Neutral Citation no. [2003] NIQB 30 | *Ref:* **KERF3919**

Judgment: approved by the Court for handing down | *Delivered:* **06/05/2003**

(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 RICHARD NICHOLSON

FOR JUDICIAL REVIEW

KERR J

[1] In this application for judicial review a preliminary point has arisen as to whether the application should be allowed to proceed. The applicant was until recently a sentenced prisoner in HM Maghaberry, serving a sentence of 12 years for sexual offences. On 19 June 2002 he was adjudicated guilty of an offence against discipline and a penalty of three days cellular confinement was imposed. By his judicial review application he challenged both the adjudication and the award of cellular confinement. On the application for leave to apply for judicial review (which was heard on 21 June 2002) the applicant was granted leave by Weatherup J to challenge the award of cellular confinement only; he was not permitted to proceed with his challenge to the adjudication. The applicant was granted interim relief in respect of the outstanding period of cellular confinement so that he has not served all the period of this penalty. The substantive case came on for hearing before me on 2 May when it became clear that the applicant had been released on licence on 17 April 2003.

[2] For the respondent Mr Maguire has submitted that the dispute between the applicant and the prison authorities is now an entirely academic one; there is, he says, no prospect of the applicant being required to serve the outstanding period of cellular confinement, even if his licence is revoked. Furthermore, Mr Maguire says, the issues that arise in the application are peculiar to the case; they do not give rise to any point of general importance nor is their resolution likely to affect a significant number of other cases.

[3] For the applicant Mr Treacy QC submits that the fact that the applicant is now at liberty is purely fortuitous. The application was fixed for hearing in

January of this year. If an earlier date had been available the applicant would have had his application dealt with before his release. It would be anomalous that he should be denied the opportunity to challenge the validity of the adjudication simply because a hearing date was not available before now. In any event, Mr Treacy argues, the case does give rise to an issue of general importance. It is the applicant's contention that when his adjudication was imminent his solicitors made representations to the governor that he was at an increased risk of suicide if the award of three days cellular confinement was carried out. Mr Treacy suggests that the governor, on receiving these representations, was bound to have the applicant examined by a competent medical expert, at least. It is argued that the failure to arrange such an examination amounted to a breach of the applicant's rights under article 2 of the European Convention on Human Rights. There is every reason to suppose, Mr Treacy claims, that the court's ruling on this argument will have implications for future cases and will provide guidance to the Prison Service as to the manner in which it should react to similar representations that may be made for other prisoners.

[4] In *R v Secretary of State ex parte Salem* [1999] AC 450, 457 Lord Slynn of Hadley addressed the question of when it is suitable to continue to deal with a case where the issues have become academic. He said: -

> "The discretion to hear disputes, even in the area of public law, must, however, be exercised with caution and appeals which are academic between the parties should not be heard unless there is a good reason in the public interest for doing so, as for example (but only by way of example) when a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future."

It is to be noted that in that case (which involved a challenge to the withholding of income support to the appellant who was claiming refugee status) the issues became academic one month before the hearing in the House of Lords when the appellant was granted refugee status.

[5] Mr Treacy argued that the *Salem* case should be distinguished because it involved a decision by the House of Lords as to whether it should entertain an appeal rather than whether a case should be dealt with at first instance. I do not accept that the principle should be any different in the two situations. It is noteworthy that Lord Slynn expressed the rule in general terms. The real issue is whether the dispute is academic. If it is, the principle should be applied, irrespective of when that situation arose.

[6] The *Salem* principle was considered by the Court of Appeal in this jurisdiction in *Re McConnell's application* [2000] NIJB 116. Delivering the judgment of the court, Carswell LCJ said: -

> "It is not the function of the courts to give advisory opinions to public bodies, but if it appeared that the same situation was likely to recur frequently and the body concerned had acted incorrectly they might be prepared to make a declaration, to give guidance which would prevent the body from acting unlawfully and avoid the need for further litigation in the future."

That case involved a challenge to a decision of the Parades Commission imposing conditions on the appellant and all other participants in a public procession organised by the Long March Committee, which took place in Lurgan on 3 July 1999. The appellant's application for judicial review was dismissed on 2 July 1999 but by the time of the hearing before the Court of Appeal the date on which the parade was due to take place had passed. The Court of Appeal considered that it was likely in the future that the Commission would have to rule on applications similar to that involved in the appellant's case and stated that it would be disposed to make a declaration if "there was a substantial possibility that [the Commission] would then act in a way which was clearly outside its powers or contrary to its prescribed procedures". It concluded that there was not a *prima facie* case that it had acted in such a way and therefore refused to entertain the appeal.

[7] The present legal position would therefore appear to be that a court asked to give a decision on an academic issue should normally decline to do so unless there is good reason to rule on the matter. Generally it will be necessary to demonstrate that such a ruling would not require a detailed consideration of facts; it should also be shown that a large number of cases are likely to arise (or already exist) on which guidance can be given; that there is at least a substantial possibility that the decision maker had acted unlawfully and that such guidance as the court can give is likely to prevent the decision maker from acting in an unlawful manner.

[8] In the present case I am satisfied that the issues arising in the judicial review application are now academic since the applicant has been released from prison and I have been told by Mr Maguire that he will not be required to serve the remainder of the cellular confinement even if his licence is revoked and he is recalled to prison. Whether the case should be allowed to proceed must therefore be decided in accordance with the principles outlined in the preceding paragraph.

[9] The case would require a detailed examination of disputed facts. The applicant makes a number of claims that are not accepted by the Prison Service. In particular he asserts that he had been examined before the adjudication only for the purpose of determining whether he was fit for the adjudication whereas the Prison Service claims that the medical examination was designed to determine his fitness for both the adjudication and cellular confinement. There is also a dispute as to the extent of the examination undertaken by Dr Nutt and Dr Gallagher, the two medical officers who carried out the examinations of the applicant. Both doctors are accused in the skeleton argument filed on behalf of the applicant of being "less than candid" about their experience of the applicant's psychiatric difficulties and of being "misleading" in their reference to the applicant's clinical records.

[10] There are further factual issues that would require to be resolved if the case proceeded to a hearing. These include whether the applicant entertained genuine fears as to whether he might commit suicide if required to serve the penalty of cellular confinement; whether he had a previous period of cellular confinement reduced because of psychiatric problems and whether the he was aware that he could make representations when he was examined by the doctors about his capacity to withstand cellular confinement.

[11] Apart from the need to make detailed factual findings, the case is not one which should proceed because it is highly fact specific. The circumstances are unlikely to be reproduced. There might well be cases in the future where the prospect of cellular confinement will give rise to article 2 issues but they are unlikely to duplicate the position of the applicant.

[12] It follows that the resolution of the issues that arise in the present application is unlikely to provide guidance to the Prison Service in future cases. Mr Treacy argues that the proper reaction of prison governors to requests for independent medical confirmation of the fitness of prisoners to withstand cellular confinement is likely to arise in cases in the future. I am not at all sure that this will happen with any frequency but even if that were so it is by no means probable that authoritative guidance could be derived from the present case. As I have said, the outcome of the application depends heavily on the view that one would take of the particular circumstances of the case. Whether one would conclude that the governor was justified in acting on the opinions of the two doctors who examined the applicant must depend on what view one forms of the facts that are unique to this case. While the opportunity might exist for making some general comments about the requirements of article 2 these are not likely to provide authoritative guidance for other cases where the factual matrix will almost certainly be different from that which underlies the present application.

[13] I have concluded, therefore, that this is not a case in which an exception to the general rule is justified. I must refuse the application that the case be allowed to proceed.