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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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McGlinchey's Application (Leave stage) [2013] NIQB 5

IN THE MATTER OF AN APPLICATION BY MARIAN McGLINCHEY FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

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STEPHENS J

Introduction

[1] This is an application commenced on Saturday 26 January 2013 by Marian McGlinchey. The applicant initially sought leave to apply for judicial review of a decision of the Northern Ireland Prison Service refusing the applicant temporary release in order to attend her sister's, Dolours Price's, funeral and/or wake. The application for leave was listed for hearing on the same day by which time the Northern Ireland Prison Service had decided to permit the applicant temporary release in order to attend the wake but limited the duration of her attendance to 1 ½ hours. The applicant did not proceed with the application for leave to apply for judicial review of the decision that she should not be granted temporary release to attend the funeral. However she contended that the period of 1 ½ hours was too short and that an appropriate period was in or around 4 hours. Accordingly the application for leave related solely to the decision to limit her temporary release to a period of 1½ hours as opposed to a period of in or around four hours.

[2] Mr Sean Devine appears on behalf of the applicant and Mr Daly appears on behalf of the Northern Ireland Prison Service.

Procedure

[3] This application raises a procedural issue which was considered by McCloskey J in the context of a bail application in the case of *In the Matter of an Application by BG (An Applicant for Bail)* [2012] NIQB 13.

[4] This is the second judicial review application with which I have dealt in as many days of a decision by the prison authorities to refuse temporary release of a sentenced prisoner in circumstances where the applicant also faces a further charge or charges in the criminal courts in respect of which he or she has been granted compassionate bail. In this case and also in the other case the applicant had first applied for and been granted compassionate bail from the courts in respect of the further charge or charges. Those bail orders did not secure their release from custody as in relation to this case the applicant is also detained by virtue of two life sentences, her release on licence having been revoked. In the other case the applicant was already in prison by virtue of a determinate prison sentence. After the applicants had secured bail orders in respect of the outstanding criminal charge or charges thereafter they made a request to the Prison Service for temporary release. Those requests were refused and the applicants then launched applications for leave to apply for judicial review of the decisions of the prison authorities.

[5] It was a feature of both judicial review applications that it was submitted on behalf of the applicant that no or inadequate consideration had been given by the Prison Service to the decisions of the bail court judge who had granted bail. This submission was made with only the barest of information being given to me as the judicial review judge as to what had occurred in the bail court and without either any indication as to the reasons why bail was granted or any substantive information as to the competing evidence that was considered by the judge who granted bail. The Prison Service contended that the bail decision did not bind their decision but this gave rise to the impression that a judicial review judge was being asked by the Prison Service to rule in effect that a bail court judge was incorrect. That this was being done within the legal principles applicable to judicial review rather than by an appeal procedure.

[6] In *In the Matter of an Application by BG (An Applicant for Bail)* [2012] NIQB 13 the applicant for bail had been remanded in custody charged with a number of offences including conspiracy to rob. He was subsequently charged with murder. The murder charge was unrelated to the other charges. He applied for bail solely in relation to the murder charge. If he had been successful in that bail application he would not have been at liberty by virtue of the other unrelated offences including conspiracy with others to rob. In a detailed reserved judgment McCloskey J addressed the questions:-

(a) as to whether it is appropriate in principle for a bail order to be granted in circumstances where the grant of bail will not liberate the applicant and

(b) whether as a matter of good practice it is desirable that a bail application should be considered entirely in isolation from a similar application for bail in respect of earlier charges.

He concluded that there is an emphasis on bail having the effect of liberating a person who would otherwise be detained. That the provisions of Articles 4, 5 and 6 of the Criminal Justice (Northern Ireland) Order 2003 are founded on the unexpressed premise that where a court grants bail, the accused, in the great majority of cases, is liberated from custody. On a practical level he emphasised that a prominent feature of bail judicial decision-making is immediacy or currency. The factors influencing the grant or refusal of bail can change. That it was manifestly undesirable to grant bail where the applicant is detained for some other reason and the currency of the bail order will become gradually eroded and increasingly detached from material facts and realities. He answered the question of principle in the following way:-

> "I consider that fundamentally there is an inextricable link between bail and liberty."

McCloskey J also stated that as a matter of principle a court should not exercise discretion to grant bail in circumstances where this will not operate to confer liberty on the accused person concerned, immediately or in the foreseeable short term.

[7] I am informed that the Prison Service will not entertain an application for temporary release unless and until bail has been granted by the courts in relation to any outstanding criminal charges. I consider that practice to be inappropriate both as a matter of principle and also for good practical reasons.

[8] As a matter of principle I respectfully agree with McCloskey J that in the exercise of discretion a court should not entertain a bail application in circumstances where the grant of bail will not secure the liberty of the applicant. McCloskey J qualified that proposition so that a bail order could be granted if it conferred liberty on the applicant "immediately or in the foreseeable short term". It might be suggested that in these compassionate applications the grant of bail would confer liberty in the short term because the Prison Service would only be contemplating temporary release in the immediate future. However I do not consider that in such circumstances liberty is "foreseeable". The Prison Service is not obliged to arrive at the same conclusion as the court. Indeed the material available to the Prison Service may be entirely different from that available to the court. Accordingly I consider that as a matter of principle the onus is first on the Prison Service to deal with temporary release and thereafter, if granted, it is for the court to consider the grant or refusal of bail.

[9] I consider that is the appropriate sequence not only as a matter of principle but also on a practical level. The risks of flight, interference with the course of justice, the commission of further offences or threatening public order will be addressed by both the Prison Service in relation to temporary release and by the court in relation to the grant of bail. However it is the Prison Service that will be able to obtain the most recent information in relation to the applicant which bears on these risks. For instance, in the other case with which I dealt the Prison Service had

access to the applicant's disciplinary record in prison and were able to advert to features of that record including drugs and a persistent unwillingness to co-operate. The Prison Service knew the character of that particular individual through daily contact with him. Furthermore ACE risk assessments had been prepared in respect of that applicant by the Prison Service. In this case the Prison Service were aware of the reasons advanced before the Parole Commissioners in relation to the revocation of the applicant's licence and would have had access to information as to the state of the applicant's health. Furthermore, the Prison Service is able to request from the police their views as to the outstanding criminal charges.

[10] I would add that the present practice of the Prison Service to refuse to consider an application for temporary release until a bail order has been granted does not add to the detailed knowledge of the Prison Service. The Prison Service during the course of both applications before me for leave to apply for judicial review was unaware as to what information had been given to the court during the bail hearing. The Prison Service was also unaware as to the reasons given by the court for granting bail. This lack of knowledge is explained by the speed at which these decisions are required to be made. However, in practice to know that a court has granted bail may be of considerable or limited significance in subsequent decision-making by the Prison Service depending on a comparison of the evidence before the court and the evidence available to the Prison Service. No one on behalf of the Prison Service attends the bail hearings. There may be compelling reasons known to the Prison Service as to why temporary release should not be granted about which the Prison Service have not informed the court. Accordingly the court's decision may be made on a basis with which the Prison Service does not agree.

[11] The Prison Service wishes to maintain the practice of first requiring a bail application to be made before entertaining an application for temporary release. Applications to the Prison Service for compassionate temporary release have frequently to be dealt with at short notice given an unexpected death and the speed with which funerals are arranged. It is asserted that the Prison Service works under considerable time pressure and

> "the expectation that they will reach a decision in time to allow a bail application to be *prepared, listed* and heard will only add to those pressures" (emphasis added).

It is also asserted that

> "The decision making process in (compassionate temporary release) is multi-agency in nature – information has to be assimilated as far as possible from various bodies. Clarification is sought on the exact relationship between the prisoner and other party e.g. the deceased. Reports are sought from PBNI, sentence managers and the PSNI. However the Parole Commissioners and PSNI may refuse to supply the prison with

> materials and as a result NIPS will not always be in possession of same. NIPS may also be at a disadvantage in relation to expert medical evidence. NIPS is routinely advised that medical evidence cannot be disclosed (following a request) due to patient confidentiality. However often detailed medical evidence is presented to a court on a bail application."

I would observe that if under the present procedure matters are being presented to the court they are not making their way to the Prison Service. Temporary compassionate release and compassionate bail are important decisions affecting individuals at a fundamental level of their humanity and also having a potential adverse effect on the safety and security of the public. The decisions are important to the individuals and to the public. In such circumstances it would appear obvious that information relevant to the decision of the Prison Service should be made available to the bail court. Equally, that all information available to the bail court should be made available to the Prison Service. It was a feature of both these applications that there appeared to be no system or protocol in place devised by the Prison Service for the exchange of such information. This is a matter which the Prison Service may wish to consider for the future.

[12] It is not being suggested that a bail application cannot be *prepared or listed* before the Prison Service has made a decision. What is under consideration is whether the Prison Service should make the first decision both as a matter of principle and as a matter of practice. The difficulties set out by the Prison Service about coordination are removed if both the application for bail and the application for temporary release are launched at the same time but with the clear requirement that it is for the Prison Service first to arrive at a conclusion before bail is either granted or refused. If the applications are both launched at the same time the information available to the bail court from the police and in the medical reports, if any, can be made available to the Prison Service so that they can arrive at an appropriate decision.

[13] Accordingly, I consider that the correct sequence is that before bail is *granted or refused* it is first for the Prison Service to deal with and make a decision in respect of an application for temporary release and thereafter, if successful, the applicant can proceed to a hearing for bail before the criminal courts.

Factual background

[14] On 15 November 1973 the applicant and her sister were sentenced to two life terms of imprisonment and twenty year's imprisonment to run concurrently. Those sentences were in relation to criminal convictions arising out of the bombing of the Old Bailey. Between November 1973 and 19 May 1974 both the applicant and her sister were on hunger strike. On 18 February 1975 she was refused compassionate temporary release to attend her mother's funeral in Belfast. On 18 March 1975 she was transferred from a prison in England to Armagh Prison. On 30 April 1980 she

was released from Armagh Prison on humanitarian grounds given that she had been suffering from anorexia and mental health issues. That release was on licence. That licence was revoked on 15 May 2011 by the then Secretary of State for Northern Ireland under the powers contained in Article 9(1) of the Life Sentences (Northern Ireland) Order 2001.

[15] The revocation of the applicant's licence arose out of, amongst other matters, the events which occurred at an Easter commemoration in Derry on 25 April 2011. It is alleged, and the applicant accepts, that at that commemoration she held a piece of paper from which a masked man read a speech. The applicant states that she was attending the commemoration as a member of the 32 County Sovereignty Movement of which she has been a member since the late 1990s. She states that she had neither prior knowledge of any masked men intending to speak nor as to the contents of the speech that he made. Rather that he demanded that she hold the paper and that she took it for that reason also believing that he made that demand because it was a windy day and he was wearing gloves.

[16] On 13 May 2011 the applicant was arrested for supporting terrorism on the basis that the speech of the masked man was to encourage support for a proscribed organisation and that by her presence and actions she was giving public support to his views. She was charged with an offence on 14 May 2011. On 16 May 2011 in relation to that charge she was granted bail at Derry Magistrates' Court on condition that she was not to attend a public procession and £10,000 cash was to be lodged. However, she remained in custody by virtue of the revocation by the Secretary of State of her licence, that revocation being based on the events at the Easter commemoration on 25 April 2011 and on the basis of other evidence which had been made available to the Parole Commissioners.

[17] The applicant was initially detained in prison at Maghaberry. She was then moved to Hydebank. Her health has deteriorated and she is now in hospital.

Legal Structure

[18] The distinction between the court's role and the role of the Northern Ireland Prison Service needs to be emphasised. The decision-maker is the Northern Ireland Prison Service. The court's role is supervisory, it is not the decision-maker. The role of the court is limited. It is for the applicant to establish some legal basis for the court to interfere in the decision of the Northern Ireland Prison Service.

[19] I turn to consider the legal basis upon which a court could interfere in the decision. The decision-maker has to take into account all relevant matters in arriving at the decision and has to leave out of account any irrelevant matter. The decision should not be *Wednesbury* unreasonable. These are what are termed the traditional grounds for judicial review. If such a ground is made out the decision would be quashed, but it is most likely that the decision-maker will then be required to reconsider the matter.

[20] The applicant's Article 8 rights are also engaged, that is the right to respect for private and family life. That right is a qualified right, see Article 8(2). The interference with the right to respect for private and family life has to be

(a) in accordance with law,

(b) it has to pursue a legitimate aim, and

(c) it has to be necessary in a democratic society.

This last question of being necessary in a democratic society requires consideration as to whether the decision is proportionate and strikes a fair balance between the competing public and private interests. The argument in this case concentrates on the issue of proportionality, it being accepted that the interference is in accordance with law and is in pursuit of a legitimate aim. The concept of proportionality requires the reviewing court to assess the balance which the decision-maker has struck; not merely whether it is within the range of rational or reasonable decisions. The concept of proportionality in this case also requires attention to be directed to the relevant weight accorded to the interests and considerations. However, the intensity of that review will depend on the subject matter in hand. In law context is everything.

[21] Along with the concept of proportionality goes that of the margin of appreciation, frequently referred to as deference or, perhaps more aptly, latitude. The primary decision-maker on matters of policy, judgment and discretion is the Northern Ireland Prison Service. A public authority should be left with room to make legitimate choices, the width of latitude and the intensity of the review which it dictates can change depending on the context and the circumstances. Accordingly, one of the issues to be decided in this judicial review application is the degree of deference due or latitude to be extended to a body such as the Northern Ireland Prison Service.

[22] This is a leave application and at this stage I have to consider whether there is an arguable case on behalf of the applicant. This test has been formulated in different ways; see *Re Hill's application for leave* [2007] NICA 1, *Omagh District Council v Minister for Health, Social Services and Public Safety* [2004] NICA 10. In *IRC v National Federation of Self-Employed and Small Businesses Limited* [1982] AC 617 at 644 the test adopted at the leave stage in judicial review proceedings was described as follows

> "if, on a quick perusal of the material then available, the court thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting the applicant the relief claimed, it ought, in the exercise of judicial discretion, to give him leave to apply for that relief."

The applicant's health.

[23] There are a number of competing interests and considerations in play when one is considering the proportionality of the interference with the applicant's Article 8 rights. One of the considerations is the health of the applicant. The case made on behalf of the applicant is that the proposed respondent failed to take into account medical evidence as to her health and/or failed to give appropriate weight to her health when arriving at a proportionate decision.

[24] I have considered a number of psychiatric reports. The applicant has been diagnosed as suffering from a severe depressive illness with marked evidence of psychomatic retardation. She displays a lack of spontaneity of speech and a paucity of speech in general. There is evidence that she appeared profoundly depressed. She has an unresolved grief reaction with regard to the death of her mother. She was unfit to attend court in April 2012. Her condition has been one of deterioration and in June 2012 Dr Bownes and Dr Megarry advised that she then required placement in an acute care setting.

[25] Dr Maria O'Kane, Consultant Psychiatrist, has advised that in discussion with clinical staff caring for the applicant the consensus is that, if she does not have the opportunity to attend her sister's wake, she runs an increased likelihood of worsening depression or at worst of developing a pathological grief reaction. The applicant's mental health was brought to the attention of the proposed respondent by letter dated 25 January 2013. But in the proposed respondent's decision letter of the same date no specific reference was made to the applicant's health. All that was said about this issue was the contents of your solicitor's letters have been noted and duly considered. The word "duly" was not defined in any way. It is not even clear whether the decision-maker had before him all the medical reports which have been made available to this court. The decision-maker could not have known of the views of Dr Maria O'Kane as those views are contained in an e-mail dated 26 January 2013 and timed at 13 minutes past midnight. The decision-letter is dated 25 January 2013 and the fax is timed at 4.41 pm. There is no evidence that the decision-maker made any enquiries of the treating clinicians at the hospital. The mental integrity of an individual is a matter of some considerable weight, particularly when that individual has required being in an acute hospital setting for many months. Risks to mental health are just as real as risks to physical health.

[26] The original decision of the Northern Ireland Prison Service has been overtaken in that it is now accepted that the applicant may attend her sister's wake for a period of 1 ½ hours. There is no evidence that any medical advice was sought by the proposed respondents before arriving at a period of 1½ hours. From the medical perspective it is accordingly an arbitrary figure. No present medical justification can be put forward for it and indeed there is evidence that the risk with a short period is that the person who grieves is initially extremely upset but there is insufficient time for mutual consolation. It may be that there is some medical justification for this time period but there is no evidence at this leave stage

supporting it. Unusually for a leave hearing and indeed for judicial review proceedings but given the urgency of the matter I permitted the applicant to call Dr Maria O'Kane to give oral evidence. She indicated to this court that a reasonable period of time would be in and around four hours and that evidence has also to be considered by the decision-maker.

[27] Accordingly I consider that there is a sufficient case to grant leave in relation to insufficient weight being attached to the factor of the applicant's mental health or that this factor was left out of account by the decision-maker in arriving at the limitation of 1 ½ hours. I grant leave to apply for judicial review.

Conditions in relation to temporary release

[28] One of the considerations in play when one is considering the proportionality of the interference with the applicant's Article 8 rights is the nature and effectiveness of any conditions that could be imposed on the applicant if granted temporary release. The case made on behalf of the applicant is that the proposed respondent failed to take into account appropriate conditions that could have been imposed that would protect the public interest and/or failed to give appropriate weight to those conditions when arriving at a proportionate decision.

[29] In its decision-letter the Northern Ireland Prison Service states that it cannot identify any controlled ways to let the applicant attend her sister's wake accompanied, escorted or in any other fashion, for example on the basis of sureties. That decision-letter is timed 4.41 pm on 25 January 2013. Earlier on 25 January 2013 it had been indicated that sureties up to the sum of £150,000 would be available. There is no reference to that figure in the decision-maker's letter, nor is there any specific consideration as to the identities of the proposed sureties. Rather the decision is based on the proposition that regardless as to the amount of the surety or as to the identity of the sureties any conditions that could be imposed would be inadequate. It is now apparent that further definition could be brought to the conditions attaching to any temporary release. Various conditions have been suggested. The first suggestion is that no information be given in advance to the press or to anyone apart from close family members. That in effect there would be no public announcement until after the applicant had returned to the hospital. One risk which has been taken into consideration by the Prison Service of Northern Ireland in the public interest is the risk of use being made by the applicant of temporary release for an inappropriate political purpose of what should be an intensely private family occasion. It is suggested that this condition would guard against such a risk. The second condition is that medical staff can accompany the applicant as can two named politicians. Further that she travels by a particular route to the address at which the wake is being held, that she remains at those premises throughout and returns direct to the hospital. That prior to her leaving the hospital the medical staff will provide an assurance that it is safe from her own health perspective to attend. That she is prohibited from speaking either directly or indirectly to the press or from giving any interviews to the press whilst temporarily

released. That she is not to be in possession of or to have access to a mobile telephone nor is she to use any telephone. That there is a surety of £150,000.

[30] I consider that there is an arguable case that these precautions which could be put in place have also not been considered by the decision-maker or alternatively have not been given sufficient weight. On that ground also I grant leave to bring these judicial review proceedings.

Conclusion

[31] I grant leave to bring these judicial review proceedings. I will sit tomorrow to deal with the full substantive hearing.