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(subject to editorial corrections)

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 JAMES KEMP FOR JUDICIAL REVIEW

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WEATHERUP J

The application.

[1] This is an application by a prisoner at HMP Maghaberry for Judicial Review of a decision of the Governor made on 30 July 2003 and four decisions made on behalf of the Secretary of State in August 2003 by which the applicant was removed from association pursuant to Rule 32 of the Prison and Young Offender Centre Rules (Northern Ireland) 1995. In essence the applicant complains that he was not informed of the reasons for his removal from association and was therefore unable to make representations in connection with his removal from association.

[2] Rule 32 of the 1995 Rules provides –

> "(1) Where it is necessary for the maintenance of good order or discipline, or in his own interests that the association permitted to a prisoner should be restricted, they are generally offered particular purposes, the Governor may arrange for the restriction of his association.
>
> (2) A prisoner's association under this rule may not be restricted under this rule for a period of more than 48 hours without the agreement of a member of the Board of Visitors or of the Secretary of State.

> (3) An extension of the period of restriction under paragraph (2) shall be for a period not exceeding one month, but may be renewed for further periods each not exceeding one month.

The applicant's removal from association.

[3] The applicant was removed from association from 30 July 2003 to 16 September 2003. On 30 July 2003 Governor Millar completed Form R32(GOV) to the effect that the Governor had found it necessary to restrict the applicant's association for the maintenance of good order and discipline and stated the following reasons:

> "For the good order and discipline in Erne House. Investigations are ongoing."

The record of the Governor's initial interview completed by Governor Millar on 30 July 2003 states:

> "I informed the prisoner that he was being kept in SSU for the good order and discipline in Erne.
> He stated that he had not been in any trouble during his sentence.
> He said the only thing he done was complained (sic) to SO Wood that his life was under threat from (another prisoner)."

[4] Governor Millar states on affidavit that she was aware of tension between certain prisoners in Erne House on 30 July 2003 and that a variety of items had been found when a number of cells had been searched on that day and that there was concern that a particular prisoner might be made the subject of a serious assault. However she was concerned that she should not say anything that might lead directly or indirectly to any source of information being identified and for that reason she did not provide the applicant with any information other than that recorded.

[5] The first extension of restriction of association was made on 1 August 2003 by the Director of Operations at Northern Ireland Prison Service Headquarters on behalf of the Secretary of State. Form R32(OPS) records the reasons as "For the order and good discipline in Erne House pending investigation". The record of Director of Operations interview of 1 August 2003 states "Prisoner informed and made no complaints." The second extension of restriction of association was made on 6 August 2003 and Form R32(OPS) gives reasons in identical terms to the first extension and the record of Director of Operations interview states "No comments". The third extension of detention was dated 13 August 2003 and Form R32(OPS) gives

the reasons in essentially the same terms as the earlier extensions. The Director of Operations went on long term sick leave and was unable to swear an affidavit in the Judicial Review proceedings.

[6] The fourth extension of the restriction of association was made on 19 August 2003 by Max Murray the Deputy Director of Operations in Northern Ireland Prison Service on behalf of the Secretary of State. Form R32(OPS) gives reasons in essentially the same terms as the earlier extensions and the record of the Director of Operations interview of 19 August 2003 states - "Didn't speak or ask a question other than to confirm he understood why the Rule 32 was being extended". By affidavit Mr Murray states that at the interview of 19 August 2003 he told the applicant that he was considering whether the applicant's restriction of association should be extended and he asked the applicant to confirm that he understood and the applicant refused to respond. He then states that he asked the applicant for his representations as to whether or not he should extend the period and again the applicant refused to respond. He then states:

> "I told him that the prison management was concerned that he presented as a threat to other prisoners and that his presence in normal association would be likely to undermine the ability of prison management to keep order and control in Erne House. I asked him for his comment on this. Again he refused to speak or respond."

[7] On the evidence available in this application for Judicial Review this interview on 19 August 2003 is the first occasion on which the applicant was informed that the reason for restriction of association was that he presented a threat to other prisoners and that his presence in Erne House would undermine order and control. However the applicant disputes that he was told that he presented a threat to other prisoners or that his presence in Erne House was likely to undermine order and control.

[8] By way of background the applicant describes an incident on 29 July 2003 where he alleges that threats were made to him by another prisoner. He reported this threat to Senior Officer Wood on 30 July 2003. Later that day he was removed from association. Governor Johnston was Security Governor at HMP Maghaberry on 30 July 2003 and was aware of tension that existed between prisoners in Erne House and it was thought likely that different factions may attack one another. Governor Johnston received intelligence about a recent unreported assault upon a prisoner involving the use of razor blades and further intelligence that the perpetrator of the assault was likely to suffer retaliation in the near future. A search was carried out of the cells of three prisoners, including the applicant, and it is stated that in the applicant's cell the search team found glass and a piece of wood and razor blades. There

is a dispute between the parties as to whether glass was found and whether the other items were for use in handicrafts or were improvised weapons. In view of the above intelligence and the items referred to by the respondent as having been found in the applicant's cell, it was decided that the applicant should be removed from association under Rule 32. Governor Johnston indicated to Governor Millar that she was to inform the applicant of the reason for his detention and that she should be careful to avoid saying anything that might indicate the source of information upon which the decision had been taken.

The applicant's grounds of review.

[9] The applicant's grounds of challenge to the decisions of the Governor and the Secretary of State are that in making their respective decisions they both –

(a) failed to give the applicant any or adequate information or reasons as to his removal from association;

(b) failed to give the applicant any or adequate opportunity to make representations;

(c) failed to allow the applicant's legitimate expectation to be met that he would not be removed from association without being given adequate reasons and being afforded an opportunity to make representations.

[10] In essence the applicant's complaint is that the Governor and the Secretary of State did not inform the applicant of the reasons for his removal from association. In reply the respondent contends that the applicant was given such information as procedural fairness requires in the circumstances. Security considerations prevented the disclosure of further information as such disclosure would have compromised the sources of intelligence available to the prison authorities.

The giving of reasons for removal from association

[11] The extent to which the requirements of procedural fairness require that a prisoner removed from association under Rule 32 should be informed of the reasons for his removal are set out in the decision of Carswell LCJ in Re Conlon's Application (2002) NIJB 35 at pages 40 and 41.

> "We are in general agreement with the proposition that a prisoner should where feasible be informed of the reasons for his removal from association, but we do not consider that a hard and fast rule should be laid down, for the circumstances may be infinitely variable. We

would accept that the conclusion reached by Tudor Evans J in *Williams v Home Office* can no longer be sustained. It does not follow that because a prisoner does not have to be guilty of an offence before he is removed from association, he has no right to be heard. The trend of recent decisions in this area of the law has been to increase the instances in which reasons have to be furnished and an opportunity given to make representations.

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. Whether this will apply on the extension of a period of removal will depend on the circumstances, and comprehensive rules cannot be laid down. Nor do we think that there should be any hard and fast requirement about the form in which the reasons are given to the prisoner. As the judge observed, the important thing is that he is given sufficient information to permit him to understand why he was removed from association and why the visitors accept that his removal should continue. Whether this can be given satisfactorily by oral explanation or whether some documentary material is required depends on the facts of the case, although it seems likely that in most cases the gist of the prison authorities' reasons for wishing to continue the removal can be given in interview."

[12] The application of those principles to a prisoner removed from association for security reasons was stated as follows in Re Henry's Application [2004] NIQB 11 at paragraph 24 -

> "The Court of Appeal decision in Conlon's Application contemplates, first of all, that there will be some cases where it will not be possible to disclose to the prisoner the information on which the decision was based, and secondly, that in most cases the gist of the reasons for wishing to continue the removal from association can be given in interview. In this context where it is judged that information cannot be disclosed to the prisoner I consider that fairness requires that extensions of restricted association include a system of anxious scrutiny of the information by those charged with making the decision to extend the restricted association. Those given in effect a supervisory role by the statutory regulations, namely the members of the Board of Visitors and the Secretary of State must have access to the information and be able to subject it to such scrutiny as they consider necessary. Accordingly, fairness in this context would involve in the first place, that there must be information, which is judged to be reliable, upon which it can be determined that the prisoner represents a risk to good order and discipline. Secondly, the information must be available to be assessed by those making the decision in relation to removal from association. Thirdly, the gist of the concern should be disclosed to the prisoner. Fourthly, the details of the information and the sources should be protected to the extent that that is considered necessary in the interests of the informants. Fifthly, the independent scrutiny by the members of the Board of Visitors and the Secretary of State should include ongoing assessment of the information available and of the risks to informants."

[13] In Re Conlon's Application the Court of Appeal emphasised that there should be no hard and fast rules in relation to the timing or form or extent of the giving of reasons. It was stated that in most cases the gist of the prison authorities reasons for wishing to continue the removal can be given in interview. There is a balance to be made between the right of a prisoner to know the reasons for his removal from association and the protection of sources of intelligence received by the prison authorities. What amounts to a sufficient gist of the reasons for removal from association will vary with the circumstances involved in the balance that has to be struck in a particular

case. The giving of a gist requires that the prisoner be informed of the essence of the concern that prompted his removal from association and not just a repetition of the good order and discipline ground of Rule 32. There may be cases where the intelligence information is such that the essence of the concern of the prison authorities cannot be identified to a prisoner.

[14] In the present case Mr Murray states that he informed the applicant of the gist of the reasons for his removal from association, namely that he presented a threat to other prisoners and that his presence in Erne House would undermine order and control. Accordingly it is apparent that on 19 August 2003 the respondent did not consider that there was any security objection to informing the applicant of the gist of the reasons for his removal from association. There is no evidence available that this version of the gist was given to the applicant at any of the three earlier extensions of his removal from association and the applicant denies that he was so informed. It is clear from the evidence of Governor Millar that she did not inform the applicant on the 30 July 2003 of this version of the gist of the reasons for his removal from association. No reason is advanced as to why the information outlined by Mr Murray as furnished to the applicant on 19 August was not or could not have been furnished to the applicant on 30 July 2003. Accordingly I am satisfied that the gist of the reasons for the applicant's removal from association were not furnished to the applicant when Rule 32 was invoked on 30 July 2003 or when Rule 32 was extended on 1 August, 6 August and 13 August 2003. No security reason has been given as to why this gist of the reasons for the applicant's removal from association could not have been given to the applicant on the earlier occasions.

[15] While a prisoner has the right to know the reason for his removal from association to the extent compatible with the public interest in protecting sources of information, and that right can generally be satisfied by furnishing to the prisoner the gist of the reason for his removal from association, the gist involves the essence of the concern and the right is not satisfied merely by repeating the words of Rule 32. Such an approach would not involve the giving of the gist of the reasons and would only be justified when the public interest so requires. The public interest did not so require in the present case as the Secretary of State was able to give the gist of the reasons to the applicant on 19 August 2003 and no justification has been offered for not providing the same information at the earlier interviews.

[16] The applicant's period of removal from association ended on 16 September 2003. I find that, prior to 19 August 2003, the statement to the applicant of the terms of Rule 32, as the reason for his removal from association, was not sufficient to comply with the obligation to give the applicant the reason for his removal. There is a dispute as to whether the applicant was given sufficient reason for his removal from association on 19 August 2003 and the applicant has not discharged the burden of establishing

that he was not given such reason. The reason stated by the Governor as having been offered on 19 August 2003 was in terms sufficient to satisfy the applicants right to know in the circumstances and accordingly I am satisfied that the respondent's obligation in relation to the giving of the reason for removal was discharged on 19 August 2003. The ending of the applicant's removal from association on 16 September 2003 and the above findings in relation to reasons render it unnecessary to make a declaration. In the exercise of discretion, I dismiss the application for Judicial Review.