

**Neutral Citation No: [2023] NIKB 51**

**Ref: COL12148**

*Judgment: approved by the court for handing down  
(subject to editorial corrections)\**

**ICOS No: 23/23794/01**

**Delivered: 24/04/2023**

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

**KING'S BENCH DIVISION  
(JUDICIAL REVIEW)**

**IN THE MATTER OF AN APPLICATION BY SEAN O'HALLORAN  
TO APPLY FOR JUDICIAL REVIEW**

**Mr Hutton KC with Mr Mackell (instructed by Owen Beattie & Co Solicitors) for the  
Applicant  
Dr McGleenan KC with Mr McCleave (instructed by the Departmental Solicitor's Office)  
for the Proposed Respondent**

**Ex Tempore**

**COLTON J**

***Introduction***

[1] The applicant is Sean Paul O'Halloran, who is a sentenced prisoner in HMP Maghaberry. He is challenging the decision by the Northern Ireland Prison Service to detain him in a care and supervision unit under rule 32 of the Prisons and Young Offenders Centre Rules 1995 ("the 1995 Rules") since his arrival at Maghaberry on 10 March 2023.

[2] He challenges the decision to subject him to a full body x-ray scan on 10 March 2023 and on two subsequent occasions. He challenges the failure of the respondent to formulate or publish a policy in respect of the use and operational management of x-ray scanners in HMP Maghaberry.

[3] The factual background is set out in his affidavit in support of the Order 53 Statement. This is the first time he had been committed to custody. On arrival at Maghaberry he was subject to a full body x-ray scan, he was told this was required. As a result of the scan, he was detained in the Care and Supervision Unit (CSU) in accordance with rule 32 of the Prison Rules. He complains about the lack of communication from prison staff. He was told that the scan demonstrated that the

items were concealed on his person. He was subject to CCTV recording for a period of time. He was subject to further scans, either four or five, before being released from CSU on 20 March. He is adamant that there was nothing concealed or secreted on his person.

[4] These proceedings were initiated on 16 March on an emergency basis but the fact of his removal from CSU has removed the urgency of the application. On direction of the court the proposed respondent filed an affidavit from the Governor of the prison on 20 March 2023 dealing with the introduction of x-ray body scanners in the prisons.

[5] The court is familiar with challenges to the use of full body searches by the prison service for the purposes of ensuring that items are not introduced to the prison by secretion or concealed in prisoners' persons when they enter or re-enter the prison. The lawfulness of that policy has been endorsed by this court and by the Court of Appeal in this jurisdiction: see *Conway's Application for Judicial Review* [2013] NI 102.

[6] One of the arguments that has been advanced in previous challenges is that a less intrusive and, therefore, more proportionate interference with prisoners' article 8 European Convention on Human Rights (ECHR) rights would be the use of scanners rather than physical examinations being carried out by prison officers. This is referred to in the affidavit from the Governor which was directed by the court. In that affidavit he says:

“As the court is aware from a number of extant judicial review challenges concerning the search policies and practices currently operated by NIPS work had been undertaken concerning the introduction and implementation of x-ray body scanners in prisons across Northern Ireland. That work was undertaken pursuant to NIPS's ongoing public law duties and in response to a number of recommendations made by the Criminal Justice Inspector. To that end NIPS has initiated a process whereby a number of x-ray body scanners would be introduced across the prison estate. At the time that the aforementioned judicial reviews were issued the scanners were not operational. In order to allow for the introduction of x-ray body scanners NIPS was in the process of adapting its existing policies and practices. As previously highlighted to the court NIPS was taking a number of steps to facilitate that process. In particular, the court will recall that those steps included policy development, full operational assessment, staff training and adoption of appropriate safeguards.

Having concluded the above process an initial phased roll-out of x-ray body scanners was implemented from 1 March 2023. That process began in HMP Maghaberry, further operational deployment is planned for Hydebank Wood College and Women’s Prison and HMP Magilligan from April 2023.”

[7] In relation to policy development the Governor avers that the introduction of x-ray body scanners represented a significant development for the Northern Ireland Prison Service (NIPS). In order to support the introduction of x-ray body scanners the NIPS developed and introduced a bespoke policy document entitled “the Deployment and Operation of x-ray body scanners” which is exhibited to the affidavit. In addition, NIPS also introduced separate guidance concerning internal secretions entitled “Managing Internal Secretions.”

[8] Referring to the deployment and operation of the scanners policy the Deployment Policy seeks to provide instruction and guidance on the deployment and operation of x-ray body scanners on adult male prisoners and male students at Hydebank Wood in circumstances where there are concerns that prisoners may be concealing prohibited and unauthorised articles through internal concealment. The policy is then described in more detail in his affidavit.

[9] The overarching objective of the Deployment Policy is to establish a mechanism to confidently detect when individuals are attempting to use internal concealment as a method of trafficking. By following this policy and the associated local standard operating procedures it is expected to deliver the following outcomes:

- Effectively identify individuals trafficking prohibited and unauthorised articles by internal concealment.
- Avoid unnecessary action on trafficking if suspected but not confirmed.
- Manage individuals who have items concealed within their bodies to keep them safe and encourage surrender of those items.
- Prevent prohibited and unauthorised articles being distributed within the general population.
- Secure evidence to support adjudication or prosecution.

[10] The requirements contained within the Deployment Policy represent minimum standards for each prison establishment so as to ensure compliance with the applicable legislative framework and any other requirements of practice.

[11] Section 6 of the Deployment Policy details a range of bespoke requirements concerning the introduction of x-ray body scanners. The Governor asked the court

to note that the policy primarily concerned technical health and safety requirements relating to the deployment of such scanners. In contrast other sections of the policy concern the practical application of the scanners as part of an overarching search strategy within the prison. He then refers to the secretion policy which seeks to address a serious risk posed by internal secretion of contraband material. To that end the policy notes that there is considerable evidence that prisoners who are entering or re-entering custody use internal secretion as a method of trafficking to convey prohibited and unauthorised articles into prison. This can include very significant quantities of drugs which as well as being potentially extremely harmful to the individuals, have an injurious impact upon safe, decent, and secure custody for people in custody and for staff and impact upon rehabilitation and resettlement.

[12] In order to address these issues in light of the introduction of x-ray body scanners the policy focuses on three key areas, namely:

- (i) How to manage a male prisoner when an x-ray scan has detected an internally secreted item.
- (ii) How to manage a prisoner when they cannot be or refuse to be x-ray body scanned and there is reasonable suspicion or intelligence that they may be concealing internally secreted items.
- (iii) Engagement with additional policy documents relating to dealing with prohibited and unauthorised articles.

[13] In addressing the aforementioned areas the secretion policy recognises that internal secretions specifically engenders particular healthcare and general disciplinary considerations. To that end the secretion policy establishes clear frameworks for each of these discrete areas. The governor goes on to aver that each of the aforementioned policies have also been supplemented by the development of a local search strategy and that strategy is referred to in the exhibits to the affidavit.

[14] The search strategy represents a comprehensive overview of the search strategies implemented at HMP Maghaberry. The search strategy is designed to provide a co-ordinated and flexible approach to all search operations. The search strategy therefore seeks to allow for search operations to be integrated to include all elements of defensive and intelligence led searching, control of prisoner's property and collation of security intelligence to provide the agreed service delivery and ensure an appropriate level of resources are deployed to provide an effective searching regime. Due to its overarching nature much of the search strategy is not relevant in the context of the current challenge. The Governor says that the strategy seeks to ensure that the prison has recognised procedures that are designed to detect prohibited or unauthorised items and endeavour to deprive prisoners of their use, deter anyone from introducing prohibited or unauthorised items into the establishment that may, in turn, threaten good order and security within the

establishment and handle finds in such a way that it will assist partner organisations in the prevention and detection of crime.

[15] Following the introduction of x-ray body scanners the strategy has been updated to address the introduction of the scanners.

[16] Finally, the Governor asked the court to note that the strategy addresses the deployment of x-ray body scanners by reception staff within the prison service. It concerns the deployment of various search techniques including the use of x-ray body scanners in relation to different cohorts of prisoners and it addresses general search principles and issues concerning record keeping.

[17] Having considered the contents of this affidavit and the policy documents and strategies exhibited, in my view, the public law challenges or grounds identified in the Order 53 Statement are fully addressed. In my view, there are no grounds upon which the lawfulness of this policy could be challenged or considered unlawful or disproportionate. The real issue in this case turns on whether the policy was properly implemented in respect of the applicant. The applicant complains about the manner in which he was asked to agree to the procedure. He complains about a lack of communication after the initial scan. He complains that he was not given access to copies or results of the scan. It may be that there is an issue about the effectiveness of the scanner in question. It seems to the court that these issues are intensely and highly fact specific. To determine whether the respondent has acted lawfully or unlawfully the court will need to receive evidence from those involved in the search and the ongoing decision to detain the applicant in CSU. It may need to examine the results of the scans and hear evidence about the efficacy of the scanners. This exercise is not suited to judicial review.

[18] In my view, if the applicant wishes to proceed with a claim, rather than say, for example, make a complaint to the Prisoners' Ombudsman, he should do so by way of a civil action. Oral evidence and the more liberal discovery and inspection regime are best suited to the issues that arise in this case. The court has a broad discretion under Order 53, rule 9(5) of the Rules of the Court of Judicature (NI) 1980 ("the 1980 Rules") which provides:

"Where the relief sought is a declaration, an injunction or damages and the court considers it should not be granted on an application for judicial review but might have been granted if it had been sought in an action begun by writ by the applicant at the time of making his application the court may instead of refusing the application order the proceedings to continue as if they had begun by writ and Order 28, rule 8 shall apply as if the application had been made by summons."

[19] Turning to this case, it is still at the leave stage. I consider that there is insufficient evidence before the court that would justify the granting of leave. Any outstanding potential issues that arise are best addressed in a civil action. When I look at the grounds set out in the Order 53 Statement they do not readily read across to a civil pleading. The public law issues raised in the Order 53 Statement have been addressed by the Governor's affidavit. The matters giving rise to the claim are fresh and no issue arises in relation to limitation should a civil claim be initiated. I consider that clearly the appropriate forum for litigating the applicant's complaints both legally and practically is by way of a civil action in the county court. That court can provide any of the declarations sought by the applicant. The level of damages available to that court would adequately compensate the applicant should he establish a breach of article 8 ECHR or, indeed, any other tort that may arise such as trespass to the person or negligence or breach of any other statutory duty.

[20] In those circumstances I do not consider it is an appropriate case to exercise the court's broad discretion under Order 53, rule 9(5) of the 1980 Rules. I consider that the appropriate order is to refuse leave in this application, but I make it clear that I do not rule out the possibility of the applicant bringing a civil action, where, as I say, after proper discovery and inspection procedures and, if necessary, oral evidence the outstanding matters that arise in this case could be properly determined.

[21] Leave is refused. I make no order inter partes in relation to costs. The applicant's costs will be taxed as a legally aided person.