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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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Davidson's (James) Application [2011] NICA 39

IN THE MATTER OF AN APPLICATION BY JAMES DAVIDSON FOR JUDICIAL REVIEW

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Before: Morgan LCJ, Higgins LJ and Sir John Sheil

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MORGAN LCJ (delivering the judgment of the court)

[1] This is an appeal against a decision of Treacy J who refused the appellant's application for judicial review of the decision of the Deputy Governor of HM Young Offenders Centre Hydebank Wood cancelling a period of temporary home leave previously granted to the applicant in respect of the period from 17 to 20 July 2009. Mr Sayers appeared for the appellant and Mr Coll for the respondent. We are grateful to both counsel for their helpful oral and written submissions.

Background

[2] At all material times the appellant was serving a sentence of four years detention and two years probation in respect of offences of theft, hijacking, robbery and possession of an offensive weapon. He was subsequently released from custody on 30 October 2009. Prior to his release from prison he had applied for and been granted periods of temporary release under the Pre Release Home and Resettlement Leave Arrangements for All Sentenced Prisoners (the scheme). The scheme is designed to reflect the circumstances in which the prison authorities will release prisoners temporarily in order to assist in the transition from prison to outside life in exercise of the powers conferred by Rule 27 of the Prison and Young Offenders Rules (NI) 1995. Release remains critically dependent on risk assessment.

[3] The appellant was granted three periods of temporary release on 3 July, 7-10 July and 17-20 July 2009 to engage in the Challenge for Youth Programme at Castlewellan Forest Park. His release was conditional inter alia on not consuming alcohol. On his return from the first period of leave on 4 July he failed a breathalyser test and subsequently pleaded guilty to a charge of failing to comply with a condition of temporary release. Such a breach would normally render it highly unlikely that a prisoner would be considered for a further period of temporary release immediately after the adjudication but Deputy Governor Alcock decided that the appellant should continue with the previously arranged periods of temporary release.

[4] The second period of temporary release passed off without incident. On the morning of 17 July when the appellant was preparing for his third period of temporary release Deputy Governor Alcock was advised by a security department Principal Officer that ongoing security operations had indicated that the appellant was involved in the supply of drugs to the YOC. The information upon which this assessment had been made had come from monitored telephone calls from the prison. The information had only come to the attention of the security department the previous evening and Deputy Governor Alcock established that the Principal Officer had listened to the telephone conversations himself and that the information was serious and reliable. He decided he should prevent the appellant participating in the planned temporary release in light of the threat to good order and discipline within the establishment, the risk posed by drugs activity and concerns about the risk the appellant might pose to others participating in Challenge for Youth. He decided that he should investigate the evidence for the appellant's involvement in drug supply, was aware of an ongoing security operation in relation to this and in those circumstances decided that he could not at that stage provide the appellant with reasons for his decision.

[5] On 18 July 2009 the appellant submitted a written request seeking an explanation as to why he had been prevented from enjoying temporary release. On 23 July 2009 Deputy Governor Alcock wrote to the appellant advising him that the security department had informed him and evidenced to his satisfaction that the appellant was involved in drug supply to Hydebank Wood. By this time the Deputy Governor had personally scrutinised the information gathered by the security department and listened to the relevant telephone calls. These involved both the appellant directly and other persons referring to the appellant in the course of their telephone conversations. The security department also had intelligence regarding the appellant's movements and his association with persons who were described as drug traffickers within the establishment. This was the basis for the conclusion set out in the letter of 23 July 2009. The Deputy Governor considered that he could not provide more detailed information in relation to the reasons for his conclusions as this would jeopardise ongoing law-enforcement and anti-crime operations and could lead to tipping off as well as

revealing intelligence and evidence gathering techniques and targets. It appears that ongoing telephone monitoring in relation to the drugs issue was taking place. The Northern Ireland Prison Service website indicates that prisoners' phone calls have always been subject to possible monitoring and recording and notices to this effect are clearly posted next to the phones.

[6] On 9 September 2009 the appellant's solicitors issued a pre-action protocol letter of claim indicating that they required the respondent to provide the evidence on which the view was formed that the appellant was involved in supplying drugs in order to give him an opportunity to make representations on it. By letter dated 28 September 2009 the Deputy Governor responded by giving a gist of the information. He stated that a number of inmates' phone calls were monitored between July 2009 and September 2009 and that they confirmed that the appellant was involved in drug trafficking in Hydebank Wood. The letter also stated that the appellant's movements within the YOC were monitored and reports submitted confirming that he was associating with known drug traffickers. Reference was also made to his failure of the breathalyser test although it was confirmed that this played no part in the decision to refuse permission to participate in the temporary release. It was confirmed that no further information in relation to the appellant had come to light as a result of the telephone monitoring after 23 July 2009.

[7] The appellant did not apply for any further period of temporary release to engage in the Challenge for Youth Programme before his release from custody on 30 October 2009. He did apply for compassionate release in September 2009 on the basis of his grandmother's illness but this was refused because of insufficient medical evidence. Although he asserts in his affidavit that the decision to prevent him engaging in the Challenge for Youth Programme would affect his ability to take up opportunities within that Programme after release there is no evidence whatsoever from the organisers of the Programme to support that assertion.

[8] The respondent places emphasis upon the fact that Deputy Governor Alcock has worked in the Northern Ireland Prison Service for 26 years with 11 of those years at Governor grade. His roles within the Service have focused on operational security and intelligence related matters. At the relevant time he was accountable for all aspects of security within Hydebank Wood and had responsibility for liaising with law enforcement agencies with regard to public protection issues.

The submissions of the parties

[9] The appellant submitted that in a case of this type procedural fairness required that the appellant should be entitled to know the information on which the decision was made and have an opportunity to respond to it. He

relied particularly on the decision of the House of Lords in Secretary of State for the Home Department v AF [2009] UKHL 28. That was a case concerning the supervision by the court of the making of non-derogating control orders where the case against the individual was based solely or to a decisive degree on closed materials. The House held that in those circumstances the procedural requirements of a fair trial could not be satisfied.

[10] The appellant recognised that AF represented the high water mark of the trend of procedural fairness decisions. He accepted, however, that where information of concern arises in the circumstances indicated by the Deputy Governor it may not be possible to observe the requirements of procedural fairness before the decision falls to be taken. That did not, however, absolve the decision maker from the obligation to secure procedural fairness and in this case that required satisfaction of the right to know and the right to respond.

[11] He raised the issue of legitimate expectation in light of the fact that the appellant was initially assessed as suitable for temporary release. The scheme itself, however, provides that the decision on whether to grant leave will be critically dependent on the assessment of risk. That includes the risk of harm or danger to others, the risk of re-offending, the risk of engaging in illegal activity on release and the risk of failing to comply with the conditions of release. We do not consider, therefore, that the argument based on legitimate expectation adds anything to the procedural fairness argument.

[12] The respondent submitted that the requirements of procedural fairness were dictated by the circumstances of the individual case. The information on which Deputy Governor Alcock acted came to him just as the prisoner was about to be released. The appellant recognised that there may be circumstances where this prevented the information being disclosed to the prisoner before action was taken. The gist of the information provided on 23 July 2009 recognised the ongoing security operation, the need to prevent tipping off and the interest in protecting intelligence gathering methods. The fact that further information was provided on 28 September 2009 did not call into question the adequacy of the disclosure in July.

Consideration

[13] The general principles of procedural fairness were reviewed by Lord Mustill in R v Secretary of State for the Home Department ex p Doody [1994] 1 AC 531 at 560. Although the requirements of procedural fairness are now more demanding that reflects Lord Mustill's comment that the standards of fairness are not immutable and may change with the passage of time. What fairness requires depends on the context of the decision. It will often require that the person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the

decision is taken with the view to producing a favourable result or after it is taken with a view to securing its modification. A person affected usually cannot make worthwhile representations without knowing what factors weighed against his interests and it will often be necessary to ensure that he is aware of the gist of the case he has to answer.

[14] We agree with the learned trial judge that the decision in AF is not particularly helpful in the context of this case. The standards of fairness vary with the context and the subjection of citizens to control orders is completely different from the regulation of a prison.

[15] In this jurisdiction this court examined the requirements of fairness in the context of decision-making within the prison in Re Conlon's Application [2002] NIJB 35. That case was concerned with the decision to remove a prisoner from association. Carswell LCJ gave some general guidance in those circumstances.

> "The generalised requirements of fairness articulated by Lord Mustill in *R v Secretary of State for the Home Department, ex parte Doody* [1994] 1 AC 531 at 560 will, however, apply to a decision to remove him. It is important to bear in mind the essentially flexible nature of the principles set out in that case. A decision to remove a prisoner from association may have to be taken and put into effect quickly. It may not be appropriate to enter into a debate about the matter before removing him. In some cases it may not be possible to disclose to the prisoner the information upon which the decision is based, in which event any uninformed representations which he may make may be of little value. For these reasons we would not go so far as to say, as the judge did, that a prisoner must always be informed of the reasons for his removal from association at the earliest opportunity. We would not go further than to propound a general rule that the governor should at an early stage, but not necessarily before the removal of a prisoner from association, give him where possible and where necessary sufficient reasons for taking that course and afford him the opportunity to make representations about its justification. "

[16] That guidance has formed the basis for a number of subsequent prison decisions concerned with removal from association or change of categorisation. Re Thompson's Application [2007] NIQB 8 is one such case. That was a case in which a prisoner had been removed from Foyleview

following the discovery of contraband. In the course of the investigation serious allegations were made against him. He was provided with limited information in relation to those allegations while consideration was given to deselecting him from Foyleview. Weatherup J held that the eventual decision to deselect him had not been procedurally fair because he was not given adequate information about the nature of the allegations against him and therefore not given an opportunity to respond to them. The appellant relies on those cases for the proposition that there is a right to know and a right to respond.

[17] All of those cases recognise that there may be compelling reasons for not disclosing to the prisoner at the time of implementation of the decision the reasons for the decision. In this case the information had come to the decision maker at a very late stage. It raised an allegation of substance about illegal activity within the prison affecting good order and discipline. The decision maker carried out some investigation in relation to it in the limited time available and there is no reason to doubt his real concerns about tipping off, interference with the ongoing security operation and disclosure of intelligence gathering techniques. We do not consider, therefore, that there is any basis upon which it could be said that the decision not to give the prisoner the reasons for removing his temporary release on the morning of 17 July 2009 was procedurally unfair.

[18] We accept that there is a continuing obligation to act in a procedurally fair manner thereafter but the context is quite different from the association and deselection cases. In those cases the applicant is seeking to modify a decision which is adverse to him. In this instance the decision made on the morning of 17 July 2009 was not a continuing decision. It was accepted that once the decision was made the opportunity to avail of the temporary release had gone. The appellant was due for release on 30 October 2009 and no further period of release was affected by the decision. Although in his affidavit the appellant asserted that the decision to deny him temporary release had interfered with his subsequent aspiration to engage with the Challenge for Youth Programme no evidence was adduced to support that assertion and we do not consider it worthy of weight.

[19] The context of procedural fairness in this case, therefore, was not the reversal of the substantive decision or its modification but rather the exercise by the court of its supervisory duty to guard against arbitrary, irrational and unreasonable decision making. De Smith's Judicial Review (6th edn) at paragraph 7-096 distinguishes the duty of disclosure from the duty to give reasons as different aspects of the principle of procedural fairness. In this case the requirements of procedural fairness after 17 July 2009 were essentially requirements related to reasons.

[20] The context also requires that one takes into account the experience and background of the decision maker. In this instance the information disclosed to the decision maker had been judged serious and reliable by the Principal Officer from the security department but it was reviewed by Deputy Governor Alcock prior to his letter of 23 July 2009. The fact that the Deputy Governor had such long experience of security and intelligence matters is relevant in determining whether there is anything arbitrary about the decision. It is also necessary to take into account that the Deputy Governor had been prepared to give the appellant a second chance after he failed the breathalyser on 4 July 2009. That suggests that he was favourably disposed to the appellant.

[21] If this had been a continuing decision or one that could have been modified there may well have been some substance in the arguments put forward on behalf of the appellant about the failure to disclose any evidential base for the conclusions reached by the Deputy Governor in his letter of 23 July 2009. The appellant complained in particular about the failure to disclose the fact that some of the information was obtained from monitoring of the phone system. It is undoubtedly correct that there was open information from the Prison Service indicating that phone calls may be monitored. The risk for the Prison Service was that disclosure might indicate which phones were being monitored, who was using those phones and what slang or code had been deciphered by the Prison Service. Where what was at issue was the conveying of reasons for the decision we consider that the Prison Service was entitled to strike the balance on disclosure in the way that it did. At that stage it was sufficient to advise the appellant that the decision to prevent his home leave was based on evidence that he had been involved in supplying drugs to the prison.

[22] Further information was disclosed in the letter of 28 September 2009. By that time the security operation had moved on and greater transparency was appropriate. We consider that the information provided was sufficient to enable the appellant to understand how the Prison Service had gone about the making of the decision and the factors which led it to the conclusion which it reached. In the circumstances of this case nothing further was required to demonstrate that there was nothing arbitrary, irrational or unreasonable about the decision.

Conclusion

[23] We consider, therefore, that the appellant has not succeeded in demonstrating that this decision was taken in a manner which was procedurally unfair and we dismiss the appeal.