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*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

O'Rawe's Application (John) [2012] NIQB 4

IN THE MATTER OF AN APPLICATION BY JOHN O'RAWE FOR JUDICIAL REVIEW

TREACY J

Introduction

[1] The applicant in this case is John O'Rawe who is a sentenced prisoner currently detained in Her Majesty's Prison Magilligan. Following the leave hearing the relief he sought was limited by the Court to a Declaration that the Governor acted in a procedurally unfair manner by reason of his alleged failure to hold an appropriate and speedy hearing and his alleged failure to give reasons to the applicant. The impugned failures arose out of an incident on 23 December 2011 whilst the applicant and other prisoners were travelling home on the train from Magilligan at the commencement of their Christmas home leave.

Grounds of Relief

[2] The grounds upon which relief was sought were confined by the Court on the application for leave on two grounds namely:

> **"(c) On his return to HMP Magilligan on 3 January the applicant was removed from the Foyleview Unit in the absence of any charges being laid or enquiry which thereby makes him ineligible for home leave."**

And:

> **"(f) The decision to remove the applicant from the Foyleview Unit is incompatible with Article 8 of the European Convention."**

Background

[3] The background to the case is helpfully set out in the affidavit evidence including the affidavit from Governor Malcolm McClenaghan who explains that prisoners held in Foyleview enjoy what he says can be described as semi-open conditions. They can work in the community, face a less restricted regime and have an enhanced home leave scheme allowing them 4 days of home leave every other weekend whereas other prisoners within the main prison complex are held under more restrictive conditions.

[4] Prisoners located in Foyleview are expected to conduct themselves in a lawful, civil and mature manner both within and outside the prison and, according to the Governor, it follows therefore that they would be expected to be fully accountable for their decisions or actions and the consequences thereof. He referred the Court to a copy of the Foyleview compact which was signed by the applicant and Governor McClenaghan on 19 May 2011. Para11 provides:

> **"Should you be deselected from Foyleview Resettlement Unit for any reason i.e. self de-selection, breach of contract, breach of prison rules, etc you will re-enter the pre release home leave scheme at the point you left it. You will not be eligible for a greater amount of home leave than you would have received had you remained in Foyleview Resettlement Unit."**

[5] At para 15 it states:

> **"I will investigate thoroughly any allegations on inappropriate behaviour or actions on your part. You may be removed from the unit until such allegations are investigated. If the investigation finds that the allegations are unfounded you will be returned to the unit. Your removal from the unit under these circumstances is not an indication of guilt nor is it a de-selection. This is a precautionary measure until the facts can be established."**

[6] In the compact document under a section entitled "Your commitment to me" (i.e. the applicant's commitment to the prison authorities) it is important to note the following paragraphs in which the applicant committed himself to:

> **"3. Respect the work and aims of the staff and the establishment and treat staff, fellow prisoners and visitors with respect and civility at all times.**
>
> . . .
>
> **8. To refrain from the use of threats or threats of violence and to fully support the declared aim of the establishment to provide a safe environment.**
>
> . . .
>
> **10. To conduct himself in a lawful responsible manner and in a manner acceptable to the prison authorities whilst on periods of temporary release from the prison.**
>
> . . .
>
> **12. That failure to comply with any of the conditions may result in him being de-selected from the unit and returned to the mainstream of the prison."**

And that was signed by the applicant on 19 May 2011.

[7] A prisoner who, for the purposes of this judgment, I will refer to as G contacted the prison by telephone at 1250 hours on 23 December 2011 to inform the prison, amongst other things, that he and another prisoner had left the train at Cullybackey due to abuse they received from other prisoners. It appears that G is a convicted sex offender. On 3 January 2012 G reported to Governor McClenaghan that on 23 December whilst travelling by train to Belfast on Christmas home leave along with other prisoners similarly temporarily released from the prison on the same basis he was subject to verbal abuse by other prisoners. As a result of this G and another prisoner had felt the need to exit the train at Cullybackey and await the next one. G informed the Governor that he wasn't able to name the prisoner who had engaged in this behaviour but that he would be able to identify him if he saw them again.

[8] The Court was informed that G works in an area of the prison where all prisoners returning from home leave transit through. G doesn't reside in the Foyleview area. He was directed by Governor McClenaghan to advise him if he was able to identify any of the offending prisoners on their return to prison. Later on 3 January 2012 Governor McClenaghan was informed by another prison officer that G had identified two prisoners who had subjected him to abuse on the train. The two who were identified were then named by G and one of these two was the applicant.

[9] The applicant was a prisoner resident in Foyleview. On 3 January 2012 Governor McClenaghan instructed Officer McKeeman to inform the applicant that as he had been identified as allegedly engaging in the bullying of another prisoner he was to be removed from Foyleview in accordance with Section 15 of the compact pending the investigation of the allegation against him.

[10] At para9 of his affidavit Governor McClenaghan explains why he considered it appropriate to take that step and the reasons he gave were as follows:

> **(1) Release on Christmas home leave is a privilege only a limited number of prisoners in Magilligan were allowed to avail of and it was deemed important that this privilege is not abused.**
>
> **(2) G's account of the incident which occurred caused G great distress and embarrassment and because of the allegations made against him they may have put him in danger of assault.**

(The reference to G being put in danger of assault is a reference to the fact that G was identified by the applicant as a sex offender on the train and harassed and bullied as such in public).

[11] The third reason that is advanced as to why it was considered appropriate to suspend him from Foyleview was that the general public was subject to this behaviour which may have made them feel vulnerable, insecure and anxious as to how the incident might have developed into a more volatile situation. Fourthly that as the applicant was a prisoner resident in an area enjoying the special and enhanced privileges it provides he believed that it would be inappropriate for him to remain in that area during the course of the investigation as a precautionary measure.

[12] The Governor avers that Foyleview contains a mix of prisoners including sex offenders. There is minimum supervision and the bullying incident is regarded by the prison authorities as one of utmost seriousness. Governor McClenaghan was concerned to ensure that the applicant had no opportunity to engage in further

behaviour of the type that was alleged against him. He has averred that his transfer to the main prison places him without access to sex offenders and in a more restrictive regime with a greater ratio of prison officers, locked at night and generally more secure than the regime in Foyleview.

[13] It is acknowledged by the Governor that one of the consequences of having taken this step is that the applicant cannot avail of Foyleview weekend home leave which is four days every two weeks. However he is eligible to apply for home leave in accordance with the Prison Service Home Leave Scheme. The applicant applied for two periods of pre release home leave on 11 January 2012. The applications for home leave were adjourned by the Home Leave Board, chaired by Governor McClenaghan, pending the outcome of the ongoing investigation into the bullying allegation.

Progress of Investigation

[14] As far as the investigation of the allegations against the applicant are concerned they appear to have progressed as follows. On 3 January 2012 Governor McClenaghan contacted Translink who confirmed that an incident had occurred on the train on 23 December 2011 involving a group of males although Translink itself had been unaware that these males were prisoners. The Governor was also informed that the train had been carrying a number of families and other members of the general public and that the incident had been reported to the police. On the same date Governor McClenaghan made contact with the police who confirmed that they had attended Antrim train station and removed several males from the train. Also on 3 January Governor McClenaghan asked Principal Officer Stewart who has responsibility at Magilligan Prison for safer custody and manages the Prison Services' anti bullying strategy to take the matter forward. Governor McClenaghan was advised by PO Stewart that he interviewed the prisoners named as being involved and the court has been provided with a copy of PO Stewart's incident report. He records the following account which was given by the injured party G in the following terms:-

> **"On 23 December 2011 on my way to Belfast on the first day of my parole I got on the train at Coleraine as did O'Rawe, the applicant. Approximately just as the train had passed Ballymoney O'Rawe started shouting abuse and started behaving in a threatening manner towards me. I decided to move down the train away from O'Rawe who followed me down and continued to abuse telling the other passengers that I was a sex offender. I felt very threatened, intimidated and vulnerable with these**

> **on-going abuses so I left the train early fearing for my own safety"**

And he then implicates another prisoner who bullied and verbally abused him along with the applicant.

[15] In the incident report PO Stewart records that at 1410 on 6 January 2012 he spoke to the applicant, accompanied by another prison officer, and states as follows:

> **"I also informed him of the nature of my enquiry and he completely denied any involvement of any kind in this incident. I informed him that he had been positively identified by the complainant who knew him in the prison but had no dealings with him in the prison and that his co-accused had confirmed that a bullying incident had actually occurred. He then said that he had seen it but was not involved. I informed him that on the balance of probabilities he was the main protagonist in this matter and I considered him guilty of the allegation. He was also informed that because the incident occurred outside the prison with no independent witness the authorities could not proceed against him with a charge or take any action on bullying.** [I interpose that Mr Coll, for the respondent, agreed that it is not at all clear why PO Stewart said that the incident could not have been dealt with under the Prison Rules. Moreover, the lack of an independent witness does not preclude action]. **However he was informed that I would be advising the Home Leave Board of the incident with a view to consideration of restrictions on any further home leave applications. He then enquired from me was this the reason he was deselected from Foyleview and I informed him it was not as a result of this investigation nor a recommendation from me."**

As can be seen from this extract the applicant denied any participation in the incident although when confronted with a positive id he confirmed that an incident had occurred and that he had merely observed it.

[16] On 17 January 2012 PO Stewart informed Governor McClenaghan that he was satisfied that the applicant had a case to answer but as the incident had occurred

outside the prison it was decided it would not be dealt with as a charge under the Governor's adjudication procedure pursuant to the relevant prison rules. Accordingly, on 20 January 2012 Governor McClenaghan issued Senior Officer Evans, who is Foyleview Manager, with terms of reference to investigate the incident and to make recommendations to the Foyleview selection panel as to the applicant's suitability to be housed in that unit. In accordance with the terms of reference Senior Officer Evans was to complete the investigation by 6 February 2012.

[17] SO Evans' final investigation report has not been completed as he awaits input from the police. However his interim report recommended that the applicant should be confirmed as de-selected from Foyleview. As part of his investigation SO Evans had requested a copy of the report filed by the police following their attendance at Antrim train station. It is apparent from the interim report that SO Evans requested this incident report as an additional source of evidence but at the time of writing the interim report and the hearing of this case, he has not received it from the police.

[18] The applicant is thus temporarily transferred out of Foyleview pending completion of the investigation and Governor McClenaghan anticipates that the investigation will be completed in time for the issue to be decided by the selection panel in or around 14 February 2012. Importantly he confirms in his affidavit that the applicant will have an opportunity to put forward his case in person to the selection panel when his case is up for consideration. Mr Coll confirmed, as I understand it, that the applicant will in all probability be furnished with the materials upon which, subject to the necessary redactions, the selection panel intend to rely.

[19] Governor McClenaghan avers that there is evidence the applicant acted in breach of the Prison Service anti bullying policy and that it has been deemed appropriate for the reasons at paras [10] - [12] above that he be removed from the Foyleview regime until the matter is fully investigated and in order that the selection panel can properly assess the applicant's suitability to be housed in Foyleview regime and taking account of any representations that the applicant may wish to make in respect of the allegations and the evidence which has been gathered during the course of the investigation. The investigation is expected to conclude shortly

[20] The applicant complains at para6 of his skeleton argument that the common law requirements of procedural fairness have not been met and references this to the case of ***Secretary of State for the Home Department v A*** **[2009] UKHL 28**. However the applicant in ***Davidson*** **[2011] NICA 3,** a case where the prisoner challenged the cancellation of a period of temporary release previously granted, also alleged procedural impropriety also relying on ***AF.*** The Court of Appeal rejected reliance on the decision in ***AF*** and at para14 stated:

> **"We agree with the learned trial judge that the decision in *AF* is not particularly helpful in the context of this case. The standards of fairness vary with the context and the subjection of citizens to control orders is completely different from the regulation of a prison."**

[21] What fairness requires depends on the context of the decision. The requirements of fairness in the context of decision making within the prison have been recently restated in ***Davidson*** – I refer in particular to paras13-16 thereof:

> **"[13] The general principles of procedural fairness were reviewed by Lord Mustill in R v Secretary of State for the Home Department ex p Doody [1994] 1 AC 531 at 560. Although the requirements of procedural fairness are now more demanding that reflects Lord Mustill's comment that the standards of fairness are not immutable and may change with the passage of time. What fairness requires depends on the context of the decision. It will often require that the person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with the view to producing a favourable result or after it is taken with a view to securing its modification. A person affected usually cannot make worthwhile representations without knowing what factors weighed against his interests and it will often be necessary to ensure that he is aware of the gist of the case he has to answer.**
>
> **[14] We agree with the learned trial judge that the decision in AF is not particularly helpful in the context of this case. The standards of fairness vary with the context and the subjection of citizens to control orders is completely different from the regulation of a prison.**
>
> **[15] In this jurisdiction this court examined the requirements of fairness in the context of decision-making within the prison in Re Conlon's Application [2002] NIJB 35. That case was concerned with the decision to remove a prisoner**

from association. Carswell LCJ gave some general guidance in those circumstances.

> **"The generalised requirements of fairness articulated by Lord Mustill in *R v Secretary of State for the Home Department, ex parte Doody* [1994] 1 AC 531 at 560 will, however, apply to a decision to remove him. It is important to bear in mind the essentially flexible nature of the principles set out in that case. A decision to remove a prisoner from association may have to be taken and put into effect quickly. It may not be appropriate to enter into a debate about the matter before removing him. In some cases it may not be possible to disclose to the prisoner the information upon which the decision is based, in which event any uninformed representations which he may make may be of little value. For these reasons we would not go so far as to say, as the judge did, that a prisoner must always be informed of the reasons for his removal from association at the earliest opportunity. We would not go further than to propound a general rule that the governor should at an early stage, but not necessarily before the removal of a prisoner from association, give him where possible and where necessary sufficient reasons for taking that course and afford him the opportunity to make representations about its justification. "**

[16] That guidance has formed the basis for a number of subsequent prison decisions concerned with removal from association or change of categorisation. Re Thompson's Application [2007] NIQB 8 is one such case. That was a case in which a prisoner had been removed from Foyleview following the discovery of contraband. In the course of the investigation serious allegations were made against him. He was provided with limited information in relation to those allegations while consideration was given to deselecting him from Foyleview. Weatherup J held that the eventual decision to deselect him had not been procedurally fair because he was not given adequate information

> **about the nature of the allegations against him and therefore not given an opportunity to respond to them. The appellant relies on those cases for the proposition that there is a right to know and a right to respond."**

[22] The applicant has not persuaded me that there has been any breach of the requirements of procedural fairness or that there has been any vitiating delay in the investigation. The applicant has been provided with sufficient reasons to enable him to know that the impugned measures arise out of a serious allegation that he bullied a sex offender whilst on Christmas home leave in breach *inter alia* of his Foyleview compact and that the impugned measures had been taken pending the completion of the ongoing investigation. I agree that the investigation has taken rather longer than one would have hoped. However, as Mr Coll pointed out regulation of prison discipline can be a time intensive activity. In the context of the present case and the steps that have been taken by the prison authorities the time taken cannot, in public law terms, be stigmatised as unreasonable.

Conclusion

[23] In my view the high threshold of public law unreasonableness in terms of the alleged delay in this case has not yet been crossed. The applicant will be given an opportunity to put forward his case in person to the selection panel and will, I understand, be furnished, I presume in advance, with the materials upon which, subject to the necessary redactions, the panel may rely. Once the investigation has been completed the adjourned consideration of the applicant's home leave applications will be revisited. Having regard to the foregoing none of the applicant's grounds of challenge are made out and the application must be dismissed.