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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY MICHAEL PATTERSON FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

-v-

NORTHERN IRELAND PRISON SERVICE

KEEGAN J

Introduction

[1] This judicial review challenge is dated 20 October 2017. The applicant seeks leave to apply for judicial review of the decision of the proposed respondent the Northern Ireland Prison Service (the "Prison Service") dated 28 September 2017, to apply the restrictive regime of "Rule 32" to him. That decision has been subject to ongoing review however the determination is the same and the applicant remains subject to Rule 32 restriction, by the most recent extension on 9 November for a period of 28 days.

[2] On 24 October 2017 various directions were issued by McCloskey J. These were complied with and an amended Order 53 Statement was lodged. Two case management and review hearings followed and, given the subject matter an expedited hearing was convened on 15 November. Having reviewed the progress of the case it is clear to me that McCloskey J intended this to be a rolled up hearing. I proceed on that basis. Mr Devine BL appeared for the applicant and Mr Corkey BL for the proposed respondent.

The Rule at issue

[3] Rule 32 of the Prisons and Young Offenders Centres Rules provides:

> "Restriction of association

32.–(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.

(1A) Where a prisoner's association is restricted to ensure the safety of officers, prisoners or any other person, the prisoner may be accommodated in a cell equipped to aid the retrieval of any unauthorized or prohibited article which he may have in his possession.

(2) A prisoner's association under this rule may not be restricted under this rule for a period of more than 72 hours without the agreement of the Department of Justice.

(2A) The governor shall inform a member of the independent monitoring board:

(a) that he has arranged for the restriction of the association of the prisoner, and

(b) of the date, time and location of the first review of the restriction of the prisoner's association.

(2B) The governor shall inform a member of the independent monitoring board of the matters in paragraph (2A) as soon as practicable and in any event no later than 24 hours after the prisoner's association is restricted.

(2C) The governor shall keep a written record of all contact and attempted contact with members of the independent monitoring board under this rule.

(2D) Unless it is not reasonably practicable, a member of the independent monitoring board shall be present at all reviews of the restriction of the association of the prisoner.

(2E) The governor shall as soon as reasonably practicable inform a member of the independent monitoring board:

(a) of any changes to the date, time or location of the first review of the restriction of the association of the prisoner,

(b) the date, time and location of any subsequent reviews of the restriction of association of the prisoner, and

(c) any changes to the date, time or location of any subsequent reviews.

(2F) The independent monitoring board shall satisfy itself that:

(a) the procedure in this rule for arranging and reviewing the restriction of the association of the prisoner has been followed, and

(b) the decision of the governor to restrict the association of the prisoner is reasonable in all the circumstances of the case.

(2G) In order to satisfy itself of the matters in paragraph (2F) the independent monitoring board shall be entitled to inspect the evidence on which the governor's decision was based, unless such evidence falls within paragraph (2H).

(2H) Evidence falls within this paragraph if:

(a) it should not be inspected by the independent monitoring board for the purpose of safeguarding national security;

(b) its inspection by the independent monitoring board would, or would be likely to prejudice the administration of justice;

(c) its inspection by the independent monitoring board would, or would be likely to endanger

the physical or mental health of any individual; or

(d) its inspection by the independent monitoring board would, or would be likely to endanger the safety of any individual.

(2I) If the independent monitoring board is not satisfied of any of the matters set out in paragraph (2F) it shall draw this to the attention of the governor, in writing, who must, review the procedure for arranging and reviewing the restriction of the association of the prisoner, review his decision to restrict the association of the prisoner and take such other steps as are reasonable in all the circumstances of the case.

(2J) The governor must take the steps in paragraph (2I) promptly and in any event within seven days and the independent monitoring board shall not refer a matter to the Department of Justice under paragraph (2K) until the governor has taken the steps in paragraph (2I) or the end of the seven days whichever is earlier.

(2K) If after drawing a matter to the attention of the governor under paragraph (2I) the independent monitoring board is still not satisfied of any of the matters set out in paragraph (2F) it shall draw this to the attention of the Secretary of State in writing.

(2L) If a matter is referred to the Department of Justice under paragraph (2K) it must consider the matter and take such steps as are reasonable in all the circumstances of the case.

(3) An extension of the period of restriction under paragraph(2) shall be for a period not exceeding one month, but may be renewed for further periods each not exceeding one month.

(4) The governor may arrange at his discretion for a prisoner who is subject to restriction of association to resume full or increased association with other prisoners at any time, and in exercising that discretion the governor shall fully consider any

> recommendation that the prisoner resumes full or increased association on health and well-being grounds made by a registered general practitioner or a health care officer.
>
> (5) Rule 55(1) shall not apply to a prisoner who is subject to restriction of association under this rule but such a prisoner shall be entitled to one hour of exercise each day which shall be taken in the open air, weather permitting."

The challenge

[4] During the hearing Mr Devine confirmed that he was not proceeding with the ground contained in paragraph 6(d) in the amended Order 53. He also confirmed that there were essentially two heads of challenge namely a procedural argument and a substantive argument. I summarise these as follows:

(a) A complaint of procedural unfairness, the particulars of which are that the Applicant has at no time been provided with sufficient information to enable him to make meaningful representations and no reasons have been given, contrary to Rule 2(g) of the Prison and Young Offenders Centres Rules (NI) 1995 (the "Rules") and the common law, illustrated by decisions such as Re Wilson's Application [2009] NIQB 60 at [20]; and

(b) The Prison Service has not demonstrated the necessity which the invocation and application of Rule 32 requires: see for example Re Brockwell's Application [2017] NIQB 53 at [70]–[73].

[5] No affidavit has been sworn by the applicant. The only affidavit is that of his solicitor, sworn on 20 October 2017, who avers that this was attributable to urgency and that he "… will have an affidavit filed by the applicant as soon as possible". I would also have expected the solicitor's affidavit to contain averments of information and belief emanating from the applicant pursuant to Order 41, Rule 5 of The Rules of the Court of Judicature. There are no such averments. There was some debate about this at the hearing as Mr Corkey rightly raised the duty of candour. Mr Devine, whilst initially arguing that the timetable did not allow an affidavit to be filed by the conclusion of his submission stated that in fact the applicant did not need to file an affidavit because he took no issue with the substance of the material provided by the Prison Service. He simply contended that the information provided militated against a fair procedure and resulted in a decision which failed the necessity test highlighted above.

[6] The solicitor's affidavit avers that the applicant is now aged 24 years. He was committed to prison on 2 June 2016 to serve a three year sentence for driving offences and he has an earliest date of release of 3 December 2017. The application of the restrictive "Rule 32" regime to him coincided with his return to prison from a period of authorised temporary release.

[7] The Pre Action Protocol (PAP) response of the Prison Service, dated 13 October 2017, was written by The Governor. It contains the following material passages:

> "I was the Governor who initially placed [the Applicant] on Rule 32 and fully explained the reason to him. At the time Mr Patterson stated he understood but made no further comment. On 29 September your client was issued with a three page gist detailing the need for his Rule 32 ….
>
> He also attended a Rule 32 review held on 29 September where he was able to contest the allegations against him ….
>
> The allegations made against your client were made clear to him on several occasions …..
>
> We were justified in our actions as we have information your client was attempting to bring prohibited items into the prison. As a public body we have a duty of care and to allow Mr Patterson to return to normal population when we believe he has items concealed which would present as a danger to staff, other prisoners and also Mr Patterson would be negligent on our part. The objective of placing Mr Patterson on Rule 32 was to retrieve the items which he has concealed."

As regards the Applicant's "Rule 32" daily conditions, the letter continues:

> "Mr Patterson is not kept in isolation but is being prevented from having direct contact with other prisoners. He has access to the telephone on a daily basis, family visits and is heard talking to other prisoners from his cell window. He has daily contact with staff and a nurse."

[8] The written "gist" to which the aforementioned letter runs to 3 pages and contains the following material passages:

"Mr Patterson ….. is a habitual offender, with six previous periods in custody dating back to 2011. He is a drug user, evidenced by his MDT history ….

Mr Patterson has in previous sentences been involved in the use of unauthorised articles (drugs) within prison. He returned from a period of home leave on 28/09/17 and it is believed he brought drugs back into the prison …..

Any specific information regarding the original source or further details of this information is held on the Prisoner Information System (PRISM) and forms part of the complete record. Security information held on PRISM is held for the purposes of prevention or protection of crime or for the purposes of the apprehension or prosecution of offenders. As such, this information is exempt from disclosure under section 29 of the Data Protection Act 1998 and I am not, therefore, in a position to provide him with a copy of the information ….

I have access to information that suggests that he is linked to the introduction and use of drugs …..

The internal concealment of drugs is a commonly used method of concealment of unauthorised articles (drugs included) used by dealers and users. The relative shortage of drugs currently in Maghaberry means that the price for all types of drugs has escalated significantly ….

Past experience with such prisoners is that there will be a mix of drugs carried in this matter, where recreational drugs will be used by prisoners themselves while being held in the CSU, with more lucrative prescription medication being held for a later date due to higher cost of these items ….

Medication smuggled in this manner will not trigger indications by PDD. Given the short time since committal into the CSU, and the determined mindset of such drug traffickers, and the potential profit of the articles he may be holding, I believe that Patterson will still have unauthorised articles concealed ….

> The introduction of illicit materials, drugs included, is a major issue for the NIPS and we will take all necessary and proportionate action to prevent and disrupt this. Restriction of the association under Prison Rule 32 of prisoners suspected of being involved with drugs or drug use is a necessary and proportionate tool in achieving this and ensuring the protection of the safety, security and welfare of staff, prisoners and others ….
>
> Recently Maghaberry has been extremely disrupted by prisoners suffering from the effects of drugs both illegal and prescription. This has resulted in staff and prisoners being abused and threatened with violence, regimes being disrupted and several incidents where staff felt the need to sound the discipline alarm for their own safety and many incidents of prisoners being rushed to hospital by emergency ambulance following drug taking behaviours. Drugs and drug use have been a core issue in this behaviour. …..
>
> To allow Mr Patterson to enter Maghaberry integrated accommodation with a potential supply of drugs smuggled in from outside will, I fear, allow him to use and/or distribute drugs within the prison, which may result in displays and incidents of aggression and threats towards staff, other prisoners and others facing the safety, security and welfare of himself, staff, prisoners and others at risk."

[9] It is clear that the measure taken against the Applicant engaged two fundamental legal principles. Firstly, the decision making process had to be fair. Secondly, the requirements of procedural fairness are intimately linked to the prevailing context.

[10] It is of particular significance to me that the case made extensively in writing on behalf of the Prison Service has at no time been challenged by the applicant. Indeed Mr Devine expressly conceded this during the hearing. No issue was taken with Mr Corkey's summary of the Prison Service bundle of papers produced for this hearing. In particular Mr Corkey highlighted the following:

(i) The applicant was placed on Rule 32 restriction on 28 September 2017 following a suspicion that he had drugs secreted on his person following home leave.

(ii) His restriction was reviewed on 29 September 2017. The review note states that …"Michael is fully aware of the reasoning behind this. The process has been fully explained. Michael insists that he has not brought any items back with him and spent this time with family. Michael is an area that CSU staff will routinely assess this period of restriction."

(iii) His restriction was further reviewed on 26 October 2017.Included within the note of that review is the fact that "Michael freely admitted to having been found with a smoke which he claimed to have got in the yard…"

(iv) His restriction was also reviewed on 9 November 2017. The applicant did not attend this review. The note of it states that "A large amount of drugs were recovered from Mr Patterson since his last Rule 32 review and it is our belief that he still has a quantity concealed."

(v) In records of discussions after the various reviews the applicant is consistently noted to understand the procedure, the basis for intervention i.e. "suspicion of bringing drugs into prisons" and he is described as content and "not challenging anything said to him" (27 October 2017 note). After the 9 November review the applicant explained his non-attendance by saying" what's the point". The note of that discussion also reveals that "Search records indicate items recovered were Xanex, cannabis, herbal, green and blue tablets, white powder and wraps. Michael agreed that he did have these items when searched."

Consideration

[11] I accept the point made by Mr Devine that Rule 32 is restrictive and the imposition of such a regime must be justified. There can be no argument with that flowing from the case of R (On the Application of Bourgass & Another) v Secretary of State for Justice 2015 UKSC 54. However, there must be an evidential basis for contending that a particular decision is flawed. I am bound to say that the lack of any averments on affidavit by the applicant is telling and in my view this offends the duty of candour. However, putting that failing aside an evaluative judgment on the part of the Court is required in relation to this challenge.

[12] In relation to the procedural ground, I am entirely satisfied that the information disclosed to the applicant at the various stages provided him with sufficient insight into the basis of and reasons for the action being taken against him. I consider that he was therefore adequately equipped with the information necessary to respond to the case being made against him and to question it. This was a relatively simple issue unlike some of the other cases I

have read where unidentified risks are relied upon. The applicant also had the opportunity to present any defence and to make such representations as he wished. The raw materials supplied by the Prison Service amply support this view. There is also no evidentially based challenge to this analysis. The fact of the matter is that the basis for the procedure was clear. Accordingly, I consider that the first ground of challenge is lacking in any merit and so it must fail.

[13] As regards the second ground of challenge, I rely on the Prison Service letter and the rationale contained therein:

> "In making this recommendation, I have considered the expectations of Patterson as regards mixing with other prisoners, but also the requirement for safety, security and welfare of staff, prisoners and other persons and Patterson himself. Consideration has also been given to other options, for example cell and wing moves, however this has been discounted as the risk posed by the introduction of large amounts of drugs would be catastrophic in any residential area. For these reasons, this has been discounted."

[14] This extract effectively highlights the legitimate purpose of the measure. In my view there is a failure by the applicant to engage with this reasoning and approach. However, this is not determinative in itself of the second ground of challenge since the Court must form its own independent view of this discrete matter, taking into account the criterion of necessity enshrined in Rule 32. In doing so, I bear in mind that the applicant has not placed before the Court any alternative measure with supporting arguments, reasons or evidence.

[15] I have also had regard to the decision in Brockwell which is utilised by the applicant in support of this second ground. I gratefully adopt paragraph [61] of the judgment of Maguire J wherein he sets out a summary of the main governing principles as follows:

> "The main features of the legal landscape in this area appear to be as follows:
>
> - That Rule 32 should not be invoked lightly and is, in effect, a measure of last resort.
>
> - That the Rule 32 regime is likely to be challenging for the prisoner. There has now been recognition by the Supreme Court of the effects of segregation on a prisoner: see

paragraphs [35]-[40] of the judgment of Lord Reed in Bourgass.

- A test of necessity governs the use of the power in Northern Ireland. It should, therefore, not be used where there is a viable alternative way of dealing with the matter.

- The longer a prisoner is placed on the rule, the greater will be the risk of harm to him and the more compelling the justification for the use of this power must be.

- There are a range of safeguards both procedural and substantive which need to be carefully policed. It is an objective of policy in this area that a prisoner should not have to endure any period on Rule 32 longer than strictly necessary. Consequently all reasonable efforts must be made to find another way of handling the prisoner which does not involve keeping him indefinitely in separated conditions: see Conlon."

[16] The applicant relies in particular on paragraphs [70]–[73] of the decision. Within these passages the Court expresses its conclusion that the necessity test was not satisfied in that case. The facts are obviously different and this conclusion was mainly based on the failure of the Prison Service to provide evidence that consideration had been given to the adoption of measures alternative to the application of the Rule 32 regime. However, such an assessment is not apposite in this case on the basis of the evidence noted at [13] above, the PAP response and the "gist" attachment. In this case the applicant's assertion that the Prison Service failed to consider alternative, less intrusive measures is not supported by the evidence. See Re SOS Application [2003] NIJB 252 at 259. I do not accept that there has been any substantive failing and it follows that the second ground of challenge must also fail.

Conclusion

[17] Accordingly I conclude that the applicant has failed to establish an arguable case in relation to either of his core grounds of challenge. Leave to apply for judicial review is refused and the application is dismissed.