Neutral Citation no. [2003] NIQB 24 | *Ref:* **KERC3899**

Judgment: approved by the Court for handing down | *Delivered:* **31/03/2003**
(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY JOHN MURDOCK FOR

JUDICIAL REVIEW

KERR J

Introduction

[1] This is an application by John Murdock, who is currently serving a sentence of life imprisonment for murder, for judicial review of the decision of the prison authorities not to increase the number of visits that he may have with his wife, who is also serving a life sentence for murder, beyond the present level of one per month.

Background

[2] The applicant was sentenced to life imprisonment in May 1994 for the murder of his girlfriend. He is currently serving his sentence at the Life Sentence Unit, Erne House, HM Prison Maghaberry. Karen Carson, the applicant's wife, was sentenced to life imprisonment in June 1997 for the murder of her former husband. She is housed at Mourne House in the same prison. This is a unit that is separate from the main prison and is for the exclusive use of female prisoners. The applicant and Ms Carson formed a relationship while in prison and were married in Mourne House on 13 November 2000.

[3] A distinction exists between the availability of visits to prisoners from friends and relatives from outside prison and visits on an intra-institutional basis *i.e.* visits from other prisoners. The Prison and Young Offenders Centre Rules (Northern Ireland) 1995 guarantee one 'outside' visit per month. As a matter of discretion the Prison Service permits enhanced status prisoners up

to four further one-hour visits. Both the applicant and his wife are enhanced status prisoners.

[4] The Prison Rules do not make provision for intra-institutional visits. The Prison Service policy in relation to these visits is set out in Northern Ireland Prison Service Standing Orders. The relevant passage is as follows: -

> "Visits may be permitted between close relatives where both parties are in prison custody provided that their classification and behaviour is such that the visit does not pose a threat to the security and good order of the establishment.
>
> Close relatives are defined as husband or wife (including a person with whom the prisoner was living as husband or wife immediately before reception), parent, child, brother, sister, grandparent or grandchild, a person who has been *in loco parentis* to the prisoner or to whom the prisoner has been *in loco parentis,* and a person to whom the prisoner is engaged, provided that the governor is satisfied that a *bona fide* intention to marry exists.
>
> Prisoners who are husband and wife, including those classified either top or high risk, who are held in the same establishment, will normally be allowed visits at intervals of one month."

[5] The Prison Service retains a discretion to allow visits more often than is provided for in Standing Orders. The circumstances in which more frequent visits might be permitted include where prisoners intend to marry or where the female partner was expecting a child. In fact during the period before their marriage the applicant and Ms Carson were allowed extra visits in August, September and October 2000. Since then they have availed of the visits each month provided for in Standing Orders except for a period from November 2001 to January 2002 when they chose not to have any visits.

[6] On 9 April 2002 the applicant petitioned the Secretary of State for an increase in the number of visits with his wife. On 22 April 2002 the Establishment Support Branch of the Prison Service replied to the petition as follows: -

> "Standing Orders indicate that prisoners who are husband and wife, and who are held in the same establishment, will be allowed one inter-

> institutional (*sic*) visit per month. Each case is considered on its own merits. There are no compelling reasons to waive this Standing Order in your case."

[7] On 29 May 2002 the applicant's solicitors wrote to the Prison Service. The letter contained the following passage: -

> "Both Mr Murdock and his wife, Karen Carson, are exemplary prisoners. Neither of them receives a significant number of outside visitors and both are life sentence prisoners. In these circumstances the current level of inter-institutional (*sic*) visits is plainly insufficient to meet the Prison Service's obligations in relation to the maintenance of family relations."

The Prison Service replied on 29 June stating that no additional information had been provided that would warrant a change from current visiting arrangements.

[8] The applicant has claimed that the refusal of extra visits to him and Ms Carson is inconsistent with the approach of the Prison Service to other married couples whom he named in his affidavit filed in support of this application. The Prison Service has explained that in the case of one of these couples extra visits were allowed because the female partner had given birth to a child. In the other case the couple had been allowed an extra visit because they had been refused Christmas home leave. The applicant has pointed out that neither he nor his wife was eligible for the Christmas home leave scheme.

The judicial review application

[9] For the applicant Mr Larkin QC made two principal submissions. He claimed that the Prison Service had failed to comply with its own statement of policy on the maintenance of family relationships which indicates that it is important that close ties be maintained between a prisoner and his family; in failing to adhere to this policy and to respect the applicant's right to a family life the respondent had been in breach of article 8 of the Convention. Alternatively, if there had not been a breach of article 8 the Prison Service had discriminated against the applicant and his wife contrary to article 14 of ECHR by confining the number of times that they could meet to once per month. A prisoner whose spouse was not incarcerated could be visited by his partner on at least four occasions per month. The applicant and his wife had also been treated less favourably than other prisoners in a similar position.

[10] For the respondent Mr Maguire accepted that article 8 was engaged and that there had been interference with the applicant's right to respect for family life. He submitted, however, that such interference, arising as it does from a lawfully imposed sentence of imprisonment, was according to law, necessary in a democratic society in order to protect crime and protect the rights and freedoms of others and was proportionate. He resisted the applicant's claim that he had been the subject of discrimination, pointing out that he had not been treated any less favourably than a prisoner in a truly analogous position *viz* one whose spouse was also in prison.

Is the refusal to allow extra visits proportionate?

[11] There was no dispute that the sentence of imprisonment had been imposed according to law and that this was necessary in a democratic society. The main thrust of the applicant's case on article 8 was that the refusal to allow more than one visit per month was disproportionate. It was suggested that the Prison Service had to examine each restriction on the applicant's family life and to decide whether this was a proportionate response. Since the applicant and his wife were housed in the same institution and extra visits could be arranged without difficulty, to confine contact between them to one visit per month was disproportionate.

[12] In a series of decisions (*X v United Kingdom* (1975) 2 DR 105; *X and Y v Switzerland* (1978) 13 DR 241 and *ELH and PBH v United Kingdom* (1997) 91A DR 61) ECmHR has held that the refusal of prison authorities to allow conjugal visits is an interference with respect to a prisoner's right to respect for family life that is justifiable under article 8 (2) of the Convention.

[13] These decisions were reviewed by the Court of Appeal in England in the case of *R v Secretary of State of the Home Department ex parte Mellor* [2001] EWCA Civ 472 which concerned a challenge by a prisoner to the decision of the respondent to refuse to permit the artificial insemination of his wife by semen taken from him. In its judgment the Court of Appeal stated that the decisions of ECmHR establish that lawful imprisonment can constitute a justifiable interference with the right to respect for family life by virtue of Article 8(2).

[14] The argument on the Convention advanced by the applicant was summarised in paragraph 40 of the judgment as follows: -

> "The reason why imprisonment is a justifiable restriction on the exercise of conjugal rights is pragmatic. Permitting the exercise of conjugal rights in prison, together with the privacy that this would involve, would endanger the security of the prison – see *X & Y v Switzerland*. Thus imprisonment and the exercise of conjugal rights

> are incompatible *in practice*. The same is not true of the provision by a prisoner of a sample of semen. This could be taken from the prisoner within the prison without undue dislocation of the prison regime. Alternatively it could be provided by escorting the prisoner to a clinic, which would involve no greater administrative burden than that involved when a prisoner is taken to a funeral of a close relative, or to a hospital for treatment. It follows that artificial insemination provides a method by which a prisoner can exercise his right to found a family [under article 12 of the Convention], which is compatible with his imprisonment. That is a fundamental right which the prisoner ought to be permitted to exercise in the absence of a cogent reason for interfering with it."

It is important to note the way in which the argument was pitched. It was suggested that the article 12 right should be exercisable by the prisoner *unless* there was a cogent reason that it should not be. This argument has echoes in the submission of Mr Larkin that the applicant was entitled (by virtue of article 8) to more regular contact with his wife unless there were compelling reasons that this should be denied.

[15] The Court of Appeal in *Mellor* recorded the contrary submission of counsel for the Home Secretary in the following passage at paragraph 41: -

> "Miss Rose for the Secretary of State challenges this analysis. She submits that the purpose, or at least a purpose, of imprisonment is to punish the criminal by depriving him of certain rights and pleasures which he can only enjoy when at liberty. Those rights and pleasures include the enjoyment of family life, the exercise of conjugal rights and the right to found a family. Imprisonment is inconsistent with those rights not merely as a matter of practical incompatibility but because part of the object of the exercise is that it should preclude the exercise of those rights. A prisoner cannot procreate by the medium of artificial insemination without the positive assistance of the prison authorities. In the absence of exceptional circumstances they commit no infringement of Article 12 if they decline to provide that assistance."

The material part of this submission for the purposes of the present case is the suggestion that "part of the object" of imprisonment is the deprivation of rights that a prisoner would enjoy if at liberty.

[16] The Court of Appeal accepted Miss Rose's contentions on this point. At paragraph 41 Lord Phillips MR said: -

> "I consider that the jurisprudence considered above, and in particular the case of *E.L.H. and P.B.H. v. United Kingdom,* supports Miss Rose's submission. The Commission noted with sympathy the facilitating of conjugal visits in several European countries, but concluded that *for the present time* the refusal of such visits should continue to be regarded as *justified for the prevention of disorder or crime.* Mr Pannick submitted that those words were referring simply to the disorder or crime that would be liable to occur within prisons if conjugal visits were allowed. It seems to me that the reference by the Commission with sympathy to the countries where such visits were allowed demonstrates that they appreciated that such visits were not physically incompatible with the effective operation of a prison service. In nonetheless continuing to accept that there was no obligation to facilitate such visits, the Commission recognised that the majority of signatories to the Convention maintained a policy that those who had been sentenced to imprisonment should not be permitted to exercise these rights. In so doing they were adhering to what they correctly understood to be the existing jurisprudence."

Thus the justification for the denial of these rights to prisoners did not lie in the impracticality of allowing them but because of the policy consideration that imprisonment should involve a restriction on this particular aspect of life available to someone at liberty.

[17] These observations were made in the context of article 12 of ECHR, arguably a more fundamental right than is enshrined in article 8. Article 12 guarantees that "men and women of marriageable age have the right to marry and to found a family …". Article 8, by contrast, guarantees the right to *respect* for private and family life, home and correspondence. If anything interference with article 8 rights will be more readily justified than the denial of rights arising under article 12.

[18] It is inevitable that imprisonment will bring about a restriction on the prisoner's private life. The context for the examination of whether a particular restriction is proportionate must be that imprisonment, to be effective, necessarily involves curtailment of those incidents of life that are freely available to those who do not commit crime. It follows that each restriction does not have to be justified on an individual basis according to whether it is impractical not to allow the particular freedom claimed.

[19] The Prison Service correctly recognises in its policy on the maintenance of family relationships that it is important to maintain close ties between the prisoner and his family. This does not mean that every restriction on those ties that cannot be justified on the ground that it is impractical to permit it must be regarded as disproportionate. That is not to say that the feasibility of allowing a particular facility is irrelevant; merely that it cannot be regarded as determinative of the issue.

[20] It is clear that the Prison Service carefully considered the representations made on behalf of the applicant. Ultimately it was concluded that an increase in the frequency of visits by the applicant to his wife should not be allowed. Although this was expressed in terms of not departing from the guidelines established by the Standing Orders this does not signify that the Prison Service was unmindful of the need to be proportionate in its response to the applicant's request. As I have said, the framework in which the selection of the proportionate response had to be chosen is not that canvassed by the applicant *viz* whether the particular request could conveniently be accommodated. The background against which the claim of lack of proportionality must be viewed is that the loss of particular freedoms is – and should be – a concomitant of imprisonment. Viewed in this way I find it impossible to conclude that the decision to refuse to increase the number of visits was disproportionate.

Article 14

[21] It is not necessary to establish that there has been a violation of article 8 in order to rely on article 14 (which prohibits discrimination). It need only be shown that the discrimination complained of falls within the 'ambit' of one or more of the substantive articles – see eg *Van der Mussele v Belgium* (1984) 6 EHRR 163 and *Rasmussen v Denmark* (1985) 7 EHRR 371, E Ct HR.

[22] It must be established, however, that the applicant has been treated differently from people in a similar, or analogous, situation – see, for instance, *Stubbings v United Kingdom* (1996) 23 EHRR 213. I do not accept that the applicant and his wife are in an analogous position to a married couple, one only of whom is in custody. The situation of such a couple is quite different from that of the applicant and his wife. In the case of a couple where only one spouse has been sentenced to prison, the other spouse should not have her article 8 rights interfered with beyond that which is justified by her husband's

incarceration. In the case of a couple where both are in prison the justification for interference with article 8 rights proceeds on a completely different basis. It would be quite wrong to restrict the opportunity of an innocent wife to visit her imprisoned husband to the level permitted to a couple who were both in prison. I do not accept, therefore, that the applicant has demonstrated discrimination on the basis of a comparison with a husband whose wife is not in prison.

[23] In relation to the other prisoners named by the applicant in his affidavits I do not consider that there is sufficient evidence to allow me to conclude that they were in a directly analogous position to the applicant and his wife. It was asserted by the Prison Service that one of these couples had had a baby and that this was the reason for increasing the number of visits that they were allowed. That claim has not been disputed by the applicant and, if correct, would provide a clear point of distinction from the applicant's case. In relation to the other couple named, the governor has said that they were refused Christmas home leave and that this consideration prompted the grant of extra visits. The applicant's claim that neither he nor his wife was eligible for home leave at Christmas is not sufficient to establish that they were in a directly analogous position to that couple.

Conclusions

[24] None of the grounds advanced by the applicant has been established and the application for judicial review must be dismissed.