Neutral Citation No. [2009] NIQB 80 | *Ref:* **WEA7615T**

Judgment: approved by the Court for handing down | *Delivered:* **11/09/2009**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

Wray's Application [2009] NIQB 80

AN APPLICATION FOR JUDICIAL REVIEW BY

NEVILLE WRAY

WEATHERUP J

[1] This is an application for Judicial Review of an adjudication decision made by the Governor of HMP Magilligan on 20 April 2009 that the applicant had failed to comply with a condition of temporary release by failing a drugs test when he returned to the prison on 24 February 2009. Mr Hutton appeared for the applicant and Mr McMillen appeared for the respondent.

[2] The drugs testing scheme involves two stages. An A sample and a B sample are obtained. The A sample is taken for screening purposes. If it is positive the B sample is taken for confirmation purposes. It is only if there is confirmation on the result from the B sample that a finding may be made against the prisoner in an adjudication.

[3] The applicant was adjudicated on the A sample only. The applicant's solicitor challenged this approach. Leave to apply for Judicial Review was granted on 21 April 2009. After the grant of leave the Prison Service quashed the adjudication and notified the applicant by letter dated 5 May 2009. The respondent then applied to the Court to dismiss the application for Judicial Review on the basis that the matter had become academic as the adjudication had been quashed.

[4] In R(Salem) v Secretary of State for the Home Department [1999] 2 All ER 42 in the House of Lords, Lord Slynn stated:

> "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 good reason in the public interest for doing so, as for example (but only as 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."

[5] The respondent submitted that this was a case where there was no public interest and no need for a hearing; that the difficulty that arose in the case was due to a misunderstanding in the particular case; that there was no doubt and no dispute in relation to the proper approach to drug testing in the prison; that the mistake had arisen as the adjudication was conducted on the basis of the preliminary screening test and it was accepted this was not the proper procedure; that it had been a mistake by the adjudicating Governor and it was not necessary to proceed with the Judicial Review.

[6] The applicant, on the other hand, took a different view of the matter and considered that there was an issue that required investigation; that there was uncertainty over the propriety of the drug testing procedure adopted in the prison; that it was a matter of concern given the number of drug tests that are conducted by the prison; that there was a the likelihood that any flaw was being repeated daily and likely to give rise to litigation in the future; that in the circumstances there was a public interest in examining the issue and there was also the prospect that there were other cases affected by the same mistaken approach.

[7] At a preliminary hearing on the respondent's Salem application I considered that there was a public interest in determining how this error had come about and confirming that it was not part of the system to adopt this mistaken approach. Accordingly an explanation was sought from the respondent to address those matters.

[8] In reply the respondent filed an affidavit from Governor Patrick Gray on 7 August 2009 in which he set out the approach of the Prison Service. He indicated that the applicant's case was indeed academic for a number of reasons. First, that the applicant's punishment had been rescinded by letter of 5 May 2009. Secondly, that the applicant had now been released from custody as by the time the matter came to hearing he had completed his sentence. Thirdly, that when the second confirmatory test was carried out it was positive for cannabis. Fourthly, it was accepted by the Prison Service that an error had occurred and also accepted that it was necessary to take appropriate steps to ensure that the error would not occur in the future. For that purpose the Prison Service had issued an Instruction to Governors, number 'IG15/09' dated 26 June 2009 with the title 'Drug Testing of Prisoners – Procedure following a positive drugs test'. This included the paragraph:

> "… where a prisoner is to be charged as a result of a positive drugs test, the charge can be laid and the adjudication opened on the basis of the screening test. The adjudication must then be adjourned to await the result of the confirmation test. It is only on the basis of a positive confirmation test that the adjudication Governor can be satisfied beyond reasonable doubt."

Fifthly, Governor Gray stated that the existing system of drug testing will be replaced by a new system in the autumn of 2009. The new system remains under consideration.

[9] Governor Gray indicated, contrary to what had earlier been stated to be the position, that further enquiries had established that there had been up to 30 incidents where a similar error had been made over the previous year, 29 of those had occurred at HMP Magilligan and one had occurred at Hydebank Wood. In addition, it would seem that hundreds of tests are carried out within the prison as part of the normal control of the prisons and the regimes for prisoners that operate throughout the prison estate. It was established that 29 of the 30 incidents where this error has occurred were confined to cases dealt with predominately by two Governors at HMP Magilligan and that it had not been a practice that had been adopted by the remainder of the compliment which extends to 39 Governor grades within the Prison Service. It was explained that it appeared that the concentration of errors had come about as a result of a close working relationship between the two Governors at HMP Magilligan and their shared experiences. The Prison Service had narrowed down the error and addressed it with the Governors concerned.

[10] In relation to the future Governor Grey stated that the intention was to move the Prison Service to the same system as that used in Great Britain. This system involves a sample of saliva, taken and analysed on the spot, with the analysis equipment rendering an immediate positive/negative and all positive samples being sent to the laboratory for analysis. However, this system will require a change of the Prison and Young Offender Rules (Northern Ireland) 1995 and the proposed changes are presently out for consultation. The draft of the amended rules extends not only to the alterations in relation to drug testing but to many other alterations that are proposed. Accordingly the respondent contends that it has addressed all possible public concerns that could arise and the Judicial Review should be dismissed.

[11] Mr Hutton, for the applicant, was critical of the initial Prison Service response in this case which had indicated that the applicant's case was an isolated incident , whereas it had now been established on further enquiry that the error extended to at least 30 cases.

[12] While the applicant's case had become academic, it was decided at the preliminary Salem application that there was a public interest in investigating the

error further and determining the nature of the problem and confirming that it would not recur. For that reason the respondent was required to file an affidavit to provide an explanation of all the circumstances. Having received that explanation from Governor Gray and identified the source of the problem, noted the Instruction to Governors which is designed to prevent recurrence of the error and noted that the system is about to change in any event, I do not propose to order any other form of relief and will dismiss the application for judicial review.

[13] Mr Hutton pressed for the publication of the transcript of the ruling to the above effect at the conclusion of the Salem hearing and this text is the result. This arises from the contention that there are at least 29 others who have been adjudicated on an erroneous basis and their representatives ought to be alerted to the background to the problem by the publication of the ruling.