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*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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AN APPLICATION BY BRENDAN CONWAY FOR JUDICIAL REVIEW

AND IN THE MATTER OF AN ADJUDICATION AT HMP MAGHABERRY ON 25 OCTOBER 2010

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TREACY J

Introduction

[1] The applicant is a remand prisoner at HMP Maghaberry. The final manifestation of the Order 53 Statement mounts a challenge to the lawfulness, vires and Convention compliance of the full body search policies operated by the respondent.

[2] The applicant seeks declarations that the policy of routine full body searching of prisoners on entering and leaving the prison is unlawful, is ultra vires Rule 16 of the Prison and Young Offender Centre Rules (NI) 1995 ("the Rules") and that it is incompatible with Art 8 ECHR. In addition, the applicant also seeks declaratory relief that the policy of forcible full body searching of prisoners who neither consent to nor resist such a search is unlawful, and is incompatible with Arts 3 and 8 ECHR.

[3] The grounds upon which the relief is sought are:

> **"(a) The policy of routine full body searching of prisoners on entering and leaving the prison is an inflexible, indiscriminate, blanket policy which applies to all prisoners regardless of the circumstances and admits of no consideration of**

individual circumstances which may contra-indicate the need for a strip search.

(b) The policy of routine full body searching on entering and leaving the prison is ultra vires Rule 16 of the Prison and Young Offenders Centre Rules (NI) 1995 in the following respects:

(i) Rule 16 does not require that a prisoner should be full body searched each time he enters and leaves the prison.

(ii) Rule 16 permits full body searching only in the limited circumstances specified therein.

(iii) Even in those limited circumstances, the power to subject a prisoner to a full body search pursuant to Rule 16 is discretionary.

(iv) It was therefore not intended that full searches would be routine or automatic even in those circumstances in which they may be authorised.

(c) The policy of routine full body searching upon entering and leaving the prison is incompatible with Article 8 ECHR in the following respects:

(i) It is not 'in accordance with the law'; and

(ii) It is disproportionate.

(d) The policy of forcible strip searching of prisoners who neither consent to nor resist a full body search on entering or leaving the prison, including in particular the routine use of Control and Restraint techniques, is an inflexible, indiscriminate, blanket policy which applies to all prisoners regardless of the circumstances and admits of no consideration of individual circumstances which may contra-indicate the need for a forcible strip search, such as the absence of any resistance.

(e) The policy of forcible strip searching of prisoners who neither consent to nor resist such a

search is ultra vires Rule 16 of the Prison and Young Offenders Centre Rules (NI) 1995 in the following respects:

(i) Rule 16 does not require that a prisoner should be forcibly strip searched if he refuses to consent to a search.

(ii) Rule 16 permits the use of force in carrying out a full body search only in the limited circumstances specified therein.

(iii) Even in those limited circumstances, the power to use force in the carrying out of a search pursuant to Rule 16 is discretionary.

(iv) It was therefore not intended that the use of force in carrying out searches would be routine or automatic even in those circumstances in which they may be authorised.

(f) The policy of forcible strip searching of prisoners who neither consent to nor resist such a search is incompatible with Articles 3 and 8 ECHR in the following respects:

(i) The manner in which such forcible searches are carried out, including in particular the use of Control and Restraint techniques, amounts to inhuman or degrading treatment;

(ii) Further or in the alternative, such searches are not in accordance with the law;

(iii) Further or in the alternative, such searches are disproportionate.

(g) As a result of the above, the applicant was not guilty of disobeying lawful orders in respect of his failure to submit to a routine full body search."

Background

[4] For many years all prisoners, remand or convicted have been required to submit to a full body search on committal or discharge from prison. Governor Craig, in his third affidavit, has attested that he has been a Governor rank within the NIPS for 27 years and has worked at HMP Maghaberry and YOC Hydebank Wood and HMP Magilligan. Throughout this period he has averred that the full searching of prisoners on entering or leaving the prison has formed part of the normal operations of the establishments and is known to all staff and prisoners alike.

[5] The applicant has been refusing to comply with the policy of full body searches of prisoners entering and leaving the prison. In consequence of these refusals he has been adjudicated upon for offences of prison discipline and subject to forcible full body searching in line with prison policy.

[6] The practice of full body searches has been the subject of a detailed and recent review by the Northern Ireland Prison Service. The review team conducted a cross-jurisdictional analysis of full body searching in the British Isles. The review recognised and supported the need for full body searching of prisoners entering and leaving prison. Following the review it has recommended that all prisoners should (continue) to be fully body searched on committal and discharge from prison. NIPS have also developed specific Standing Operating Procedures for the DST (Dedicated Search Team).

[7] A full body search of a co-operating prisoner does not involve any physical contact between prison staff and prisoners. At no time is the prisoner completely naked and the whole process is normally over in minutes. It also appears that the search methodology is less intrusive than that applied in other UK prisons where squatting and mirror searches are authorised or in the Irish Prison Service (IPS) where, according to their training manuals, a search on first committal involves a prisoner being totally naked.

[8] The purported justification, necessity and proportionality of the full body search and forcible full body search in the case of non-compliant prisoners is set out in the affidavits of Governor Craig, which it is necessary to set out in some detail. Governor Craig of the Northern Ireland Prison Service, swore an affidavit on 17 November 2010 in which he averred as follows:

> **"4. On or about June 30th 2010 I was engaged by the Director of Operations to conduct a review of the practice of full body searching in the Northern Ireland Prison Service. This review arose as a result of recommendations made by the Prisoner Ombudsman following an investigation into two representative complaints from prisoners in Roe House, HMP Maghaberry.**

5. Recommendation 10 of the Ombudsman's report was:

> ***'I recommend that arrangements are put in place, by the end of June 2010, for an independent prison wide review of the full body searching arrangements to examine each of the circumstances in which full body searches are carried out, including entry and exit to the SSU and to the video link suite, and to check that the method and frequency of searches is necessary, proportionate and individually risk assessed where appropriate. Recommendations from the review should be implemented immediately.'***

6. I lead the Review Team that included representatives from the Scottish Prison Service and the National Offender Management Service (NOMS) for England and Wales. The Review also involved consultations with colleagues in the Irish Prison Service and interviews with a number of stakeholders. ... The Review Team conducted a cross-jurisdictional analysis of the practice of full body searching in the British Isles. The Review is not yet complete as it [is] subject to independent scrutiny from three experts in the field. This independent analysis will be conducted by Audrey Park (Director of HMP Addiewell, a private sector prison in Edinburgh), Jim McManus (Professor of Criminology, Glasgow Caledonian University), and Brian Collins (a Member of the Independent Monitoring Board Council). We have received responses from two of the three independent scrutineers. When those responses are finalised the Review Report will be presented in final form to the Minister. ...

7. As part of the Review, in line with the terms of reference, the context in which prisoners are full body searched and the necessity for such searches was addressed. In so doing the Review revisited the Human Rights Analysis conducted by NIPS in 2005. For ease of reference I have copied the extracts from that analysis which relate to Full Body Searching of Prisoners on Committal and Discharge, and, the Full Body Search generally. ...

'On Committal

43. On committal, all prisoners are full body searched. This includes new committals from the courts, prisoners returning from court production, transfers from other establishments and returning from home leave.

44. This procedure is carried out to deter, detect and prevent the introduction of prohibited and unauthorised items into the establishment as demonstrated by finds of drugs and other unauthorised articles on prisoners being committed.

45. Bearing in mind the historical information provided earlier in this document, the Prison Service considers this to be a proportionate and necessary response to the threat posed to security and a good ordered prison community.

On Discharge

46. On discharge, prisoners are full body searched. This includes court/routine hospital productions, transfers to other establishments, prisoners being discharged for periods of home leave and those being discharged from custody.

47. This procedure is carried out to deter, detect and prevent the exportation of any item from the establishment that could be used to:

- *Assist an escape from lawful custody*
- *Cause injury or damage to any person or property whilst outside the establishment*
- *Form part of a protest whilst at court*
- *Commit any act that would cause embarrassment to the Prison Service, the wider community and the Government*
- *In the case of those being discharged for periods of home leave and those being finally discharged from custody, the purpose of the search is to ensure that no item of prison property is unlawfully removed from the establishment.*

48. The Prison Service considers this procedure to be a proportionate and necessary response to the threat posed to security, other prisoners, staff and the wider general public.

Person Searching – Full Body Search

24. Without the ability to full body search this strategy would be severely undermined as there are no alternatives, or technologies, currently available to achieve the same legitimate objective. The Prison Service is committed to keeping abreast of the latest practical technologies and practices in searching and anti smuggling techniques.

25. The system of full body search has been developed over a number of years to create a balance between detecting contraband and protecting the decency and privacy of the prisoner and staff involved.

26. At no time is the prisoner required to be completely naked, nor is there any physical contact between staff and prisoner during the search. The whole process is normally over in minutes.

27. The Prison Service records the frequency of full body searching on individuals. Should any prisoner feel that he/she has been unfairly treated, he/she retains the right to lodge an internal complaint, make contact with the Prison Ombudsman or seek legal advice and these records may be referred to.

28. The objective of the search is to prevent illicit items being introduced into the prison or being moved within the prison, whilst preserving and protecting the dignity of the prisoner and staff involved as far as is reasonably and humanly practicable.'

8. The Review concluded that this Human Rights Analysis was, even with the passage of time, still relevant in relation to the threats posed and the necessity and proportionality of the NIPS response.

I would also point out that the search methodology applied in NIPS is less intrusive than that applied in NOMS where squatting and mirror searches are authorised, or in IPS where, according to their training manuals, a search on first committal involves a prisoner being totally naked.

9. The focus of the analysis at that time was, whilst not ignoring firearms and explosives, more on the prevention and detection of illicit drugs. The drugs situation in prisons has worsened (there have been four confirmed drugs related deaths in custody in the last five years) and at the same time the threat posed by the introduction of weapons and explosives has increased in line with violence in the community particularly from dissident republican groups.

10. The Review also considered the limitations of the Rub Down Search which is described in the NIPS Analysis thus:

> *'This type of search would be effective in the detection of items that may be secreted in the clothing and on or around the limbs and upper body, but due to the methods and procedures used to preserve dignity it would be unlikely to detect items secreted around the upper inner thigh and other sensitive body areas. Experience and intelligence has proved* **that this is the preferred method of** *concealment use by those smuggling illicit items into establishments.'*

11. The review also considered a number of technological solutions including X-Ray Body Scanners, Millimetre Wave Scanners, Metal Archways and High Penetration Hand held Metal detectors and Body Orifice Security Scanners (BOSS) Chairs. The use of BOSS Chairs has been the focus of commentary in debates about the use of searching in Roe House. BOSS Chairs are a form of sophisticated metal detection equipment and are operationally limited in that they will not detect non-metallic or organic material concealed externally or internally upon a prisoner.

12. The X-Ray Body Scanner has not yet been tested for use in prisons. The Millimetre Wave Scanner only detects "skin deep" and does not detect items concealed internally. The range of Metal Detection Equipment does just that – detect metal. Most drugs and explosives are organic and non-metallic. There is an alarming array of non-metallic weapons available commercially or improvised. There have also been a number of instances in Northern Ireland prisons where viable quantities of explosives have been imported into the prison.

13. These technological solutions do not represent a complete solution to the threat posed by imported contraband. Equally, the Review recognised that Full Body Searching has its limitations in that a full search does not adequately address the problem of contraband that is ingested or concealed internally. This makes a multi-layered approach to the searching all the more critical. The Review recognised and supported the <u>need</u> for searching including Full Body Searching and the draft Report has made the following recommendations:

> **...**
>
> **g) All prisoners should be Full Body Searched on Committal to and Discharge from prison. In the case of <u>juveniles</u> on committal a risk assessment should be undertaken to determine whether or not a Full Body search is lawful, necessary, proportionate, reasonable, accountable and non-discriminatory. The risk assessment should take into consideration the circumstances of committal, previous history if known and the nature of any contraband to which the subject may have had access to prohibited articles and the risk such articles may constitute [sic].**
>
> **h) Female Prisoners should be searched according to the arrangements set out in Appendix C Full Search Procedure for Female Prisoners Policy and Guidance for Staff – Level 1 and Level 2 Searching**
>
> **...**

j) There should be no requirement to routinely Full Body Search juveniles

14. This review was conducted while ongoing efforts were being made to resolve a dispute which had developed between NIPS and some separated prisoners in Roe House. This dispute had gone on for some months and a Joint Facilitation Group (JFG) had been appointed in order to try to address this. The engagement between the Applicant and other prisoners, the JFG and the Northern Ireland Prison Service resulted in the drafting of an agreement on 12th August 2010. I was not directly involved in the negotiations which led to that agreement. I am, however, aware that in common with the approach taken in England, Wales and the Republic of Ireland, there was never any suggestion that full body searches on entry and exit from the prison were negotiable. The non-negotiability of such searches is reflected in the fact that there is no reference to them in the terms of the agreement.
..." [Emphasis added]

[9] In his second affidavit sworn on 7 February 2011 Governor Craig further averred:

"3. The Northern Ireland Prison Service have also developed specific standard operating procedures for the Dedicated Search Team (DST). DST SOP/03 provides a specific procedure for full body searches. DST SOP/04 provides a specific procedure for use in circumstances where a prisoner refuses a full body search. This procedure was modified in September 2010. ...

4. In May 2010 I issued a Notice to all Staff (No56/10) in HMP Maghaberry outlining the Search Procedure to be employed for all separated prisoners. This document set out the procedure to be followed by staff when a prisoner refused to fully comply with the full search procedure. ...

5. On 27th May 2010 a clarification was issued to the Notice 56/10 by Governor Tosh. This clarification addressed specific logistical difficulties that could arise where a prison [sic] refused a full body search prior to a video-link consultation. ...

6. The Governor at HMP Maghaberry has issued three Governor's Orders during 2010 which address the issue of searching. Governor's Order 3-1 of 28th June 2010 outlines the circumstances in which a prisoner will be subject to rub down searches or full body searches. Governor's Order 3-2 of 14th October 2010 provides detailed instructions on the procedure to be adopted when a prisoner is to be subjected to a full search. This Order was further amended on 28th October 2010. Governor's Order 3-3 was published on 28 June 2010 and it deals with the procedure to be employed during rubdown searches. ...

7. The procedure for searching of prisoners is also addressed in the Northern Ireland Prison Service Standing Orders that apply to <u>all</u> prison establishments in Northern Ireland. ...

8. The policy on searching of prisoners in Northern Ireland is <u>analogous to that applied throughout the United Kingdom</u>. The National Offender Management Service (NOMS) has developed a National Security Framework which includes an Instruction on "Searching of the Person" issued on 12th October 2010.

...

10. At ground 3(f) of the Order 53 statement the Applicant challenges what he described as the policy of "forcible strip searching". The policy documents set out above described the circumstances in which a non-compliant prisoner will be subject to a full body search. Such searches are conducted in accordance with detailed Control and Restraint protocols. There is a specific Control and Restraint Procedure to be employed in cases where a prisoner is not compliant with an instruction that he be full searched. ...

11. The Applicant describes forcible searching of prisoners who "neither consent nor resist a routine full body search" in paragraph 3(f). In practice, prison officers are trained to deal with prisoners who are either compliant or non-compliant with the request for a full search. A prisoner who

refused to cooperate with a search but who does not resist is a non-compliant prisoner. In order to consistently manage risk both to prisoners and to staff, non-compliant prisoners are all treated in the same way regardless of whether they are passive or aggressive in their resistance. A prisoner who appears to be passive in his resistance to a search may modify his behaviour in an unpredictable manner in a way that heightens the level of risk to all parties concerned.
..." [Emphasis added]

Legislative Context

[10] The Prison & Young Offender Centre Rules (NI) 1995 were made in pursuance of Section 13 of the Prison Act (NI) 1953 as extended by Section 2 of the Treatment of Offenders Act (NI) 1968. Rule 16 of the 1995 Rules provides:

> **"(1) Every prisoner shall be searched on reception to prison.**
>
> **(2) A prisoner may be searched before or following a visit, on any occasion on which the prisoner has come into contact with, or is likely to come into contact with, persons from outside the prison, or when his cell or property is searched.**
>
> **(3) A search under paragraphs (1) and (2) may include a full search.**
>
> **(4) The governor may direct that a prisoner or prisoners be searched at such other times as is considered necessary for the safety and security of the prison.**
>
> **(5) Where the governor has grounds to believe that a prisoner is in possession of a prohibited or unauthorised article and that item may only be discovered by means of a full search the governor may direct that the prisoner be required to submit to a full search.**
>
> **(6) A prisoner shall not be undressed, or required to undress, in the sight of another prisoner, or any persons other than the officers conducting the search, but a prisoner may be required to remove a hat, coat or overcoat.**

(7) Any search for which a prisoner must undress may only be carried out by an officer of the same sex as the prisoner.

(8) Where a prisoner refuses to co-operate with a search, including a full search, such force as is necessary to effect the search may be used.

(9) This rule does not permit the search of a body cavity, but a prisoner may be required to open his mouth to permit a visual inspection.

(10) Under this rule a search of a prisoner may include a search of any prisoner's cell and property."

Convention Provisions

[11] Art 3 of the European Convention provides:

> **"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."**

[12] Art 8 of the Convention 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."**

Strip-Searching

A. Domestic Case Law

[13] In this jurisdiction in ***Carson*** **[2005] NIQB 80** Girvan J stated at para 27 thereof:

> **"Policies relating to the circumstances in which strip searching is to be carried out engage Article 3 and 8. The decision makers must justify the policy as lawful and proportionate. Prison rules do permit such searches and therefore they can be lawful but the Prison Service must show that the searches are necessary and carried out in a proportionate way and as a proportionate reaction to the relevant mischief.... A random system of searching may in fact be a necessary and proportionate response to the mischief of the importation of illicit materials into the prison but the decision maker when arriving at the judgment of what is necessary and proportionate under Articles 3 and 8 would have to look at alternative ways of reducing the problem short of undertaking the stripping of prisoners ..."**

[14] *Leonard* **[2007] NIQB 91** concerned the issue of strip searches of prisoners in separated accommodation in HMP Maghaberry. In this case Deeny J considered the question of Convention compliance and "strip searching" of a dissident Republican separated prisoner in Roe House. He stated:

> **"[19] I cannot be satisfied in the way that I need to be that strip searching is being abused here in the way in which it is done, for the reasons set out above. Certainly it was clearly accepted by counsel for the respondent, rightly in my view, that such searching should not be done in a way to degrade or humiliate the prisoner. It should only be conducted to the extent necessary for preventing the commission of criminal offences. Indeed there can be no doubt that where there is an interference with a Convention right the actions of the public authority should be the minimum required. Likewise the prison authorities should keep under review the number of strip searches. It may well be that if order increases and criminality diminishes within the prison population the extent of such strip searching in terms of its frequency could be reduced. However this seems to me a matter, so far certainly as this case is concerned, within the margin of appreciation of the Prison Service.**
>
> **[20] ... it has not been shown that the current searching practice of the Prison Service with regard to the inmates of Roe House, and the applicant in particular, is disproportionate or unnecessary. The**

> **applicant therefore does not succeed either in regard to his case on searching or his case in regard to the implementation of the Compact."**

B. Strasbourg Case Law

[15] Strip searching was addressed by the European Court in ***Van der Ven v Netherlands*** **(2004) 38 EHRR 46** on the basis of Art 3 ECHR. The Court concluded that the entire regime in a high security prison unit and the manner in which it impacted on the applicant had violated Art 3. In relation to strip searching it commented as follows:

> **"60. The Court has previously found that strip-searches may be necessary on occasions to ensure prison security or to prevent disorder or crime. In the cases of Valaŝinas and Iwańczuk one occasion of strip-search was at issue, whereas the case of McFeeley concerned so-called "close body" searches, including anal inspections, which were carried out at intervals of 7 to 10 days, before and after visits and before prisoners were transferred to a new wing of the Maze Prison in Northern Ireland, where dangerous objects had in the past been found concealed in the recta of protesting prisoners.**
>
> **61. In the present case, the Court is struck by the fact that the applicant was submitted to the weekly strip-search in addition to all the other strict security measures within the EBI. …[T]he Court is of the view that the systematic strip-searching of the applicant required more justification than has been put forward by the Government in the present case."**

[16] At paras 62-63 the Court held:

> **"62. The Court considers that in the situation where the applicant was already subjected to a great number of control measures, and *in the absence of convincing security needs*, the practice of weekly strip searches that was applied to the applicant for a period of approximately three-and-a-half years diminished his human dignity and must have given rise to feelings of anguish and inferiority capable of humiliating and debasing him. ..**

> **63. Accordingly, the Court concludes that the *combination* of routine strip searching with the other stringent security measures in the EBI amounted to inhuman or degrading treatment."** [Emphasis added]

[17] In ***Iwańczuk v Poland* (2004) 38 EHRR 8** the Court found a breach of Art 3 in circumstances where the applicant had been ordered to undergo a body search in order to vote while in prison. At para 56 the Court said:

> **"The Court ... considers that, given the applicant's personality, his peaceful behaviour during the entire period of his detention, the fact that he was not charged with a violent crime and had no previous criminal record, it has not been shown that there were grounds on which to fear that he would behave violently. Consequently, it has not been shown that the order of body search was indeed justified."**

[18] In ***Wainwright v UK* (2007) 44 EHRR 40** the European Court considered the general principles applicable to the Art 8 argument in these terms:

> **"Where a measure falls short of Art 3 treatment, it may, however, fall foul of Art 8 of the Convention which, inter alia, provides protection of physical and moral integrity under the head of respect for private life. There is no doubt that the requirement to submit to a strip search will generally constitute an interference under the first paragraph of Art 8 and require to be justified in terms of the second paragraph, namely as being "in accordance with the law" and "necessary in a democratic society" for one or more of the legitimate aims listed therein. According to settled case law, the notion of necessity implies that the interference corresponds to a pressing social need and, in particular that it is proportionate to the aim pursued."**

[19] The Court went on to address the topic in relation to visitors who were subject to strip searches upon entering a prison. The European Court noted that:

> **44. [T]he applicants were visitors to the prison, intending to exercise their Art. 8 right to see a close relative. There was no direct evidence to connect them with any smuggling of drugs into the prison,**

in particular as this was the first time that they had visited the prison.

In these circumstances the Court considers that the searching of visitors may be considered as a legitimate preventative measure. It would emphasise nonetheless that the application of such a highly invasive and potentially debasing procedure to persons who are not convicted prisoners or under reasonable suspicion of having committed a criminal offence must be conducted with rigorous adherence to procedures and all due respect to their human dignity."

46. …The treatment undoubtedly caused the applicants distress but does not, in the Court's view, reach the minimum level of severity prohibited by Art. 3. Rather the Court finds that this is a case which falls within the scope of Art. 8 of the Convention and which requires due justification under the second paragraph of Art. 8.

48. On the other hand, it is not satisfied that the searches were proportionate to that legitimate aim in the *manner* in which they were carried out. Where procedures are laid down for the proper conduct of searches on outsiders to the prison who may very well be innocent of any wrongdoing, it behoves the prison authorities to comply strictly with those safeguards and by rigorous precautions protect the dignity of those being searched from being assailed any further than is necessary. They did not do so in this case."

[20] The case of ***Wieser v Austria*** **(2007) 45 EHRR 44** describes a forcible search. The European Court observed:

"45. A search carried out in an appropriate manner with due respect for human dignity and for a legitimate purpose may be compatible with Art. 3. However, where the manner in which a search is carried out has debasing elements which significantly aggravate the inevitable humiliation of the procedure Art. 3 has been engaged ...

46. In the present case, the Court notes first that the applicant in the present case was not simply ordered to undress, but was undressed by the

> **police officers while being in a particular helpless situation. Even disregarding the applicant's further allegation that he was blindfolded during this time which was not established by the domestic courts, the Court finds that this procedure amounted to such an invasive and potentially debasing measure that it should not have been applied without a compelling reason. However, no such argument has been adduced to show that the strip search was necessary and justified for security reasons. The Court notes in this regard that the applicant, who was already handcuffed was searched for arms and not for drugs or other small objects which might not be discerned by a simple body search and without undressing the applicant completely".**

[21] In the recent case of ***Staszewska v Poland (App No 10049/04)*** the Court found no breach of Article 3 where the Applicant had been subjected to a strip body search at a police detention centre to which she had been brought.

The Applicant's Submissions

The Vires Argument

[22] Rule 16 is the only rule which authorises a full body search of a prisoner. It is submitted that the policy of routine full-body searching on entering and leaving the prison is contrary to that Rule, with the result that there is no rule which authorises or permits such a policy. Rule 16 prescribes the circumstances in which a prisoner can be subjected to a "full search" (which is understood as meaning the same as a "full body search"). This gives rise to the obvious implication that these are the only circumstances in which a prisoner can be subjected to a full search under this rule. Where it appears in Rule 16, the power to conduct a full search is expressed in discretionary terms, so the rule-making authority did not intend that full searches would be routine or automatic in any of the circumstances in which it could occur. Rule 16(1) requires that a prisoner should undergo a search on reception to prison. Read in context, it is clear that "reception to prison" refers to the prisoner's first arrival at prison, his/her initial committal (see e.g. Rules 15, 17, 19, 20, 21, 22, 23). By virtue of Rule 16(3), this mandatory search on first reception may be a full body search. Rule 16(2) provides that a prisoner may be searched (i) "before or following a visit" (ii) "on any occasion on which the prisoner has come into contact with, or is likely to come into contact with persons from outside the prison" (emphasis added) or (iii) when his cell or property is searched. Rule 16(2) deals only with circumstances arising inside the prison – visits, actual or potential contact with persons from outside the prison, and cell/property searches. The actual or potential "contact" is not contact with persons outside the prison but contact with persons *from* outside the prison. By virtue of Rule 16(3), such discretionary searches may

include a full body search. Rule 16(4) provides that the governor may direct that a prisoner or prisoners may be searched at such other times as is considered necessary for the safety and security of the prison. However, this is not a power which is amplified by a provision permitting such a search to include a full search (unless the situation falls within Rule 16(5)). The only other time when full body searching is authorised by the Rules is set out in Rule 16(5). There is, it was submitted, therefore no power under the Prison Rules to conduct a full body search of a prisoner in the circumstances or for the reasons set out in paragraphs 43, 46 and 47 of the Respondent's "Search Policy Human Rights Analysis" (see p6 above) except insofar as they fall within the circumstances prescribed in Rules 16(1), (2) and (5).

[23] Moreover, even in these limited circumstances, the discretion whether to conduct a full search must be properly exercised. A blanket policy of full body searching cannot be authorised by resort to a discretionary power. Such a policy is not a proper exercise of the discretion as it does not allow for individual assessment of the requirement for full body searching (see e.g. Fordham 50.4.4 (Duty not to adopt an unduly rigid policy); 50.4.5 (The policy must not automatically determine the outcome); 56.1.2 (Decision vitiated by disregarding of relevancy). In support of their argument that the adoption of a blanket policy affecting fundamental rights was unlawful the applicant sought to rely on the judgment of Lord Bingham in ***R(Daly) v Secretary of State for the Home Department*** **[2001] 2 WLR 1622** (in particular paras 18 and 19 thereof).

[24] In summary, the only provision of the Rules that could allow for full body searching on entering and leaving the prison (other than initial reception) is Rule 16(5), which is clearly inapt to support a blanket policy of full body searches of every prisoner as a matter of routine. This rule provides the governor with the discretion to order a full body search only where s/he has grounds to believe that the prisoner is in possession of a prohibited or unauthorised article and that item may only be discovered by means of a full search. In real terms, this means that such searches could only be intelligence/information led or indicated by the technology.

The Applicant's Convention Arguments

[25] It was not contended by the applicant in this case that the policy of routine full body searching on entering and leaving the prison constituted a breach of Art 3. The applicant did however submit that the policy of *forcible* strip searching of prisoners who neither consent to nor resist the full body search has not been shown to be necessary, justified or required for a "compelling reason". Given the manner in which it is carried out as described by the applicant in his affidavit it was submitted that such searching reaches the minimum level of severity required by Art 3 and constitutes inhuman and degrading treatment. The applicant asked the Court to note that prisoners who do not consent to a full body search are not individually risk assessed before forcible searching takes place. Such forcible searching is an automatic consequence of refusal to submit.

[26] Furthermore, the applicant submitted, the manner in which the forcible search is carried out is the same in every case – either a prisoner complies with an order for a full body search or he doesn't, if he is "non-compliant" force is used. They submitted that strip searching should only be carried out on the basis of individual risk assessments and/or suspicion and in support of this relied on reports from the European Committee for the Prevention of Torture ("CPT"). Also relevant to this issue, they said, is the use of the standby search team ("SST") to carry out the forcible strip searches. The SST, it was submitted, has been the subject of much criticism. In particular the report of the CPT's visit to the UK, including HMP Maghaberry, in 2008 is relevant (see para 153-157). In addition the recent joint reports of the Criminal Justice Inspectorate and HM Inspector of Prisons are highly critical of the use of the SST in HMP Maghaberry (report of announced inspection in 2005 at paragraphs 6.1; 6.4-6.5; 6.20; 6.43) and of the decision to retain the SST in the same form (report of unannounced follow-up inspection in July 2009 at paragraphs 6.8-6.10). Concern is also expressed about the SST by Audrey Park in her report on the ***Review of the Searching of Prisoners in the NIPS*** (para 4.6, page 395).

[27] The applicant submitted that full body searching and forcible full body searched engaged Art 8 to the extent that the policies underpinning such searches and the searches themselves must be justified under Art8(2). For the reasons set out above in connection with the scope and application of Rule 16 the applicant submitted that the policy of routine strip searching of prisoners on entering and leaving of the prison and the policy of **forcible** strip searching of prisoners who neither consent to nor resist such a search were not in accordance with the law and therefore in violation of Art 8.

[28] On the issue of proportionality the applicant submitted that the policies were not a proportionate response to the mischief they sought to address because they were blanket policies that do not permit individual circumstances to be taken into account.

[29] The applicant submitted that the Court could not conclude from the respondent's evidence that the policies adopted were "no more intrusive than is necessary" because they (i) do not allow for the consideration of individual circumstances; (ii) did not provide any or sufficient detail to allow the Court to reach the conclusion that the circumstances are such that blanket policies are justified.

The Respondent's Submissions

[30] The respondent submitted that Rule 16 as a whole must be read within the overall context and statutory scheme in which the overarching theme is that of the need for control and superintendence of prisoners in the interests of security, safety and good order and discipline in the prison. An aspect of that overarching theme is what can and cannot be brought into or brought out of the prison and what can be held and possessed by prisoners. Searching, it was submitted, is the key feature of advancing the interests of security, safety and good order and discipline without

which effective policing of the requirements of the prison rules would be undermined. In particular, the respondent submitted that full searching of prisoners would be required since without it it would be difficult to uncover a range of prohibited items in particular drugs, munitions, firearms, other weapons, mobile phones, and parts of same etc.

[31] Where prisoners are going out or coming into the prison they crossed the interface between the "outside" environment and the closed environment of the prison. In such circumstances there is an opportunity to move contraband across the interface and there is a common need to ensure an effective system exists to counter and to deter such activity. They submitted that Rule 16 and each of its parts should be read purposefully and in this light and that to do otherwise and to read each part of it in a narrow and isolated way, as they submitted the applicant contended, was contrary to the central object of the provisions. For those reasons the respondent submitted that Rule 16 provided ample authority for the full body searching of prisoners coming in and out of the prison. In particular the respondent submitted that Rule 16(1) should be read expansively and in view of its purpose so that the reference to "on reception" encompasses the clearing house of outgoing and incoming prisoners. In the alternative they said that Rule 16(2) can be viewed as applying to any situation in which there is a contact between the prisoner and those outside the prison. Thirdly, they submitted that it is the case that the Governor has directed the occasion of prisoners going out of, or coming back into the prison, a situation where prisoners are to be full searched as he considers this necessary for the safety or security of the prison. The respondent did not accept that Rule 16(4) is restricted in the manner suggested by the applicant and that to impose a restriction that "search" in this context does not include "full search", given the overall scheme and purpose of the provisions would make no sense and would undermine the effective operation of the Rule.

[32] The respondent acknowledged that whilst parts of Rule 16 are expressed in discretionary language they submitted that it didn't follow that the application of policy which required full body searching on entry and exit from the prison was ultra vires or that the application of the general policy of searching on exit and entry involved an abdication rather than a discharge of discretion.

[33] The respondent relied on the decision of the Divisional Court in ***R v Secretary of State for the Home Department (ex parte Zulfikar)*** **[1996] COD 256; The Times, 26 July 1995.** In that case the applicant brought a judicial review challenge to the policy applied at HMP Frankland which required that prisoners were subjected to a full body search after each prison visit. The prison authorities argued that the blanket policy of conducting searches after each visit was justifiable because often it was prisoners who were not considered to be involved in smuggling contraband who were prevailed upon by others to bring material into the prison. Further, it was argued that differentiating between different categories of prisoners was invidious and could lead to those exempt from searching being subject to intimidation by other prisoners.

[34] The Rule under consideration in that case was Rule 39(1) of the Prison Rules 1964 which provided that:

> **"Every prisoner shall be searched when taken into custody by an officer, on his reception into a prison and subsequently as the governor thinks necessary."**

[35] The Court also considered the rules contained in the Prison Service security manual which included Rule 66.20 which provided that:

> **"Each inmate should be strip searched upon reception."**

[36] Stuart Smith LJ found that the rationale articulated by the prison authorities accorded with common sense. Butterfield J held that the question of the policy to be adopted with respect to searching was one which the Governor of a prison establishment was best placed to make and that the searching procedures were designed to preserve the security of the prison and to eliminate the smuggling of contraband and prohibited items into the prison. He held that the authority of the Governor in this regard should not be susceptible to challenge save in the most exceptional circumstances. The Respondent submits that this reasoning is entirely applicable to the present case.

[37] The decision of the High Court in ***Zulfikar*** was appealed to the Court of Appeal as a renewal of the leave application. The Court of Appeal repeated the terms of the judgment expressed by Mr Justice Butterfield and stated:

> **"Those sentiments succinctly summarise what has been said by Stuart-Smith LJ in a closely reasoned and necessarily much longer judgment. In refusing leave to appeal, the single Lord Justice said that the decision of the Divisional Court is full reasoned and based on a detailed affidavit from the Prison Governor, the contents of which I too find persuasive on the points in issue. For my part, I take the view that there is no arguable ground for contending that the decision of the Divisional Court was in error and I regard this application as a hopeless one. I would refuse it."**

[38] In respect of the applicant's Convention arguments the respondent argued that the jurisprudence with respect to Art 8 engagement in full body search policies was relatively well settled citing the judgment of Girvan J in ***Carson*** **[2005] NIQB 80** and Deeny J in ***Leonard*****.**

[39] The respondent placed considerable reliance on the decision in ***Leonard*** which considered the issue of strip searches of prisoners in separated accommodation in HMP Maghaberry. In ***Leonard*** the Court considered the question of Convention compliance and strip searching for a dissident republican separated prisoner in Roe House. The respondent relied in particular upon paras 19 and 20 of the judgment set out at para 14 above and in particular emphasised the following passage where the Court stated:

> **"... it has not been shown that the current searching practice of the Prison Service with regard to the inmates of Roe House, and the applicant in particular, is disproportionate or unnecessary. The applicant therefore does not succeed either in regard to his case on searching or his case in regard to the implementation of the Compact."**

[40] The Court was asked by the respondent to note that there had been no substantive change in the full body search policy which applied in Roe House in the ***Leonard*** case and that which applied in Roe House in August/September 2010 and that therefore on that basis alone the Court could reject the applicant's Art 8 point.

[41] Having then reviewed the Strasbourg jurisprudence in respect of strip searching the respondent submitted that routine full body searching of sentenced and remand prisoners would not, without more, constitute a breach of Art 8. Referring to ***Wainwright*** as the high watermark of the Strasbourg jurisprudence on Art 8 in the strip searching context they submitted that the Court in that case plainly distinguished the practice of searching visitors from that of searching sentenced and remand prisoners. Moreover, they submitted that the Court in ***Wainwright*** found that on the specific facts of that case where searching policy had not been complied with the requirement of proportionality had not been met. The Court, they said, was not considering the Art 8 compliance of the searching policy but that it was implicit in the Court's reasoning that if the policies and procedures had been adhered to there would have been no breach found of Art 8 and submitted on that analysis that the applicant's case gained no support from ***Wainwright.***

[42] The Strasbourg jurisprudence demonstrated that any challenge to Art 8 compliance of a full body search policy ought only to succeed if there was a demonstrable lack of proportionality. It was submitted that this was a point which had already been ventilated before the Court in ***Leonard*** and that the Court in that case had no hesitation in finding that the current searching policy with respect to the inmates in Roe House was proportionate. They submitted that in the light of ***Wainwright*** and ***Leonard*** the Court need go no further.

[43] They further submitted that if an analysis of the proportionality of the policy of routine full body searches on entry and exit was required then they submitted that the Court could adopt the proportionality template set out at para 17 of ***F & Thompson*** **[2010] UKSC 17** where Lord Phillips stated:

> **"In order to decide whether interference with a fundamental right is proportionate to the legitimate end sought to be achieved the court has to ask the questions identified by the Privy Council in de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 AC 69 at p80:**
>
> > **'whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective'."**

[44] They also relied on Lord Phillips' reference to the observations of Lord Nichols in ***Wilson v First Country Trust Ltd (No2)*** **[2004] 1 AC 816.** At para63 of his speech Lord Nicholls observed that the application of the proportionality test required a value judgment and that in the making of that judgment in many cases the facts would speak for themselves. The respondent submits that the present case is in that category.

[45] Against this background the respondent submitted that the legislative objective of the routine full body search policy is the maintenance of good order and discipline within the prison, the discharge of the duty of care owed to prisoners and staff and the protection of the public. The requirement to have a routine, rather than random or risk led policy on full body searches on entry and exit to the establishment is plainly connected to that legislative objective. The *method* of implementing full body searches is circumscribed by written policies and procedures which this Court has already found to be Convention compliant. Accordingly the respondent submitted that, as per ***Leonard*** the full body search meets the proportionality test. The order directing the applicant to comply with full body search policy was lawful and the adjudications conducted in relation thereto could not be impugned. They also rejected the applicant's contention that the full body searches were not in accordance with law relying, inter alia, on Rule 16 of the Prison Rules.

[46] The respondent submitted that, per ***McFeely v UK*** **[1981] 3 EHRR 161**, the conduct of a full body search will not reach the threshold of severity required to engage Art 3. The Court was asked to note that the policy used for searching those who are non-compliant is a procedure utilised only when all other options have failed. This is fully set out in DST SOP-04. A prisoner in this situation is given a period of time for reflection before action is taken. The applicant complains that the Standby Search Team are used for these searches. However, the use of appropriately trained staff working to specific protocols is a safeguard for both staff members and

prisoners in such circumstances. The respondent submits that the applicant cannot make good a case of Art 3 or Art 8 breach with respect to this aspect of Prison Service policy.

Discussion

The Ultra Vires Argument

[47] The contention that full body searching is ultra vires Rule 16 of the Prison Rules is a species of challenge which has not previously been advanced either domestically or in Strasbourg. This previously unrecognised species of illegality would, if correct, have potentially calamitous consequences. In none of the many previous challenges to strip searches whether in Europe or Northern Ireland has such a contention ever been advanced nor does it feature in any of the policy review documents before the Court. Everyone rightly or wrongly appears to have been proceeding on the basis that there was lawful authority for the conduct of such searches. Indeed, the contention advanced on behalf of the applicant did not feature in the original version of the Order 53 Statement. True it is that such considerations cannot divest an otherwise unimpeachable argument of its legal merit. The startling consequences that would result, the yawning gap in prison security and the multiplicity of civil claims by litigiously minded prisoners inevitably provokes searching scrutiny of the correctness of such arguments. Neither the floodgates argument nor its novelty speaks to its merits – but it does provide a provocative focus.

[48] Although the argument was not advanced in ***Carson*** or ***Leonard*** the Court in both those cases proceeded on the basis that prison rules permitted such searches. I am quite satisfied that Rule 16 constitutes ample authority for the conduct of such searches. The applicant's argument, if correct, would mean that whilst power to conduct such searches was available at first reception they were not available thereafter for example when prisoners were returning from a period of home leave. On the applicant's argument the only power the Governor could deploy in those circumstances would be Rule 16(5). Such a conclusion is, in my view, illogical and certainly not one which is compelled by the Rules. In my view the Rules empower and authorise such searches not least because it can never have been the intention of Parliament in Rules designed to ensure, inter alia, the security and safety of prisoners and staff alike that a yawning gap in prison security would thus be created.

[49] The argument that "reception" in Rule 16(1), in context, refers to the prisoner's first arrival in prison is superficially attractive. I consider however that the respondent is correct that Rule 16 must be read in the context of the overall statutory scheme and that "on reception" encompasses, as the respondent put it, "the clearing house of outgoing and incoming prisoners".

[50] I also note that in para 3 of his third affidavit Governor Craig referred to the NIPS website and he exhibited to his affidavit a document taken from the website which refers to Maghaberry Prison which has been on the website since 2006 and which remains on it today. It is referred to as an A-Z guide and under a section entitled "Reception" includes the following paragraphs:

> **"Reception ... Who passes through reception?**
>
> **All prisoners arriving at Maghaberry or leaving the prison must pass through the reception building. This includes those being committed to prison for the first time, those going to and from Court, prisoners being released time served, or for a period of temporary release ...**
>
> **The Committal Process**
>
> **... The person is given a full body search in a private cubicle to ensure that they are not attempting to smuggle any illegal articles or substances into the prison ...**
>
> **Court Productions**
>
> **A similar procedure is followed by those going to Court or on a period of temporary release. All receive a full body search when leaving or returning to the prison. ..."**

[51] Alternatively, I accept that 16(2) can apply to the situation in which there is contact between the prisoner and those outside the prison. I reject the applicant's argument that the actual or potential "contact" referred to in 16(2) is not contact with persons outside the prison but contact with persons *from* outside the prison and that it is only dealing with circumstances arising inside the prison. In my view a person who is returning from home leave, from a hospital visit or Court is a prisoner who "has come into contact with, or is likely to come into contact with, persons from outside the prison" within the meaning of 16(2) and accordingly liable to be searched. As is clear searches whether conducted under 16(1) or 16(2) may include a full search.

[52] I am less attracted to the respondent's third, alternative, position to the effect that 16(4), if applicable, authorised a full search. Such a construction is difficult to reconcile with 16(3) which provides that a search under 16(1) and (2) may include a "full search" and 16(5) which authorises "a full search" in the circumstances specified. The absence of any reference to a full search in 16(4) in contra-distinction to 16(3) and 16(5) indicates that a full search is not authorised under 16(4).

[53] My conclusion in relation to Rule 16 simultaneously disposes of the applicant's contention that such searches were not in accordance with law.

Proportionality

[54] It is clear from the domestic and European jurisprudence that compelling reasons of security can justify intrusive interferences such as strip searching. If it is in accordance with law, as I hold it to be, the remaining issue is whether the measures are disproportionate. I have concluded, with one caveat, that they are not and that compelling reasons of security justify the policy of full body searching of all prisoners entering or leaving the prison.

[55] That there are compelling, convincing and subsisting security needs justifying the maintenance of full body searching is evidenced by the 2005 Human Rights Analysis conducted by NIPS and, more recently, the recommendations of the cross-jurisdictional review team made in 2010. It is not without significance that the policy on searching prisoners in Northern Ireland is analogous to that applied throughout the United Kingdom and indeed that the search methodology applied in NIPS is less intrusive than that applied in NOMS where squatting and mirror searches are authorised or in the IPS where, according to their training manuals, a search on first committal involves a prisoner being totally naked.

[56] Technological advances have not, for the reasons set out in Governor Craig's affidavit, obviated the need for such full body searches which are, in my assessment, proportionately justified on compelling grounds of security. It is however plainly incumbent on the respondent to keep the issue of full body searches under regular review taking into account, inter alia, any such advances which might obviate or diminish the need for such searches.

[57] As previously pointed out the prisoner is never completely naked, no physical contact is involved and the search is over in minutes. Whether physical contact takes place is effectively at the election of the prisoner. If he chooses to co-operate there will be no physical contact. Even when he refuses there is plenty of time built in for reflection to give the prisoner the maximum opportunity to change his mind if he is so disposed to do.

[58] I do not accept that a uniform application of full body searching on entering and leaving prison is disproportionate. As Lord Bingham observed in ***Daly*** **[2001] 2 WLR 1622** (albeit in the context of searching of a prisoner's legally privileged material in his absence):

> **"19. ... In considering these justifications, based as they are on the extensive experience of the prison service, it must be recognised that the prison population includes a core of dangerous, disruptive and manipulative prisoners, hostile to authority**

and ready to exploit for their own advantage any concession granted to them. Any search policy must accommodate this inescapable fact ...".

[59] A challenge to the blanket policy applied at HMP Frankland which required that prisoners were subjected to a full body search after each prison visit was regarded by the Divisional Court and the Court of Appeal as "hopeless". The prison authorities had argued in that case that the blanket policy of conducting searches after each visit was justifiable because often it was prisoners who were not considered to be involved in smuggling contraband who were prevailed upon by others to bring material into the prison. Further, it was argued that differentiating between different categories of prisoners was invidious and could lead to those exempt from searching being subject to intimidation by other prisoners. The Court of Appeal (like the Divisional Court) found the detailed affidavit and reasoning from the prison governor in that case "persuasive". The absence of a uniform practice could therefore be regarded as inimical to the security of the prison.

[60] The applicant challenges the use of C&R techniques by the SST where he has indicated that he will not consent to nor resist a full body search. It is however not possible to conduct a full body search on a prisoner who does not co-operate. His clothing will have to be removed. There is a specific control and restraint procedure to be employed in cases where a prisoner is not compliant with an instruction that he be fully searched. DST SOP/04 provides a specific procedure for use in circumstances where a prisoner refuses a full body search. A prisoner who refuses to co-operate with a search but who does not resist is treated as a non-compliant prisoner. As pointed out in para 11 of Governor Craig's second affidavit, in order to consistently manage risk both to prisoners and to staff non-compliant prisoners are all treated in the same way regardless of whether they are passive or aggressive in their resistance. A prisoner who appears to be passive in his resistance to a search may modify his behaviour in an unpredictable manner in a way that heightens the level of risk to all parties concerned. In my assessment, the adoption of a uniform practice/procedure to deal with non-compliant prisoners who are given every opportunity to have a lawful, justified full body search which does not involve physical touching of the prisoner by prison officers cannot, for the reasons advanced by Governor Craig, be regarded as disproportionate.

Conclusion

[61] In summary my conclusions are that routine full body searching of prisoners on entering and leaving the prison is lawful, is not ultra vires Rule 16 of the 1995 Rules and is not incompatible with Art 8 ECHR. Furthermore, the policy of forcible full body searching of non-compliant prisoners is lawful and is not, in the circumstances of this case, incompatible with Art 3 or Art 8 ECHR.

[62] The one caveat to what I have said concerns full body searching of prisoners who are being discharged on acquittal or completion of their sentence. The purpose

of the search is stated to be to ensure that no item of prison property is unlawfully removed from the establishment. Although this point was raised in the arguments it was, in context, not the central thrust of the applicant's submissions. I entertain significant reservations as to whether such a *routine* search on *final discharge,* can be regarded as lawful or proportionate. On what basis, for example, can a prisoner who has been acquitted and in respect of whom there are no reasonable grounds for suspecting that he is unlawfully removing prison property be subject to fully body searching /forcible body searching? This specific matter may, in light of the applicant's primary focus, have received less attention from the Respondent than it may warrant. I will hear the parties as how they submit this matter ought now to be addressed.