Neutral Citation No: [2024] NIKB 38	*Ref:* **HUM12530**
*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:* **20/05/2024**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

KING'S BENCH DIVISION
(JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY PAULO JORGE SANTOS FOR LEAVE TO APPLY FOR JUDICIAL REVIEW
(No. 2)

Ronan Lavery KC & Maria Mullally (instructed by McIvor Farrell) for the Applicant
Tony McGleenan KC & Philip Henry KC (instructed by the Departmental Solicitor's Office) for the Proposed Respondent

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HUMPHREYS J

Introduction

[1] The applicant was sentenced to a determinate custodial sentence, for offences relating to the supply of Class A drugs, of two years and two months with a custody expiry date ('CED') of 28 March 2024.

[2] In a previous application for judicial review, he sought to challenge the refusal of his application for transition leave made on 23 October 2023 under the Temporary Release Transition Leave Scheme of May 2023 ('the 2023 scheme'), as well as the legality of the scheme itself.

[3] Leave was granted on a single ground, namely that the Northern Ireland Prison Service ('NIPS') has misinterpreted the scheme in terms of when an application had to be made. Leave was refused in respect of claims of irrationality, breach of article 8 ECHR and the unlawful fettering of discretion.

[4] On 22 December 2023 the applicant was invited by NIPS to make a fresh application for transition leave under the 2023 scheme. Such an application was made on 9 January 2024. The applicant sought 72 hours of leave, to commence on 22 January 2024, in order to 'sort out' his ID card, his driving licence, his settlement application and his GP.

[5] The application was refused on 18 January 2024, and it is this decision which is the subject matter of the instant challenge.

[6] The application proceeded by way of a rolled up hearing on 14 March 2024 when I dismissed the application for leave.

The Decision

[7] NIPS gave the following reasons for the refusal of transition leave:

> "HM Immigration have indicated that you were served with a deportation order in 2019 and that on your date of release immigration will seek to transfer you to a detention centre (immigration) unless you have secured bail.
>
> NIPS are sensitive and have considered your local family connections however pending deportation, the management of risk supersedes this consideration.
>
> In the event of bail being secured for any upcoming decision on the basis of deportation, applicant could submit a further application for Transition Leave if within scheme timeframes."

[8] Following receipt of this decision, the applicant's solicitor submitted an application to the Immigration Bail Tribunal in Glasgow. A response was received on 25 January 2024 which recorded that the applicant was previously granted bail by the Tribunal on 2 November 2017 but that the management of bail, if still current, would be the responsibility of the Home Office. It also stated:

> "As Mr Santos is not held on immigration matters, we are unable to list an application for immigration bail"

[9] The evidence before the court included a note of a telephone attendance between the applicant and his solicitor which recorded a discussion between the applicant and an immigration officer, Mr Ekkermaus. The applicant was advised that he would be detained upon his release on the basis of the likelihood of absconding, his previous bad character and the likelihood that he would not comply with bail conditions.

The Grounds for Judicial Review

[10] The applicant contends:

(i) The decision to refuse transition leave in the last eight weeks of his sentence constituted an unlawful interference with his article 8 rights;

(ii) The decision was irrational since it failed to interpret the scheme in accordance with its stated aim of rehabilitation

The Respondent's Evidence

[11] An affidavit has been sworn by Tim Elliott, a Governor within NIPS and Head of the Prisoner Development Unit at Maghaberry Prison. He was a member of the panel which refused the applicant's request for transition leave.

[12] He refers to form IS 91, dated 18 October 2017 and issued by the Home Office, which provides written authority to hold an individual in immigration detention. It records that the applicant had been convicted of serious drugs offences.

[13] The IS 91 was accompanied by a deportation order and correspondence from the Home Office which stated that the applicant's representations had been refused and a decision made to deport him. The deportation order set out the detailed reasons for the decision to deport having been made. There is no indication that any appeal was pursued in respect of this order.

[14] A further IS 91 was issued on 27 February 2024 which provides authority to detain the applicant.

[15] Governor Elliott states that the immigration status of the applicant rendered his application for transition leave academic. Since he remains the subject of a deportation order, the applicant would not be permitted to reside in Northern Ireland, and therefore it would not be appropriate to grant transition leave to aid his move back into the community. He will be detained and deported upon release from his custodial sentence.

The Scheme and its Legislative Basis

[16] Rule 27 of the Prison and Young Offenders' Centre Rules (Northern Ireland) 1995 provides:

> "**Temporary release**
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> 27.-(1) A prisoner to whom this rule applies may be temporarily released for any period or periods and subject to any conditions.
>
> (2) A prisoner may be temporarily released under this rule for any special purpose or to enable him to have medical treatment, to engage in employment, to receive

> instruction or training or to assist him in his transition from prison to outside life.
>
> (3) A prisoner released under this rule may be recalled to prison at any time whether the conditions of his release have been broken or not.
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> (4) This rule applies to prisoners other than persons-
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> (a) remanded in custody by any court; or
>
> (b) committed in custody for trial; or
>
> (c) committed to be sentenced or otherwise dealt with before or by the Crown Court.
>
> (5) In considering any application for temporary release under this rule previous applications, including any fraudulent applications, may be taken into account."

[17] The 2023 scheme is the latest version of a series of schemes made by NIPS under Rule 27. It states that its aim is to assist prisoners coming towards the end of their sentence with their transition to the community in a structured manner. Para1.2 makes it clear that transition leave is not an entitlement, but that NIPS assesses each application according to the criteria set out at para 4.5 of the scheme.

[18] For prisoners with continuous custody of more than 12 but less than 18 months (such as the applicant), transition leave may be granted of up to nine days which may be split with two days taken in the last two months of the custody period and seven days as a block just prior to the CED (para 4.2).

[19] Each application must then be risk assessed in accordance with the scheme criteria (para 4.5). The issues to be examined include where the prisoner would reside, the level of family support, any drugs issues, the risk of reoffending, the behaviour in custody, the impact on victims and the information provided by other statutory agencies. In particular para 4.5(xii) states:

> "For foreign national prisoners, PRISM must be interrogated to confirm no Home Office holding orders are present. Immigration services must also be consulted and any information relevant to the individual prisoner and their application for Transition Leave factored into the decision making process. The presence of a Holding Order is not sufficient to stop an application but does form part of the risk assessment."

The Judicial Review Application

[20] A number of duties are imposed upon an applicant for judicial review:

(i) A proper evidential basis for a challenge must be established;

(ii) As Carswell LCJ emphasised in *Re D's Application* [2003] NICA 14:

> "We have said on previous occasions that affidavits which contain such facts in judicial review applications ought to be sworn by the persons with first-hand knowledge of the essential facts and that it is undesirable that affidavits should be sworn by solicitors or other persons deposing to such facts. In our opinion leave to apply for judicial review should not generally be given nor should legal aid be granted unless proper first-hand affidavit evidence is filed." (para [11])

(iii) There must be compliance with the duty of candour which requires full and frank disclosure of all relevant matters, including those which may be adverse to the applicant's case.

[21] In this case, the court received an affidavit from the applicant's solicitor, Mr O'Hare, an affidavit from a paralegal Ms Gillespie and a draft unsworn affidavit from the applicant. The draft affidavit has one para of substance, and it only serves to correct an error in the telephone attendance note of Mr O'Hare.

[22] As a result, the court had no first hand evidence from the applicant in relation to his immigration status. There is no evidence from the applicant at all concerning the 2017 deportation order which was of central relevance to this case. This represents a breach of both the duty in *Re D* and the duty of candour.

[23] The court acknowledges that the matter came on for hearing on an urgent basis, but it is nonetheless wholly unacceptable for a judicial review application to fail to satisfy these basic requirements.

[24] On that basis alone, I refuse leave to apply for judicial review.

The Merits of the Challenge

[25] The applicant argues that the failure to grant his transition leave constituted a disproportionate interference with his article 8 right to family life and failed to recognise the purpose of the scheme to enable prisoners to reintegrate back into society upon release. He complains of a rigid approach which failed to acknowledge the desire of the applicant to regularise his immigration status.

[26] Part of the applicant's pleaded case is that the proposed respondent relied on "erroneous grounds" when it was stated that the applicant was subject to a deportation order. This is, on the evidence, manifestly incorrect.

[27] NIPS is empowered to grant transition leave to prisoners following an application and risk assessment process. The applicant invites the court to conclude that it was irrational to refuse such leave in circumstances where he had been convicted of serious offences and was the subject of a deportation order.

[28] The existence of the deportation order and the IS 91 authority to detain are clearly material factors which the decision maker was entitled to take into account in determining whether transition leave should be granted. The claim that this decision was Wednesbury irrational is simply unarguable.

[29] The reasons proffered by NIPS for the refusal of leave indicate that the applicant's family circumstances were taken into consideration but the "pending deportation and risk of flight" were found to supersede this consideration. This is indicative of a proportionality based approach having been adopted by the decision maker.

[30] Moreover, the conclusion that the applicant was not a suitable candidate for transition leave since he would not be returning to the community in Northern Ireland is an unimpeachable one. On the basis of the validly obtained deportation order, he would be subject to detention followed by removal from the United Kingdom.

[31] There is no basis to contend that there was any unlawful interference with the applicant's article 8 rights. Any interference was in accordance with law and proportionate in the circumstances.

[32] No arguable case with realistic prospects of success has been made out by the applicant.

Conclusion

[33] Accordingly, the application for leave to apply for judicial review is dismissed.