Neutral Citation No: [2018] NIQB 26 ***Judgment: approved by the Court for handing down (subject to editorial corrections)****	***Ref:*** **KEE10581** ***Delivered:*** **13/03/2018**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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IN THE MATTER OF AN APPLICATION BY NATHAN HASTINGS FOR JUDICIAL REVIEW OF A DECISION OF THE NORTHERN IRELAND PRISON SERVICE

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KEEGAN J

[1] This is an application for judicial review of a decision of the Northern Ireland Prison Service ("NIPS") not to allow the applicant to add his solicitor's mobile telephone number to a list of permitted telephone numbers. The application is dated 19 May 2017 and leave was granted on 22 September 2017.

[2] The applicant's case is contained in his affidavit which is dated 9 May 2017. Further affidavits were filed by the applicant's solicitor dated 21 September 2017, 15 January 2018 and 16 January 2018. The respondent has filed evidence comprised in two affidavits dated 1 December 2017 and 25 January 2018.

[3] Mr Moriarty BL appeared on behalf of the applicant and Mr Corkey BL on behalf of the respondent. I am grateful to both counsel for their helpful written and oral submissions.

[4] The Order 53 Statement claims relief by way of the following:

(a) A declaration that the decision not to allow the applicant to add his solicitor's mobile telephone number to his list of permitted telephone numbers from the prison is illegal, irrational and unfair.

(b) An order of certiorari to remove to the court and quash the decision.

(c) An order of mandamus requiring the Northern Ireland Prison Service to reconsider the decision.

[5] The grounds upon which the relief is sought are pleaded as follows:

(i) The decision not to allow the applicant to add his solicitor's mobile telephone number to his list or permitted telephone numbers from the prison is incompatible with the applicant's rights under the common law.

(ii) The decision not to allow the applicant to add his solicitor's mobile telephone to his list of permitted telephone number from the prison is incompatible with the applicant's rights under Article 8 of the ECHR and therefore is in breach of section 6 of the Human Rights Act 1998.

(iii) The decision not allow the applicant to add his solicitor's mobile telephone number to his list of permitted telephone numbers in the prison is irrational and unfair in the circumstances.

(iv) The applicant is entitled to expect parity with other prisoners in the United Kingdom and has the legitimate expectation that his solicitor's mobile telephone number would be added to his list of permitted telephone numbers from the prison.

(v) The decision not to allow the applicant to add his solicitor's mobile telephone number to his list of permitted telephone numbers from the prison is incompatible with the applicant's rights under Article 6 of the ECHR and therefore is in breach of section 6 of the Human Rights Act 1998.

The applicant's evidence

[6] In his affidavit the applicant explains that he is presently a sentenced prisoner in Maghaberry Prison. He states that he had been trying to have the mobile telephone number of his solicitor Mr Ferghal Shiels of Madden and Finucane added to his list of permitted telephone numbers from the prison. He avers that most recently on 7 February 2017 he made a formal request to the Governor bearing the unique request identification number NY/02487/17. He also avers that this request was refused by the Security Governor. He then states that on 12 February 2017 his solicitor wrote to the security governor seeking consent to his telephone number being added to the approved list.

[7] At paragraph 6 of his affidavit the applicant states that:

> "I have telephoned the Madden and Finucane office looking for Mr Ferghal Shiels on several occasions about a number of separate matters and have frequently been unable to make contact. At the present time, I am taking advice in respect of an outstanding adjudication, about

> outstanding complaints with the Prisoner Ombudsman, about a proposed transfer to a prison in the Republic of Ireland and about issues regarding the perceived discrimination against Irish culture, language and identity within the prison by prison officers towards separated prisoners."

[8] The applicant also avers that he has contacted Mr Shiels with the authority of other prisoners to discuss matters relating to adjudications that they were facing and to raise issues for consideration on their behalf. At paragraph 9 of his affidavit the applicant refers another prisoner Mr Neil Hegarty by way of example who he states had an apparent difficulty in contacting Mr Shields on 18 February 2017 in order to achieve compassionate temporary release. Various details are set out in the affidavit about the steps taken to advise Mr Hegarty and the ultimate outcome that he did obtain compassionate temporary release. The affidavit then refers to various other details from the solicitor's letter.

[9] The affidavits from Mr Shiels set out various matters in relation to this case. In particular in accordance with the duty of candour reference is made to the fact that the applicant made a complaint about this issue in 2014. In dealing with this, Mr Shiels avers that the reference to this complaint "misses the point" in that the applicant has now taken legal advice which he did not have in 2014. Paragraph 4 of Mr Shiel's first affidavit also refers to the fact that there is nothing to prevent the registration of mobile telephone numbers with the Law Society. Various other matters are averred to in Mr Shiel's first affidavit which are by way of comment and are not particularly helpful within the judicial review. The second and third affidavits of Mr Shiels refer to how the the postal system and the video link system work within the prison by way of analogy. In his second affidavit Mr Shiels avers that the applicant first contacted him in respect of the subject matter of these proceedings on 10 February 2017 and he states that:

> "This issue arose because the applicant had tried to contact me at our office unsuccessfully on a number of occasions and his inability to contact me was causing the applicant a great sense of frustration."

The respondent's evidence

[10] The replying affidavit of 1 December 2017 sets out some background and refers to:

> "The unfortunate reality that there are persons detained in prison and persons outside of the prison estate who seek to carry on illicit activity in contravention of both the criminal law and the prison rules. These activities put the

> lives of both prisoners and prison staff in jeopardy." The affidavit specifically refers to the smuggling of illegal and other unauthorised articles into the prison estate as a particular issue. Reference is then made to the fact that there "is a cohort of prisoners who have stated the aim of killing persons who they perceive as manifestations of the State. In their perception this includes NIPS prison staff."

[11] This affidavit continues by referring to the issues of mobile phones being particularly problematic in management terms within the prison. At paragraph 8 the affidavit states:

> "Unmonitored telecommunication lines outside of the prison can provide a constant, covert and unassailable means of communication between criminal elements and others. In recent times prisoners have gone to extreme lengths to secrete mobile telephones into prisons in this jurisdiction for the purpose of establishing covert lines of communication with persons involved in drug trafficking or other illegal activities. Within Maghaberry since 1 January 2017, 23 mobile phones have been recovered. Where phones are interrogated, it is clear that various criminal acts are usually planned, instigated and actioned through the use of the mobile phone."

[12] The affidavit then refers to the monitoring of telephone communications in the specific context of legal communications and states as follows:

> "NIPS also respects the need for prisoners to have confidential communications with their legal advisors. To this end NIPS makes the following provision for confidential legal consultation:
>
> (a) Private legal consultation rooms.
>
> (b) Video link.
>
> (c) Written correspondence.
>
> (d) Prior to and following video court sessions there may be an opportunity for prisoners and their legal advisors to have video consultation.

(e) Prisoners are allowed to register their solicitor's landline number on their telephone contact list and, following verification, telephone communications to that telephone number will be considered legal communications and will not be monitored."

[13] Paragraph 17 states that:

> "A prisoner can request that his legal representative's landline number is added to the white list and subject to the verification process for all other requested numbers this number will be authorised and contact will be possible via the prisoner phone system."

[14] Paragraph 18 of the affidavit then explains the special protection for legal communications and states that legally privileged telephone calls and correspondence between a prisoner and his or her lawyer may not be recorded, listened to or read unless the Governor has reasonable cause to believe that the communication is being made to further a criminal purpose.

[15] The affidavit then refers to the applicant's particular status. It states at paragraph 19 that the applicant is a separated Republican prisoner and that he has successfully applied to be accommodated under those conditions. Certain criteria must be fully met to achieve this status which include that the applicant is a member or supporter of a proscribed organisation connected with the affairs of Northern Ireland and admitting him to separated conditions would not be likely to prejudice his safety.

[16] At paragraph 23 this affidavit refers to the particular vulnerability of mobile phones and describes this by virtue of their nature as in "transient, transferrable and vulnerable". This affidavit then details the fact that a complaint was received from the applicant by the Prisoner Ombudsman in May 2014 about NIPS refusal to add his solicitor's mobile phone number as an approved number on the prison phone system subject to legal privilege. It is confirmed that the Ombudsman upheld the complaint and made one recommendation in June 2015. The affidavit avers that NIPS received a recommendation that the Prison Service adopt the approach taken by the National Offender Management Service and develop a policy governing the use of legal representatives' telephone numbers. The affidavit explains that the Governing Governor and the Governor with responsibility for security considered the recommendation made by the Prisoner Ombudsman in 2015. The affidavit states that they have since retired and so it is not possible to provide a personal contemporary account of their consideration, however in response to the recommendation the then Governor of Maghaberry Prison indicated he was unwilling to accept this recommendation stating that his legal communications were

subject to legal privilege he was unable to satisfy himself that all mobile phones that would be provided for the purpose of legal communication were exclusively to be used for that purpose only and would not be accessed by other person not entitled to legal privilege.

[17] The respondent's case is then summarised at paragraph 32 which contains the rationale for refusing the applicant's request namely:

(a) Confidential communications by prisoners can be used by prisoners for a wide range of illicit reasons.

(b) There are unique threats associated with paramilitarism in Northern Ireland.

(c) Legal communications cannot be monitored.

(d) Mobile phones are impermanent, transient, transferable and vulnerable.

(e) There is no administrative mechanism that can be used to provide satisfactory and sustained verification that mobile phones are being used for the means intended or by the intended solicitor.

(f) That the risks that a mobile phone may be compromised and provide an opportunity for confidential communication between a prisoner and a third party cannot be satisfactorily mitigated.

[18] The second affidavit filed by the respondent makes a number of important points in relation to the issue of mail and video link. At paragraph 16 of this affidavit the author states he wishes to take this opportunity to categorically refute the suggestion that the NIPS, through its telephone policy, is somehow seeking to impugn the legal profession in this jurisdiction. The affidavit continues by reiterating the fact that NIPS puts a particularly high degree of trust in the legal profession which allows the system to operate effectively.

[19] Paragraph 19 of this second affidavit summarises the position as follows:

> "If NIPS were to allow mobile phone numbers to be added to a prisoner's list of telephone numbers for privileged legal communications the Prison Service would have to oversee a system that would involve dozens if not hundreds of different mobile telephones. NIPS would have no means of verifying the ownership of these telephones and they would have no power to compel solicitors to update their details if there was a

> change of circumstances. Put simply NIPS could not ensure that communications conducted by this means would be between a prisoner and a solicitor."

Legal context

[20] In this case there was no dispute about the relevant legal principles as they have a long and settled pedigree. In R (Daly) v Home Secretary [2001] 2 AC 532 the House of Lords dealt with the issue of prisoners' rights in the context of the ECHR after the imposition of a custodial sentence as a result of criminal conviction. Lord Bingham giving the leading speech in this case reiterated the fundamental importance of access to the courts in the following terms;

> "Any custodial order inevitably curtails the enjoyment, by the person confined, of rights enjoyed by other citizens. He cannot move freely and choose his associates as they are entitled to do. It is indeed an important objective of such an order to curtail such rights, whether to punish him or to protect other members of the public or both. But the order does not wholly deprive the person confined of all rights enjoyed by other citizens. Some rights, perhaps in an attenuated or qualified form, survive the making of the order. And it may well be that the importance of such surviving rights is enhanced by the loss or partial loss of other rights. Among the rights which, in part at least, survive are three important rights, closely related but freestanding, each of them calling for appropriate legal protection: the right of access to a court; the right of access to legal advice; and the right to communicate confidentially with a legal advisor under the seal of legal professional privilege. Such rights may be curtailed only by clear and express words, and then only to the extent reasonably necessary to meet the ends which justify the curtailment."

[21] Lord Bingham went on say that since the policy clearly infringed prisoners' rights to confidential communication with legal advisors the test was whether the extent of this infringement can be "justified as a necessary and proper response to the acknowledged need to maintain security, order and discipline in prisons and to prevent crime". This case placed the issue clearly within the framework of the European Convention on Human Rights ("ECHR") particularly Article 8.

[22] Counsel referred to the United Nations Basic Principles on the role of lawyers which articulates the following established and incontrovertible principle:

> "All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality."

Article 8 is engaged and any interference must of course be necessary in a democratic society, pursue a legitimate aim and be proportionate. This is referenced in a number of cases including *Silver v The United Kingdom* [1983] 5 EHRR 374 and *Dudgeon v The United Kingdom* [1981] 4 EHRR 149. Counsel also referred to the case of *R v Home Secretary Ex Parte Bamber* 15 February 1996 in relation to justifiable control of prisoner's communication with the media. I also bear in mind the principle that the judicial review court exercises a supervisory jurisdiction in making any determination. The respective roles of judges and administrators are fundamentally different and the decision maker as here is afforded a margin of appreciation.

Arguments made by counsel

[23] Mr Moriarty made a number of points which I summarise as follows:

(i) He contended that the NIPS's objections to this course were misplaced given that the mobile telephone number would be that of a solicitor and that the solicitor if the telephone was lost, misplaced or stolen could cancel the contract.

(ii) He also made the case that mobile telephones are vital lines of communication for solicitors in this type of work practised by the applicant's solicitor.

(iii) He made the point that solicitors just do not lend or otherwise give their phones to third parties because it would be unsafe to do so.

(iv) He argued that the suggestion of criminal, terrorist elements obtaining the ability to communicate with the accomplices within the prison under inappropriate legal privilege via the mobile phone is absurd.

(v) He made the point that the prisoners in England have a facility to use mobile telephones and the risks in England were marked given the threat from Islamic terrorists.

(vi) Overall Mr Moriarty argued that the decision was irrational. He also contended that it breached Article 8 of the ECHR because it was not a proportionate decision and it did not have a legitimate aim. He also argued that in view of the issues that were affecting the applicant in

relation to perceived discrimination against Irish culture, language and identity within the prison it is submitted that the Prison Service was acting in breach of Article 6 of the ECHR.

(vii) In relation to the delay in bringing the application Mr Moriarty sought to distinguish *Re Turkington's Application* [2014] NIQB 58 on the basis this was an on-going breach similar to the facts of *Somerville v Scottish Ministers* [2007] UKHL 44. As such, he argued that the delay should not prejudice the case given that in 2014 the applicant did not have legal advice. If the court was attracted to the delay argument Mr Moriarty submitted that this was a clear case where the time should be extended given that this an issue that would arise again.

[24] Mr Corkey, on behalf of the respondent made the following points which I reproduce in summary form:

(i) He stressed that there was a context to this application. He referred to the facility for confidential legal consultations via telephone constitutes only one of a suite of positive measures undertaken by the respondent to facilitate confidential legal consultations between prisoners and their legal representatives across a number of media including private legal consulting rooms, video link, written correspondence and telephone communication with a solicitor's landline.

(ii) Mr Corkey reiterated the point that the custodial sentence interferes with fundamental rights however he contended that the issue really was the proportionality of any interference.

(iii) Mr Corkey made a point the respondent has not made out a substantial case of detriment in his affidavit. He submitted that the evidence falls short in that the applicant really refers to the views of one other prisoner rather than making a substantial case in relation to himself.

(iv) Mr Corkey also referred to the fact that the respondent is unable to undertake some of the key components of a verification process for legal telephone numbers and has no power to compel a solicitor to inform the respondent of a change of mobile or other issues in relation to it.

(v) Mr Corkey referred to the very real concerns that the respondent has regarding the desire among criminal elements to have confidential lines of communication into and out of the prison estate. In all of those circumstances Mr Corkey argued that the issue in this case was not one which could be sustained in substance.

(vi) In any event, Mr Corkey argued that the delay in this case should militate against this application succeeding. He referred to the fact that the applicant is an intelligent man, who appears to have many channels of legal communication on-going in relation to various matters and that he acts as an advisor to other prisoners.

(vii) Mr Corkey referred to the fact that the applicant challenged the policy in 2014 and he was informed in June 2015 of the outcome and nothing further was done in this case until February 2017. As such, Mr Corkey contended the delay prejudiced the respondent given that the Governor who dealt with the original decision had now retired and in any event he argued that there was no explanation at all in the applicant's affidavit as to this and so the case should founder on the basis of delay.

Consideration

[25] I bear in mind the legal principles at play which are recited above in exercising this supervisory jurisdiction. There are a number of points that were raised in the written case by the applicant that I can deal with in fairly short order. Firstly, ground (v) in the Order 53 Statement raised an issue in relation to Article 6 of the ECHR which is described in the written argument as affecting the applicant in relation to perceived discrimination against Irish culture, language and identity. This line was not developed in argument and in my view it achieves no traction whatsoever.

[26] Secondly, the applicant did not develop the point of parity with other prisoners in the United Kingdom contained with ground (iv). I was not shown a specific policy from the other prisons. I am unaware of what protections or verifications are in place there in relation to solicitors' mobile communications. However, from the argument, I infer that the relevant Law Society is engaged with this and assists by way of maintaining a register. In any event, it is incorrect to state that just because there is a certain policy in one part of the United Kingdom that it should automatically apply to Northern Ireland. The analogy drawn with Islamic terrorists is also limited because it misses the point about the unique characteristics of the security situation in Northern Ireland and the particular threat to members of the security services and the NIPS which engages Article 2 of the ECHR.

[27] The question is whether the refusal decision by the Governor is illegal, irrational and unfair, grounds (i) and (iii) or in breach of Article 8 of the ECHR, ground (ii). I have looked carefully at the applicant's affidavit which forms the foundation of this case and I consider it to be weak in a number of respects. Whilst there is reference to the applicant not being able to contact a solicitor in February 2017, the detail is scant. There is then reference to another prisoner who ultimately succeeded in obtaining compassionate temporary release and so that evidence is not

persuasive. The applicant does not explain the delay in bringing this challenge between 2015 and 2017. By contrast the affidavits filed on behalf of the respondent are detailed and clearly explain the legitimate security aim and the management difficulties which would arise if the policy were altered. I recognise the margin of discretion afforded to the decision maker in this type of case. I should say that I accept the respondent's averment that it does not impugn the legal profession in any way in making a defence of this case.

[28] I do not consider that the applicant has established a breach of Article 8 or that the Governor's decision making is illegal, irrational or unfair in relation to him. I bear in mind that this is not a case about a prohibition on the applicant being able to obtain legal advice. The issue of legal advice is well provided for through a range of media described by the respondent including landline telephone, video link, letters and consultations. The applicant essentially raises a convenience point. I am far from convinced that the applicant has established any substantial detriment on the basis of the evidence I have received. I also consider that the delay point raised by Mr Corkey is well made. It is clear to me that this issue was raised in 2014 and adjudicated on in June 2015. There has been no adequate explanation by the applicant as to why it was not actioned prior to February 2017. Mr Moriarty made the case that some prisoners may not have the ability to understand these matters however he wisely backed away from the suggestion that this applied to the applicant. This is also a very different species of case from *Somerville* which related to on-going segregation with consequent detriment. So even if the applicant had convinced me in relation to his substantive complaint he has not overcome the delay point.

[29] However, this case does raise some wider points which are directed towards a potential change of policy. In looking at the issue it must be recognised that mobile telephones have particular characteristics. Telephone calls with solicitors are also distinguished by the fact that they are not recorded. If communication with solicitors by way of mobile telephone were to be permitted there would have to be robust management, verification and regulation. That would apply across the solicitor's profession. In terms of this wider policy point the applicant makes the case that the issue will arise again and so it needs to be adjudicated upon. I am unsure as to how pressing an issue this is and the need for change would have to be established. However, I have considered the argument. I note that there is a different position in England and Wales which I assume came about by way of administrative action after a consultation process.

[30] There are also a number of perspectives namely that of the applicant's solicitor who asserts that mobile telephone communication can be managed and safeguards can be put in place. In particular, the case was made that a register could be maintained by the Law Society. However, there is no evidence that the Law Society has been consulted or that this is feasible or that this meets the safeguarding concerns. There may also be a variability of view within the legal profession. The

position of the respondent has a number of strands namely security, safeguarding and that an alteration of policy would lead to an unnecessary burden at present. It seems to me that a judicial determination would not be purposeful in the absence of a process which should involve full consultation on these issues. I therefore decline to issue any general declaratory relief.

Conclusion

[31] Accordingly, for the reasons given above, this judicial review is dismissed.