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Judgment: approved by the Court for handing down

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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY ALEXANDER PATTERSON FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

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COLTON J

[1] I am obliged to counsel in this case for their focussed, written and oral submissions which were of great assistance. Mrs Orla Gallagher appeared on behalf of the applicant. Mr Tom Fee appeared on behalf of the proposed respondent.

The Application

[2] At the relevant time the applicant was a prisoner in HMP Maghaberry.

[3] On 28 December 2018 the Duty Governor of HMP Maghaberry was informed by a telephone call from the PSNI that a check had been carried out at the applicant's address at 00.10 and that he was not present. At that time he was on Christmas home leave and subject to curfew and residence conditions.

[4] As a result he was the subject of adjudication proceedings on his return to prison under the prison rules and ultimately on 6 March 2019 he was found guilty of a breach of his Christmas home leave curfew.

[5] From the outset the applicant contested the charge.

[6] The history of the proceedings was as follows:-

- 30 December 2018 – hearing adjourned to enable the applicant to seek legal advice.

- 30 January 2019 – hearing adjourned due to staff unavailability.

- 2 February 2019 – adjourned again for the same reason.

- 21 February 2019 – adjourned so that the Governor could make further inquiries from the PSNI.

- 6 March 2019 – hearing took place - applicant found guilty.

[7] A number of matters arise from this sequence. After the adjournment on 30 December 2018 the applicant's solicitors wrote to the NIPS on 4 January 2019 indicating that the applicant was denying the breach which was the subject matter of this adjudication. In addition the solicitors asked the Prison Service to confirm:-

> *"That the following is available and disclose:*
>
> *(i) Witness statement.*
> *(ii) CCTV/ bodycam footage …*
>
> *We wish to put you on notice that our client may wish to call witnesses on his behalf during any adjudication."*

[8] A further letter was sent on 11 January 2019 in which the applicant's solicitors sought inter alia … *"a copy of the police officer's statement/note of what happened (as it is understood police called to Mr Patterson's home leave address at 10pm) and what information the NIPS have regarding the alleged breach."*

[9] A reply from the Prison Service was sent on 23 January 2019. In relation to the PSNI the letter says:-

> *"Any information reference the PSNI please contact them directly to request this."*

[10] Subsequent to the adjournment on 21 February 2019 in which it was indicated the Governor wanted to make inquiries from the police the following email inquiry was sent:-

> *"Colin I held an adjudication on the above-named prisoner in relation to breach of curfew times. He is stating that the police can provide no evidence in relation to this.*
>
> *However the ECR confirmed with me that a call was received from PSNI Musgrave Street at 15.30 hours on 28/12/18 stating that he had carried out a check of the house at 00:10 that morning and there was no answer and the house was in darkness. They gave a reference number: CC2018122800062 in relation to this.*

> *Could you confirm with them the details of this check within the reasonable rules and let me know so that the adjudication can be completed".*

[11] The following response was received on 22 February 2019:-

> "*Details are correct as below and 12.10 is still a reasonable time (early into his nightly curfew) with a check to be carried out and the door answered if someone is in."*

[12] In passing I comment that it is not clear that the reference in the initial email to "reasonable rules" relates to the time of the call but this is not crucial to the determination of the leave application.

[13] On the basis of that information the adjourned hearing proceeded on 6 March and the applicant was found guilty.

[14] Subsequently on 8 March 2019 the applicant's solicitors KRW Law, obtained a statement from the police officer who carried out the bail check and also a copy of the relevant notebook entry from which it emerged that in fact the police had gone to the wrong address.

[15] On receipt of this information the Prison Service confirmed as follows:-

> *"1. The adjudication and subsequent awards have been withdrawn and will be expunged from the applicant's record immediately and will not be used against him.*
>
> *2. The applicant is eligible to apply for temporary release under Rule 27 of the Prison (Young Offenders) Rules (Northern Ireland) 1995 and any applications received by this office will be heard at the next arranged home leave board which I can confirm will sit on Thursday 21 March 2019 at 15:30 hours."*

[16] Since then the applicant has been released from prison.

[17] These are matters of substance to the applicant. The adjudication resulted in a withdrawal of some privileges and meant he was ineligible for home release between December 2018 until the matter was expunged from his record in March 2019.

[18] By these leave proceedings the applicant seeks a declaration that the Prison Service acted unlawfully in making the determination on 6 March 2019. Mrs Gallagher in her able submission made many trenchant and in my view, on the face of it, valid criticisms of the conduct of the adjudication.

[19] She complains that in fact there was a premature finding of guilt in that the applicant was refused an application for home leave during the adjournment period. More pertinently for these proceedings she focusses on what she says are material matters which demonstrate procedural unfairness in the conduct of this entire adjudication. The gravamen of her complaint relates to a failure to carry out any reasonable or adequate inquiries and to do so timeously. Further the applicant was not permitted to present his case by reason of the failure to permit him to call witnesses at the hearing on 6 March 2019.

[20] Mr Fee responded by saying that this application is now academic under the well-established principles in the case of **Salem**. It is not in dispute that as far as the applicant's private interests are concerned the application is academic. Mrs Gallagher however contends that there remains an issue of wider public interest to be considered and that there would be utility in granting leave in these proceedings. Three Governors were involved at different stages in this adjudication and it must be a matter of public concern that the adjudication was handled in this way. There would, she suggests, be merit in the court considering these matters in the public interest as prison adjudications are extremely common and issues of inquiries, communication with the PSNI and the facility to call witnesses may well arise again.

[21] In relation to **R(Salem v Secretary of State for Home Department)** [1999] 1 AC 450 in a well-known passage Lord Steyn held that the courts do have a discretion to hear judicial review proceedings which have become academic but that it would be exercised with caution. He held:-

> *"The discretion to hear disputes even in the area of public law must, however, be exercised with caution and appeals which are academic between the parties should not be heard unless there is a good reason in the public interest for doing so, as for example (but only by way of example) where a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future."*

[22] In **Re JR47** [2013] NIQB 7, McCloskey J identified "utility" to be the primary factor in considering whether a court should make a declaration in proceedings which were otherwise academic.

> *"(85) … In reflecting on the propriety of granting any of the declaratory relief now sought, I consider the main criterion in the present context to be that of utility. Where the grant of declaratory relief would serve an important practical purpose, this will clearly count as a positive indicator; see* ***T v Declaratory Judgment (Zamir & Woolf, 4th Edition)*** *paragraph 4-99 and following. I refer particularly to the following passage:*

> *`If … the grant of declaratory relief will be likely to achieve a useful objective, the court will be favourably disposed to grant a relief …*
>
> *[Conversely] a declaration which would serve no useful purpose whatsoever can be readily treated as being academic or theoretical and dismissed on that basis.'"*

[23] Mrs Gallagher also refers me to the dicta from Carswell LCJ in the case of **Re McConnell's Application** [2000] NIJB 116 at page 120 in support of her case as follows:-

> *"It is not the function of the courts to give advisory opinions of public bodies, but if it appeared that the same situation was likely to recur frequently and the body concerned had acted incorrectly they might be prepared to make a declaration, to give guidance which would prevent the bodies from acting unlawfully and avoid the need for further litigation in the future."*

[24] The **Salem** principle does not impose an absolute rule. It is open to the court to continue to examine an otherwise academic challenge in the circumstances anticipated by Lord Steyn.

[25] The case before me is not one which requires a detailed consideration of the facts – although there is a factual dispute about whether or not the email of 21 February 2019 was provided to the applicant.

[26] In considering the matter it seems to me that this is a highly fact sensitive case.

[27] A simple error was made and reasonable and timeous inquiries would have identified and rectified that error in my view.

[28] There is no criticism or issue in relation to the relevant rules (The Prison and Young Offenders Centre Rules (NI) 1995) - in particular Rule 2(1)(g) which deals with general principles and the requirement to give reasons and Rule 36 which relates to the requirement to make inquiries set out the appropriate principles to be applied to a procedure of this type. Nor can any criticism be made of the Prison Service manual on the conduct of adjudication in the context of this case.

[29] No issue of construction arises in relation to any of these documents.

[29] Nor is there any issue as to the basic requirements for procedural fairness to include the need to make reasonable inquiries and to facilitate a prisoner to make his case, if necessary by the calling of witnesses.

[30] What is at issue in this case is the actual implementation of these rules and principles.

[31] There is no evidence that a large number of similar cases exist or are anticipated or that this is a situation which is likely to recur frequently.

[32] What the case involves is the application of well-established principles and lawful rules to the specific facts of the case.

[33] In those circumstances I consider that no useful purpose can or will be served by the continuation of these proceedings. At best a declaration would serve only as an advisory opinion on an issue which is fact specific.

[34] In those circumstances and for the reasons I have set out leave to seek judicial review is therefore refused.

[35] I make no order in relation to costs save that the applicant's costs are to taxed in accordance with the Legal Aid Schedule, the applicant being a legally assisted person.