Neutral Citation: [2017] NIQB 18 | *Ref:* **KEE10186**

Judgment: approved by the Court for handing down | *Delivered:* **18/01/2017**
*(subject to editorial corrections)**

IN THE HIGH COURT IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY JAMES HUNTER TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF THE NORTHERN IRELAND PRISON SERVICE

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KEEGAN J

[1] I gave an ex tempore ruling in this matter and I now issue my decision in this written format. This case came into the court list after close of business on 17 January 2017 for an emergency hearing. I read the papers in advance of the hearing and the skeleton arguments and various authorities provided by Mr McGettigan BL and Miss McMahon BL. I am grateful to counsel for the attention they have applied to this case at short notice and for providing those materials to me overnight.

[2] I did convene a short directions hearing on 17 January 2017 around about 5:45pm and at that Mr McGettigan appeared and indicated that he would be ready to proceed on behalf of the applicant. Mr Brown appeared for the Department, and he required some short time to instruct counsel. Mr Brown assured me that if I were to take a certain course that the issue of relief would not become redundant due to time and on that basis I decided to and to hear this case at 9:00 am the following day.

[3] There was some urgency to this case because the relief sought related to the fact that the applicant wished to visit the grave of a deceased cousin on 18 January 2017 at 2:00 pm during home leave. As such, counsel agreed that the case would proceed as a rolled up hearing.

[4] I considered the docket for ex-parte application and the affidavit of the applicant and the Order 53 Statement. In his affidavit the applicant avers that he is a prisoner at HMP Maghaberry. He states that he received an indeterminate sentence for attempted robbery in December 2006. He has remained in custody notwithstanding the expiry of the minimum custody tariff and he states that his

cousin died suddenly on 18 January 2015. The applicant states that he was unable to attend her one-year anniversary on 18 January 2016 and that he wants to attend at her grave this year, which is the two-year anniversary.

[5] I am grateful to Mr McGettigan for clarifying that the position is not that there is a service or a religious mass for this deceased. It is simply that by custom the family attend at the grave or the memorial on the anniversary day. The applicant can visit the grave on another day. However, the case is that it would be preferable to go with the family on the traditional annual visit to the grave. Mr McGettigan is not saying that the applicant has not visited the grave before or could not visit it again if he was granted home release.

[6] The applicant had been granted a period of home leave from 17 January 2017 until 19 January 2017. The home leave was then rescinded by decision of the prison authorities. The context of that is set out in the affidavits and in the decision-making letter which relates to a prison search on 9 January 2017. As a result of that, the applicant underwent a random drug test on 12 January 2017. The urine test from that was negative but the drug test was sent to the laboratory for further testing. That result is awaited. The reason for that was a suspicion that the applicant may test positive for drugs in the context of increased drug use and security issues within the prison. All of that is set out in the correspondence I have received from the governor and the decision-making letter of 16 January 2017. So the home leave was then revoked and that decision was reviewed twice by the governor, given the timeframes. This process is set out in the decision-making letter which is the impugned decision.

[7] In terms of the legal arguments, Mr McGettigan has filed a comprehensive skeleton argument and he has refined his arguments in court by relying in terms of relief on grounds (a) and (d) in the Order 53. Ground a is about the proportionality of the decision as Mr McGettigan says Article 8 is engaged and he says grounds (b) and (c) feed into that and then ground (d) is in relation to an alleged breach of the applicant's legitimate expectation given that home leave was previously granted.

[8] In summary, Mr McGettigan says that there has not been sufficient weight given to the significance of the visit to the grave. He says that inadequate weight has been given to the fact that the urine test was negative. He submits that the case is based upon suspicion of drugs rather than anything else and inadequate weight has been given to the fact that this applicant has engaged with home leave successfully over a number of months, in particular at Christmas past.

[9] Mr McGettigan argues that the decision is disproportionate in terms of the weighting of various factors and he relied upon a decision of Treacy J in Re Smith's Application for Judicial Review [2014] NIQB 50 which deals with an applicant wishing to visit his ill grandmother. The refusal was found to be disproportionate in that case. Mr McGettigan accepts that the circumstances of that case are different

but nonetheless he says that it is an example of a court considering Article 8 of the ECHR to decide whether or not a decision is proportionate.

[10] Mr McGettigan also raised legitimate expectation and he argued that the prison authority has broken faith with the decision on home leave. He argued that there is a requirement of fairness and that the balancing exercise should tip in favour of the applicant. Mr McGettigan said that the Article 2 point raised by the governor is not substantiated and he submitted that given the circumstances that there should be an order of mandamus in this case to allow the home leave to take place today. It was accepted that this is a rare and unusual course. In the alternative Mr McGettigan said that there could be a quashing order and the governor would have to retake the decision.

[11] Miss McMahon, on behalf of the Department, filed a comprehensive skeleton argument and she crisply narrowed the issues to the following. She said that when considering Article 8 you have to look at the complexion of the Article 8 right. Miss McMahon argued that this case is different to many of the cases on the facts. It involves consideration of the applicant's relationship with a cousin who sadly died two years ago. Miss McMahon submitted that the attendance at the memorial can take place on home leave and on another occasion. She says that the prison governor has weighed this up along with the issue of the increased drug use in the prison and that there is a justifiable reason to interfere with Article 8 rights, given public policy, given the issue of public confidence and safety in relation to maintaining the prisons as best as can be done in a drug-free or managed way.

[12] Miss McMahon in her skeleton argument points to an important factor which is the respective roles of the court and the prison service in terms of decision-making and she referred to a case of McGlinchey's Application [2013] NIQB 5 in that regard. Miss Mc Mahon also referred to the fact that two reviews have taken place in the prison so she says the lawfulness of this decision is unimpeachable. It was submitted that prison service is best placed to determine risk and that this is a court of judicial review it is not a court looking at the substance of the decision. Miss McMahon referred to the Article 2 rights of prison officers. She also referred to the history in terms of the fact that home visits had previously been allowed and she says that is indicative of the approach to risk taken by the prison. She also referred to the fact that this is a discretionary remedy and she refers to the Prison Rules and she says that the decision-making is flexible because if the drug test came back as negative the matter of home leave would have to be revisited and that is set out by the governor and that, she says, is proportionate and reasonable.

[13] Miss McMahon did not accept that there is a legitimate expectation in this case because of the nature of the discretionary remedy for home release. She argued that such an obligation would lead to an unworkable situation in prisons where circumstances are fluid. So she submitted that the case that has been referred to me by Mr McGettigan is fact sensitive and that this is a different case from R v North and East Devon Health Authority ex parte Coughlan [2000] 2 WLR 622.

[14] I have decided that I prefer the arguments of the Department in this case. My reasoning in relation to that really is rooted firstly, in the nature of the Article 8 right at issue. This it seems to me is of a particular complexion and as a result, I consider that the interference is proportionate. This is a case where the deceased is a cousin who died some years ago. In my view the decision-maker has weighed up all of the relevant factors. There is a margin of appreciation given to the decision-maker in this case and I do not accept the arguments made about the weight given to the various factors. In my view, there is a justifiable reason for interference posited in this case and I consider that the decision-making letter sets out the reasoning with clarity in relation to that.

[15] I am not entirely convinced that there is a legitimate expectation in this case given the reasoning put forward by Miss McMahon about the nature of the remedy. In particular the attendance at the grave could not be guaranteed and home release is discretionary depending on circumstances. If I am wrong on this analysis I consider that if there is any legitimate expectation that the actions of the governor do not amount to an abuse of power, that there has been a fairness in relation to a change to the decision and that is rooted in the factors that I have outlined in relation to Article 2 rights of prison officers and in relation to the policy of trying to keep the prison drug free.

[16] This is a case that raises an important issue which may have an application to other cases. I have dealt with it at very short notice. It seems to me on balance, that the applicant has raised an arguable case in his application and in the comprehensive submissions and written arguments made by Mr McGettigan. In my view the case does get over the very low hurdle for leave but I am dismissing the case on the merits.