contract" per Lord Woolf in Coughlan para 59 and see Laws LJ in Ex p. Begbie where he says that it is more likely to be held binding if made to a smaller number of people, on discrete facts, "with no implications for an innominate class of persons."

(3) Although reliance has been held not to be an essential part of substantive legitimate expectation (see Begbie and Bibi), it is obviously an important aspect of any assessment of fairness which "will normally be required in order for the claimant to show that it would be unlawful to go back on a representation" (Schiemann LJ in Bibi's case p 246 para 29).

(4) If the person or group who relied on a clear and unambiguous representation had acted to his or her detriment it is very likely the representation will be binding on the public authority, unless found to be in breach of their statutory duty.

(5) If the person or group has not acted to their detriment, but met the first three criteria above it would still be binding on the authority, unless there is an overriding public interest in departing from the earlier statement, and the person or group had been given an adequate opportunity to make representations about such a departure and those representations had been considered in good faith by the decision maker before arriving at its ultimate decision. Otherwise the court would be likely to strike down the position as unfair.

[35] Although substantive legitimate expectation clearly differs from earlier categories of expectation it does seem to me that ultimately it is still a matter of the court supervising the fairness or natural justice of the procedure of the public bodies rather than the merits of the decision. Is there any overriding public interest which renders the breach of a clear and unequivocal representation to an individual or defined group, within acceptable levels of fairness? Of course such considerations will frequently now overlap with a consideration based on the contention that there have been breaches of the European Convention of Human Rights which would involve the court considering whether the response of the public authority in question was proportionate in all the circumstances.

[36] It is also clear from the authorities over the years that the courts would be much more reluctant to quash a decision in the "macro political field" (per Laws LJ in Ex p. Begbie) or when authority has competing claims on limited resources per Lord Brightman in R v Hillingdon London Borough Council Ex p. Puhlhofer [1986] AC 484 and per Lord Hoffmann in R v Brent LBC Ex p. Awua [1996] AC 55 at p 72. The present case is in a different category which involves the liberty of the individual and where no question of resources has been raised by the respondent.

[37] Furthermore it impeaches on something that has historically been regarded as unfair and still is ie a retrospective change. "It is a principle of legal policy that, except in relation to procedural matters, changes in the law should not take effect retrospectively." Bennion on Statutory Interpretation. Admittedly the reason the author gives for it is that the individual is presumed to know the law and is required to obey the law. Therefore to change the law after he has transgressed to make earlier conduct guilty which was not at the time an offence is clearly unfair. This does not apply to merely procedural changes. In the present case we have something in between those two parameters ie somebody is told they will enjoy a privilege or right and then have it taken away from them without any misconduct or neglect on their part.

[38] Applying the principles I have identified above I have found that there was a clear and unambiguous representation to the applicants as to the commencement of the period when they would become eligible for home leave and the duration of that home leave. It was normally made when they were committed but in the case of John Neale seems to have been repeated some months after the new procedure had been brought in. I find that although it may be that there are other prisoners in a similar position to the applicants, upon whom I do not comment, we are dealing with a small group of individuals and not with the public at large. I find that these applicants, as they are, all relied on the representations which they were made although there is a paucity of detriment. (John Darragh suggested that he would have applied to transfer to Maghaberry at an earlier stage if he had known he was

not getting home as early and as often as he had originally thought. Counsel for the respondent however points out that a prisoner has no right to serve his sentence in any particular prison.) To renege on this representation would therefore, in my view, require the Prison Service not only to give these prisoners an opportunity to make representations and that those representations be fairly considered but that there should be some overriding public interest to justify applying the new policy retrospectively with regard to serving prisoners. Clearly therefore the prisoners have brought themselves within the third of Lord Woolf's categories. To use the test expressed by him in the last sentence of paragraph 57 I must now weigh the requirements of fairness ie that the earlier representation should be held to, "against any overriding interest relied upon for the change of policy."

[39] Mr McMillan for the respondent robustly submits that the need of the prison service in changing circumstances required that any such expectation be over borne. Public concern had been expressed about the former procedure which resulted in prisoners appearing back in their home environment, albeit only on leave, soon after they had been sentenced by the court, even for quite serious offences. To move to the new procedure, which reflected that Prison Service dealing with a largely non- paramilitary population required that this be done rapidly. Furthermore it would lead to complications if two systems were running in tandem.

[40] The last point was swiftly refuted by counsel for the applicants who pointed out that two systems are already running in tandem in that there already is a cut-off date which applies to those prisoners who were within the period when they became eligible for leave even if they had not actually begun such leave. As to the principle thrust of the justification for the policy it is pointed out that there is no attack on the policy as such in its generality ie that leave should only be granted nearer to the end of the sentence and for shorter periods than in the past. That is a legitimate exercise of its authority by the Prison Service, and counsel for the applicants take no issue with it. What, they say, has not even been addressed by the Prison Service Management Board was whether that reason justified making the policy <u>retrospective</u> so as to affect those who had already been informed of both the date on which they would become eligible for leave and the periods of leave they could potentially enjoy. I observe there was no measurement of the extent of the concern perceived.

[41] A considerable quantity of relevant documentation was, properly, released by the Prison Service to assist the court. I will not go through this exhaustively because salient features do emerge but I refer to some of the documents with regard to which submissions were made to me by counsel. At paragraph 5 of a memorandum from Mr Bill Kirk to Mr Brian McCready there is a recognition that the new arrangements should be "easily managed

and understood by prisoners. They must also engage with human rights legislation."

[42] A memorandum from Dave Eagleson, Deputy Governor HMP Magilligan, to the same Bill Kirk, on 20 September 2001 suggests that the new arrangements should apply to anyone convicted after a cut-off date. If that had been done of course there would be no complaint from these applicants. Mr Kirk in a memorandum of 16 August 2002 to Mr McCready does refer to the legitimate expectation of prisoners as "about the only thing raised by prisoners. We should not be fettered by this."

[43] It is averred by Mr Woods and emerges from the documents that there was an extensive consultation exercise with prisoners and otherwise.

[44] He avers that the Board of Management of the Prison Service decided, at a meeting held on 29 July 2004, that the cut-off date for the operation of the scheme should be 31 December 2004. This lead to his instruction of 30 July 2004 (Exhibit TW4, p 58 of John Sullivan's trial book). It can be seen therefore that five months after the scheme was introduced the Board of Management clarified that it would have retrospective effect for those sentenced before 1 March 2004 unless they had eligibility for home leave on or before 31 December 2004 but Mr Woods's circular does not address the issue as to what overriding public interest justified them retrospectively altering the home leave arrangements for these prisoners. Nor does he exhibit any minute of the Board of Management of the Prison Service to show that they had addressed this issue. Nor, among the documents provided, is there a paper which was put before the meeting of the Board of Management on 29 July making the case for or justifying the retrospective element of the policy. What appears to have happened is that on 20 February 2004 the Director General of the Prison Service, Mr Peter Russell, sent a memorandum to Mr Bill Kirk objecting to the suggestion of Mr Kirk in the final draft of the scheme that prisoners who had a "legitimate expectation" (and the phrase is actually used) of the more generous eligibility date and quotas of the current system would dispute the removal of these rights. Mr Kirk argues for that point of view in a memorandum dated 19 February 2004. He points out that it would be simple and easy to administer. He points out that at the committal interview sentenced prisoners will already have been informed of leave eligibility. He points out that it could be argued that any future cut-off date for those already sentenced would simply be arbitrary. The very short and rather vague memorandum from Mr Russell of 20 February simply does not deal with these points. It does not make a case of an overriding public interest for removing the home entitlement to leave expectations of prisoners already sentenced by the then impending date of 1 March 2004. Counsel draws attention to certain passages in the papers which shows that some officials at least were alert to the possibility of challenge in the courts. That is a perfectly understandable position for them to adopt but unfortunately the

Prison Service Board of Management and Director General did not make any adequate response to the precautionary approach proposed by other officials.

[45] This is inevitably a summary of the details of submissions made by a number of counsel over two days about this matter but it does seem to me that the Prison Service have fallen well short of demonstrating any overriding public interest for the retrospective element in the scheme or indeed any proper consideration of it from the point of view of the European Convention on Human Rights to which I will turn in a moment. It seems to be therefore that the decision must be quashed in so far as it imposes the scheme retrospectively on those sentenced on or before 1 March 2004.

European Convention on Human Rights

Article 7

[46] Mr Larkin QC for John Sullivan argued that there was a breach of his client's rights under Article 7 of the European Convention on Human Rights in that he was being exposed to a higher penalty "than the one which was applicable at the time the criminal offence was committed." He relied on a decision of the Court of Appeal, R, on the Application of Uttley v Secretary of State for the Home Department [2003] 4 All ER at 891 in support of that contention. While it did appear to support his contention I expressed concern at the hearing at the reference in that report to the suggestion that the sentencing of a prisoner by a judge was a "fiction". It seemed to me that although, ultimately in the exercise of the prerogative of mercy, and for the good management of prisons, the Executive was permitted to release prisoners earlier than the sentence imposed by the court, that sentence constituted a maximum beyond which the Executive were not entitled to go. I pointed out also that the decision seemed to be inconsistent with the immediately preceding decision in the same volume, that is, R v R [2003] 4 All ER 882 at para 29. In the events subsequently counsel found that the Uttley case had been successful appealed to the House of Lords under the reference (now) [2004] 4 All ER 1. The House ruled that Article 7(1) would only be infringed:

> "If a sentence was imposed on a defendant which constituted a heavier penalty than that which could have been imposed on the defendant under the law in force at the time that he committed the offence ie it would only be infringed if the sentence was heavier than the maximum sentence that could have been imposed at the time the offence was committed."

Counsel then abandoned his submissions under Article 7.

Article 8

[47] He was on sounder ground in contending that there was a breach of his client's rights under Article 8 of the Convention. Indeed counsel for the respondent accepted that there was an interference by a public authority with the applicant's right to private life in so far as his number of visits home and the duration and commencement of those would be adversely affected by the new scheme. Mr McMillan contended that this was nevertheless justified for the same reasons that he had advanced in relation to the common law argument.

[48] Consideration of Article 8 by a public authority was the subject of an appeal to the Court of Appeal in Northern Ireland In Re Jennifer Connor [2004] NICA 45. I respectfully adopt the reasoning of the Lord Chief Justice at pages 26-30 of that judgment. It seems fully applicable to the case in question as the Lord Chief Justice said:

> "The consideration of whether an interference with a Convention right can be justified involves quite a different approach from an assessment at large with regard to what is best for the person affected."

It seems to me that no such consideration was carried out by the Management Board of the Prison Service here with regard to the retrospective element of the scheme. To quote Higgins J: "there was no analysis of the alternatives that might be open to the Trust". In the absence of any evidence of such consideration complying with Article 8 I find that the retrospective element of the scheme should be quashed for that reason also.

[49] For the reasons set out in the paragraphs leading to paragraph 45 above and the immediately proceeding paragraphs I therefore grant certiorari to quash the decision of the Northern Ireland Prison Service insofar as it imposed the scheme retrospectively on those sentenced on or before 1 March 2004.

[50] Since this judgment was written the Court of Appeal have given judgment in In the matter of an Application by Martin Griffin for Judicial Review. The issues in that matter overlap to an extent with the issues with which I have been dealing in the present application. The view arrived at by the Court of Appeal is in accord with the view which I had formed. It would appear that the material in their affidavits differed somewhat from those in the affidavits before me, but not to a decisive extent. In the light of the conclusion which they reach at paragraph 35 of their judgment and consistent

with the order of certiorari I confirm that the home leave entitlement of the four applicants must be determined on the basis of the scheme that applied before 1 March 2004.