

**Neutral Citation No: [2009] NIQB 64**

*Ref:* **MOR7574**

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

*Delivered:* **30/6/09**

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

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**QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)**  
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**Phillips Application [2009] NIQB 64**

**IN A MATTER OF AN APPLICATION BY RALPH PHILLIPS FOR  
JUDICIAL REVIEW**

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**AND IN A MATTER OF A DECISION BY GOVERNOR DAVID  
KENNEDY DATED 13 JUNE 2008**  
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**AND IN THE MATTER OF A POLICY OF THE NORTHERN IRELAND  
PRISON SERVICE IMPLEMENTED ON 14 APRIL 2008**  
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**MORGAN J**

*The decision*

[1] The applicant in this case is a life sentence prisoner at Her Majesty's Prison Maghaberry. On 21 May 2008 he submitted a request that he be permitted to send out £50 from his Inmate Personal Cash (IPC) account to his daughter for her birthday at the end of June. He had previously made small payments to his two children on their birthdays out of his account during the four years that he had already served in prison. On 13 June 2008 Governor Kennedy refused the request. He referred to an Instruction to Governors effective from 14 April 2008 restricting the payment of money in and out of prison. That portion dealing with the payment out of moneys provided as follows:

"The passing out of any money by a prisoner should only be allowed in exceptional circumstances. It is likely that any such cases will be minimal. The prisoner must make a request in writing to the Governor who will consider the request on its merits.

Reasons of family occasions, such as birthdays, christenings, communion or confirmations will not be a sufficient reason to pass money out.

The Prison Service is currently progressing work on introducing a voucher scheme which will be available through tuck shops."

### *Background*

[2] In summer 2007 the Deputy Director of Operations of the Northern Ireland Prison Service instructed Governor Gray to carry out a review of management arrangements for reducing the supply of illegal drugs to prisoners. Governor Gray concluded that the primary method of payment for drugs was through visitors paying money into the dealer's IPC accounts and/or money being paid directly into a prisoner's account who then passed it out to the dealer's visitors. He concluded that the problem was not just restricted to those involved in the drug trade but that vulnerable prisoners were being bullied. Approximately £700,000 had been received for prisoners in the previous year and substantial amounts were then being turned around and passed back out of the account to visitors. In January 2008 Governor Gray recommended severe restrictions on the payment in of monies to prisoners and a prohibition on prisoners passing any money out of the prison to any person. He recognised that there would be individual cases where rigidly enforcing the recommendations may cause hardship and that Governors should have discretion in such cases.

[3] As part of the process of preparing his report Governor Gray attended meetings on 13 September 2007, 18 October 2007, 1 November 2007 and 13 December 2007 at which he outlined the approach which he intended to recommend. The meeting in October 2007 was with the Internal Monitoring Board and was attended by a representative of the Prisoner Ombudsman's Office. The other meetings were regular meetings of the Northern Ireland Prison Service Regional Alcohol and Drug Strategy Network and were attended by representatives of Opportunity Youth and those connected with voluntary agencies such as Northlands and Dunleavy.

[4] The effects of the policy were reviewed and considered at a formal review meeting on 4 September 2008. The meeting noted that there was clear evidence of exceptional circumstances being recognised and discretion being used. Governor Kennedy noted that there may be a case for flexibility in dealing with some life sentence prisoners particularly towards the end of their sentences. It was noted that there had been appropriate requests for payment out including one case where an inmate was allowed to pay his landlord as he otherwise would have been evicted from his home.

*The challenge*

[5] The applicant challenges the policy of the Northern Ireland Prison Service contained in the Instruction to Governors issued on 14 April 2008 and also challenges the decision of the Governor who implemented that policy. Essentially the challenge is based on four grounds. First the applicant contends that the restriction on payment out is outside the powers of the Northern Ireland Prison Service. Rule 17(3) of the Prison Rules provides:

"Any cash which a prisoner has on reception to prison shall be paid into an account under the control of the Governor and the prisoner shall be credited with the amount in the books of prison"

Rule 18 provides that the prison authorities may deal with money received into the prison in a variety of ways. They can credit the money to the IPC account, return the money to the sender or otherwise deal with the money subject to any discretion of the Secretary Of State. The applicant accepts that the Governor enjoys a broad discretion as to the operation of prisoner accounts under his control but contends that the nature of that control is subject to the general principles found in Rule 2(1) which specifically provides that prisoners retain all rights and privileges except those removed as a necessary consequence of their imprisonment and requires that facilities be given to maintain links with families. Accordingly the applicant maintains that the Governor did not have power to prevent the applicant providing funds from his IPC account for his child's birthday.

[6] Secondly the applicant maintains that the policy and the decision of the Governor interfered both with the applicant's enjoyment of private and family life protected by article 8 of the ECHR and his right to property protected by article 1 protocol 1. It does not appear to be in dispute that in each case the policy and the decision interfered with the relevant right but the respondent maintains that the interference in neither case was disproportionate.

[7] Thirdly the applicant submits that the Governor fettered his discretion in considering the application or alternatively that his application of the policy must have been disproportionate. The applicant contends that a restriction on the control of funds within an IPC account could only be lawful in circumstances where the power to prohibit the passing of money was subject to a requirement that the Governor had reasonable grounds to believe that the request to transfer money out of the prison was for a purpose not conducive to the good order and discipline of the prison or not in the interests of the wider community.

[8] Although not part of the original application the applicant was granted leave to add a ground based on a failure to properly consult interested parties about the content and application of the policy and in particular a failure to consult with interested parties when proposals were still at a formative stage by way of a consultation document or other adequate documentation.

### *Discussion*

[9] It is common ground that by virtue of Rule 17(3) and Rule 18 of the Prison Rules the Governor has control of the credit within an IPC account. I further accept that by virtue of Rule 2 the control of that account must recognise the need to maintain family links especially for long-term prisoners and the need to ensure that the rights and privileges of a prisoner are respected as far as this is possible within the terms of his imprisonment. In this case the issue faced by the Prison Service was the extent to which it was necessary to impose control over the IPC account in order to address the issue of the supply of drugs within the prison environment generally. The issue, therefore, in relation to the relationship between Rule 17(3) and Rule 2 raises some of the same questions which arise under article 8 of the ECHR. At paragraph 22 of his skeleton argument Mr McQuitty BL characterised this case as having at its heart a proportionality challenge. I consider that he was right to characterise this application in this way. If the interference with article 8 convention rights is proportionate Rule 2 will not prevent Rule 17(3) having its full effect. If the interference is not proportionate the applicant will succeed.

[10] By virtue of article 8 of the ECHR everyone has the right to respect for his private and family life. The right is qualified and interference may be justified where it is in accordance with law and necessary in a democratic society in the interests of the prevention of disorder or crime. There is no serious argument about the fact that Rule 17(3) provides the necessary basis in law for the control by the Governor of the IPC account. Secondly there was no dispute that the legitimate aim pursued by the Prison Service was the reduction in illegal drugs supply and consumption within the prisons. Although it was faintly argued by the applicant that the only issue at play was the making of lodgements into the prison it is clear from the report prepared by Governor Gray on 7 January 2008 that his concern related also to money being passed back out. I am satisfied, therefore, that the measures in question were related to the legitimate aim that was being pursued.

[11] The intense scrutiny required in relation to convention rights means that there are two further stages which must be considered in this case. The first is in relation to the policy contained within the Instruction to Governors. The applicant notes that the underlying papers leading up to the adoption of this policy do not expressly record any reference to the convention rights of prisoners. Although acknowledging that the decisions of the House of Lords

in Begum v Denbigh High School [2006] UKHL 15 and Belfast City Council v Misbehavin Ltd [2007] UKHL 19 lead to the conclusion that a failure to refer to the convention does not of itself constitute a breach of convention rights the applicant contends, however, that the failure of the decision maker to expressly consider convention rights means that the assessment made by that decision maker will carry less weight with the court.

[12] I consider that this submission does not properly reflect the approach of the House of Lords in Re Misbehavin. This issue was touched on by Lord Roger at paragraph 26 of his opinion where he said:

"Of course, where the public authority has carefully weighed the various competing considerations and concluded that interference with a Convention right is justified, a court will attribute due weight to that conclusion in deciding whether the action in question was proportionate and lawful. As Lord Bingham said in *R (SB) v Governors of Denbigh High School* [2007] 1 AC 100, 116G, para 31:

'If, in such a case, it appears that such a body has conscientiously paid attention to all human rights considerations, no doubt a challenger's task will be the harder. But what matters in any case is the practical outcome, not the quality of the decision-making process that led to it'."

Similarly, having observed that head teachers and governors could not be expected to make decisions with textbooks on human rights at their elbows, Lord Hoffmann observed, at p 126C, para 68:

"The most that can be said is that the way in which the school approached the problem may help to persuade a judge that its answer fell within the area of judgment accorded to it by the law."

In my view it is important to recognise that the test is not whether lip service has been paid to the recitation of convention rights but whether the evidence establishes that the public authority firstly has particular skills in relation to the matters in respect of which the balance is to be struck and secondly has carefully balanced the considerations which lie at the heart of the decision-making process. That approach is further supported by paragraph 37 of the opinion of Baroness Hale in the same case:

"But this is not a case in which the legislation itself attempts to strike that balance. The legislation leaves it to the local authority to do so in each individual case. So the court has to decide whether the authority has violated the convention rights. In doing so, it is bound to acknowledge that the local authority is much better placed than the court to decide whether the right of sex shop owners to sell pornographic literature and images should be restricted - for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights of others. But the views of the local authority are bound to carry less weight where the local authority has made no attempt to address that question. Had the Belfast City Council expressly set itself the task of balancing the rights of individuals to sell and buy pornographic literature and images against the interests of the wider community, a court would find it hard to upset the balance which the local authority had struck. But where there is no indication that this has been done, the court has no alternative but to strike the balance for itself, giving due weight to the judgments made by those who are in much closer touch with the people and the places involved than the court could ever be."

[13] In drawing up the policy the matters to be balanced were the adverse effect on individual prisoners on the one hand and the need to tackle the extent of drug abuse within the prison environment which inevitably had an effect upon good order and discipline. There is no doubt that the Prison Service had particular insights into the extent of the drug problem and the effect on the prison population. In such circumstances their evaluation of the balance is always likely to carry considerable weight with the court when considering whether the interference is justified. In this case the policy permitted of exceptions and the evidence indicates that the policy was being applied in a manner consistent with the proper exercise of discretion by the governors.

[14] The intense scrutiny required in relation to convention rights then requires the court to look at the balance that was actually struck between this applicant's rights and the need to prevent crime within the prisons. The interference of which the applicant complained was the restriction on him leaving £50 of his money out for his daughter's birthday at the end of June. The adjudicating Governor examined the computer record of the applicant's IPC account. He noted that the applicant regularly received cash deposits

from his visitors in addition to the amounts which the applicant received by way of earnings within the prison. The exhibit of his IPC account shows that the applicant received £20 cash in as a result of a visit on 8 June 2008 and a further sum of £50 as a result of a visit on 11 June 2008. The applicant says that he does not want to phone his visitors and ask them to send money to his daughter but if his concern is to ensure family life with his daughter it is difficult to understand why he should have such resistance to that course.

[15] I consider that the evidence demonstrates that the Governor looked carefully at all the circumstances surrounding the applicant's request and was entitled to take into account in examining the extent of any interference with private or family life the option available to the applicant of redirecting money sent in by his visitors directly to his child. In those circumstances any interference was in my view modest and clearly outweighed by the need to address criminal behaviour within the prisons affecting good order and discipline. I consider, therefore, that the applicant's reliance upon article 8 fails on proportionality grounds and in light of the observations of Lord Neuberger in Re Misbehavin I do not consider that the challenge under article 1 article protocol 1 adds anything further.

[16] Finally the applicant asserts that there was a duty to consult and a failure to do so. This was not part of the applicant's original case and the applicant does not contend that there was any duty to consult him in relation to the preparation of the Instruction to Governors. The evidence indicates that the Prison Service advised the Internal Monitoring Board and a small number of groups concerned with minimising the supply of drugs in prison of their proposed change to the IPC account rules. I accept that the duty of consultation can arise as a result of prior governmental practice or because of a representation that consultation would be provided in advance of a decision being taken (see Judicial Review in Northern Ireland paragraph 7.09). None of those considerations, however, arise in this case and I see no basis for concluding that any duty of consultation was imposed on or accepted by Prison Service in relation to this decision.

[17] In the circumstances, therefore, I consider that none of the grounds of challenge are made out and accordingly I dismiss the judicial review application.