Neutral Citation No. [2003] NIQB 20 | *Ref:* **KERF3892**

Judgment: approved by the Court for handing down | *Delivered:* **20.03.2003**

(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY WILLIAM McKINLEY FOR JUDICIAL REVIEW

KERR J

Introduction

[1] By this application William McKinley, a sentenced prisoner and currently an inmate of HMP Maghaberry, seeks judicial review of the introduction of a voluntary drugs testing scheme to the prison and of the decision to remove him from enhanced status to standard regime because of his refusal to undertake a drugs test.

Background

[2] In October 1999 a review of the use of drugs in prison was carried out by Mr Michael Murray, an independent consultant specialising in the field. He reported that there was widespread use of drugs throughout the prison population. A follow up to Mr Murray's review was carried out in November 2001. This revealed that 39% of the prison population had taken or were currently taking cannabis. Other drugs were also being used in the prison. The experience of prison staff was that drugs use was rife.

[3] Some time before November 2000 a voluntary drugs testing scheme had been introduced in the Young Offenders Centre and HMP Magilligan. Evidence from these institutions and from various institutions in England and Wales where similar schemes had been introduced was that they operated as an effective deterrent to the use of drugs. It was considered that this was due principally to two factors. Firstly the drugs testing was random. Secondly it was possible to build into the progressive regimes system an incentive to prisoners to stay off drugs.

[4] In November 2000 a progressive regimes system was introduced into HMP Maghaberry. It is based on the principle that prisoners can earn privileges by good behaviour and lose privileges if they engage in bad behaviour. Three regimes were created: - basic, standard and enhanced. The lowest of these, basic regime, conforms to all of the requirements of the Prison and Young Offenders Centres Rules (Northern Ireland) 1995. The range of privileges is increased as one moves up to standard and enhanced regimes.

[5] In order to move from standard regime to enhanced status one must be prepared to undergo and successfully undertake a drugs test. While on enhanced regime one is liable to be tested again. If a prisoner refuses to take the test or fails it, he is removed from enhanced regime to standard. Prisoners are not obliged to take the test. Failure to do so does not result in disciplinary proceedings. If a prisoner refuses to undertake a test or if he fails it, however, he is not permitted to remain on the enhanced regime.

[6] Prisoners were given the opportunity to comment on the introduction of the voluntary drugs testing scheme. In fact none did so. In May 2001 a document entitled 'Progressive Regimes and Earned Privileges' (PREPS) was published. It referred to an intention to introduce a form of drugs testing as part of the criteria for a prisoner attaining or remaining on the enhanced regime. Written suggestions from prisoners were invited. On 10 August 2001 a notice to prisoners was disseminated setting out the proposals for the introduction of voluntary drugs testing. This was followed by further notices about the scheme in October and November 2001. The drugs testing regime then came into force on 3 December 2001. In August 2002 it was decided to extend the drugs testing scheme to those who are on standard regime and those on basic regime who aspire to move to standard regime.

[7] A prisoner has the right to dispute the results of a drugs test by sending part of the sample of urine taken from him to an independent laboratory for testing. If there is a difference of opinion between the laboratory used by the prison and that used by the prisoner this is taken into account in an appeal by the prisoner under the PREPS scheme.

[8] The regime level of a prisoner may be affected by the outcome of an adjudication conducted by a governor or the Board of Visitors. Any prisoner found guilty of a serious offence or two lesser offences will be automatically reduced to a lower regime level. After the elapse of six months from a finding of guilt on a lesser charge, however, this will be disregarded for regime allocation purposes.

[9] The applicant has been detained in HMP Maghaberry since July 1999. After the introduction of PREPS he was assigned to the enhanced regime in November 2000. On 12 October 2001 he received notice of the voluntary drug-testing scheme that was to be introduced. He claims not to have been

aware of the proposal before then. On 20 December 2001 he was instructed to attend for a drugs test. On informing the prison authorities that he did not wish to undergo testing he was reassigned to standard regime.

[10] One of the complaints made by the applicant was that prisoners who could not afford to pay to have a sample analysed at an independent laboratory would be placed at a disadvantage. In an affidavit filed on behalf of the respondent, Governor Mogg suggested that in cases of hardship a discretionary payment might be made from public funds to cover the cost of such a test. In a later affidavit, Governor Maguire, who succeeded Governor Mogg in March 2002, explained that this is not general policy in the Prison Service. Mr Maguire estimated that it would cost £100,000 per annum to fund independent laboratory tests.

The judicial review application

[11] For the applicant Mr Larkin QC claimed that the drugs testing system was in fact not voluntary since the failure to undertake it resulted in the withdrawal of privileges. This was a clear breach of the applicant's rights under article 8 of the European Convention on Human Rights. The applicant accepted that the prison authorities were entitled to take measures to combat the use of drugs in prisons but such measures must be according to law and proportionate. These measures were not proportionate, Mr Larkin submitted, because there was no limit on the number of times that an inmate might be tested; the prison authorities had elected not to use what would have been a much fairer system of deciding in an adjudication whether the prisoner had taken drugs before withdrawing privileges; and the prisoner was also effectively obliged to accept the finding of the laboratory engaged by the prison authorities.

[12] Mr Larkin also argued that the PREPS scheme had not been introduced according to law. No power was vested in the prison authorities under the Prison Act (Northern Ireland) 1953 or the Prison and Young Offender Centre Rules (Northern Ireland) 1995 to create the scheme. In fact, said Mr Larkin, the regime offended the 1995 Rules in a number of respects. Firstly, it directly linked a prisoner's classification with adjudication awards contrary to Rule 9 (3). Secondly, a reduction in regime level brought about a reduction in association contrary to Rule 9 (3). Thirdly, forfeiture of privileges could only occur on foot of an order of the governor under Rule 39 (1) and the privileges forfeited had to be specified in the order by virtue of Rule 10 (3); this had not happened in the applicant's case.

[13] Finally it was submitted that the procedure by which the applicant's regime level was altered was in breach of article 6 of ECHR. Since the applicant's article 8 rights were engaged, he was entitled to access to an independent tribunal and a fair trial to determine the extent and effect of

those rights. The applicant did not have the chance to engage with the finding against him.

The legal basis of the scheme

[14] The Prison and Young Offenders Centre Rules (Northern Ireland) 1995 are made pursuant to the powers vested in the Secretary of State by section 13 of the Prison Act (Northern Ireland) 1953. Rule 10 (1) provides: -

> "10. – (1) There shall be established at every prison a system or systems of privileges appropriate to the classes of prisoners held there."

The system of privileges provided for in this paragraph is to be distinguished from the classification system that is dealt with in Rule 9.

[15] Rule 9 (1) provides: -

> "9. - (1) Prisoners shall be classified in accordance with any directions made by the Secretary of State, having regard to their age, offence, length of sentence, previous record, conduct in prison or while on temporary release under rule 27 and the requirements of security, good order and discipline at the prison in which they are confined."

Conduct in prison is only one factor to be taken into account in fixing the classification of a prisoner whereas this is the dominant factor in deciding upon his regime level.

[16] The applicant's argument that PREPS does not comply with Rule 9 (1) confuses the classification system with a regime designed to bestow or withhold privileges. Rule 10 clearly contemplates that a privileges system will be introduced and there is nothing in the 1953 Act or the Rules to suggest that this should be done by anyone other than the prison authorities. I have concluded therefore that the introduction of the scheme was *intra vires* the power of the governor.

[17] Rule 39 (1) provides: -

> "39. – (1) The governor may, subject to rule 41, make one or more of the following awards for an offence against prison discipline-
>
> (a) …
>
> (b) …

> (c) …
> (d) stoppage of any or all privileges other than earnings for a period not exceeding 28 days or 90 days in the case of evening association;"

If the governor makes an order stopping privileges Rule 10 (3) provides that it shall apply only to those privileges specified in the order. It is on these provisions that Mr Larkin relied to advance the argument that the applicant's "forfeiture" of privileges was invalid because it did not occur as a consequence of an order of the governor and the privileges lost were not specified in such an order.

[18] The power of the governor to stop privileges under Rule 39 arises where there has been an offence against discipline. The forfeiture of privileges in that situation derives from a finding of guilt after an adjudication. It has no relevance to the position of the applicant. Rule 10 (1) provides for the implementation of a comprehensive system of privileges and the use of that general power cannot be inhibited by the specific provisions of Rules 10 (3) and 39 (1) which are designed to cater for withdrawal of privileges in particular circumstances. I am satisfied, therefore, that it was not necessary to comply with Rules 10 (3) and 39 (1) in order to introduce and implement the PREPS scheme.

Article 8

[19] Article 8 of ECHR provides: -

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

The respondent submits that article 8 is not engaged because prisoners cannot be compelled to give a sample for drug testing. There is therefore no question of the prison authorities failing to respect the applicant's right to respect for his private life. He is entirely at liberty to choose whether or not to undergo a drugs test. The applicant's riposte to this is that effectively he has no choice if he wishes to remain on the enhanced regime. He must take the test. To

require him to do so in order to allow him access to the enhanced regime necessarily involves a compromise on his private life.

[20] In *Peters v Netherlands* (Application 21132/93) the European Commission on Human Rights held that a compulsory medical intervention in the form of a requirement to provide a urine sample to be tested for drugs constituted an interference with the right to respect for private life. In that case, however, the applicant was ordered to undergo the test and a disciplinary sanction was imposed on him when he refused to comply. It is clear that the compulsory nature of the procedure was critical to the decision of the Commission. It observed at page 79: -

> "In respect of Article 8 of the Convention the Commission recalls that a compulsory medical intervention, even if it is of minor importance, must be considered an interference with the right to respect for private life (cf. No. 8239/78, Dec. 4.12.78, D.R. 16 p.184; No. 8278/78, Dec. 13.12.79, D.R. 18 p.154 and No.10435/83, Dec. 10.12.84, D.R. 40 p.251). It therefore considers that the obligation to undergo a urine test constitutes an interference with the applicant's right to respect for his private life within the meaning of Article 8 para.1 of the Convention."

[21] In the present case the applicant is not obliged to undertake the test. If he chooses, he may refuse to provide a sample of urine. No disciplinary action will be taken if he does not undergo the test. In these circumstances where compliance with PREPS is entirely voluntary I cannot accept that there is any interference with the applicant's right to a private life.

[22] Even if I had been of the view that the applicant's right to respect for his private life had been interfered with by the PREPS scheme, I would have held that no breach of article 8 arose. For the reasons given earlier, I am satisfied that it is in accordance with law. Further, I am entirely satisfied that its introduction is justified by the need to combat what is clearly an endemic problem of drugs misuse within the prison system in Northern Ireland. The statistics relating to those who have continued to use drugs in prison and the improvement that has been achieved in other institutions when schemes similar to PREPS have been implemented bear irrefutable testimony to the need for such a scheme in Northern Ireland.

[23] The denial of access to the enhanced regime to those who fail or are unwilling to take a drugs test is, in my view, an entirely reasonable response to the problem. I do not consider that the theoretical possibility of the tests occurring frequently renders the PREPS scheme disproportionate. To be

effective the scheme must have a random element. To limit the number of tests or to require that these take place on a predictable basis would severely curtail its efficacy. Likewise, to confine the prison authorities in their efforts to combat drugs use in prison to the system of adjudication would seriously compromise the effectiveness of the campaign to rid the prisons of drugs. The history of and the contemporary evidence about the use of drugs in prison make clear that it will not be eliminated if the authorities may only take action where drugs use has been detected and made the subject of an adjudication. The failure to detect drugs use and to deal with it by placing prisoners on a charge lies at the heart of the decision to introduce the voluntary drugs testing scheme.

[24] The applicant claimed that he was effectively denied the opportunity to challenge the results of the drugs test and that this aspect of the regime rendered it disproportionate. In its initial formulation the PREPS scheme required an inmate to sign a consent form which contained the statement, "I agree to abide by the findings of the [drugs] test and that the result is binding". That statement has now been removed from the consent form but Mr Larkin argued that the limited challenge available to a prisoner effectively prevented any dispute as to the findings of the laboratory engaged by the prison. It is true that a prisoner will in general be expected to meet the cost of a second test if he wishes to challenge the findings of the test carried out for the prison but I do not consider that this is in any way unreasonable. There is no reason to suppose that the laboratory tests that the prison has carried out are unreliable and it would be a significant expense if the prison was required to underwrite the cost of second tests requested by those prisoners who produced negative results.

Article 6

[25] Article 6 (1) of ECHR provides: -

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court

> in special circumstances where publicity would prejudice the interests of justice."

The applicant claims that since his article 8 rights are engaged he is entitled to a determination of those rights by an independent tribunal. I have held that his right to respect for a private life is not engaged but I must now address the question whether he has other rights in relation to the administration of the PREPS scheme which engage article 6.

[26] In *Re Winchester* [2002] NIQB 65 Weatherup J held that the allocation of a prisoner to a particular level of regime was an administrative decision that did not engage article 6. In that case the applicant claimed that his failure to provide a sample for drugs testing was due to his inability to pass urine at the time that the sample was requested.

[27] ECtHR has consistently held that the expression "civil rights and obligations" in article 6 (1) must be given an autonomous meaning. The scope of the concept cannot be determined solely by reference to the domestic law of the respondent state: *König v Federal Republic of Germany* (1978) 2 EHRR 170, 192-193, para 88; *Benthem v Netherlands* (1985) 8 EHRR 1, 9, para 34. In *König* the Court pointed out that the content of the asserted right was highly relevant. At para 89 it said

> "Whether or not a right is to be regarded as civil within the meaning of this expression in the Convention must be determined by reference to the substantive content and effects of the right - and not its legal classification - under the domestic law of the State concerned. In the exercise of its supervisory functions, the Court must also take account of the object and purpose of the Convention and of the national legal systems of the other contracting States."

[28] The Court has also consistently stated that the first step is to ascertain whether there was a *contestation* over a "right" which is recognised under national law. The dispute must be genuine and serious; it may relate not only to the actual existence of a right but also to its scope and the manner of its exercise; and the outcome of the proceedings must be directly decisive of the right in question: see, for example, *Mennitto v Italy* (2000) 34 EHRR 1122, 1129, para 23.

[29] I do not consider that a claim to be placed on a particular level of regime can be regarded as a right qualifying for article 6 protection. Enhanced status is in essence a privilege which can be earned rather than a right to which a prisoner may claim to be entitled. As Laws J said in *R v Secretary of State for the Home Department, ex parte Hepworth* (1997, unreported),

decisions on privileges are "executive decisions arising wholly within the context of internal prison management, having no direct or immediate consequences for such matters as the prisoners' release".

[30] In *Begum (FC) v London Borough of Tower Hamlets* [2003] UKHL 5 the House of Lords recognised that the original intention of the draftsmen of the Convention was to restrict civil rights and obligations to those under private law. But as Lord Hoffmann observed in his speech in *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] 2 WLR 1389, 1414-1416, paras 78-88, this is now of no more than historical interest. The Court's jurisprudence has made substantial inroads into the exclusion of a citizen's rights and obligations under public law from the protection of article 6. As Lord Walker of Gestingthorpe pointed out, these inroads have not always followed a consistent pattern. He said at para. 112: -

> "112. Further development in the case-law may therefore be expected. The existing Strasbourg jurisprudence most directly in point is the line of cases starting with *Feldbrugge v The Netherlands* (1986) 8 EHRR 425 and leading to *Salesi v Italy* (1993) 26 EHRR 187 and *Mennitto v Italy* (2000) 34 EHRR 1122. These indicate that article 6(1) is likely to be engaged when the applicant has public law rights which are of a personal and economic nature and do not involve any large measure of official discretion (see *Masson v The Netherlands* (1995) 22 EHRR 491, 511, para 51."

[31] Applying this dictum to the present case it seems to me that the applicant's claim that he should not have been deprived of enhanced status clearly does not partake of the type of right that engages article 6.

Conclusions

[32] None of the grounds advanced by the applicant has been made out and the application for judicial review must therefore be dismissed.