Neutral Citation No [2012] NIQB 38

Ref:	**TRE8516**

*Judgment: approved by the Court for handing down (subject to editorial corrections)**

Delivered:	**30/5/2012**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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AN APPLICATION BY MARK HARBINSON FOR JUDICIAL REVIEW

Harbinson's (Mark) Application [2012] NIQB 38

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TREACY J

Background

[1] The applicant is a sentenced sex offender currently detained in HMP Magilligan.

[2] He was convicted on 25 February 2011 and sentenced on 20 May 2011 to a determinate sentence of 7 years, comprising 3½ years in custody and 3½ years on licence. His release date is 1 May 2013.

[3] The applicant is currently appealing his conviction.

[4] Shortly after entering custody the applicant attained 'enhanced' status on the 'Progressive Regimes and Earned Privileges Scheme' (PREPS). The PREPS scheme is designed to incentivise prisoners to engage in desirable behaviours by rewarding such behaviours with various privileges. There are three levels in the scheme representing a scale of privileges to which a prisoner may have access: basic, standard and enhanced. Prisoners may move up and down through the levels based on their behaviour which is measured in particular against their sentence plan.

[5] On 7 September 2011 the applicant was told that he was being reduced from the enhanced regime to the standard regime. The reasons given for this demotion were that he was appealing his conviction and not complying with his sentence plan.

[6] The applicant challenges his demotion from enhanced to standard status.

Grounds for Review

[7] The applicant challenges the approach of the respondent on three broad overlapping grounds:

(i) That the respondent had failed to recognise that an extant appeal is a relevant consideration as to whether there may be a good reason for not accepting guilt and that accordingly the Prison Service had ignored a relevant consideration.

(ii) That the requirement to admit guilt whilst an appeal remained extant was unfair.

(iii) That the respondent had ignored the permissive wording of PREPS and enfettered its discretion and that it had adopted what was characterised as a blanket approach.

[8] The relevant portion of the PREPS scheme is as follows:

> **"Endorsement and review of regime levels**
>
> **114. Recommendation for promotion or demotion must involve the respective residential officer and their immediate line manager. Where necessary the views of other professionals should be sought. PREPS decisions on promotion and demotion should be based on an assessment of the progress in achieving sentence planning objectives and the requirement to maintain appropriate standard of behaviour. Addressing offending behaviour is at the heart of PREPS so it is essential that attendance on prisoner programmes and courses as required according to identified risk and need are undertaken with this purpose in mind and not merely as a method of progressing through the PREPS regimes or to gain extra privileges. Attendance on such programmes should only be undertaken on the advice of the relevant programme manager or offender manager unit and should be reviewed regularly. A prisoner who continuously refuses to admit his guilt or avoids taking a required programme recommended by professional staff cannot be deemed to be addressing their offending behaviour and may be subject to a reduction in regime level."**

Relief Sought

[9] The applicant seeks an order of Certiorari to quash the decisions:

- To reduce his regime status from enhanced to basic; and
- To make it a requirement of his sentence plan that he admit his guilt.

He seeks a declaration that the said decisions were unlawful, ultra vires and of no force and effect.

Mandamus is sought in order to:

- Require the Prison Service to consider its decisions in accordance with law;
- Return the applicant to enhanced status
- Remove from the applicant's sentence plan the requirement that he admit guilt.

Arguments

[10] Two related decisions of the Northern Ireland Prison Service are challenged by the applicant.

[11] The first is the decision to demote the applicant from the enhanced PREPS regime to the Standard PREPS regime. The second is the decision to make it a condition of his sentence plan that he should admit guilt in order to attain a place on the Sex Offenders Treatment Programme (SOTP) course which is in turn a compulsory requirement of achieving/maintaining the enhanced status. The applicant submits that due to failures in approach on behalf of the respondent these decisions are ultra vires and unlawful. These failures are: the failure to consider, as a relevant consideration, that the existence of an extant appeal is a good reason for not accepting guilt; that the requirement to admit guilt while an appeal remains extant is unfair; that the Prison Service fettered its discretion in making these decisions by ignoring the permissive wording of the policy/applying a blanket approach.

[12] It is submitted in reply that as the respondents must treat the prisoner as guilty they must draw up a sentence plan, and in the case of the applicant the SOTP must be a condition of that plan in order to achieve their stated and legitimate operational objectives. Under the scheme they are entitled to treat denial as precluding attendance on the SOTP and may only deviate from the stated policy in an 'Exceptionally Strong Case' which they submit the instant case is not. It is also submitted by the Respondents that the approach taken is not a blanket approach but a legitimate guiding policy to assist in the exercise of discretion which allows the deciding authority to 'listen to' any exceptional circumstances.

Discussion

[13] Once sentenced the Prison Service is obliged to treat the prisoner as guilty. The Prison Service is fully entitled to take all lawful measures to secure the efficient attainment of the legitimate aims and objectives forming the basis for the PREPS system. It is not at issue that the Prison Service may apply the PREPS regime to those denying their guilt. Moses J, in ***Potter v SoS for the Home Department*** **[2001] EHWC Admin 1041** at para 72 stated:

> **"There is every justification for linking a system of privileges to a system of sentence planning, which *must* operate on the basis that a prisoner is guilty of the offences for which he is convicted"** [Emphasis Added]

[14] Moses J further noted at paras 42–45:

> **"There is, to my mind, nothing unfair or inappropriate in requiring a sex offender, guilty of serious sexual assault as these claimants were, to attend at SOTP, even if he denies he is guilty of those offences. It is a key purpose of imprisonment to encourage constructive behaviour by a prisoner and thereby reduce the risk of his reoffending and increase protection of the public. It is, therefore, fair and rational to encourage participation in a course which may reduce risk of reoffending by means of the schemes for providing an incentive to attend such a course and granting privileges to those who undertake such courses.**
>
> **Prison management is entitled to operate IEPS and the court is entitled to proceed on the basis that a prisoner, once convicted, is guilty of the offences that form the subject matter of those convictions. A prisoner is not entitled to rely merely upon his assertions of innocence to excuse himself from confronting his offences. Were it otherwise, the system of rewarding those who are prepared to confront their offences would be undermined. One who denies his offence should not reap the same rewards as one who is prepared to admit and confront them."**

[15] The court also accepts that it should be "slow to interfere with decisions which relate to the management of prisons" [***Potter*** **at para 38**].

[16] Having accepted that the Prison Service are fully entitled to adopt an incentivising scheme to encourage desirable behaviour like the PREPS scheme, the net issue in this case resolves to whether the application of the scheme in the instant case was lawful and fair. Moses J, in ***Potter,*** noted at para7:

> **"If the decisions fall outwith the spirit or letter of the schemes, properly construed, then this court should say so"**

[17] The spirit and letter of the scheme is fully set out in the PREPS corporate framework. At p7 of this document it is stated that in achieving the strategic objectives of PREPS the prison will ensure that 'the scheme is fairly operated'. At the same page it also notes that 'safeguards and standards are built into the system to support the operation of PREPS and to monitor fairness, accountability and effectiveness'. At para115 it states that 'decisions must be reached fairly'.

[18] One of the safeguards built into the scheme is the existence of significant discretion in its application, in particular in relation to recommendations for promotion or demotion. This discretion can be found, in the main, at para 114 set out above.

[19] The permissive 'may' in this section is a safeguard to allow discretion to be applied in the individual case which upholds the spirit and letter of the policy – i.e. that it be applied fairly. It implies that while there may be a presumption that refusal to admit guilt/avoiding taking the required programme will be subject to a reduction in regime, that presumption is rebuttable by sufficient countervailing reasons.

[20] Specific factors which will contribute to a decision to demote are outlined at paragraph 59, in the section 'Chapter 2: Regime levels within PREPS':

> **"59. Demotion in regime level will take place should the following occur:**
>
> - **Prisoner fails to engage fully in activities outlined on their Sentence Plan** ***due to a deliberate action or choice on their part.***
> - **Prisoner fails to live up to the conditions of their compact**
> - **Prisoner receives two adverse reports in any three month period from any member of staff**
> - **Prisoner fails or refuses to take a voluntary drug test...**
> - **Prisoner fails or refuses to take a voluntary alcohol test."** [Emphasis Added]

[21] Two things may be noted about the paragraph. First, the use of 'will' is at odds with the permissive 'may' at para 114. Para 114 is part of 'Chapter 5: Reporting on Prisoners' which represents specific advice for those making decisions about privilege levels. At para 108 (also in Chapter 5) there is a (non-exhaustive) list of factors which must be taken into account when making these decisions.

> **"108. Factors which must be taken into account when making decisions about privilege levels and particular privileges include, for example:**
>
> - **The prisoner's approach to the sentence and willingness to use their time in custody constructively to attend activities which will help them to avoid situations that may lead to re-offending and to leading law-abiding, productive and healthy lives, e.g. through involvement in sentence planning and offending and behavioural programmes, and preparation for release.**
> - **The prisoner's behaviour overall, i.e. compliance with rules, orders and instructions, routines and relationships with other prisoners and staff.....**
> - **The prisoner's attitude to people outside prison...."**

[22] I think these various paragraphs (108, 114, 59) must be read together and when this is undertaken it is clear that in making a finding of fact that one of the events triggering demotion has occurred the deciding authority is obliged to exercise its discretion (at para114) in weighing up the factors specified at para108 as well as the unspecified factors implied (which would, in the interests of fairness include 'all relevant factors').

[23] It is clear that in weighing up whether demotion was to occur, this discretion was not used: in the Demotion Request of 6 September 2011 it is stated 'as he is currently appealing he has excluded himself from taking part in that programme'. The reason for demotion given to Mr Harbinson was simply that his denial precluded him from following his sentence plan. It has not been suggested that there was any other reason for demotion.

[24] Collins J in ***Green v SSHD*** **[2004] EWHC 596** refers to the dicta of Moses J in ***Potter***. He quotes the following extract from that case at para 22:

> **"...Moses J at paragraph 57 said:**

Nor is there any basis for criticising the weight attached to the single requirement to attend an SOTP ... I accept that the claimants would probably otherwise have qualified. But whether attendance on an SOTP was set as a long – or a short-term objective, the prison management was entitled only to reward those who addressed their offending behaviour. All these claimants failed on that ground. That ground was a sufficient ground for refusal of enhanced status."

Then in para59 he said

I conclude that there is neither anything unfair or irrational in the schemes or in their application to these prisoners in refusing enhanced status on the ground of a refusal to attend a SOTP in the face and by reason of their denial of guilt."

[25] Commenting on this, Collins J in Green continued at para25:

"It is obvious that what Mr Jarvis did was to regard his failure to achieve the SOTP, which was a necessary part of his sentence plan, as fatal to his application. It seems to me that that is exactly what Moses J was saying. He uses the word 'weight' , but in context it is plain that what he means is that the prison authorities .... were entitled to regard the failure to attend a SOTP as fatal to the claims...

It is equally clear from the evidence that was before the court in the cases before Moses J, that there are circumstances in which *even denial may be overridden to enable an enhanced status to be granted. That will depend upon the individual circumstances of a particular case.*" [Emphasis Added]

[26] At paras15-16 of this case Mr Justice Collins stated with apparent approval that it was recognised by the respondent prison service that it would not be fair to remove enhanced status merely because an appeal was being pursued:

15. ... An appeal against conviction would normally indicate a denial of guilt of the offences of which the prisoner had been convicted, but it was apparently recognised that it would not be fair to remove the enhanced status merely because an

appeal was being pursued, and that, as I understand it, was the basis of the policy.

16. Again, I say, "as I understand it", because I have no direct evidence about the matters, save that in a statement by Mr Norbury, who is the governor of the prison, which has been filed on behalf of the defendant, it is said in paragraph 14:

"I am aware that some confusion appears to have arisen in the correspondence between the Claimant's representatives and Wing Governor Jarvis concerning the effect on the IEPS of a prisoner's appeal to the Court of Appeal. It is correct that if a prisoner has been granted permission to appeal to the Court of Appeal (Criminal Division) he is entitled to remain on enhanced status if that is the level he has already achieved. However, a prisoner's status under the IEPS is unaffected by an application to the Criminal Cases Review Commission, until such point as the matter is referred to the Court of Appeal."

[27] It may be observed, as submitted by the Applicants, that the equivalent scheme administered in the UK – the Incentives and Earned Privileges Scheme (IEPS) – reflects the approach to deniers indicated in Green. The relevant section of the National Offenders Management Service (NOMS) guidelines reads:

Managing prisoners who deny their offence IEP and sentence planning

...that the Prison Service must accept the verdicts of the court and hence it follows that convicted prisoners have to be treated for all purposes as being guilty of the offence (with some allowances made for those who are appealing see paragraph 4 below).

...

4. Although the guidance below is specific to sex offenders the same principles can be applied to all sentenced prisoners who are in denial of their offence and are involved in the sentence planning process.

...

Sex Offenders in denial of their offence

> **7. The following differentials can be made between three types of sex offender in terms of their stance on their guilt. These are:-**
>
> **(1) Those who accept guilt.**
>
> **(2) Those who deny guilt and are appealing.**
>
> **(3) Those who deny their guilt but are not appealing including those who have had an appeal refused.**
>
> **A distinction can be made between suitability for SOTP which applies to those sex offenders who have the risk and need factors that SOTP addresses and readiness for SOTP recognising there are needs to work on and are willing to do so via the Prison Services accredited programme. A convicted sexual offender who denies his offence is technically suitable for SOTP but is not ready for SOTP. This is because SOTP requires analysis of the lead up to offences.**
>
> **9.** It is recommended that all sex offenders, with the exception of appellants, who set an initial sentence plan target be assessed for SOTP and if suitable to undertake the recommended programme.

[28] The approach thus advocated in England and Wales recognises that it would be unfair to remove enhanced status from an appellant denier merely on the basis of an extant appeal. The applicant submitted that the concept of fairness is universal and therefore if to ignore an appeal in England and Wales is considered unfair, there is no logical reason why it should not be considered unfair in Northern Ireland. As noted in my ex tempore judgement I believe there is considerable force in this submission. The commitment to fairness evidenced at p7 of the PREPS scheme emphasises the safeguards inherent in the scheme. While clearly there is no obligation on the Northern Ireland Prison Service to follow the NOMS approach, there is an obligation to ensure that safeguards are effective in securing a meaningful fairness by taking due consideration of all relevant considerations.

[29] The respondents have argued that the Prison Service is entitled to formulate a policy to guide the exercise of this discretion [***In Re Findlay*** **[1985] 1 AC 318]** and that the approach taken in response to this discretion in cases like the applicant's – i.e. where the prisoner is an appellant – is one which satisfies the principles in ***British Oxygen Co Ltd v Board of Trade*** **[1971] AC 610** in that the respondent was

'*willing to listen'* should the applicant have had some exceptional reasons which would have prevented his participation in the SOTP.

[30] In ***Findlay*** it was held that a deciding authority may formulate such a policy, however a distinction was drawn between a 'lawful policy in which great weight has to be given to one factor ...*without excluding consideration of other relevant factors* ..and an unlawful policy which would in certain classes of case exclude a full consideration of the merits of the case' [Emphasis added].

[31] In relation to the applicant's case, as the only reason put forward for the applicant's demotion was his exclusion from SOTP, a pre-condition of the Prison Services decision to demote required determination of the following key fact:

- "Prisoner fails to engage fully in activities outlined on their Sentence Plan *due to a deliberate action or choice on their part."*

[32] And in coming to a decision on this matter the authority was required to take into account all relevant factors.

[33] In considering all deniers (whether appellant or non-appellant) as within the same category, the prison authority have failed to take into consideration relevant factors. The approach adopted as a result of this categorization has therefore fettered their discretion.

Conclusion

[34] There is a clear difference between the capacity of appellant and non-appellant deniers to act deliberately or choose to engage fully in the relevant scheme. These terms imply an unburdened mind free to make a selection between a range of options. However, for an appellant denier, the continued availability of an appeal, which could lead to the quashing of his conviction and return of his personal liberty, must be seen to weigh heavily on any capacity to choose or act deliberately. The nexus of unfairness in this case lies in the neglect of the factual differences between appellant and non-appellant prisoners, and the associated prospect that the appellant prisoner will ultimately be acquitted. Requiring an admission of guilt while this process is in train is irrational and operates unfairly against the appellant prisoner. This is the position that obtains under the England and Wales NOMS policy and I find no logical reason why considerations of fairness as regards appellant deniers should be different under the Northern Irish scheme. Failing to take account of this fundamental pragmatic difference resulted in vitiating unfairness.

[35] For these reasons the decision to demote Mr Harbinson and the decision to include a condition of admission of guilt into his sentence plan must be quashed.