

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND  
QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

AN APPLICATION BY CIARAN JAMES CUNNINGHAM  
FOR JUDICIAL REVIEW

WEATHERUP J

Pre- Release Home Leave for Prisoners.

[1] The applicant is a separated prisoner at HMP Maghaberry. He applies for judicial review of the operation of the pre-release home and resettlement leave arrangements for sentenced prisoners. While the application originally extended to a number of issues the applicant's complaint is now limited to the arrangements for notice to prisoners of home leave entitlement. Mr O'Rawe appeared for the applicant and Mr Coll for the respondent.

[2] The applicant was remanded into custody at HMP Maghaberry on 6 July 2003. He remained on remand until he was sentenced to six years' imprisonment on 14 October 2004. While on remand he was transferred to separated conditions on 11 September 2003 and he remained in separated conditions after he was sentenced.

[3] Until 1 March 2004 the pre-release home leave arrangements for all determinate prisoners were those issued on 21 September 1998. A star class determinate prisoner serving continuous custody of more than 24 months, but less than 48 months, was entitled to pre-release home leave from an eligibility date of 12 months prior to the earliest date of release, with a period of leave of 26 days. The applicant's early release date was 1 July 2006 and had he been a sentenced prisoner under the 1998 scheme he would have been entitled to 26 days leave from 1 July 2005.

[4] Under the new scheme applied to those prisoners sentenced after 1 March 2004 entitled "Pre-Release Home and Resettlement Leave Arrangements for all

Sentenced Prisoners” a prisoner serving a period of continuous custody of more than 24 months, but less than 48 months, has a leave eligibility period of 6 months prior to the early release date, with a home leave quota of 8 days and a resettlement quota of 6 days. Under the new scheme the applicant was entitled to a total of 14 days leave from 1 February 2006.

[5] When first introduced on 1 March 2004, the new scheme had retrospective effect to prisoners sentenced before that date. This led to challenges by way of judicial review that were considered by the Court of Appeal in Griffin’s Application [2005] NICA 15 and by Deeny J in Neale and Others Applications [2005] NIQB 33. As a result the new scheme was not applied to those prisoners sentenced before 1 March 2004, unless the old scheme operated to the disadvantage of such prisoners, in which case they were entitled to elect for the new scheme. In Neale & Others Applications the four prisoners who had each been sentenced before 1 March 2004, had, upon their committal to HMP Magilligan, each received a written document that included particulars of the date of eligibility for home leave and the period of home leave for which each was eligible. This was found to be a clear and unequivocal representation of home leave entitlement under the old scheme furnished to each prisoner and grounded a legitimate expectation of entitlement to home leave under the old scheme. No overriding public interest was demonstrated for the introduction of the retrospective element in the new scheme.

[6] A written notice of home leave entitlement was not furnished to the applicant. The applicant contends that the respondent should be required to furnish to all prisoners, upon committal after sentence, a written statement of the particulars of eligibility for home leave. A failure to do so is alleged to amount to a breach of the right to respect for private and family life under Article 8 of the European Convention and a breach of the applicant’s legitimate expectation based on the previous practice of the respondent, as illustrated by Neale & Others Applications.

### **Prisoners in Integrated Conditions.**

[7] The respondent contends that different practices apply to integrated and separated prisoners. An integrated remand prisoner at HMP Maghaberry undergoes induction when brought to the prison, but that does not involve any explanation of the home leave arrangements because they have no application to remand prisoners. An integrated sentenced prisoner at HMP Maghaberry undergoes further induction when brought to the prison after sentence, but that induction does not involve any explanation of the home leave arrangements, unless the subject is raised by the prisoner. However after approximately 20 days the integrated sentenced prisoner at HMP Maghaberry undergoes a resettlement meeting. Resettlement plans are prepared for each such prisoner and at this meeting details will be furnished of a prisoner’s early release date and his home leave entitlement. This information is generally not available as early as the induction meeting for sentenced prisoners.

[8] Integrated sentenced prisoners at HMP Maghaberry may be transferred to HMP Magilligan where the focus is on release and resettlement. A high percentage of the prisoners at HMP Magilligan are deemed eligible to apply for home leave - by way of example this was calculated at 94% of the prison population at HMP Magilligan at 17 May 2006. All prisoners transferred to HMP Magilligan undergo induction which includes them being furnished with written particulars of their individual entitlement under the home leave scheme. The four applicants in Neale & Others Applications had been transferred to MPH Magilligan. As appears from Neale & Others Applications each such transferred prisoner is furnished with written particulars of the home leave eligibility date and the home leave quota. Governor Jeanes of HMP Maghaberry avers that the issue of individual eligibility slips to the prisoners at HMP Magilligan plays a significant part in the management and progression of prisoners at HMP Magilligan.

### **Prisoners in Separated Conditions.**

[9] Separated prisoners are housed at HMP Maghaberry further to a "Compact for Separated Prisoners." The Executive Summary dated February 2004 states that on 8 September 2003 the Government accepted the Steele Review recommendation that Republican and Loyalist prisoners with paramilitary affiliation should be accommodated separately from each other, and from the rest of the prison population, on a voluntary basis within Maghaberry Prison. The Executive Summary further refers to the introduction of new pre-release and resettlement leave arrangements which will apply to all sentenced prisoners. The Compact sets out the arrangements as applied to separated prisoners.

[10] The applicant was admitted to custody at HMP Maghaberry on 6 July 2003. He was transferred to the interim separated conditions in Lagan House as a remand prisoner on 11 September 2003. He was then transferred to permanent separated conditions in Roe House as a remand prisoner on 7 March 2004. Prior to the transfer to Roe House, the applicant was interviewed by Governor Martin and Principal Officer Davies on 4 March 2004. He was provided with a copy of the Compact for Separated Prisoners and a copy of the pre-release and resettlement leave arrangements. The pre-release and resettlement leave arrangements outlined the new scheme which had taken effect on 1 March 2004 (and which at that date also applied to prisoners sentenced before 1 March 2004 as well as those sentenced after that date). The text included information about the new home leave scheme, which would apply to the applicant if and when he became a sentenced prisoner. The respondent refers to notices to prisoners posted on notice boards in Roe House in May, July and October 2004 explaining the new scheme for home leave entitlement. The applicant denies that he received a copy of the new home leave and resettlement scheme at the interview of 4 March 2004 or that he was aware of the notices to prisoners of May, July or October 2004. However, the issue in the judicial review no longer concerns the application to the applicant of the new home leave and resettlement scheme but rather the furnishing of written particulars of the applicant's entitlement under the new scheme.

[11] After the decisions were delivered in Griffins Application and Neale and Others Applications the applicant's solicitor wrote to the Governor at HMP Maghaberry on 26 April 2005 seeking the applicant's parole eligibility date and the period of parole leave to which he would be entitled. Written particulars were received in a reply dated 26 May 2005.

[12] Accordingly an integrated sentenced prisoner is given the personal particulars of his home leave entitlement at the resettlement interview some 20 days after sentence. In the event of transfer to HMP Magilligan an integrated sentenced prisoner is given written particulars of his entitlement at the induction interview after transfer. On the other hand a separated prisoner is given general information about home leave while on remand and on becoming a sentenced separated prisoner there is no interview at which he is given particulars of his home leave entitlement. Particulars of the home leave entitlement of separated prisoners are obtained upon request to the prison authorities by or on behalf of the prisoner. The reason for the different treatment of separated prisoners is said to relate to the different character of separated conditions. Separated prisoners are not subject to a resettlement plan as this requires the development of a relationship between prisoner and prison officer, and this is not judged to be a desirable aspect of arrangements for separated prisoners because of the influence of paramilitary organisations. However resettlement does remain an aspect of separated conditions and separated prisoners may apply for resettlement leave.

[13] Notice to a separated prisoner, after sentence, of the personal particulars of home leave entitlement must be a straightforward administrative matter. I am not satisfied that the different character of separated conditions is an explanation for the failure to volunteer to a separated prisoner oral or written particulars of home leave entitlement after he has been sentenced. The particulars will of course be provided upon request. The issue is whether the absence of such a straightforward administrative measure as volunteering the personal particulars of home leave entitlement to a separated prisoner after sentence warrants intervention by the Court on judicial review grounds. The applicant relies on a right to such notice as an aspect of the right to respect for private and family life under Article 8 of the European Convention and on legitimate expectation based on the practice of the prison authorities as outlined in Neale & Others Applications.

#### **Article 8 of the European Convention**

[14] Article 8 provides that -

“(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 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.”

[15] Restrictions on private and family life are necessary incidents of lawful custody, however any restrictions do not remove such right to respect for family and private life as may be compatible with the lawful deprivation of liberty, see Daly v Home Secretary [2001] 2 WLR 1622. When assessing the obligations imposed by the article “regard must be had to the ordinary and reasonable requirements of imprisonment and to the resultant degree of discretion which the national authorities must be allowed in regulating a prisoner.....” per Kerr LCJ in Griffin’s Application at paragraph 25.

[16] In Griffins Application the Court of Appeal held that there had been an interference with the applicant’s Article 8 rights because, as a sentenced prisoner entitled to home leave under the old scheme, he was suffering a reduction in the amount of home leave by the application of the new scheme. Such interference required justification and the respondent, relying on public safety grounds as sufficient justification, was found to have failed to provide evidence to support the public safety ground. Accordingly the Court of Appeal found a breach of Article 8. It must be noted that the interference with the applicant’s article 8 rights arose from the reduction in home leave entitlement applied to the applicant. The Court of Appeal referred to those prisoners, such as the applicant in the present case, sentenced after the new scheme came into operation. At paragraph 34 the Court of Appeal stated:

“Without reaching any final decision on the matter, it appears to us that there is a strong argument available to the respondent that the 2004 scheme does not infringe Article 8 rights of prisoners sentenced *after* the scheme came into force. Certainly in the present case we have concluded that Article 8 has been engaged solely because the entitlement that would have been available to the applicant was reduced.” (Italics added)

[17] The applicant suffered no such reduction of home leave in the present case. The scheme did not apply to the applicant until he was sentenced on 14 October 2004, at which time the new scheme had been in operation for 7 months. I accept the respondent’s argument in the present case, and the preliminary view of the Court of Appeal in Griffin’s Application, that there has been no interference with the applicant’s Article 8 rights.

[18] However the Court of Appeal did regard a home leave scheme as an aspect of a prisoner’s article 8 rights. Home leave ought to benefit family and private life.

The old and new home leave schemes advance article 8 rights. It was the reduction in entitlement to home leave, *as a sentenced prisoner*, that amounted to an interference with article 8 rights. The applicant regards a home leave scheme as an aspect of a prisoner's article 8 rights that requires automatic notice to the prisoner of the particulars of entitlement. Separated sentenced prisoners receive particulars of home leave on request. I do not accept that article 8 imposes a positive obligation to furnish automatic notice. There is no procedural aspect of article 8 relating to notice of home leave entitlement that is engaged in the present case.

**Legitimate Expectation.**

[19] Further the applicant contends that he had a legitimate expectation of written notice of particulars of home leave based on the respondent's practice as outlined in Neale & Others Applications. The respondent has demonstrated three practices in relation to the disclosure to prisoners of personal particulars about home leave. At the resettlement interview for integrated sentenced prisoners at HMP Maghaberry personal particulars are outlined. At the transfer interview for integrated prisoners transferred to HMP Magilligan, written notice of personal particulars of home leave are furnished. For separated prisoners general particulars of the home leave scheme are given on transfer to the separated conditions, whether on remand or as a sentenced prisoner, and personal particulars of home leave entitlement are furnished to sentenced prisoners on request. There has been no practice that generates a legitimate expectation of automatic written notice of particulars of home leave entitlement for separated prisoners.

[20] I accept the explanation of the different cultures for conditions at HMP Magilligan and between separated and integrated conditions at HMP Maghaberry. At the same time I have not accepted the different cultures as explaining the absence of the simple administrative measure of providing written particulars to separated sentenced prisoners. However separated prisoners may obtain such particulars on request. The presence or absence of written notice is not claimed to affect entitlement to home leave but only knowledge of that entitlement, and then only pending a request. The administrative ease with which a particular matter might be achieved is not of itself a basis for judicial review.

[20] Administrative arrangements will often vary in different institutions. The variations in the present case do not warrant intervention by way of judicial review.

[21] The applicant has not established either ground of judicial review and the application is dismissed.