

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY MARKUS LEWIS FOR
JUDICIAL REVIEW

WEATHERUP J

The application.

[1] The applicant is a prison officer at HMP Maghaberry and applies for judicial review of a decision of a Governor made on 26 October 2004 to commence disciplinary proceedings against the applicant. It is alleged that the applicant acted in a manner that was in breach of acceptable standards of conduct under the Northern Ireland Prison Service Code of Conduct and Discipline. Details of the allegations are that the applicant "in breach of the duty of confidence owed by you to the Northern Ireland Prison Service appeared on and participated in the BBC Spotlight programme which was broadcast on 12 October 2004." Mr Grainger appeared for the applicant and Mr McMillan appeared for the respondent.

Restrictions on communications to the media.

[2] Rule 115 of the Prison and Young Offenders Centre Rules (NI) 1995 provides -

"(1) Except with the permission of the Secretary of State, an officer shall not directly or indirectly communicate to a representative of the press, television or radio or any other person matters which he has come to know in the course of his official duties.

(2) An officer shall not without the permission of the Secretary of State publish any matter or make any public pronouncement relating to the administration of any prison or to any of its prisoners."

The background.

[3] The applicant joined the Northern Ireland Prison Service in 1979 and became a member of the Prison Officers Association (POA). He served at the Young Offenders' Centre at Hydebank and then at HMP Maze before transferring to HMP Maghaberry in 1990.

[4] At HMP Maghaberry the female prison, after the closure of Armagh, was contained in Mourne House, a self-contained unit set in nine acres outside the walls of the main prison. Mourne House closed on 21 June 2004.

[5] In Northern Ireland the POA has an Area committee and branches at Maghaberry, Hydebank Wood, Magilligan and Millisle. Up to 21 June 2004 the Maghaberry branch of the PAO operated a "male side" which dealt with the main prison and a "female side" which dealt with Mourne House. In 1993 the applicant was co-opted as a member of the committee of the Maghaberry branch of the POA (Male Side) and in 1995 he became Secretary and in 1996 he became Chairman. Accordingly prior to 21 June 2004 the applicant was Chairman of the Maghaberry branch of the POA (Male Side) and there was a separate Chairman of the Maghaberry branch of the POA (Female Side).

[6] With the closure of Mourne House on 21 June 2004 the Maghaberry branch of the POA (Female Side) ceased to exist and what had been the Maghaberry branch of the POA (Male Side) became the Maghaberry branch of the POA. This name change was approved by the POA Area committee on 6 August 2004. From 21 June 2004 the applicant was the Chairman of the Maghaberry branch of the POA.

[7] While Chairman of the Maghaberry branch of the POA (Male Side) from 1996 the applicant avers that he conducted numerous interviews with the media including television and radio interviews covering a wide range of issues dealing with matters of concern to POA members. In recent times he had spoken to the media on no less than 41 occasions on both television and radio and in December 2003 had produced a lengthy article for the News of the World newspaper and in all cases was dealing with matters of concern to POA members. On none of those occasions had the applicant sought the permission of the Area Chairman nor had he ever been approached or admonished by the Area Chairman or the prison authorities for speaking to the media without express permission.

[8] The applicant sets out in his affidavit that in January 2002 the Principal Officer in charge of Mourne House and four Senior Officers were tasked to address issues concerning ill-treatment and abuse of female prisoners in Mourne House. The applicant states that in June 2002 this group produced a report to the Governor. Also in June 2002 an article appeared in the Mirror newspaper dealing with the issue concerning ill-treatment and abuse of female prisoners in Mourne House. The Principal Officer and the Four Senior Officers were subject to threats and they approached the applicant to represent them and the applicant agreed. In September 2003 the Principal Officer informed the applicant that he was going to invoke the Northern Ireland Civil Service "whistle blowing" policy and the applicant accompanied the Principal Officer to meetings with senior members of the Northern Ireland Office. An investigation was undertaken by the Northern Ireland Office, commencing in April 2004 and conducted by a number of retired police officers. The applicant was interviewed by the inquiry team in September 2004.

[9] BBC Northern Ireland broadcast a "Spotlight" programme in October 2004 in relation to Mourne House. The applicant and three other prison officers and the Area Chairman contributed to that programme. The applicant states that he spoke to the Spotlight programme as a representative of the POA and as the representative of the Principal Officer and the four Senior Officers who had reported on Mourne House.

[10] Prison Service Headquarters and the Area Chairman of the POA do not agree that the applicant appeared on the Spotlight programme as a representative of the POA. On 13 October 2004 the Area Chairman issued a statement on behalf of the POA referring to the applicant as the "whistle blower" and declaring that he did not speak on behalf of the POA. On 18 October 2004 the Press, Communication and Planning Officer at Prison Service Headquarters wrote to the Area Chairman of the POA with reference to the Spotlight programme and expressed concern that "we appear to have no formal agreement about the prison matters upon which POA officials may comment, who those officials may be and on what restrictions are applicable to those comments". A meeting was proposed with a view to reaching a mutual understanding and protocol which would address the issues mentioned.

[11] On 26 October 2004 the applicant was served with the statement of alleged misconduct by Governor Wilson who had prepared the papers at the behest of Governor Longwell.

[12] On 12 January 2005 the Head of Prison Personnel at Prison Service Headquarters wrote to the Area Chairman of the POA and indicated that "my understanding of your custom of practice arrangement is that you are a sole spokesman for the POA (NI) in terms of communicating with the media. You

are the only person authorised to speak to the media unless you delegate authority to one of your POA colleagues. Is this correct?" By a reply dated 13 January 2005 the Area Chairman stated first of all that the applicant was the whistle blower referred to in his statement of 13 October 2004; secondly, confirming that the custom and practice arrangement which POA (NI) had with the Prison Service management is that the Area Chairman is the sole spokesperson for the POA (NI) in relation to communicating with the media unless the Area Chairman delegates that authority to someone else within the Association; thirdly that the Area Committee and all elected officials of the POA (NI) were aware that the Area Chairman is the only person elected to speak on behalf of the POA (NI) unless the Area Chairman delegates that authority to someone else; fourthly that the applicant did not have the authority of the Area Chairman to speak on the Spotlight programme on behalf of the POA (NI) "as the subject of the programme was incidents which happened in the female branch of the POA (NI) ie Mourne House and not at Maghaberry male branch." The Area Chairman stated that he had delegated authority to three members of the Mourne House branch to appear on the programme and put over the views of the POA. Those three members had also been the subject of disciplinary proceedings as well as the applicant, but when the Area Chairman confirmed that authority had been delegated to those three members the disciplinary proceedings were withdrawn.

[13] The affidavit of the former Secretary of the Maghaberry branch of the PAO (Female Side) avers that the Spotlight programme was solely concerned with matters that occurred in Mourne House and involved Mourne POA officers. The closure of Mourne House and of the Maghaberry branch of the POA (Female Side) did not invest the applicant with an entitlement to speak on issues that concerned officers he did not represent and in an institution in which he had no official interest. Further the former Secretary reiterates the stated position of the Area Chairman in relation to communications with the media namely, that the Area Chairman is the sole spokesman with power to delegate and that he and two other officers had received authority from the Area Chairman to be interviewed by the Spotlight programme and that the applicant had no such authority.

The grounds for Judicial Review.

[14] The applicant's grounds for judicial review are -

(a) The decision and the manner in which that decision was reached were unreasonable and unfair.

(b) The applicant contends that it is unlikely that he will be afforded a fair hearing in the circumstances.

(c) The decision was reached in breach of the Northern Ireland Prison Service Code of Conduct and Discipline and in breach of the consistent past practice for communication with the media by representatives and officials of the POA.

(d) The Governor and the Northern Ireland Prison Service failed to have regard to relevant matters and had regard to irrelevant considerations in reaching the decision to commence disciplinary proceedings against the applicant and failed to have regard to its consistent past practice under the Code of Conduct and Discipline and the procedure proscribed by legislation.

(e) The Governor and the Northern Ireland Prison Service failed to take into account or to attach sufficient weight to the fact that the applicant's appearance in the media was not in his capacity as a prison officer but rather as chairman and representative of the Maghaberry POA.

(f) The Governor and the Northern Ireland Prison Service failed to give notice of or to provide adequate or proper reasons for any change of practice concerning the giving of media interviews prior to the preferring of disciplinary charges.

(g) The applicant had a legitimate expectation based on consistent past practice. That the provisions of the Code of Conduct and Discipline were not intended to prevent recognised representatives of staff occasions from representing their members; that the said provision did not prevent access to the press or others in this respect and that the Governor and Northern Ireland Prison Service would not act in a manner inconsistent with that past practice.

(h) The applicant had a legitimate expectation that his contact with and appearance in the media would be considered in the context that he was speaking as chairman of the Maghaberry POA.

(i) The decision to commence disciplinary proceedings violated the applicant's right to freedom of expression under Article 10 of the European Convention on Human Rights.

(j) The decision to commence disciplinary proceedings for an improper purpose, namely to punish the applicant for speaking in public on a matter which may have been politically embarrassing for the Northern Ireland Prison Service.

(k) The Governor and Northern Ireland Prison Service in reaching the decision to commence disciplinary proceedings against the

applicant acted unfairly and unreasonably in the circumstances and this decision was arbitrary, disproportionate, unfair, unreasonable and wrong in law.

(1) The charges served on the applicant were unsigned and undated.

The applicant's standing to communicate with the media.

[15] At the heart of this application is the applicant's reliance on an established past practice of communication with the media on POA concerns in his capacity as a branch Chairman of the POA, and without having to obtain permission and without objection from within the POA or from the prison authorities. However the replying affidavits sworn on behalf of the respondent raise factual issues about that past practice. In particular there are two issues in relation to the applicant's entitlement to participate in the Spotlight programme. The first concerns the scope of the applicant's POA authority on 12 October 2004. It is common case that he was Chairman of the Maghaberry branch of the POA on that date. The applicant treated his position as being the Chairman representing all POA members at Maghaberry, whether those serving in the male prison or those formerly serving in Mourne House. The Area committee of the POA and the former committee of the female side at Maghaberry POA do not regard the applicant as entitled to involve himself in events that occurred in Mourne House. It seems that while the Maghaberry branch of the POA (Female Side) had ceased to exist from 21 July 2004 it is unclear who represents members of the former Maghaberry branch (Female Side) in respect of events occurring when Mourne House was operating. At all events the applicant represented the Principal Officer and the four Senior Officers who had produced the report on Mourne House and continued to represent them in October 2004. That representation, which extended to attendance with senior officials in the NIO, was never the subject of challenge. In the applicant's eyes that role appears to be an added basis on which he was representing POA members on 12 October 2004, and those members concerns related to matters affecting Mourne House. In the POA's eyes and in those of the prison authorities none of these matters entitled the applicant to assume responsibility for the concerns related to matters affecting Mourne House.

[16] The second issue concerns authority to communicate with the media. Rule 115 forbids such communication except with the permission of the Secretary of State. Prison Service Headquarters, on behalf of the Secretary of State, appears to have been unclear as to the basis on which POA officials might comment to the media on Prison Service matters. The letter of 18 October 2004 from Prison Service Headquarters indicates that no formal agreement existed and proposed a meeting with a view to reaching a mutual

understanding and protocol which would address the issues raised in the letter, namely the matters upon which POA officials may comment, who those POA officials might be and what restrictions would be applicable. For present purposes it might be noted that one of the particular issues referred to upon which a mutual understanding and protocol was to be reached was "who those officials might be" who could communicate with the media. The approach taken in the letter of 18 October 2004 does not appear to be consistent with the comments of the Head of Personnel to the Area Chairman some three months later when, while recognising that there was no formal agreement, he expressed an understanding as to the precise issue of who the POA officials might be who could communicate with the media, namely that the Area Chairman was the sole spokesperson unless the Area Chairman delegated authority to a POA colleague. Also by January 2005 it was being stated by the Area Chairman that the Area Committee and all elected officials of the POA were aware of the arrangement in relation to communication with the Press, even though the Press, Communications and Planning official at Prison Service Headquarters does not appear to have been aware of that arrangement on 18 October 2004.

[17] It seems clear that, on the Area Chairman's approach, delegation need not be express but may be implied, because all of the applicant's previous press communications were undertaken without objection and without express approval from the Area Chairman. If the issue relating to Mourne House was within the applicant's remit as Chairman of the Maghaberry branch of the POA in October 2004 then he might reasonably have expected to have implied authority to communicate with the media on the issue. Whether it was within his remit is a matter of debate between the applicant and other officials of the POA. For present purposes the particular factual issues discussed above in relation to the scope of the applicant's authority within the POA and the scope of authority to communicate with the media are issues that remain unresolved. The different positions have been set out on affidavit in this Judicial Review, but the issues require further examination and do not lend themselves to resolution on affidavit. Judicial Review is not a suitable vehicle for the resolution of such factual disputes. Had the applicant's claim to a clearly established past practice in relation to communication with the media not been disputed in the papers, or had the dispute been capable of resolution on the papers, the position in this application might have been different.

[18] The claim in relation to a consistent past practice as to communication with the media is formulated by the applicant as a breach of consistent past practice, as failing to have regard to consistent past practice, by reference to his role as Chairman and representative of the Maghaberry branch of the POA, as failing to give notice of an alleged change of practice in relation to communication with the media and as a legitimate expectation based on that past practice. As it has not been possible to ascertain the factual position in

relation to past practice on the basis of the papers in this application the applicant cannot succeed on any of the formulated grounds based on past practice. The issues of the scope of the past practice and the remit of the applicant as a representative of the POA are matters for further investigation which will have to be determined as an aspect of any disciplinary proceedings.

Disciplinary proceedings and Judicial Review.

[19] The respondent contends that the other matters relied on by the applicant are also matters that ought to be determined in the disciplinary proceedings. Reliance is placed on R v Chief Constable of Merseyside Police Ex Parte Merrill [1989] 1 WLR 1077 which involved disciplinary proceedings against a policeman. There was a preliminary issue as to whether a notice of proceedings had been served on the policeman as soon as reasonably practicable. This was treated as a preliminary issue by the Tribunal and the proceedings were adjourned for a Judicial Review of the Tribunal's ruling on the preliminary issue. Both decisions were described by the Court of Appeal as mistaken. Two elements of the judgment are relied on by the respondent. First, that a disciplinary tribunal has a general power to dismiss proceedings on the ground of unfairness, which the respondent contends is sufficient to enable the tribunal in the present case to address all the applicant's grounds. Second, that it is rare to have a situation in which Judicial Review should even be considered before a final decision in the disciplinary proceedings.

[20] I accept the respondent's argument in respect of all the other grounds relied on by the applicant. The applicant contends that he cannot receive a fair hearing in the disciplinary proceedings. He relies on apparent bias on the basis that there is a conflict of interest in the case of certain officers connected with the disciplinary proceedings and certain officers affected by the inquiry into Mourne House, together with a limited number of those who might otherwise qualify for involvement in the disciplinary proceedings. The composition of the disciplinary tribunal has not been established. The issue of apparent bias may be raised before the disciplinary tribunal. At this stage it has not been established that the applicant cannot receive a fair hearing in the disciplinary proceedings.

[21] The applicant contends that there has been improper motive and improper purpose in the commencement of the disciplinary proceedings against the applicant. This is an aspect of the claim that there has been a change of past practice and any consideration of improper motive or improper purpose requires an examination of the matters giving rise to the factual disputes referred to above, being an examination that should first be undertaken in the disciplinary proceedings. This is an issue that can be raised in the disciplinary proceedings. Further the applicant contends that the

commencement of disciplinary proceedings is a breach of the applicant's right to freedom of expression under Article 10 of the European Convention on Human Rights. Before determining this issue again it will be necessary to ascertain the proper factual basis for the restrictions imposed on the applicant. This is a matter initially to be determined by the disciplinary tribunal. The applicant contends that the charges served on the applicant were unsigned and undated but a copy produced at the hearing had been signed and dated. Any issue on this matter can again be raised at the disciplinary hearing. Finally the applicant contends that the decision to commence disciplinary proceedings was unfair and unreasonable and I do not accept that it has been established to be so. All other issues raised by the applicant may also be raised at the disciplinary tribunal.

[22] As the applicant has not made out any of the grounds of Judicial Review the application is dismissed.