

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY SAMUEL ANDERSON
FOR JUDICIAL REVIEW

WEATHERUP J

Seperated prisoners at HMP Maghaberry.

[1] The applicant is a prisoner at HMP Maghaberry and seeks Judicial Review of a decision of the Secretary of State for Northern Ireland made on 26 October 2004 refusing the applicant's petition requesting a transfer to separated accommodation for loyalist prisoners at Bush House, HMP Maghaberry. Mr Maguire BL appeared for the applicant and Mr McMillan BL appeared for the respondent.

[2] In August 2003 the Secretary of State appointed a Safety Review Team chaired by John Steele with terms of reference to consider the options for improving conditions at Maghaberry Prison, particularly as they related to safety for all prisoners and staff and to make recommendations to the Secretary of State. The Steele Report was published in August 2003 and concluded that separation of paramilitary prisoners was necessary in the interests of safety. The arrangements for separation within the prison were left to be dealt with by the Prison Service and the Governor. The option was described as "separation by paramilitary affiliation" which it was stated could provide a safer environment provided staff remained on landings, normal lock-ups were applied and the prisoners had the option of mixed accommodation. These conditions were added to ensure that what was described as "Maze style segregation" was out of the question on safety grounds and the Government and the Prison Service were advised to make it clear beyond doubt that 24 hour unlock and the withdrawal of staff were not negotiable.

[3] On 8 September 2003 the Government accepted the recommendations of the Steele Report and introduced separated accommodation by political affiliation. An explanatory booklet "Compact for Separated Prisoners" was issued in February 2004 stating that the Government had accepted the Steele review recommendation that Republican and Loyalist prisoners with paramilitary affiliations should be accommodated separately from each other and from the rest of the prison population on a voluntary basis within Maghaberry prison. Paragraph 3 of the Compact asked "Who can go into separated conditions?" The answer was provided as follows -

"All applications for separated conditions will be considered by the Secretary of State who, in reaching a decision, will have regard to -

- whether the applicant is 18 or over
- the nature of the offence or alleged offence
- the applicant's criminal record
- the applicant's prison background
- whether or not the applicant will be at risk or pose a risk in separated conditions
- whether or not the applicant is or is perceived to be a member or supporter of a paramilitary organisation
- such other credible information as may be considered appropriate."

This application has focussed on the status of the sixth criterion as to whether the applicant is or is perceived to be a member or supporter of a paramilitary organisation.

The applications for transfer to separated conditions.

[4] The applicant is serving a sentence of life imprisonment at HMP Maghaberry further to conviction on 3 May 2002 on a charge of murder. He was placed in Erne House and on 17 November 2003 the applicant applied to be transferred to separated conditions and on 10 January 2004 he withdrew his application. On 12 February 2004 the applicant made a further application to be transferred to separated conditions but there were no cell spaces in the separated loyalist wings and the application was not processed. The application was revived on 2 April 2004 and the applicant was interviewed by Governor Martin and Principal Officer Davis. In the application forms and at interview the applicant did not claim affiliation with a paramilitary organisation nor did he claim that he was under threat in his prison accommodation in Erne House. Governor Martin did not consider that the applicant was perceived to be a member or supporter of a paramilitary organisation nor that his conviction for murder had been sectarian. Information available to Governor Martin from the police did not provide any

paramilitary trace for the applicant. Information available to Governor Martin from the prison security department did not indicate any paramilitary affiliation. Governor Martin decided that the applicant did not meet the criterion that an applicant is or is perceived to be a member or supporter of a paramilitary organisation and the application for transfer to separate conditions was not recommended. This recommendation was forwarded to Max Murray, a deputy Director of Operations at the Northern Ireland Prison Service. Mr Murray agreed that the applicant did not satisfy the criterion of paramilitary affiliation and on 7 April 2004 refused the application.

[5] The applicant then petitioned the Secretary of State on 14 April 2004 and addressed all the criteria set out in the Compact and stated that he was a supporter of a specified paramilitary organisation. Governor Martin again recommended refusal of the application on the basis of an absence of paramilitary affiliation and Tom Woods a deputy Director of Operations at the Northern Ireland Prison Service accepted that recommendation. On 18 May 2004 the applicant's request for a transfer to separated conditions was refused.

[6] On 20 May 2004 the applicant was involved in an incident which resulted in him being removed from Erne House and placed in a special supervision unit under Rule 32 of the Prison and Young Offenders Centre Rules (NI) 1995. As a result of various extensions the applicant remained on Rule 32 until November 2004. His placement in the special supervision unit under Rule 32 is not under challenge in this application for Judicial Review. The incident of 20 May 2004 that led to the applicant being placed in the special supervision unit arose when the applicant approached an officer and demanded to be taken off the landings. He stated that he did not wish to mix with Roman Catholics or sex offenders. The applicant proceeded to smash the TV, the video recorder and the class office window and was then removed to the special supervision unit. Later extensions of the applicant's restriction of association under Rule 32 were on the basis that the applicant refused to remain in Erne House stating that he would not mix with Roman Catholics.

[7] On 8 June 2004 the applicant's solicitors wrote to the Governor and to Prison Service Headquarters referring to a request from the applicant to be transferred from Erne House as a result of being threatened by Republican prisoners. It was stated that the applicant had reported these threats to prison staff as recently as 25 May 2004. As noted above the requests for transfer to separated conditions had not been based on threats to the applicant's safety. The applicant had met with Governor Martin for interview about his application to transfer to separated conditions in April 2004 and they had spoken on other occasions and the applicant had not raised the issue of threats from other prisoners. The solicitor's complaint seems to have been treated as having been overtaken by the applicant's move from Erne House on 20 May 2004.

[8] On 15 September 2004 the applicant further petitioned the Secretary of State for transfer to separated conditions. Governor Kennedy recorded that the applicant did not provide any evidence to support a change of the earlier decision and recommended refusal on the ground that the applicant did not meet the criteria for separated conditions. The petition and recommendation were considered by Mr Woods at Prison Service Headquarters who agreed with the recommendation and on 26 October 2004 the applicant was informed that his request for a transfer to separated conditions was refused.

[9] On 7 November 2004 the applicant reported threats from Republican prisoners whom he did not wish to name. Further to a risk assessment it was recommended that the applicant be returned to Erne House and monitored closely. A further risk assessment was carried out on 16 February 2005 when it was recommended that the applicant remain in Erne House and be closely monitored.

[10] In his grounding affidavit filed in December 2004 the applicant stated that since 2003 he had been receiving threats to his life from Republican prisoners in Erne House and following those threats he had made numerous requests for transfer to separated conditions, including a request for transfer on 20 May 2004. By a second affidavit filed in January 2005 the applicant stated that in objecting to remaining in Erne House he may have referred to Roman Catholics but his concern was for the threats to his safety from other prisoners. In a third affidavit filed in April 2005 the applicant again took issue with the view being attributed to him that his objection was to being in Erne House with Roman Catholics and stated that his concern was for threats emanating from Republican prisoners.

[11] The applicant supports his application for a transfer to separated conditions on the ground of safety, because of threats from Republican prisoners, and also on the ground of support for a paramilitary organisation. These grounds have not always been the clear basis of the applications that have been made and the respondent has considered the reasons for the proposed transfer to be based on a dislike of Roman Catholics and sex offenders. However in the course of the continuing process relating to the transfer applications the respondent did assess the applicant's paramilitary affiliation and the risk to his safety. For the purposes of the present application it will be assumed that the applicant's grounds for the proposed transfer to separated conditions are his reported threats to his safety from Republican prisoners and his declared support for a paramilitary organisation.

Grounds for Judicial Review.

- [12] The applicant's grounds for Judicial Review resolved to two matters -
- (i) that the Secretary of State failed to take reasonable measures to protect the applicant's right to life under Article 2 of the European Convention on Human Rights;
 - (ii) that the Secretary of State abused his discretion under Rule 9(4) of the Prison Rules relating to the placement of prisoners by elevating membership or support for a paramilitary organisation to a pre-condition for transfer to separated conditions and thereby fettered his discretion and failed to employ the full width of his discretion under Rule 9(4).

Article 2 of the European Convention.

- [13] Article 2 of the European Convention on Human Rights provides that -

“Everyone's right to life shall be protected by law.”

Article 2 includes a positive obligation to protect life and “it is sufficient for an applicant to show that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge. This is a question which can only be answered in the light of the circumstances of any particular case.” Osman v United Kingdom [1998] 29 EHRR 245 at paragraph 18.

[14] The application of Article 2 to the placing of a prisoner at risk was considered by the Court of Appeal in R (Bloggs) v Secretary of State for the Home Department [2003] 1 WLR 2724. The starting point is that the right to life under Article 2 is unqualified (paragraph 64). However despite the fundamental and unqualified nature of the right to life it is still appropriate to show *some* deference to and/or to recognise the special competence of the Prison Service in making a decision going to the safety of the inmates life. The intensity of the court's review is greater - perhaps greatest in an Article 2 case - than for those human rights where the Convention requires a balance to be struck (paragraph 65).

[15] Carswell LCJ visited this issue in Re Meehan's Application (2004) NIJB 53 in the context of an application for a personal protection weapon. At paragraph [18] it was stated -

“In our opinion it is useful to focus, as did the judge in the present case, on whether a breach of Article 2 has been established rather than concentrating on the question whether Article 2 has been engaged. Of course if Article 2 has not been engaged at all, there cannot be a breach, but a decision that it has been engaged does not necessarily provide a conclusive answer to the question whether the State has been in breach of the requirements of the Article. We respectfully agree with the approach of the Court of Appeal in *Lord Saville of Newdigate v Widgery Soldiers*, [2001] EWCA Civ 2048 which in our view is not inconsistent with that of the ECtHR in *Osman v United Kingdom*. The court should ascertain the extent or degree of risk to life, take into account whether or not that risk has been created by some action carried out (or proposed) by the State, determine whether it would be difficult for the State to act to reduce the risk and whether there are cogent reasons in the public interest why it should not take a course of action open to it which would reduce the risk. It should then balance all these considerations in order to determine whether there has been a breach of Article 2.”

[16] It is not in dispute that the respondent has a duty to protect the life and safety of the applicant and must take all steps that could be reasonably expected to avoid a real and immediate risk to the life of the applicant of which they have or ought to have knowledge. The respondent contends that any risk to the applicant is addressed by monitoring the applicant in Erne House and that if the applicant was at such a risk as warranted his removal from Erne House he would be removed, but that removal would not result in the applicant being moved to the separated conditions for Loyalist prisoners at Bush House. As Governor Martin states at paragraph 9 of his affidavit -

“Separated accommodation is not designed to deal with individuals’ concerns as to their safety. There are other methods available to the respondent if concerns arise as to the safety of a prisoner. For example a move of prison (although not for a life sentence prisoner) the vulnerable prisoners unit or the close monitoring in normal location. If the applicant has real concerns about threats to his life, a transfer to the separated prisoners unit is not the answer to his problem.”

Of the three options noted by Governor Martin the first is not available to the applicant as he is a life prisoner, the third is being applied at present and the second is available if considered necessary.

[17] There is a dispute as to the extent to which the applicant has made complaints about threats to his safety from Republican prisoners in Erne House. To the extent that the applicant has made complaints about threats to his personal safety those matters have been assessed by the prison authorities and a determination made as to the appropriate response. However had the respondent determined that the reasonable measures required to address the risk to the applicant would involve his removal from Erne House he would not have been transferred to Bush House. I am satisfied that the decision not to transfer the applicant to separated conditions in Bush House is not a breach of Article 2 of the European Convention. If there is a real and immediate risk to the applicant the respondent will undertake appropriate measures and if that requires removal from Erne House the applicant will be transferred to the vulnerable prisoners unit or other appropriate placement. A real and immediate risk that was judged to exist would not assist this applicant in securing a transfer to separated conditions.

Rule 9(4) of the Prison Rules.

[18] Rule 9(4) of the Prison and Young Offenders Centre Rules (Northern Ireland) 1995 provides that –

“Prisoners may be located in such part of the prison as the governor may determine by reference to their classification and any other factors which he may decide to take into account.”

[19] The respondent has a discretion as to the placement of the applicant within the prison. The Compact for Separated Prisoners provides that in considering whether an applicant may transfer into separated conditions the Secretary of State “will have regard to” the specified criteria, which include paramilitary affiliation. The applicant contends that the policy contained in the Compact for Separated Prisoners does not make it a pre-condition for transfer to separated conditions that the applicant should have paramilitary affiliations, but rather provides that this is one aspect to which regard will be had. The applicant contends that the policy permits of transfer to separated conditions even for those prisoners who do not have paramilitary affiliation. Accordingly, in treating paramilitary affiliation as a pre-condition and failing to recognise the wider discretion, the applicant contends that the respondent has fettered its discretion and not exercised the powers under Rule 9(4).

[20] The Compact for Separated Prisoners must be read in its context. The first paragraph of the Executive Summary at the beginning of the Compact provides the context for separated conditions as being Government acceptance of the Steele Review recommendation that Republican and Loyalist prisoners with paramilitary affiliation should be accommodated separately from each other and from the rest of the prison population. It is clear from the Executive Summary and from the Steele Review that a separation scheme was to be introduced for paramilitary prisoners that did not involve "Maze style segregation". Separated prisoners are held in Loyalist and Republican wings. However this is regarded as an exceptional measure as is apparent from paragraph 2 of the Compact which provides that normally prisoners in Northern Ireland are expected to live in integrated conditions which the Prison Services believes is the best way to run prisons as it normally provides the greatest safety. Governor Martin describes the separation recommendation of the Steele Review as "a response to a problem of disorder among paramilitary prisoners. It was not a mechanism to allow prisoners to join the separated houses simply because they request to do so not withstanding no known paramilitary association."

[21] I am satisfied that paramilitary affiliation was intended to be a precondition for transfer to separated conditions as the overall context of the Compact for Separated Prisoners seeks to address the issue of paramilitary prisoners. While the wording of the Compact suggests that paramilitary affiliation is only a consideration and not a condition for transfer, this document is not a statutory instrument and I am satisfied from the overall context of the Compact that an applicant for transfer must satisfy the respondent that he is or is perceived to be a member or supporter of a paramilitary organisation. Further I am satisfied that the respondent is entitled to place prisoners in separated conditions by reference to paramilitary affiliation. Accordingly the applicant must satisfy the requirement for paramilitary affiliation if he is to be transferred to separated conditions.

[22] The applicant claims to be a supporter of a specified paramilitary organisation. The respondent has made enquiries from staff in the prison, the police and the prison security section and has concluded that the applicant is not affiliated to a paramilitary organisation. The applicant's claim that he is a supporter of a paramilitary organisation is not sufficient to satisfy the requirement. The respondent must be satisfied that the applicant is or is perceived to be a member or supporter of a paramilitary organisation. The respondent has made relevant inquiries and has not been satisfied that the applicant has the necessary paramilitary affiliation. The applicant has not established any grounds in Judicial Review for interfering with that conclusion.

[23] The applicant makes a number of additional points that are based on the mistaken premise that a threat to the applicant's safety is a basis for securing a placement in separated conditions. The applicant contends that even if he does not satisfy any requirement for paramilitary affiliation he is entitled to be considered for transfer on safety grounds. Even assuming that the applicant cannot remain in Erne House on safety grounds he would not be transferred to Bush House for that reason. Further, the applicant contends that the decision to refuse the transfer in October 2004 was invalid as the risk assessment was not carried out until November 2004 after the decision was made. Again the risk assessment concerned the applicant's safety and the prospect of a transfer to protected conditions if appropriate. Of course the risk to the applicant in separated conditions would be a factor in any decision to transfer to separated conditions, as would be the case with any placement, but it is not a basis for the transfer.

[24] The applicant contends that the respondent has fettered the discretion under Rule 9 (4) by excluding the applicant from consideration for transfer to Bush House. Not all prisoners are eligible for transfer to all placements in the prison system. The applicant has not satisfied the criteria for transfer to separated conditions. The applicant has not challenged the establishment of separated conditions and I have upheld the requirement for paramilitary affiliation imposed by the respondent. Rule 9(4) does not entitle a prisoner to be considered for transfer to every placement within the prison. It is not a fettering of the discretion under Rule 9(4) to impose conditions for transfer to a particular placement. There may be Judicial Review grounds for challenging the imposition of certain conditions, but no such grounds have been established in the present case.

[25] The applicant has not established any grounds for Judicial Review and this application is dismissed.