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Judgment: approved by the Court for handing down | *Delivered:* **13/04/2005**
(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

IN THE MATTER OF CONOR CASEY AND THE GOVERNOR OF HMP MAGHABERRY

DEENY J

[1] The applicant is a prisoner serving a sentence at HM Prison Maghaberry. He seeks judicial review of para. 4.8 of the Prison Service Standing Orders regarding craft works produced by prisoners including the applicant. Mr Frank O'Donoghue QC who appeared for the applicant with Mr Neil Fox made clear at the commencement of his submissions that he was proceeding on the narrow ground that sub-paragraph (c) of paragraph 4.8 of the Northern Ireland Prison Service Standing Orders was in breach of the applicant's human rights under Article 10 and Article 14 of the European Convention on Human Rights and it was therefore unlawful. This accorded with the view of Mr Justice Kerr in granting leave, I was told by Mr Paul Maguire, who appeared for the Prison Service, in that he had made it clear at that time that he was giving leave to review the policy and not individual incidents in which particular craft works produced by the applicant had been confiscated or not forwarded to the outside world.

[2] The craft works in question are known as cell crafts for the obvious reason that they are produced by the prisoner in his cell rather than in some group or workshop activity. They are sufficiently well established to have a section to themselves in the Northern Ireland Prison Service Standing Orders. I set out paragraph 4.8 in full.

> "4.8 CELL CRAFT ACTIVITIES
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> The Governor may as a privilege allow prisoners to engage in cell craft activities in the prisoner's own cell or in other designated areas.
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> Approved materials, tools and equipment for cell craft activities may be supplied by the Governor or

purchased from the tuck shop. Approved tools are supplied by the Governor who has the discretion to admit or prohibit the use of any materials, tools or equipment.

The Governor may impose such conditions on the manner in which the cell craft is undertaken and on the nature of the final product, as he thinks necessary in the interests of the security, good order or discipline of the prison.

Completed cell craft may be collected at visitors reception by a relative or friend nominated by a prisoner or the prisoner concerned may ask the Governor's permission to retain it in his cell. A prisoner will not be allowed to accumulate finished items in his cell.

The following restrictions apply to cell crafts:

(a) crafts which bear paramilitary insignia or slogans will be confiscated;

(b) drawings etc. must not be framed;

(c) the use of any language other than English will be restricted to a simple readily understood inscription. Items which contravene this provision may not be allowed out of the prison; and

(d) the use of any material belonging to the prison is expressly forbidden. Such articles will be confiscated and disciplinary action may be taken against offenders.

Governors must keep records of any abuse of the privilege of cell craft activities."

[3] Mr O'Donoghue's contention was that, while accepting that the standing orders as they provide for restrictions on craft activity necessary in the interests of the security, good order or discipline of the prison (per rule 67(3)(b) made by the Secretary of State in exercise of his powers under The Prison Act 1953), are lawful, the freestanding restriction on the use of a language other than English to a simple readily understood inscription is in contravention of the applicant's rights under Articles 10 and 14 of the

European Convention of Human Rights. He contended that the use of the Irish language in prisons in Northern Ireland was exclusively the domain of Catholic or Republican prisoners. The words underlined are an important qualification of that statement. It is indisputable that many scholars and students who were neither Catholic nor Republican have been active exponents of the Irish language over the centuries and today. However, for the purposes of this application counsel for the respondent did not dispute or take issue with the proposition that in the prisons in this jurisdiction interest in that language was clearly identifiable with one tradition and not the other. Equally it was not contended that there were prisoners who spoke and read only Irish. There may be foreign nationals in our prisons nowadays who speak or read no or very little English, but this issue is not before the court.

[4] Nor was it disputed in the light of the European jurisprudence, that material of this kind on paper or cloth, whether visual or written, could be a valid form of self-expression and attract the protection of Article 10 of the European Convention. See T v United Kingdom (1986) 49 DR 5.

[5] One factual matter of some importance is the acknowledgement by Mr Ian Johnston, a Governor of the prison, at paragraph 6 of his affidavit that in practice the prison does employ one or more persons who can translate Irish. Therefore the justification for the present policy wording is not that it is necessary because the prison would be unable within its own reasonable resources to translate more than a "simple readily understood inscription". It is also appropriate to note that Governor Johnston acknowledged that he himself would not have confiscated two of the applicant's items which were confiscated ie. a drawing of the inside of the General Post Office in Dublin during the 1916 Rising and a drawing of the emblem of the County Tyrone Gaelic Athletic Association which included a few words in Irish. This acknowledgment on his part does appear to indicate that at times the policy is either ambiguous or is misinterpreted by some prison officers.

[6] In his Order 53 statement the applicant relied on Article 9 of the European Convention on Human Rights. Mr Maguire submitted that there was no breach of the right to freedom of thought conscience or religion involved in the policy in question. This was clearly right and reliance was not placed by Mr O'Donoghue on Article 9 in his submissions. He did however contend that the policy did interfere with the applicant's right to freedom of expression which is protected by Article 10 of the Convention. This contention was, rightly, accepted by Mr Maguire but he contended that it was justified under Article 10(2).

[7] Mr O'Donoghue also contended that given the fact that an interest in Irish was confined in the prisons in Northern Ireland at the present time to prisoners of one tradition and not of another ie. likely to be Catholic by religion and Nationalist or Republican by political opinion, there was a breach

of their Article 14 rights not be discriminated against. It is clear that Article 14 is engaged here by reason of the interference with the applicant's right, subject to justification, under Article 10. I must therefore ask myself whether there was discrimination on any grounds such as language, religion, political or other opinion.

In his very thorough and helpful skeleton argument Mr Maguire referred to a number of relevant authorities which were opened to me at the hearing or which I have since considered.

[8] In Harry Grace v The United Kingdom (Application No. 11523/85) the European Commission on Human Rights concluded, in considering an application under Article 8 of the Convention that "the prohibition on prisoners sending letters containing obscure or coded messages is in accordance with the law and necessary in a democratic society for the prevention of disorder of crime." The reasons for this view are obvious and the sending out of such messages whether in the form of artworks or otherwise should not be used to facilitate an escape from the prison or the commission or incitement of any other criminal offence.

[9] Campbell v The United Kingdom 15 EHRR 137 was a decision of the European Court of Human Rights of 1992 whereby the correspondence passing between the applicant, who was serving a prison sentence in Scotland and his solicitor was opened by the authorities. This was held to be an interference with the applicant's rights under Article 8 of the Convention. However, the Court at paragraphs 35 to 38 concluded that the interference was "in accordance with law" within the meaning of Article 8(2). The national court had found that it was authorised by the Prisons (Scotland) Rules 1952 made under the Prisons (Scotland) Act 1952 and supplemented by standing orders and it was not for the European Court to examine the validity of secondary legislation which primarily fell within the competence of national courts which upheld the validity of the rules here. Applying that to this case one notes that there is no challenge to the rules as such but only to a small part of the Standing Orders made thereunder.

[10] A similar matter was considered by Weatherup J in In the Matter of an Application by John Byers (unreported 2004). This related to the policy of the Northern Ireland Prison Service not to permit the wearing of Easter lilies by prisoners in the communal areas of prisons. I note that in that case the learned judge found that Section 75(4) and Schedule 9 of the Northern Ireland Act provide for enforcement of equality duties through the Equality Commission so that the provisions did not contribute to the present application. Furthermore, the terms of Section 76 relating to discrimination by public authorities did not add to the remedies claimed by the applicant. Although the applicant in this case had contended otherwise in his Order 53

statement his counsel did not dispute the ruling of Weatherup J in the Byers case in that respect.

[11] I have considered in this case whether it would be appropriate to apply the common law maxim de minimis non curat lex. It seems to me that maxim is still valid and relevant and in accordance with the modern doctrine of proportionality or with the view of the European Court of Human Rights that a national decision-maker should be left a margin of appreciation. If the applicant had sought to argue about the confiscation of particular items of cell craft I consider that it would have been applicable. However, as counsel wisely chose not to do so, but to confine the application to an ongoing policy wording I do not apply the maxim here.

[12] In Sinn Féin's Application [2004] NICA 4, the Court of Appeal adopted the approach of Brooke LJ in Wansworth London Borough Council v Michlak [2002] 4 AER 1136, paragraph 20, a decision subsequently approved by the House of Lords. The four questions he set out are as follows:

> "(i) Do the facts fall within the ambit of one or more of the substantive Convention provisions.
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> (ii) If so was there different treatment as respects to that right between the complainant on the one hand and other persons put forward for comparison (the chosen comparators) on the other.
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> (iii) Were the chosen comparators in an analogous situation to the complainant's situation.
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> (iv) If so, did the difference in treatment have an objective and reasonable justification – in other words did it pursue a legitimate aim and did the differential bear a reasonable relationship of proportionality to the aims sought to be achieved."

[13] As regards to question one the facts do fall within the ambit of Article 10 and in turn Article 14. In answer to question two there was different treatment as respects the right between this applicant who was not able to send out cell craft in the language he preferred to work in and prisoners who were making cell crafts that were in the English language and had no such restrictions. In answer to question three it does seem to me it was an analogous situation. As Mr Justice Weatherup has pointed out question four concentrates not directly on the restriction imposed on the applicant's freedom of expression and whether that can be justified but rather on the differential treatment and whether that can be justified. In either event that is really the question for decision here. Was the interference necessary. Was it a

proportionate response to a legitimate aim ie. the prevention of the commission or instigation of crime disorder etc. (In Byers case it was concluded that there was a justification for the decision to permit the poppy but not the Easter lily, which the court found to be an objective and reasonable justification).

[14] With regard to legitimate aims the respondent would go further and say that these standing orders were not only to promote good order and discipline in the prison but to help in the process of rehabilitation of prisoners; to turn prisoners away from their criminal pass; to ensure that support is not lent to paramilitary activities; to prevent others from being incited to criminality and, in the prison context in discipline. Clearly these aims are indeed legitimate and proper.

[15] In R (Ponting) v Governor of HMP Whitemoor 2000 EWCA Civ. 224 the court was dealing with the use of a computer by a prisoner. Arden LJ who was in the majority in that decision said at paragraph 112:

> "It would be recalled that at this stage of the inquiry the function of the court is to review the balancing exercise carried out by the decision-maker and that appropriate deference is to be given to the decision-maker. While the domestic court does not apply a 'margin of appreciation' in the way that the European Court of Human Rights does, there is a margin of discretion which must be accorded to the state and organs of the state (see R v DPP ex parte Kevilene [2000] 2 AC 326 at 380-381 per Lord Hope of Craighead). The judgemental issue is then the level of deference to be paid to the decision-maker."

I observe that Lord Steyn in a recent lecture to the Judicial Studies Board in Northern Ireland questioned whether "deference" was an appropriate way to describe the relationship between the courts and those organs of the state whose decisions it was reviewing. Even if another term is to be preferred it is interesting to note that at paragraph 114 Arden LJ said:

> "Moreover as the courts role is supervisory, it is not for the courts to define how the time of prisoners should be spent or the priorities for allocation of prison resources."

I respectfully agree with that sentiment. If the court did conclude that the present rule was not a justified interference so that the present standing order was unjustified it would be preferable that it did not do so in a way that imposed an extra burden on the prison's resources which the court would not

be in a position to assess. I observe that it is not the role of the court to manage let alone micro-manage the workings of the prisons, any more than schools or hospitals, where the daily routine of the institution and its proper conduct must be very largely left to the persons experienced and qualified in the management thereof.

[16] In Austin's Application (unreported 1998) Coghlin J, at page 8 commenced a helpful review of leading relevant authorities to justify his conclusion that it was "important to bear in mind that neither Articles 10 and 11 of the Convention nor the common law right to freedom of expression are absolute. Both Articles 10 and 11 provide that the freedoms which they seek to preserve may be subject to a number of restrictions including those necessary "in a democratic society in the interests of national security" or "public safety" or the prevention of "disorder or crime" or the "protection of the rights and freedoms of others".

[17] In R v Secretary of State for the Home Department Ex p. Simms [1999] 3 All ER 400 the House of Lords considered the rights of prisoners serving life sentences to communicate with journalists. I quote from the judgment of Lord Steyn on behalf of the court, at p 403(c):

> "A sentence of imprisonment is intended to restrict the rights and freedoms of a prisoner. Thus the prisoner's liberty, personal autonomy, as well as his freedom of movement and association are limited. On the other hand it is well established that a 'convicted prisoner, in spite of his imprisonment, retains all civil rights which are not taken away expressly or by necessary implication': see Raymond v Honey [1982] 1 All ER 756 at 759, [1983] 1 AC 1 at 10 and R v Secretary of State for the Home Department Ex p. Leach [1993] 4 All ER 539 at 548, [1994] QB 198 at 209. Rightly, Judge LJ observed in the Court of Appeal in the present case that:
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> "The starting point is to assume that a civil right is preserved unless is has been expressly removed or it's lost is an inevitably consequence of lawful detention in custody."

[18] R v Secretary of State for the Home Department Ex p. Daly [2001] 3 All ER 433; 2001 UK HR 26. was a case in which a differently constituted Judicial Committee considered the right of the Prison Service to examine legal correspondence of prisoners in the absence of the prisoners. At para.18 Lord Bingham, having accepted that the searching of the legal correspondence was

indeed prima facie an infringement of the prisoner's common law right to the privilege said:

> "[18] It is then necessary to ask whether, to the extent that it infringes a prisoner's communal right to privilege, the policy can be justified as a necessary and proper response to the acknowledged need to main security, order and discipline in prisons and to prevent crime."

He concluded that it was not so justified, as he did also at para.23 when applying Article 8 of the European Convention.

[19] Article 10(2), which the respondent admits is engaged and prima facie interfered with, I now set out in full:

<u>Article 10 – Freedom of Expression</u>

> "2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

The respondent must establish that this interference with the applicant's freedom of expression, to the extent that it exists is necessary for one of these purposes, eg the prevention of disorder or crime and the protection of the rights of others. It does not seem to me that they have established that it is so necessary. The object of avoiding the conveyance of information which might be conducive to disorder or crime does not require this particular form of words in the policy or this distinction, with regard to, one reminds oneself, crafts, between English and Irish. The setting out of a poem in Irish would be in breach of this policy and yet may be understood by the Irish speakers retained by the Prison Service. A passage in English e.g. from "Finnegan's Wake" might well excite the suspicions of a prison officer but could not be prohibited.

It does seem to me that the present wording does unnecessarily interfere with the lawful rights of the applicant.

[20] An alternative form of words might be as follows:

> "The use of language which cannot readily be understood by the application of the prison's current resources will not be permitted."

This form of words would not require the Prison Service to go on employing Irish translators if they no longer found it necessary to do so. Such a form of words would lend itself to a proper recognition of parity of esteem between persons of different background in Northern Ireland. I do not direct that the Prison Service use that particular form of words. They will wish to reflect on that in due course and arrive at a form of words satisfactory to them which is informed by this judgment and deals in a proportionate way with the rights of the prisoners in their custody. However I do grant a declaration that the present form of words at 4.8(c) is unlawful for the reasons given.