Neutral Citation No: [2023] NIKB 118 *Judgment: approved by the court for handing down (subject to editorial corrections)**	*Ref:* **ROO12334** *ICOS No:* **23/070105** *Delivered:* **29/11/2023**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY THOMAS MORGAN FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION BY THE NORTHERN IRELAND PRISON SERVICE

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Mr David McKeown (instructed by McConnell Kelly & Co, Solicitors) for the Applicant
Mr Philip Henry (instructed by the Department Solicitor's Office) for the proposed Respondent

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ROONEY J

Introduction

[1] On 21 August 2023, when judicial review proceedings were commenced, the applicant was a remand prisoner detained in HMP Maghaberry. In his grounding affidavit, the applicant avers that prior to his remand, he was attending a counsellor for mental health issues. The counsellor is named as Ms Mandy McDermott, who is employed by AchieveNI. Following his detention in prison on remand, the applicant states that he wished to continue the counselling sessions with Ms McDermott, whom he claims was willing to attend HMP Maghaberry to facilitate such sessions.

[2] The applicant avers that when he applied to have the counselling sessions facilitated through professional visits, he was informed by the governor of HMP Maghaberry that this was not possible. In his affidavit, the applicant avers that when Ms Mandy McDermott contacted the proposed respondent regarding the provision of counselling services, she was informed that in-person visits are reserved to legal representatives. Otherwise, virtual or remote visits lasting 20 minutes could be organised. On receipt of these details, the applicant states that he added Ms McDermott to his list of approved visitors and met with her on a remote basis.

He claims that the counselling session was monitored against his wishes and were only allowed to last for approximately 20 minutes. The applicant avers that shortly after the initial visit, he was informed by the governor that virtual or remote visits with counsellors would not ordinarily be permitted. However, an exception would be made in the applicant's case so that the visits with Ms McDermott could remain but would be visually monitored and would still only last 20 minutes.

[3] On 26 April 2023, the applicant's solicitor sent an email to the proposed respondent questioning the justification for not allowing the applicant to have a face-to-face session with Ms McDermott and stating that a Zoom or remote session lasting only 20 minutes would not be of sufficient time to complete a therapy session.

[4] The respondent replied in a letter dated 26 April 2023. The said response, which would be considered in more detail below, can be summarised as follows:

(a) Professional visits are primarily for legal matters and to facilitate access to justice. Such visits would also encompass, for example, visits from social services and probation.

(b) There is no provision for a private counsellor to attend on a face-to-face basis.

(c) Virtual visits are capped at 20 minutes so as to ensure that the maximum number of prisoners can avail of this service.

(d) Similar to in-person professional visits, visual links are observed but there is no audio monitoring.

(e) It is open for remand prisoners to apply for bail to attend private appointments.

(f) As the applicant is 'single celled', he can avail of in-cell telephone appointments.

[5] An undated pre-action protocol letter was received by the respondent on 16 May 2023. In the Order 53 Statement dated 17 August 2023, the applicant sought to challenge the proposed respondent's ongoing failure to allow effective engagement between the applicant and his counsellor, or in the alternative, to provide equivalent psychological services. The grounds of challenges specified were founded on illegality (error of the law as to visits; failure to offer appropriate rehabilitation and care); leaving out of count material considerations; taking into account immaterial considerations, procedural unfairness; irrationality; breach of legitimate expectation; violation of his rights under articles 5, 8 and 14 ECHR; breach of Prison Rules; and unlawful failure to publish and apply any relevant policy re the applicability and use of visits.

[6] A case management review by Scoffield J, inter alia, listed the leave hearing for 20 November 2023.

[7] Prior to the commencement of the leave hearing on 20 November 2023, Mr McKeown, counsel for the applicant, stated that having considered the respondent's skeleton argument, the only matters which required the court's consideration were (a) whether the proceedings were academic, and, if not, (b) whether there had been a failure to provide and publish a policy, and, if it existed, whether there had been a breach of such a policy.

[8] Mr Henry BL, on behalf of the respondent, only became aware that the grounds for challenge were to be limited to the said issues on the morning of the hearing. Mr Henry restricted his submissions to a consideration of four issues, namely:

(i) The absence of a factual foundation to the proceedings;

(ii) The proceedings were academic;

(iii) The availability of alternative remedies; and

(iv) The lack of merit relating to the single remaining ground of challenge.

Is the case academic?

[9] In *Anthony, Judicial Review in Northern Ireland* (2nd Ed) 2014, at para 8.18, the learned author stated:

> "… the courts are generally reluctant to grant the remedy where the matter between the parties has since become academic (in the sense that it is no longer live) or the issues raised are speculative and where the judgment of a court would be in the form of advice."

[10] The guiding principle on whether a matter is academic is as provided by Lord Slynn in *R v Secretary of State for the Home Department, ex parte Salem* [1999] UKHL 8 in which he states:

> "The discretion to hear disputes, even in the area of public law, must, however, be exercised with caution and appeals which are academic between the parties should not be heard unless there is a good reason in the public interest for doing so, as for example (but only by way of example) when a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or

> are anticipated so that the issue will most likely need to be resolved in the near future."

[11] Applying this guidance, it seems to me that two questions arise. Firstly, is the matter in dispute academic between the parties, in the sense that it is no longer live. Secondly, even if the matter is deemed to be academic, should the court exercise its discretion and nevertheless hear the dispute if there is a good reason in the public interest for doing so.

[12] In *Salem*, Lord Slynn referred to a discrete point of statutory construction as an example of a circumstance when a court might exercise its discretion to hear a dispute which has become academic. This example is not intended to be exhaustive, but in many cases does provide the starting point against which academic claims are measured.

[13] Turning to the facts of this case, as stated above, when the judicial review proceedings were instigated in August 2023, the applicant was a remand prisoner. This is no longer the situation. The court was advised that in September 2023, the applicant was granted bail. Therefore, at the date of the hearing, the proposed respondent was no longer responsible for any restrictions on the applicant's access to his counsellor, Ms McDermott.

[14] In light of this recent development, Mr Henry BL, counsel for the respondent, submits that the applicant's claim has lost practical substance. In other words, the judicial review proceedings can have no practical effect and serve any useful purpose between the parties.

[15] Mr McKeown BL, on behalf of the applicant, submits that whilst the impugned decision no longer directly affects the applicant, this is an appropriate case for the court to exercise its discretion. He claims that there remains a significant public interest for prisoners to know the respondent's policy regarding the nature, extent and availability of prison visits. In essence, Mr McKeown argues that the matter in question will inevitably arise in the future.

[16] Although not referred to in written or oral submissions, in support of Mr McKeown's argument, the court takes into consideration the dicta of Scoffield J in *Bryson's Application* [2022] NIQB 4 at para [22]:

> "[22] The "matter between the parties" is in my view to be understood as the real-life dispute or circumstance which has given rise to the legal question. The fact that there is an ongoing legal debate – which may arise in future between the same or, more likely, *other* parties – is relevant to the separate and posterior question the court will address in a case which has become academic,

> namely whether the case nonetheless ought to be permitted to proceed in the public interest."

[17] Mr Henry BL, submits that the matter in question between the parties does not give rise to an ongoing legal debate. He submits that the issue in the present case has not arisen in any other case notwithstanding that HMP Maghaberry processes in excess of 5,000 prisoners every year.

[18] Having carefully considered the competing submissions, it is my decision that the matter between the parties is plainly academic. The applicant is no longer a remand prisoner. Rather, having successfully applied for bail, the applicant can effectively access whatever medical and psychological services that are available to him, including counselling sessions with Ms McDermott. Furthermore, I am not persuaded that in light of the issues that have been raised, I should exercise my discretion to hear the dispute in the public interest or that they are likely to require consideration in the future. In my judgment, it is unlikely that the matter at issue will arise as a recurring problem and generate ongoing legal debate. The issue raised is speculative. There is no justification for an advisory judgment on this speculative issue. Since each case must be assessed on its own merits, the court must be cautious before granting a prospective order.

[19] By reason of the foregoing, I dismiss the applicant's application for leave to apply for judicial review. In my view, the matter in issue between the parties is academic and there is no good reason for the court to exercise its discretion to permit the application to proceed, whether on the grounds of public interest or otherwise.

Merits of the case

[20] Although, for the reasons given above, I have dismissed the applicant's application for leave to apply for judicial review, I consider it necessary to make some comments in relation to the merits of the case.

[21] The respondent submits that the evidential foundation to the judicial review proceedings is non-existent. The proceedings were grounded on the affidavit of the applicant. It is submitted by the respondent that the said affidavit does not provide any details regarding the applicant's request to the proposed respondent for psychological and counselling services. The affidavit refers to Ms McDermott having made contact with the respondent in relation to providing the applicant with counselling services and was informed that in-person visits were reserved for legal representatives, although virtual visits could be organised. No affidavit was filed on behalf of Ms McDermott. In addition, no details were provided as to when the applicant initially received counselling services from Ms McDermott, the nature and purpose of the counselling and the justification for continuation of the said services whilst in prison. No details were provided as to whether, if the applicant made a request for the said counselling services, the respondent was given an opportunity to

respond as to the psychological assistance that was available and could be provided whilst the applicant was on remand.

[22] The applicant submits that the remaining single ground of challenge was to ascertain whether the respondent had a policy in relation to the provision of visits to prisoners and, if such a policy did exist, the nature and extent of that policy. The applicant relies on the case of *R(Lumba and another) v Secretary of State for the Home Department* [2011] UKSC 12. However, as stated by Colton J in *Mullan's Application for Judicial Review* [2023] NIKB 19:

> "Lumba is only authority for the proposition that where a policy is in existence it should be published. It is not an authority for the proposition that every element of decision making by a public authority must be accompanied by a published policy, nor is there any authority to that effect."

[23] The respondent submits that the facts in *Lumba* involved the deliberate withholding of information about a policy used to detain immigrants who were unlawfully in the UK because of a well-founded fear that it would not withstand legal scrutiny. The facts in *Lumba* differs significantly from the facts in this case. Firstly, the respondent states that whether couched in terms of a policy or an administrative decision, the relevant provisions were published online and would have been within the knowledge of the applicant. Secondly, with specific regard to the respondent's letter dated 28 April 2023 the applicant was plainly aware of the ambit and reasons for the policy. Professional visits were primarily for legal matters and to facilitate access to justice. The policy was not inflexible, in that in-person visits were available to social services and probation. The justification for virtual visits being capped at 20 minutes was to ensure that the maximum number of prisoners could avail of this service, which was used to facilitate family and social visits. Although visual visits were observed, similar to in-person professional visits, there was no audio monitoring.

[24] The court requested the respondent to produce the materials which were available to all prisoners in relation to prison visits. The materials included the following, namely,(a) a power point slide show presented to prisoners when they enter the prison; (b) a document entitled 'Help and advice for those visiting a prison in Northern Ireland; (c) a print-off from the respondent's website, entitled 'How to have an online visit.'; (d) a notice posted for prisoners dated 23 August 2022 entitled 'Visits Bookings;' (e) a notice posted for prisoners dated 27 January 2022 entitled 'Recommencement of in-person Legal Visits.' Having looked at these documents, it is clear that the respondent had published relevant materials in relation to the policy regarding the provision and use of visits.

[25] The respondent also argues that the applicant had an in-cell telephone in his single person cell which he could use to speak with his counsellor or make an

application for compassionate bail to attend with her in-person if he so wished. No such application was made. In this regard, the respondent also argues that alternative remedies were available to the applicant but not availed of.

[26] I agree with the submissions made by the proposed respondent in respect of the merits of the claim. Although unnecessary for the determination of this application, if so required, for the reasons given above, I would have dismissed the applicant's application on the merits.

Decision

[27] For the reasons stated above, I dismiss the applicant's application for leave to apply for judicial review. The case is properly to be viewed as academic. I do not consider that this is a case which falls within the exceptional category where a court should exercise its discretion to permit the application to proceed.

[28] I will follow the usual course of making no order as to costs between the parties at this stage. A legal aid taxation order will be made in respect of the applicant's costs.