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*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY BRENDAN CONWAY FOR JUDICIAL REVIEW

Before: Morgan LCJ, Higgins LJ and Girvan LJ

GIRVAN J (delivering the judgment of the court)

Introduction

[1] This is an appeal brought by the appellant, Brendan Conway. It is the second appeal arising out of the appellant's judicial review challenge to decisions and actions taken by the respondent Prison Service for Northern Ireland ("the Prison Service") in respect of its policy relating to the full body searching of prisoners entering and leaving HMP Maghaberry ("the prison") where the appellant at all material times was a remand prisoner.

[2] Mr Macdonald QC and Ms Doherty appeared on behalf of the appellant. Mr McGleenan QC appeared with Mr Coll on behalf of the Prison Service. We are grateful to counsel for their helpful written submissions and succinctly presented oral submissions.

[3] The factual background to these proceedings is set out in paragraphs [3] to [10] of the judgment given by this court in [2012] NICA 11, as are the details of the evolution of the judicial review application. The appellant challenges the lawfulness of an adjudication decision given on 25 October 2010; the lawfulness of a forcible body search carried out on 23 September 2010; the lawfulness of the Prison Service's policy in respect of routine full body searching of prisoners entering and leaving

prison; and the lawfulness of the policy of forcible full body searches of prisoners who claim to be neither consenting to nor resisting a full body search.

[4] In his initial judgment in the proceedings Treacy J dealt with the legality of the Prison Service's policy of routine body searching of prisoners entering and leaving the prison. He concluded that the policy of forcible full body searching of non-compliant prisoners was lawful and compatible with Articles 3 and 8 of the Convention.

[5] The Court of Appeal on appeal concluded:

(a) Rule 16(2) of the Prison Rules provides a clear legal basis for full body searching of prisoners. It is expressed as a discretionary power. While a law which confers a discretionary power must indicate the scope of the discretion, prison orders and instructions to be followed save in exceptional circumstances are to be taken into account in assessing whether the requirement of foreseeability is satisfied.

(b) A Prison Service policy governs the full body search of prisoners entering and leaving the prison. The policy is comprised in a number of documents referred to in paragraph [32] of the Court of Appeal judgment [2012] NICA 11.

(c) A policy which precludes a decision maker from departing in any circumstances from the policy or from taking into account special circumstances which are relevant to a particular case would be an unlawful policy and the absence of any degree of flexibility would amount in itself to disproportionality.

(d) In this case, subject to the issue of inflexibility, the general policy was proportionate. It was in accordance with law. It was necessary for the protection of the rights and freedoms of others and the prevention of crime. If it admitted flexibility to cater for special circumstances it was perfectly lawful.

[6] The judge had not subjected to analysis the issue whether the policy was in practice applied in an entirely inflexible way. The Court of Appeal concluded that it was necessary for the judge at first instance to consider the question whether there was in fact total inflexibility on the part of the Prison Service in the application of the policy. Furthermore, the judge had still to consider the allegations relating to the search of the appellant carried out on 23 August 2010, which the appellant claimed was unlawful and disproportionate, and he had to decide whether that matter should be more properly dealt with by separate civil proceedings. (The judge in fact decided on the remittal of the case that it would be appropriate for such a claim to be brought by separate civil proceedings.)

[7] On remittal the judge admitted in evidence a further affidavit from Governor Armour. He reached the conclusion that the court could not find on the evidence that there was total inflexibility in the application of the policy precluding the exercise of discretion to dis-apply the policy when the dictates of proportionality might so require. He concluded that that avoided the possibility of disproportionality and illegality in the application of the policy.

[8] As Mr McGleenan reminded the court, the appellant's argument relates to the practice of full body searching in respect of non-compliant prisoners who represent a very small subset of the prison population and who are predominantly prisoners involved in a protest in the separation wing at Roe House. The large majority of prisoners comply with the search policy. When examining the question of flexibility the issue is whether there is, or is not, total inflexibility in the application of the policy in the narrow and already exceptional circumstances applying when prisoners refuse to consent to normal searching.

[9] Sedley J in R v Ministry of Agriculture, Fisheries and Food ex parte Hamble Fisheries (Off Shore) Ltd [1995] 2 All ER 714 addressed the two conflicting imperatives of public law thus:

> "The first is that while a policy may be adopted for the exercise of a discretion it must not be exercised with the rigidity which excludes the consideration of possible departure in individual cases. The second is that a discretionary public law power must not be exercised arbitrarily or with partiality between individuals or classes potentially affected by it."

[10] The implementation and operation of prison policies will always have to take account of a strong imperative to ensure consistency, equality of treatment and the avoidance of the risk of arbitrariness on the part of prison officers operating and implementing the policy. Thus, in the context of the running of a prison the balancing of these two imperatives may justify greater weight being given to the second imperative. It will only be in rare and exceptional cases that the implementation of what is a generally proportionate scheme will produce a disproportionate outcome in relation to an individual case. The question is whether in the circumstances it has been demonstrated that the Prison Service operates the policy in such a way as to preclude the exercise of any discretion to avoid a disproportionate outcome in an individual case.

[11] Paragraph 1 of the Governor Order 3-2 provides:

> "Every prisoner, male and female, will be fully searched on committal, on final discharge and at any other time at the Governor's discretion. This would include inter-

> prison visits, home leave, court appearances or any other occasion that the Governor may order."

[12] In the present case the appellant's application does not relate to searches on committal or on final discharge but rather to searches occurring during the period of imprisonment. The reference to the Governor's discretion appears to relate to the words "at any other time". Thus the policy on its face provides for an overriding Governor's discretion. Paragraph 6 envisages the exercise of discretionary judgment:

> "If something is found concealed during the course of the search, staff must try to recover the article. It is important that staff are alert to the prisoner trying to dispose of the article eg by swallowing or throwing it away. The prisoner will be observed at all times. If the prisoner does swallow a suspected article, staff must seek the advice of their senior manager."

[13] In the part of the policy dealing with full body search refusal paragraphs 5 and 6 provide:

> "5. Following the minimum 15 minute period of reflection the prisoner will be given a further opportunity to comply with a full body search procedure.
>
> 6. If the prisoner still refuses to co-operate the duty Governor will be informed of the prisoner's decision not to co-operate and the reasons given, if any. The decision to use the reasonable and proportionate amount of force required to conduct the search may be taken by the duty Governor after he has established all the facts. The duty Governor may decide to discuss this with a more senior Governor before taking any decision to instruct a full body search to be carried out."

[14] In paragraph [40] of its judgment in [2012] NICA 11 the court noted the apparent exercise of flexibility by the Prison Service:

> "It appears that the Prison Service decided on 23 August 2010 on the appellant's return to prison not to subject him to a strip search because he had not left the prison van or come into contact with third parties. This appears to have been a decision to dis-apply the policy because of those exceptional circumstances. "

[15] Paragraph 18 itself makes express provision for a proportionate exception to the general policy and thus provides an example of a case in which the general policy will not be applied by way of an exception to the general policy. It provides:

> "Under no circumstances will any prisoner who has undergone recent surgery, or has any known medical problem be forcibly searched without prior consultation and agreement with a qualified healthcare officer. Such a prisoner should be given a meticulous rub down search, consistent with the advice of the healthcare officer. A metal detector should be used as an additional search aide. On completion of the search the medical officer will be informed and the prisoner medically examined. "

[16] Mr MacDonald subjected the evidence in paragraph 4 of Governor Armour's affidavit to criticism and argued that this further affidavit provided no evidence of flexibility in relation to the application of the policy. We accept that the incidents referred to in paragraph 4(a) were not really examples of a discretionary disapplication of the policy because the officers concerned were criticised for not subjecting the appellant to searches. In the case of prisoner McGeough on 21 March 2011 the prisoner *complained* of chest pain. Strictly he was not a prisoner who "had undergone recent surgery who had any *known* medical problem". Thus he did not fall within the strict wording of paragraph 18. Accordingly, that was a case which showed a degree of flexibility going beyond the strict wording of paragraph 18 which, as noted, itself provided an exception to the general policy. In the case of Rooney his case would appear to fall within the wording of paragraph 18 and thus the decision in relation to him was not by way of exception to the policy although it was the implementation of the exceptional provision as set out in paragraph 18. The same goes for the prisoner Taylor. In the case of prisoner McMahon the prisoner was transferred to an external hospital by ambulance due to suffering from suspected fitting. It had been confirmed to the Governor by the duty night guard principal officer that due to the urgent nature of the situation, the potential seriousness of the prisoner's condition, and the fact that the paramedics were working on the prisoner, he was not subjected to a full body search on leaving the prison. There appears to have been a dispensing with the requirement to carry out a meticulous rub down search and the requirement to use a metal detector. The case of prisoner O'Donnell would appear to have been an application of paragraph 18 of the policy.

[17] The policy in its proper construction permits on its face the exercise of discretion. For the reasons given the discretion to step outside the requirements of the general policy will properly be rarely exercised in practice in view of the context of the rule. It has not been established on the evidence that there was a total inflexibility on the part of the Prison Service in the operation of the policy and, accordingly, we conclude that the judge was correct in his ultimate conclusion on the issue.

[18] We will hear counsel on the question of costs.