

*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Delivered:	6/06/2012
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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

AN APPLICATION BY LOUIS MAGUIRE FOR JUDICIAL REVIEW

Maguire's (Louis) Application [2012] NIQB 39

TREACY J

Introduction

[1] The Applicant is a sentenced prisoner serving a life sentence for murder at HMP Maghaberry. His conviction is currently under appeal.

[2] In the Applicant's original Order 53 statement there were many and various grounds stated. However, all of those original grounds have been shed and, having been given leave to amend, only one new ground remains to be considered.

[3] The Applicant seeks a declaration that Rule 67(8) of the Prison and Young Offenders Centre Rules (Northern Ireland) 1995 is incompatible with Article 8 ECHR and *ultra vires*.

Arguments

[4] The Applicant states that his family visits are impaired by the requirement in Rule 67(8) that all visits take place within the hearing of a Prison Officer and that this represents an interference with his Article 8 rights. Any interference with the rights protected by Article 8 must be in accordance with the law and necessary and proportionate. It is contended that Rule 67(8) does not satisfy these requirements, in particular, because it does not afford a measure of legal protection against arbitrary interference by Public Authorities and is therefore not convention compliant.

[5] The Respondent argues that Rule 67(8) is lawful, necessary and proportionate. It is submitted that the rule represents a 'necessary and inevitable consequence of imprisonment' and that in evaluating any interference with Article 8 the court must take into account the actual monitoring which took place, which in this case they

argue was minimal. They further argue that the court must have regard to its limited supervisory role, having regard to the separation of powers, when it comes to matters of prison policy.

Statutory Framework

Prison and Young Offenders Rules (Northern Ireland)
1995

Preamble: 'in pursuance of S13 Prison Act (Northern Ireland) 1953

"67(1) Except as provided by statute and in these rules, a prisoner shall not be permitted to communicate with any person outside the prison, or that person with him, without the authority of the Department of Justice.

(2) Notwithstanding paragraph (1) above, and except as otherwise provided in these rules, the Department of Justice may impose any restriction or condition, either generally or in a particular case, upon the communications to be permitted between a prisoner and other persons if the Department of Justice considers that the restriction or condition to be imposed -

- a) does not interfere with the convention rights of any person; or
- b)
 - i) is necessary on any of the grounds specified in paragraph (3) below;
 - ii) reliance on the grounds is compatible with the convention right to be interfered with; and
 - iii) the restriction or condition is proportionate to what is sought to be achieved.

(3) The grounds referred to in paragraph (2) above are -

- a) the interests of national security;

- b) the prevention, detection, investigation or prosecution of crime;
- c) the interests of public safety;
- d) securing or maintaining prison security or good order and discipline in prison;
- e) the protection of health or morals;
- f) the protection of the reputation of others;
- g) maintaining the authority and impartiality of the judiciary; or
- h) the protection of the rights and freedoms of any person.

...

(7) Every visit to a prisoner shall take place within the sight of an officer unless the Department of Justice otherwise directs, and for the purposes of this paragraph a visit to a prisoner shall be taken to take place within the sight of an officer if it can be seen by an officer by means of an overt closed circuit television system.

(8) Subject to rule 71 [on communications with legal advisors], every visit to a prisoner shall take place within the hearing of an officer, unless the Department of Justice otherwise directs..."

S13 Prison Act (Northern Ireland) 1953

"1. Subject to the provisions of this Act the Department may make rules to be styled 'prison rules' for -

The administration, regulation and management of prisons;

The classification, segregation, accommodation, maintenance, clothing, treatment, training, employment, discipline, punishment and control of persons required to be detained in prisons;

...

9. The Department may by prison rules make provision for any other matter which appears to the Department to be necessary or expedient for the purpose of carrying this act into effect.”

Article 8 ECHR

“Right to Respect for private and family life

Everyone has the right to respect for his private and family life, his home and his correspondence.

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

Discussion

[6] The net point in this application is a simple one: does the wording of Rule 67(8) render it incompatible with Article 8 by virtue of failing to provide safeguards against arbitrary interference by public authorities? Is the rule overbroad, permitting unnecessary interference with the prisoners’ rights which serves no legitimate aim? Does the rule fail to articulate an appropriate threshold below which monitoring of visits is unlawful?

[7] The function of the Prison Service is to manage and administer our prison regimes. This is a broad responsibility and involves, at a minimum, ensuring that the goals of incarceration, punishment, containment, protection of society etc are achieved as best as possible. In carrying out this important social function they are also vested with the responsibility for the well-being and security of the prisoners in their care. In order to fulfil these heavy responsibilities the Prison Act (Northern Ireland) 1953, as set out above, permits the Prison Service to make prison rules for, *inter alia*, administration, regulation and management of prisoners.

[8] The Applicant has directed the court to various authorities from which some general points in relation to Article 8 and permissible interferences therefrom may be observed.

[9] In Gillan v UK [2010] 50 EHRR 45 at para76-77 it was stated:

“76. The Court recalls its well-established case law that the words, “in accordance with the law” require the impugned measure both to have some basis in domestic law and to be compatible with the rule of law, which is expressly mentioned in the preamble to the Convention and inherent in the object and purpose of Article 8. The law must thus be adequately accessible and foreseeable, that is, formulated with sufficient precision to enable the individual – if need be with appropriate advice – to regulate his conduct.

77. For domestic law to meet these requirements it must afford a measure of legal protection against arbitrary interference by public authorities with the rights safeguarded by the Convention. In matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, for a legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion conferred on the competent authorities and the manner of its exercise.”

[10] In Re C and Ors [2008] NI 203 at para 92 the court said:

“92. As appears from Klass for interception measures to be regarded as ‘necessary in a democratic society’ there must be safeguards in place to prevent abuse...”

[11] Campbell LJ went on at para 93 to quote Rotaru v Romania (2000) 8 BHRC 449:

“... in order for systems of secret surveillance to be compatible with Article 8 of the convention, they must contain safeguards established by law which apply to the supervision of the relevant services’ activities. Supervision procedures must follow the values of a democratic society as faithfully as possible, in particular the rule of law, which is expressly referred to in the Preamble to the convention. The rule of law implies, *inter alia*, that interference by the executive authorities with individual’s rights should be subject to effective

supervision, which should normally be carried out by the judiciary, at least in the last resort, since judicial control affords the best guarantees of independence, impartiality and proper procedure.”

[12] Applying this relevant case law to the instant case, several observations may be made. First, Rule 67(8) is not expressed as a discretion. It is a hard and fast rule and one which is accessible and foreseeable. Second, while the rule may appear to offer no judicial oversight, it must be read in conjunction with the general principles of the Prison Rules at Part 1:

“2. (1) These rules are made with regard to the following general principles –

All prisoners committed by the courts shall be held safely and securely for the protection of the community and in the interests of justice...

(h) Order and discipline in prison shall be maintained at all times with firmness and fairness but with no more restriction than is necessary for safe custody and well-ordered community life..

(j) Prisoners retain all rights and privileges except those removed as a necessary consequence of their imprisonment

(2) These principles, taken together, are intended as a guide to the interpretation and application of the rules.”

[13] The Prison Service has a discretion under the 1953 Act to make rules for the control of prisoners. This discretion has been used to formulate the 1995 rules. The 1995 rules clearly stipulate that they will impose no more restriction than is necessary for safe custody and well-ordered community life. These rules may be subject to judicial review, as here, and where that is the case regard must be had to the limits on the Prison Service’s discretion as expressed in the rules themselves and to the Convention jurisprudence. Therefore the argument that there is no judicial oversight of Rule 67(8) is not well-founded.

[14] Nowhere in the authorities is it suggested that a blanket restriction can *never* be necessary or proportionate, however when a blanket restriction is put in place it must be thoroughly scrutinised. Having ascertained that the claim cannot be upheld on the basis of a lack of safeguards therein, it must now be considered if the rule is necessary and proportionate. The question which must be asked is ‘Is it necessary in

a democratic society that all visits to prisoners must be within the hearing of a Prison Officer? Or would the protection of the interests provided for in Article 8(2) be adequately catered for by some other means?' (This is paraphrased from C and Ors [2007] NIQB 101 at para 79).

[15] It is not contended that the interests which the rule seeks to protect fall outwith the exceptions in Article 8(2). The only issue is whether the blanket restriction in Rule 67(8) goes beyond what is necessary to secure those interests. I find that it does not.

[16] As noted above the primary function of the Prison Service is to ensure the effective administration and management of the prison regime in Northern Ireland. Attendant on this is the requirement that the well-being and rights of prisoners in its care are protected. Mr Gray in his affidavit outlines the purpose of Rule 67(8) as 'to allow visits to prisoners to be properly monitored and ensure that no threat to the good order of the prison is being discussed or planned ... it is necessary to ensure that any criminal activity including details of a security nature are not being discussed.'

[17] It was noted in R v Home Secretary, ex p Daly [2001] 2 AC 532 at para5:

"5. 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."

[18] Later in that judgement, at para 7, quoting Raymond v Honey:

"7. A convicted prisoner, in spite of his imprisonment, retains all civil rights which are not taken away expressly or by necessary implication."

[19] It may be noted here that the *only* interference complained of in the current application is that prisoners' visits must be within the hearing of a prison officer, and that in all other ways contacts with family members are supported. As noted in Van Der Ven v Netherlands (2004) 38 EHRR 46 at para68:

"Any detention which is lawful for the purposes of Article 5 of the convention entails by its nature a

limitation on private and family life. Whilst it is an essential part of a prisoner's right to respect for family life that the prison authorities should assist him in maintaining contact with his family ... the court recognizes at the same time that some measure of control over prisoners' contacts with the outside world is called for and is not in itself incompatible with the convention."

[20] Any communication with persons outside the prison represents a potential breach of prison security. The monitoring of these communications is no comment on the prisoner himself – if completely unmonitored communication exists within a prison it is ripe for exploitation by *any* member of the prison population. It can easily be imagined that a model prisoner, given the privilege of unmonitored communication with his family, could quickly become the subject of threats and coercion to use that communication channel for the benefit of other prisoners. That is why some monitoring of communication is a necessary and justified feature of imprisonment. I am conscious that the power to monitor could be open to misuse by the Prison Service, but such misuse is not alleged here.

[21] In assessing the proportionality of the rule the Applicant does not contend that the interests which it seeks to protect are insufficiently important or that there is no rational connection to the end sought. In weighing the proportionality, then, the only outstanding issue is the third strand of the *de Freitas* test, i.e. that the means used are no greater than necessary to accomplish the objective. In R (N) v Ashworth Special Hospital [2001] HRLR 46 it was confirmed that:

"15. The degree of interference ... does not fall to be assessed exclusively by reference to his perception of the degree of interference and his reaction to the interference. A proper assessment ... must include taking account of the level of actual monitoring."

[22] The level of monitoring as described by Mr Gray is not disputed by the Applicant. Mr Gray states in his affidavit:

"A prison officer will be overtly present in the visits room and will patrol the area ... it is not the case that Prison Staff will micro-supervise that visit and listen in to all of the content of the conversation. In reality the Prison Staff listen to little, if any of the detail or continuity of the conversations."

[23] Given that this description is undisputed, and the importance of a general policy of monitoring all communications as confirmed above, this level of monitoring seems very firmly within bounds proportionate to the desired objective.

It is difficult to conceive of a means of monitoring communications which is less intrusive.

[24] Finally, the court is reminded that it has a limited supervisory jurisdiction in relation to measures 'which are *bona fide* intended to discharge the legitimate aim of securing the safety and security of inmates and staff within the Northern Ireland Prison Service establishments' (Re Irwin's Application [2011] NIQB 107). In fact the matter falls so squarely within the *de Freitas* test that it has been unnecessary to consider the deference owed the Prison Service in relation to this matter: suffice to note, in the same terms as in the Ashworth judgement, that 'none of the matters raised, in my judgement, suggest that the [Respondent's] margin of appreciation has been exceeded.'

Conclusion

[25] For these reasons I reject the application. Rule 67(8) is in accordance with law, necessary and proportionate.