Neutral Citation No [2016] NIQB 27 | *Ref:* **TRE9921**

*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **15/3/2016**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY GERARD FLANNIGAN FOR JUDICIAL REVIEW

and

IN THE MATTER OF DECISION OF THE NORTHERN IRELAND PRISON SERVICE

Flannigan's Application [2016] NIQB 27

TREACY J

Introduction

[1] This application challenges the policy by which forced strip searches are recorded on a video camera and retained for a period of 6 years.

Background

[2] The Applicant is a prisoner at HMP Maghaberry.

[3] He was remanded into custody on 30 October 2014 whereupon he was informed that he was going to be subjected to a strip search. He objected to this course of action and was informed that it would therefore be conducted with force. He was given fifteen minutes within which to consider his decision and was informed that, in the event that he continued to refuse the search, the search by force would be video-taped.

[4] Mr Flannigan continued to refuse the search. The search was then conducted by force and recorded.

[5] The footage will be retained for a total of 6 years.

[6] Due to either technical fault or operator error the actual search itself was not recorded. The footage that remains consists of the introduction and the end of the

search which shows the Applicant finishing off dressing, the nurse entering and leaving his cell and the SO entering to confirm if he had any complaints about the manner in which the search was carried out, which he did not.

[7] A Governor at Maghaberry Prison avers that the Applicant is a "Class A" prisoner who has made an application to be housed in "Separated Republican" wings. He further avers that these prisoners (i.e. prisoners in the Separated Republican wings) are engaged in an 'ongoing deliberate and orchestrated campaign inside Maghaberry… not to comply with [Full] searches' with the aim to bring about the cessation of such searches.

[8] He further avers that, in the past, and in an effort to secure the aim of the cessation of full searches, these prisoners protests by means which included 'such violence … against staff that it was considered that their Article 2 rights were engaged and it was necessary that the searches be carried out by staff wearing full 'Personal Protection Equipment' (PPE) to minimise the risk of injury to them. Furthermore, these prisoners made false and malicious allegations of physical and sexual assaults against staff in the carrying out of full searches on a frequent basis. This also impacted on staff causing them upset and distress, and engaged their Article 8 rights.'

[9] Hand held overt video recording was introduced to provide first hand evidence of the conduct of prisoners and staff during full searches.

Chronology

[10]

- 30 October 2014 – The Applicant is remanded in custody. He is forcibly searched and said search is recorded on a video camera.

- 23 December 2014 – The Applicant's solicitor writes to NIPS in relation to the strip search and its underlying policy.

- 15 January 2015 – NIPS respond to the Applicant's letter in the following terms:

> "Your client on committal refused to comply with required full search. As per NIPS policy, following him being granted a period of reflection on his decision, he was searched under Control and Restraint. As this is classed as 'planned use of force' it is NIPS policy, where possible, to record any such planned incidents

> The footage is held in a secure, access controlled cabinet. Unless required for official purposes, no one will have access to it.
>
> No one has viewed the footage
>
> Footage will be held for a period of six years."

- 19 January 2015 – the Applicant's solicitors send pre-action letter to NIPS. That letter impugned the policy as having '*no basis in common law or in statute… The making and retention of this recording is therefore ultra vires Articles 3 & 8 ECHR.*' That letter similarly impugned the underlying policy as being unlawful. Finally that letter invited NIPS to quash the policy and to immediately return the footage of the Applicant.

- 21 January 2015 – NIPS responded by reiterating its position and continuing:

> "It is prison Service Policy, in common with other agencies, to video record all planned use of force incidents to provide a record that is retained to safeguard both the prisoner and the staff involved where subsequent complaints or allegations are made. The dignity of any subject is a key consideration and recording does not take place of any images deemed to be inappropriate and unnecessary. The recordings are also made for the prevention and detection of crime and images are retained in compliance with the Data Protection principles."

Relief Sought

[11] The Applicant sought the following relief:

> (a) An order of certiorari quashing the policy of the Northern Ireland Prison Service by which forced strip search procedures are recorded on a video camera and then retained for a period of 6 years.
>
> (b) An order of mandamus compelling NIPS to destroy the recording of a strip search of the Applicant made on 30 October 2014.
>
> (c) A declaration that the decisions were and each of them is unlawful, *ultra vires* and of no force or effect.

(d) Such further or other relief as the Court deems just.

(e) Damages.

(f) Costs.

(g) All necessary and consequential directions.

Grounds for Relief

[12] The grounds on which this relief was sought are:

(a) The policy of video recording forced strip searches is *ultra vires* by virtue of Rule 16(6) of the Prison and Young Offenders' Centre Rules;

(b) By making a video recording of a forced strip search of the applicant, NIPS, contrary to its obligations under section 6 of the Human Rights act 1998, has acted incompatibly with the applicant's rights under Article 3 of the Convention by interfering with his right not to be subjected to degrading treatment in a manner that is not proportionate;

(c) Further, or in the alternative, by retaining a video recording of a forced strip search of the applicant for 6 years, NIPS, contrary to its obligations under section 6 of the Human Rights Act 1998, has acted incompatibly with the applicant's rights under Article 3 of the Convention by interfering with his right not to be subjected to degrading treatment in a manner that is not proportionate;

(d) By making a video recording of a forced strip search of the applicant, NIPS, contrary to its obligations under section 6 of the Human Rights Act 1998, has acted incompatibly with the applicant's rights under Article 8 of the Convention by interfering with his right to respect for private and family life in a manner that is not proportionate;

(e) Further, or in the alternative, by retaining a video recording of a forced strip search of the applicant for 6 years, NIPS, contrary to its obligations

under section 6 of the Human Rights Act 1998, has acted incompatibly with the applicant's rights under Article 8 of the Convention by interfering with his right to respect for private and family life in a manner that is not proportionate.

Relevant Law

[13] Rule 16 of the Prison and Young Offenders' Centre Rules (Northern Ireland) 1996:

> "Search
>
> 16. – (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."

[14] Article 8 ECHR

"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 of 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] Status of Governor

"116. – (1) The governor shall be in command of the prison.

(2) The governor shall be responsible for the safe custody of all prisoners until they are discharged from his custody by the expiration of their sentence or by order of a court or by Royal Warrant or by order of the Department of Justice.

(3) The governor shall be responsible for prisoners' treatment according to law, for the safeguarding of their rights and for the maintenance of discipline in the prison.

(4) Subject to any direction from the Department of Justice, the governor shall have authority over all officers and employees on the staff of the prison.

(5) The governor shall ensure the safe custody and proper disposal or use of all monies, equipment and materials in the prison and shall keep whatever records and accounts are required by direction of the Department of Justice."

[16] Rule 48A:

"48A.-(1) Without prejudice to his other powers to supervise the prison, prisoners and other persons in the prison, whether by use of an overt closed circuit television system or otherwise, the governor may make arrangements for any prisoner to be placed under constant observation by means of an overt closed circuit television system while the prisoner is in a cell or other place in the prison if he considers that –

(a) Such supervision is necessary for –
i. The health and safety of the prisoner or any other person;
ii. The prevention, detection, investigation or prosecution of crime; or
iii. Securing or maintaining prison security or good order and discipline in the prison; and

(b) It is proportionate to what is sought to be achieved.

(2) If an overt closed circuit television system is used for the purposes of this rule, the provisions of rules 68C and 68D shall apply to any material obtained."

Applicant's Submissions

[17] The Applicant accepts that searches are expressly provided for in the 1995 Rules and that, furthermore, the concept of searches, subject to proportionality on each occasion, can be brought within the exemptions contained within Article 8, namely the need to prevent disorder or crime.

[18] However, the Applicant argues that Rule 16(6) is antithetical to the policy of video recording searches. That sub-rule provides that the only persons permitted to see the prisoner in a state of undress are '*the officers conducting the search*'. The Applicant submits that there is no provision for extra persons to video record the events, commentate, or indeed to watch the proceedings via live stream. The

Applicant further submits that on a plain reading, there is no provision for a person to subsequently watch the proceedings by way of a recording.

[19] The Applicant argues that the fact that no footage can be taken of any intimate area is inconsistent with the stated aim of the policy, namely, the gathering of proof that will exonerate a Prison Officer accused of unlawful sexual touching. As sexual touching can only take place in an intimate area, then the recording of footage that does not record that area in any way is unnecessary and fails to meet the purported aim of the policy.

[20] The Applicant seeks an order of mandamus to destroy the footage on the basis that, where the footage allegedly shows nothing other than extraneous matters, it is illogical for the Respondent to refuse to so destroy it.

[21] The Applicant argues that Rule 16 is drafted in terms of necessity. Therefore, in an invasive and demeaning strip search procedure that can only be conducted when 'necessary', the only persons that can and should be able to view the search are those directly involved in perfecting the search. It is only their presence which is 'necessary' to the search.

[22] The Applicant argues that the impugned policy of recording strip searches is plainly designed to provide evidence should NIPS itself be sued for damages. The Applicant submits that the prevention of possible litigation is not contained within the exemption to Article 8 and as a result this impugned policy is unlawful as it fails to pursue a legitimate aim. In response to the Respondents contention that the recordings are used for the prevention and detection of crime, the Applicant notes that this cannot be the case as the recording of a forced strip search cannot possibly prevent a crime, let alone detect it; that is the purpose of the strip search itself.

[23] The Applicant submits that, even if it is accepted that strip searches can be proportionate and necessary in certain circumstances, the need to record the degrading experience is neither.

[24] The Applicant argues that the impugned policy is not 'in accordance with law' as required by Article 8(2) because the practice is *ultra vires* Rule 16 on a simple application of them.

[25] The Applicant submits that, the State must demonstrate that the practice is 'in accordance with law' (in terms of having a basis in national law and also in terms of satisfying the quality of law requirement) and further that the practice is 'necessary in a democratic society'. The state must thus show that the interference is justified on the basis of one of the aims specified in Article 8(2) to establish that the interference is necessary. The interference must correspond with a 'pressing social need'. The state must further demonstrate that the interference is 'proportionate' to the legitimate aim sought to be achieved. This will be determined by reference to the

reasons advanced. The more serious the interference the greater the need for its justification.

[26] The Applicant argues that, in the absence of statutory authority to conduct video recording of forced strip searches and / or to retain records of any such recording, the necessary procedural safeguards are absent and therefore not 'in accordance with law'.

[27] The Applicant argues that the interference is not 'necessary in a democratic society'.

[28] The Applicant submits that the length of time for which the recordings are kept is much too long and is a further basis on which the interference with prisoner's Article 8 rights is disproportionate.

Respondent's Submissions

[29] The Respondent argues that the officer responsible for operating the camera is part of the search team and is assisting with the search. That being so, the prisoner is not undressed or required to undress in the sight of another prisoner or in the sight of any person other than officers conducting the search. Therefore, there is no inconsistency with Rule 16(6) and the recording of the search is not *ultra vires* the Rule.

[30] The subsequent retention of the footage is for a defined period of time with access to same being restricted in the manner set out in the affidavit evidence.

[31] Subsequent viewing of the footage will not result in someone else having been present while the prisoner was undressed or required to undress. Therefore even if the footage is ever viewed the prisoner will still not have been undressed or required to undress in the sight of that other person. Nor will anyone later viewing the footage actually see the prisoner in a state of undress because of the way in which the camera is used and the footage restricted to avoid any inappropriate footage being recorded.

[32] In the instant case there was in fact no substantial footage recorded of the search of the Applicant. It is therefore questionable whether the Applicant's Article 8 rights have been engaged and certainly there has been no interference with his Article 8 rights.

[33] The Respondent accepts that a prisoner's rights can be engaged in circumstances where a full body search is recorded, but it argues that the policies and procedures in place, and the manner in which they are implemented in practice, are designed to prevent insofar as possible any interference with the Article 8 rights of a prisoner being searched and where that is not possible to ensure that any interference is proportionate.

[34] The Respondent submits that there can be no reasonable argument that the use of video recording equipment within the prison generally is outwith the power of the Respondent as the body responsible for inter alia the supervision, management, security, administration, control and safekeeping of prisoners and prison officers therein in Northern Ireland or the power of the Governor generally to authorise a full search and the video recording of that search.

[35] The Respondent argues that no quality of law issues arise in this case. This was an instance of overt, planned recording, in specific circumstances. In relation to the Applicant's reliance on case law regarding secret surveillance the Respondent notes that very different issues are at play in those circumstances. Additionally, the recording in this instance takes place in accordance with a clearly defined, precise, predictable and accessible public policy. The subject is advised at all times of what is happening and is given time to consider his decision not to cooperate in a search. Safeguards are in place at a policy and procedural level to ensure that any interference is kept to the minimum necessary and to avoid any unlawful infringement of the subject's human rights, during the search and afterwards when footage is retained. The Prison Rules taken as a whole also provide safeguards against arbitrariness, in particular the general principles at Rule 2 of the Prison Rules. The subject also has recourse to various avenues at law if he feels his rights have been infringed.

[36] The policy pursues a legitimate aim. It was introduced to prevent incidents of violence and interference with officers' rights. Additionally it pursues the following aims:

(a) To provide evidence of criminal activity by prisoners during incidents for potential criminal prosecution.
(b) To provide evidence of breaches of prison rules for disciplinary proceedings.
(c) To offer protection for NIPS staff against false or malicious allegations made by prisoners.
(d) To ensure that the highest professional standards of behaviour are maintained by NIPS staff.
(e) To ensure that the NIPS is seen as a model of best practice in incident management.
(f) To act as a de-escalation tool in the management of incidents.

[37] These aims are legitimate and seek to prevent disorder or crime, protect health and to protect the rights and freedoms of others. The policy has been effective in achieving these aims.

[38] The Respondent reminds the Court to have regard to the margin of appreciation to be afforded to public bodies making decisions within their remit and with their specialist knowledge, experience, expertise and understanding it has of all

the relevant issues. It reminds the Court that it has a limited supervisory jurisdiction in relation to decisions of this kind.

[39] The Respondent notes the difficulty surrounding the organised and systematic refusal to cooperate with full searches by dangerous prisoners and the necessity of addressing the resultant disorder, violence and threats to prisoners. It further notes that those aims are legitimate and that no other lesser interference has been identified that would satisfy the said aims. Further the Respondent argues that there are numerous safeguards in place to ensure that any interference with Article 8 rights is only manifest when unavoidable and is kept to the minimum necessary. For these reasons the policy and procedures are a proportionate means of achieving the aims pursued.

[40] In relation to the retention of the footage the Respondent argues that recording and retention are inextricably linked. The practical effect of the recording is to create the record. If the record were not retained the benefit of recording in the first place would be lost. It is the future availability of the objective record of the search that discourages and prevents *inter alia* criminal violence and threats during the course of the search, as well as interference with Prison Officers' Article 8 rights by way of malicious allegations thereafter. Furthermore, there are safeguards in place to protect the Applicant's Article 8 rights relating to the retention of the footage an in particular restricting access to same.

[41] The Respondent argues that retention for 6 years is not disproportionate as that is the limitation period for several torts.

[42] The Respondent argues that the use of hand held video recording equipment, the retention of footage and the procedures in place are consistent with procedures across the UK and that this is evidence of proportionality.

Discussion

[43] It is convenient to discuss the Article 8 arguments first.

Are the Applicant's Article 8 Rights Engaged?

[44] It is accepted that a search involving the removal of clothing engages Article 8. Nakedness is inherently private and forcing it upon someone cannot but engage one's right to privacy. However, in the context of the search carried out in the instant case, the interference is justified by the exceptions at Article 8(2).

[45] The video recording of such a search must further engage Article 8 because in the act of recording, control of the use of the search subjects body and nakedness is wrested from him in such a way that images of his body may be used at any later date without the search subjects consent or even knowledge. Such recording, to be

lawful, must, separately from the search itself, be brought within the exceptions at Article 8(2).

[46] In the instant circumstances there was a technical glitch which resulted in the failure to record the actual search. This fact cannot disengage Article 8. The loss of control over the use of the search subject's nakedness occurs at the time where there is an intention to record the search and all parties believe that the search is being recorded. This is an interference with the search subject's Article 8 rights in itself. The creation and retention of the record is a further and ongoing interference.

In Accordance with Law

[47] The requirement that an interference with Article 8 must be 'in accordance with law' means:

> 'Firstly, that the impugned measure should have some basis in domestic law; secondly, it refers to the quality of the law in question, requiring that it should be accessible to the person concerned, who must moreover be able to foresee its consequences for him, and that it is compatible with the rule of law.' [see Perry v UK App. No 63737/00]

[48] The two rules suggested by the Respondent to constitute a 'basis in domestic law' for the policy of video recording full searches of prisoners are manifestly insufficient to provide such a basis.

[49] Rule 116 discusses the duty of the Governor with no specific reference to video-recording. Rule 48A deals with the power of the Governor to supervise prisoners, including by closed-circuit television. The actual process by which the video-recording was carried out was by human-operated, handheld cameras, and its function was beyond supervision – having instead the character of an active protective / deterrent purpose and effect.

[50] In the absence of any proper basis in domestic law the recording of the search and its retention and the policy under which it was carried out, are not 'in accordance with law' and therefore not a justified interference with the Applicant's Article 8 rights.

<u>Conclusion</u>

[51] For the above reasons the application for judicial review is allowed.