Neutral Citation No: [2021] NIQB 55 *Judgment: approved by the court for handing down (subject to editorial corrections)**	*Ref:* **ROO11525** *ICOS No:* *Delivered:* **21/05/2021**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

QUEEN'S BENCH DIVISION
(JUDICIAL REVIEW)

_____

IN THE MATTER OF AN APPLICATION BY ABDUL WAHAB FOR JUDICIAL REVIEW

_____

Mr Donal Sayers, QC with Mr Chambers BL (instructed by McNamee McDonnell Solicitors) for the applicant
Dr McGleenan, QC with Mr Summers BL (instructed by The Departmental Solicitors Office) for the respondent

_____

ROONEY J

Background

[1] The applicant and his wife have been charged with the offences of murder, causing or allowing the death of a child and causing grievous bodily harm with intent. The offences relate to the applicant's step-daughter (his wife's daughter) who was 5 years old when she died.

[2] The applicant is detained on remand at HMP Maghaberry. Mrs Wahab is a remand prisoner at HMP Hydebank Wood**.**

[3] Mrs Wahab was pregnant with a child of the marriage and her expected delivery date was on 25 August 2020. Arrangements had been made for Mrs Wahab to be brought to the Ulster Hospital, Dundonald for the delivery of her baby.

[4] On 24 August 2020, the applicant made an application for bail on compassionate grounds. He sought to be released for a 12 hour period to be with his wife at the Ulster Hospital, Dundonald, during her labour and the birth of the child.

[5] The bail application was heard over 2 days before Mrs Justice Keegan on 24 and 25 August 2020. At the conclusion of the hearing, the learned judge refused the application as sought but granted an order for bail on the following conditions:

(i) The Prison Service will facilitate a Zoom visit for the applicant during the course of Mrs Wahab's labour. The applicant's solicitor is to inform the Prison Service when Mrs Wahab goes into labour. I shall refer to this as 'bail condition 1' or the 'Zoom visit condition.'

(ii) Within 2 hours of the birth of his child, the applicant will be admitted to compassionate bail to attend at the Ulster Hospital for one 2 hour visit with his wife and new born child. The applicant's solicitor is to inform the police when Mrs Wahab has given birth. I shall refer to this 'bail condition 2.'

(iii) The visit between the applicant, his wife and new born child shall take place between the hours of 12 noon and 2 p.m. unless this is not practical. If this is not practical, the visit shall take place during another 2 hour period during the 24 hour period after the applicant's child is born hereinafter 'bail condition 3'.

[6] Two further conditions were imposed by the learned judge which are not relevant to this application. It must be stressed that the said conditions were drawn up and agreed by the parties and then placed before Keegan J for her approval. The bail order is dated 25 August 2020 and appears to have been granted by the learned judge at approximately 16:00 hours.

[7] In an affidavit sworn by the applicant's solicitor dated 26 August 2020, it is averred that Mrs Justice Keegan, in an ex tempore judgment, stated that the Article 8 ECHR rights of the applicant and his wife had been engaged and it was important to permit the applicant remote visitation by Zoom during his wife's labour and the birth of their daughter.

[8] It is worth pausing at this point in the narrative to emphasise the following facts. Firstly, it appears that during the discussions between the parties with regard to the bail conditions, the respondent was not consulted as to the nature and extent of the respondent's policy with regard to virtual visits and video link facilities and, more significantly, operational restrictions on the policy. Secondly, no consideration was given by the parties as to whether the court had power to impose bail condition 1. Thirdly, apart from referring to a Zoom visit *"during the course of Mrs Wahab's labour"*, bail condition 1 does not provide any further detail as to the specific time when and for how long the Northern Ireland Prison Service ('NIPS') was obliged to facilitate a Zoom visit for the applicant. The said issues, perhaps understandably not addressed at the time due to the urgency of the application, took on a greater significance as the events unfolded.

[9] At paragraph 10 of the applicant's solicitor's affidavit dated 26 August 2020, Ms. Colleen McCreesh states that at approximately 5:00 p.m. on 25 August 2020 she spoke directly to the Duty Governor of HMP Maghaberry who informed her that Zoom visitation was only available between the hours of 8:30 a.m. and 8:00 p.m. and,

due to "*prison safety*", Zoom facilities were not available after 8:00 p.m. The obvious dilemma facing the applicant was that the expected date of delivery was 25 August 2020. If his wife went into labour after 8:00 p.m., he would not be present remotely with his wife. A view was taken that the unavailability of the Zoom facilities after 8:00 p.m. would have the effect of frustrating the bail order made by the court.

[10] Due to the urgency of the situation, the matter was referred to the applicant's junior counsel, Mr Michael Chambers BL. Having considered bail condition 1, Mr Chambers advised that the learned judge did not have the jurisdiction to issue a direction as to how the prison authorities facilitated Zoom calls within the prison. An email was sent to the High Court bail office at 6:11 p.m. on 25 August 2020 drawing this issue to the attention of Keegan J. The court was requested to consider whether or not it did have jurisdiction to direct the Prison Service to facilitate a Zoom on a 24 hour period.

[11] A pre-action protocol letter was sent to the Prison Service at 7:30 p.m. on 25 August 2020.

[12] At 10.20 a.m. on 26 August 2020, the applicant's solicitor received correspondence from Deputy Governor David Savage, HMP Maghaberry, urgently seeking a variation of bail condition 1 and stating as follows:

> *"We are very mindful of the obligations of all court orders but it is simply not possible for the Northern Ireland Prison Service to comply with condition 1 as it stands, should Mr Abdul (Wahab's) wife be in labour between 19:30 in the evening and 8:30 in the morning. Operationally within NIPS it is only possible for Zoom visits to be facilitated between the times of 8:30 to 19:30 during the day. … The reasons pertaining to this are operational and security based. I can advise that the Prison is required to be fully locked by 19:30 hours and all prisoners, keys and staff accounted for. Maghaberry Prison is the only Category A Prison in Northern Ireland and with this comes additional security measures that are not present in either Magilligan Prison and Hydebank Security College - completing any unlock following 19:30 hours increases security risk in the establishment. One of the things which is not present in Maghaberry Prison due to its Category A status is a Wi-Fi network that can be accessed from residential units."*

[13] Keegan J offered a further hearing to the parties at 1.00 p.m. on 26 August 2020. However, it was indicated that if the applicant was proceeding with a judicial review, this would take precedence.

[14] On 26 August 2020, an emergency application for leave to apply for judicial review was heard by Lord Justice Treacy. At the invitation of the court, the parties agreed to an amendment of the bail order by which it was confirmed that the facility

of a Zoom visit would be unavailable between 19:30 hours and 08:30 hours on the following morning.

[15] The court granted the applicant leave to apply for judicial review. The respondent was also ordered to file an affidavit confirming in detail the reasons why compliance with the order of Keegan J was not feasible.

[16] In written submissions on behalf of the applicant, comprehensively crafted by Mr Donal Sayers QC, it is stated that the court, by granting leave, made it clear:

(a) that it was concerned with the NIPS policy of general application in respect of Zoom visits ("the Zoom visits policy"); and

(b) that it considered there to be a good reason in the public interest why the application should be heard, notwithstanding that there would be no live dispute between the parties when the hearing took place (*R v Secretary of State for the Home Department, Ex Parte Salem [1999] UKHL8)*.

[17] The said submissions will be considered in more detail below.

[18] Despite the fact that the expected date of delivery of the baby was 25 August 2020, Mrs Wahab did not go into labour until Thursday, 3 September 2020. When Deputy Governor Savage became aware at 7:00 a.m. on this date that Mrs Wahab was going into labour, he immediately contacted the Duty Governor to ensure that the applicant was prioritised for 'unlock' as soon as possible so that he could be moved to the virtual visits suite. The applicant was taken from his residential location to the virtual visits suite at 8:34 a.m. It appears that the labour lasted throughout the day and had not concluded when the applicant was returned to his residential unit at 7:34 p.m. Therefore, it appears that the applicant had been permitted Zoom facilities for approximately 11 hours. As considered in detail below, the respondent argues that everything possible was done for the applicant, including changing the virtual visitation rights of other prisoners.

[19] Mrs Wahab gave birth to a daughter on 3 September 2020. The respondent was informed at 8:00 a.m on 4 September 2020 and immediately contacted the applicant. The respondent was in the process of arranging another virtual visit for the applicant, when PSNI Officers arrived to escort the applicant on compassionate bail to the Ulster Hospital, Dundonald.

The policy relating to virtual visits

[20] The respondent emphasises that the policy for Zoom visitation facilities or virtual visits arose out of extraordinary circumstances. Due to the pandemic and Covid-19 restrictions, normal visitation rights were suspended. In an effort to reduce the impact of the suspension, the Governor of HMP Maghaberry issued a notice to prisoners and staff dated 9 April 2020. The notice provided for the introduction of

"virtual visits" from 13 April 2020. Virtual visits would be available each day of the week between 09:00 hours and 16:30 hours. Each virtual visit was to be allocated a 30 minute slot, to include the time to set up the video link and to clean the area before the next session started. Additional staff would be deployed to assist in the management of the visits. Prisoners would be allocated one visit per week. The notice stated that the facility would be kept under review.

[21] In a further notice to prisoners dated 15 May 2020, Governor Lindsay indicated that, in order to maximise family contact during Covid-19, prisoners would be able to avail of two virtual visits per week commencing 18 May 2020.

[22] Mr Sayers QC highlights that there is a discrepancy in the hours allocated to virtual visits as specified in the notices dated 9 April 2020 and the respondent's reply to the pre-action protocol letter dated 26 August 2020. In the said letter it is stated that, "*operationally within NIPS, it is only possible for Zoom visits to be facilitated between the times of 8:30 and 19:30 during the day.*" It is not clear when the Governor extended facilitation of virtual visits to 19:30. However, as stated above, the extension must have been in place on 3 September 2020 when the applicant was permitted a virtual visit from 8:34 a.m. to 19:30 p.m. approximately.

Grounds of challenge

[23] Two primary grounds of challenge are raised by this application.

[24] Firstly, the applicant contends that application of the virtual or Zoom visits policy in this case resulted in a disproportionate interference with the applicant's right to respect for family life under Article 8 ECHR.

[25] Secondly, it is contended that insofar as it excludes all operations between 19:30 hours and 8:30 hours, the Zoom visits policy is intrinsically inflexible. In the alternative, it is argued, the respondent applies the Zoom visits policy too rigorously and without a preparedness to entertain exceptions to it.

[26] It is accepted by counsel, and I agree, that the two grounds of challenge are inextricably linked. While I accept that there is an overlap, I have attempted to deal with each of the grounds seriatim.

[27] Before I consider the said grounds of challenge, it is necessary to address two matters raised by Dr McGleenan QC, senior counsel for the respondent, in his succinct and apposite oral submissions. Firstly, Dr McGleenan QC argues that the application is academic. Secondly, the application is premised on an "*unfortunate genesis*" which ought not to have occurred. He argues that the problem arose from the bail condition which the court did not have the power to impose. Accordingly, in the circumstances, it is not appropriate for the judicial review court to make a declaration. I will consider each submission.

Whether or not the application is academic

[28] The relevant principle is as stated by Lord Slynn in *R v Secretary of State for the Home Department, Ex Parte Salem* [1999] 2All.E.R. 42 at 47,

> *"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."*

[29] Applying the examples given to this case, Dr McGleenan QC argues that there is no discrete issue of statutory construction. Also, there are no other similar cases which exist or are anticipated which justify resolution of the issue in the near future. Essentially, it is argued that there are no wider public interest considerations that would require the court to grant relief.

[30] I consider that there is considerable merit in Dr McGleenan QC's submission that the matter is academic between the parties and therefore no good reason in the public interest to reach a determination on the issue. It is my view that the issue raised by the circumstances of this particular application is exceptional and unlikely to occur in the future. The likelihood that an applicant and his partner, who is pregnant and due to give birth when both are on remand or even sentenced prisoners, is extremely low.

[31] Mr Sayers QC argues that, notwithstanding there is no live dispute between the parties, the issue does engage a public interest. He states that foreseeable situations may arise where a remand prisoner will seek the facility of Zoom visits outside the prescribed hours, for example, when his partner is in labour or a close relative is near to death.

[32] I would be inclined to dismiss the application on the basis that the matter is academic. However, having heard the evidence presented by the parties, the court is in a position to deal with the substance of the case. Accordingly, I will proceed to consider the merits of the case and the grounds of challenge.

[33] **Effect of the conditions imposed by the bail court**

[34] Dr McGleenan QC submits that since the issues raised by the applicant originated from a bail condition which the court did not have power to impose, the judicial review court should refuse to consider whether a declaration should be granted.

[35] Mr Sayers QC, at my invitation, provided further submissions on what he termed 'the Zoom visit order.' He emphasised that the matter as to whether Keegan J lacked jurisdiction to make the Zoom visit order was not raised by either party before Treacy LJ. Rather, the terms of the amended Zoom visit order were agreed between the parties and the amendment was then made to the bail order. This order was not made as part of the judicial review proceedings.

[36] Mr Sayers QC states, and I agree, that the Zoom visits order should not have been made as part of the original bail order on 25 August 2020. Likewise, the amended bail order should not have been made on 26 August 2020. Essentially, the Zoom visits order was not an order that either admitted the applicant to bail or imposed a condition to which his release on bail was subject. Although the jurisdiction of the High Court to grant bail and to impose conditions on bail falls within the inherent jurisdiction of the court (unless presented with a prosecution appeal under section 10 of Justice (Northern Ireland) Act 2004), as stated by McCloskey J in *Re BG (Bail) [2012] NIQB 13 at [17], "fundamentally, there is an inextricable link between bail and liberty."* The Zoom visits order did not address the applicant's liberty or impose a condition on his release on bail. It is regrettable that the parties did not present legal argument to both Keegan J and Treacy LJ in relation to the court's power to make the said Zoom visits order. The explanation appears to be that the urgency of the application for judicial review took precedence.

Article 8 ECHR rights

[37] Mr Sayers QC submits that Keegan J was correct to determine that Article 8 ECHR is engaged by the circumstances of married remand prisoners when the birth of their child is imminent. He also submits that Keegan J was correct to conclude that any interference with the right to respect for family life resulting from detention of the applicant could be mitigated by the facility of remote contact. In other words, interference with his Article 8 ECHR rights would not be disproportionate where the applicant could, at least remotely, be with his wife by way of a Zoom visit during her labour.

[38] In written and oral submissions, Mr Sayers QC argues that the respondent has not clearly defined the nature and extent of its policy relating to Zoom visits. In particular, he argues that if the statement of Governor Savage is taken to provide details of the policy, it disproportionately interferes with the applicant's right to respect for family life by imposing restricted access on remote contact between the applicant and his wife during her labour and delivery of their child. Furthermore, it is claimed that the respondent demonstrates no preparedness to consider how the hours of restricted access might be addressed to ensure compliance with Article 8 ECHR and avoid breach of section 6 of the Human Rights Act 1998. Mr Sayers QC advances the argument stating that the respondent failed to give consideration to alternative arrangements, including additional staff resources, to ensure ECHR compliance in exceptional circumstances.

[39] It is my view that the applicant's Article 8 rights are engaged. This is also accepted by Dr McGleenan QC. Accordingly, as stated in the respondent's submissions, the central issue in the case is whether the decision not to further extend the virtual visit during the hours of lockdown resulted in a disproportionate interference with the applicant's Article 8 rights. As Dr McGleenan points out, since the applicant is a remand prisoner detained pursuant to an order of the court, some interference with the applicant's rights is one of the necessary ingredients of his lawful detention. The core question for the court is whether any inference is justified in accordance with Article 8(2) ECHR.

Proportionality and interference with Article 8 ECHR

[40] In *Re McGlinchey's Application* [2013] NIQB 5 at [20], Stephens J noted that Article 8 is a qualified right and that any decision by a public authority which interferes with the right must be:

(a) in accordance with the law;

(b) in pursuit of a legitimate aim; and

(c) necessary in a democratic society.

[41] Stephens J further stated at paragraph [20] that the question as to whether the interference is necessary in a democratic society:

> *"…requires consideration as to whether the decision is proportionate and strikes a fair balance between the competing public and private interests. … The concept of proportionality requires the reviewing court to assess the balance which the decision-maker has struck; not merely whether it is within the range of rational or reasonable decisions. The concept of proportionality in this case also requires attention to be directed to the relevant weight accorded to the interests and considerations. However, the intensity of that review will depend on the subject matter in hand. In law, context is everything."*

[42] Having considered the opposing arguments, it is my view that the respondent has struck a proportionate and fair balance between the competing interests and considerations at play. In coming to this decision, I am persuaded by the following matters. Firstly, the genesis of virtual visits policy arose out of a reasonable and pragmatic response to the suspension of prisoners' visits due to Covid-19 restrictions. Secondly, it was expressly stated that the facility for the provision of virtual visits would be kept under constant review. The respondent did not stick rigidly to the initial policy. The number of virtual visits per week was extended. The total number of hours per day was also extended. The length of time for each Zoom visit was flexible, whereby in appropriate cases, the period could be extended.

The flexibility is clearly demonstrated by the fact that on 3 September 2020, when the applicant's wife went into labour, the applicant was permitted an extension of the Zoom visit facility and remained in remote contact with his wife for 11 hours.

[43] In *McGlinchey*, Stephens J emphasised that the concept of proportionately should be considered alongside the margin of appreciation afforded to public authorities so that they had the flexibility to make legitimate choices on matters of policy, judgment and discretion when making their decisions. Specifically, at paragraph [21] Stephens J stated as follows:

> *"Along with the concept of proportionality goes that of the margin of appreciation, frequently referred to as deference or, perhaps more aptly, latitude. The primary decision-maker on matters of policy, judgment and discretion is the Northern Ireland Prison Service. A public authority should be left with room to make legitimate choices, the width of latitude and the intensity of the review which it dictates can change depending on the context and the circumstances. Accordingly, one of the issues to be decided in this judicial review application is the degree of deference due or latitude to be extended to a body such as the Northern Ireland Prison Service."*

[44] With regard to the circumstances of this case, it is stated by Governor Savage that, in order to facilitate a Zoom visit after the prison is locked down, would require the deployment of around 20%-25% of staffing resource and this could compromise the ability of staff to respond to emergency situations and unacceptably put the health and safety of others at risk. In his affidavit dated 23 September 2020, Governor Savage highlights the numerous services and programmes that operate during the day but, due to reduced staffing resource, do not operate at night. In order to properly contextualise the difference between the daytime and night time operations, Governor Savage appends a useful illustrative comparison to his affidavit dated 23 September 2020.

[45] Furthermore, Dr McGleenan QC argues that, although the application is premised on an interference with the applicant's Article 8 ECHR rights, the court must also take into consideration the competing rights of other prisoners and staff, including their Article 2 rights and the wider public interest in ensuring a safe and secure environment for offenders at HMP Maghaberry.

[46] It is my view that the respondent is a public authority and best equipped to make decisions on the safe and efficient operation of the prison having regard to an efficacious use of funding. A reduction of staff during lockdown hours for the reasons stated by Governor Savage is plainly reasonable and proportionate. Therefore, the decision of the NIPS to refuse to permit an unlock during the hours of lockdown, except where required for urgent medical assistance, is within the degree of latitude or margin of appreciation extended to the Prison Service in its task of

ensuring a safe environment, both to prisoners but also to staff working in the prison.

Inflexible policy/inflexible application of the policy

[47] The applicant argues that the Prison Service, in the exercise of its discretion to operate the facilitation for Zoom or virtual visits, is in breach of the principle established in *British Oxygen Co. Limited v Minister of Technology* [1971] AC610, 625 per Lord Reid.

[48] As submitted by Mr Sayers QC, the *British Oxygen* principle is described by Auburn Moffett and Sharland, '*Judicial Review: Principles of Procedure* [2013] at paragraph 1317:

> *"Where a public body has a power to act, it must not fetter that power: it must not disable itself from giving proper consideration to the exercise of the relevant discretion."*

[49] The authors go on to say at paragraph 21.28:

> *"As a general rule, policies and guidance must not be inflexible: they must not fetter the exercise of the relevant discretion and preclude the public body from departing from the policy or from taking into account circumstances which are relevant to the particular case."*

[50] The *British Oxygen* principle was considered by Kerr J in *Re Herdman's Application* [2009] NIJB 46 at [19] - [21] where he said:

> *"… the decision maker must be prepared to consider the individual circumstances of each case and be prepared, if the circumstances demand it, to make an exception to the policy - British Oxygen Co. Limited v Minister of Technology [1971] AC610.*
>
> *A policy may operate to place an illegitimate fetter on the exercise of discretion in two ways. The policy may be intrinsically inflexible in erecting an unacceptable high threshold for the applicant to cross. Alternatively, if the policy is applied too rigorously and there is a lack of preparedness on the part of the decision maker to entertain exceptions to it…… there must be a readiness to recognise exceptions to that policy if warranted by the specific circumstances of a particular case. The requirement is not satisfied by routine examination of the particular facts that arise in an individual application. There must be a rigorous enquiry as to whether those circumstances justify an exception be made to the general policy. Put simply,*

> *the Minister must not only be conscious of the particular circumstances of the applicant, he must also scrupulously consider whether those circumstances warrant a departure from the normal rule. The need to do so is more critical where the policy erects a high - albeit not unacceptably so - standard."*

[51] Dr McGleenan QC urges me to accept that the facts of this particular case are clearly distinguishable from the facts in *Herdman*. In this case, it is argued, the issue emanates from a unique set of circumstances. The policy initiated by the Prison Service to facilitate virtual visits is continuously under review and is evolving.

[52] The respondent submits that the test in *Re Herdman* does not undermine the decision taken by the Prison Service in this case. As stated by Kerr J in *Herdman* at paragraph [19]:

> *"[19] A public body endowed with a statutory discretion may legitimately adopt general rules or principles of policy to guide itself as to manner of exercising its own discretion in individual cases, provided that such rules or principles are legally relevant to the exercise of its powers, consistent with the purpose of the enabling legislation and not arbitrary, capricious or unjust - Halsbury's Laws of England, Vol. 1(1), para 32. But the decision maker must be prepared to consider the individual circumstances of each case and be prepared, if the circumstances demand it, to make an exception to the policy - British Oxygen Co. Limited v Minister of Technology [1971] AC610."*

[53] As indicated above, I am prepared to accept that NIPS have demonstrated that they are prepared to consider the individual circumstances of each case and, if the circumstances demand it, make an exception to the policy. Since the inception of the policy, it has been kept under review and has changed. Initially, a prisoner was only entitled one virtual visit per week. It May 2020, virtual visits were extended to two per week. A normal visit was allocated a 30 minute slot. However, with regard to the circumstances of this case, NIPS made an exception to the normal virtual visit policy by extending not only the hours of operation of the virtual visit but also the length of time in which the applicant was remotely present with his wife during her labour.

[54] Mr Sayers QC in a further effort to test the lawfulness of the Zoom visit policy, asked the court to consider the case where a prisoner seeks a virtual visit with a family member whose death is anticipated within hours during the course of the evening. Applying the current Zoom visit policy, the prisoner would not be allowed final contact with a family between 19:30 hours and 8:30 hours. Accordingly, he argues that the outworking of a lawful policy cannot be lawfully applied.

[55] Dr McGleenan QC argues that the court should give little weight to this allegedly analogous scenario. He states that in most end of life scenarios,

applications for compassionate temporary release (CTR) are accompanied by medical evidence confirming the critical illness of an individual. In the circumstances, he argues that the aim of facilitating a visit is not to be present at the moment of expiry of life, but to afford the prisoner an opportunity to final contact with their family member. Accordingly, prisoners released on a CTR are granted an overnight visit and a return later on the same day rather than causing an upheaval to the prison night regime.

[56] I am not persuaded that the end of life analogy greatly assists me in this case.

Decision

[57] For the reasons given above, I reject the grounds of challenge for this application. Whilst I accept that the applicant's Article 8 ECHR rights have been engaged, the interferences by the respondent, as a public body, with an Article 8 ECHR right are readily justifiable. In balancing the Article 8 rights of the applicant with the Article 2 rights and the health, safety and security of the prisoners and staff at HMP Maghaberry, the decision of the respondent was entirely proportionate. The respondent operated a system of virtual visits in a proportionate manner so as to minimise the necessary infringement of Article 8, which accompanies the detention of the applicant in a custodial environment. In exercise of its discretion, the respondent has not acted in an inflexible manner. Rather, the policy in relation to virtual visits has been kept under review and continues to evolve.

[58] The application is hereby dismissed.