Neutral Citation No. [2010] NIQB 21 | *Ref:* **TRE7761**

Judgment: approved by the Court for handing down | *Delivered:* **19/02/10**

*(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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Barron's (Elaine) Application (Leave Stage) [2010] NIQB 21

AN APPLICATION FOR JUDICIAL REVIEW BY ELAINE BARRON

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TREACY J

Introduction

[1] The applicant seeks leave to apply for judicial review of a decision and/or policy of the Northern Ireland Prison Service ("the prison service") and the Police Service of Northern Ireland ("the police service").

[2] The applicant, who was a visitor at HMP Maghaberry, seeks, inter alia, the following relief (i) an order quashing the decision and/or the policy relied upon by the proposed respondents on 3 February 2010 to conduct a full/strip search of the applicant; (ii) a declaration that the policies and practices concerning strip-searching of visitors to the prison are ultra vires and incompatible with Articles 8 and/or 3 of the ECHR; (iii) interim relief prohibiting the respondents from subjecting the applicant to a full/strip search at the prison until this application is determined; (iv) damages.

[3] The grounds upon which relief is sought include the following: that the respondents did not have the power to conduct full/strip searches in the circumstances, that they had failed to consider whether the search was necessary, justified or proportionate, that it was carried out without the applicant's consent and without adequate safeguards against abuse[1], that the respondents acted on a misapprehension of the relevant facts, that the search was a prima facie violation of Article 8, that it was a breach of Article 3, that

[1] The alleged lack of adequate safeguards was not particularised in the Order 53 Statement – see however PACE Code C, Annex A, para.11 which do contain provisions regulating the conduct of strip searches in respect of detained persons.

"any" policy of either of the respondents permitting full strip searches in the circumstances complained of was incompatible with the applicant's rights under Articles 8 and 3, that the applicant suffered humiliation and distress and that she wished to visit her partner in prison without being subjected to a full/strip search if she does.

Background

[4] The background to the application is set out in a detailed affidavit from the applicant from which it appears, inter alia, that in March or April 1999 or 2000, when her partner Robert Black was then a remand prisoner, she was stopped by prison staff entering the prison and it was discovered she had drugs in her possession. She was prosecuted, pleaded guilty and she recollects receiving a suspended sentence.

[5] Similarly on another occasion in 1998 when she was attending the prison for a visit with other members of her family, she avers that one of her party was discovered with drugs for which she took responsibility as a result of which she was banned from visits for a period of six months.

[6] Insofar as the impugned strip search of the applicant on 3 February 2010 is concerned she avers that she was stripped searched by two female police officers and that following the search she was given a document which is exhibited as EB1. That document, in a paragraph entitled Grounds of Search, states "Intell led" – meaning intelligence led.

[7] By letter dated 5 February 2010 the applicant complained to the prison service, the Governor and the Chief Constable in identical terms. Before that letter was responded to the applicant launched the present judicial review proceedings on 11 February 2010.

[8] On the morning of the leave hearing the Court was furnished with the letter from the prison service to the applicant's solicitors which stated:

> **"Dear Sirs**
>
> **RE: MISS ELAINE BARRON**
>
> **I write with reference to your written submission received both here at Maghaberry and I am aware of further copies to our headquarters and to the PSNI.**
>
> **I can confirm that your client was searched by PSNI officers as indicated in your submission and can further advise that the Prison Service has a range of measures in place in an effort to minimise the supply of drugs entering prison. All visitors to**

prisoners are subject to a rub down search and a passive drug dog line up.

Where drugs are found on a visitor the PSNI are called to the prison and the visitor is arrested. Where the passive drug dog gives a positive indication on a visitor – and no drugs are found during the rub down search – a closed visit, with no physical contact, will be offered to the visitor.

As part of an improved multi-agency response to the serious issue of drugs in prison, police have, on occasions, been present along with prison staff at visitors' entrances. In cases when the passive drugs dog gives a positive indication on a visitor, or where there are reasonable grounds for doing so, the police will carry out a full body search on the visitor in accordance with their powers under the Misuse of Drugs Act.

Where a visitor to a prison believes that they have been unfairly treated or victimised, they can make a formal complaint to the Prisoner Ombudsman. Complaints against the PSNI can be made to the Police Ombudsman.

Under the Criminal Justice Order 2008 any person who brings a controlled drug into a prison without authorisation will be liable to imprisonment for up to 10 years and fined.

Yours faithfully
Governor R Taylor
HMP Maghaberry"

Submissions

[9] At the leave hearing Mr McGleenan, on behalf of the proposed respondents, informed the Court that the search was carried out under Section 23(2) of the Misuse of Drugs Act 1971[2] ("the MDA") although the

[2] *Powers to search and obtain evidence*
23. - (2) If a constable has reasonable grounds to suspect that any person is in possession of a controlled drug in contravention of this Act or of any regulations made thereunder, the constable may-
(a) search that person, and detain him for the purpose of searching him;
(b) search any vehicle or vessel in which the constable suspects that the drug may be found, and for that purpose require the person in control of the vehicle or vessel to stop it;
(c) seize and detain, for the purposes of proceedings under this Act, anything found in the course of the search which appears to the constable to be evidence of an offence under this Act. …"

document that was furnished to the applicant and referred to at para.6 above makes no reference to drugs as being the reason for the search nor is there any reference to the MDA. The only legislation referred to in the manuscript portion of the document is Arts.3-5 of PACE which do not confer a power to search for drugs.

[10] The applicant furnished the Court with a Skeleton Argument setting out the purported legal background. Under Rule 49 of the Prison Young Offender Rules 1995 a visitor can only be searched with their consent. However, where a visitor does not consent to being searched they may be denied access to the prison. This is to be contrasted with the position of a prisoner whose consent is not required for a search – see Rule 16. Where, as in the present case, the search was carried out by the police in purported exercise of their powers under the MDA, consent is not necessary. Provided the power of search is lawfully exercised on reasonable grounds the police can *require* the person to submit to a search. An unlawful search is of course an actionable trespass.

[11] At the core of the applicant's complaint is whether or not there existed in the circumstances a power to carry out the strip search and, if such power did exist, the legality of the exercise of such power. Normally a challenge to the lawful exercise of such coercive powers, whether by way of search or arrest, have been dealt with by way of an action for damages for, inter alia, trespass to the person. Such civil proceedings with its associated processes of pleadings, discovery and examination and cross-examination of witnesses are generally more appropriate for addressing disputed areas of fact upon which the legality of a particular decision will often turn.

Conclusion

[12] Whilst the judicial review court must always be astute not to abdicate its supervisory role[3] I am satisfied that the most efficient and convenient method of resolving the applicant's complaint is by way of recourse to a claim in tort and accordingly I am satisfied that it would not be appropriate to permit this application to proceed because of the existence of this suitable alternative remedy. I leave aside entirely the applicant's right to formally complain to the Prisoner Ombudsman and the Police Ombudsman.

[3] See ***Re DPP's Application*** **[2000] NI 174**