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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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Phillips' (Ralph) and McKinstry's (James Junior) Applications [2011] NICA 68

IN THE MATTER OF AN APPLICATION BY RALPH PHILLIPS FOR JUDICIAL REVIEW

AND

IN THE MATTER OF AN APPLICATION BY JAMES JUNIOR McKINSTRY CRAIG FOR JUDICIAL REVIEW

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Before Higgins LJ, Coghlin LJ and Sir John Sheil

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HIGGINS LJ

[1] Ralph Phillips (the first appellant) appeals against the order of Morgan J refusing his application for judicial review of a decision of the Prison Service refusing his request to be permitted to send out £50 from his Inmate Personal Cash (IPC) Account to his daughter for her birthday at the end of June. James Junior McKinstry Craig (the second appellant) appeals against the decision of Stephens J refusing his application for judicial review of a decision of the Prison Service refusing his request to be permitted to send out money from his IPC account to his daughter. The appeals were heard together since both challenge the validity of a Northern Ireland Prison Service Policy (the policy) introduced by the Northern Ireland Prison Service ("the Prison Service") in April 2008 and raise similar points of law. In addition the second appellant raised a separate issue that the policy, which was introduced to reduce the supply of illegal drugs to prisoners and means of payment for those drugs, was ultra vires the Prisons and Young Offenders Centre Rules (Northern Ireland) 1995, as amended (the vires argument). Ms Anyadike-Danes QC and Mr McQuitty appeared on behalf of the first appellant and Mr Scoffield appeared on behalf of the second appellant. Mr Maguire QC and Ms Murnaghan appeared on behalf of the respondent, the Northern Ireland Prison Service (the Prison Service), in both appeals.

[2] I have had the opportunity to read in draft the judgment of Coghlin LJ. I adopt the factual background as set out in his judgment. I agree that the appeal of the first appellant should be dismissed for the reasons set out by Coghlin LJ in paragraphs 1 to 39 of his judgment and for the same reasons that the appeal of the second appellant, on grounds other than the vires argument, should also be dismissed. Coghlin LJ found that the vires argument should be resolved in favour of the second appellant.

The Vires Argument.

[3] In his Statement filed under Order 53 of the Rules of the Supreme Court (Northern Ireland) 1980 at paragraph 2 the second appellant sought an order of Certiorari quashing –

i. the provisions of the Prison Service policy adopted in or around April 2008 in relation to the use of prisoners' money (the policy) which restrict the passing of moneys out of the prison by prisoners (the impugned provisions);

ii. a decision of Governor Jeanes made on or about 30 July 2008 whereby, pursuant the terms of the policy, the applicant was refused permission to pay money out to his daughter.

In addition he sought –

b) a declaration that those provisions of the policy which restrict the passing of moneys out of the prison by prisoners are unlawful, ultra vires and of no force or effect;

c) a declaration that the decision of he Governor referred to at paragraph 2(a)(ii) above is unlawful, ultra vires and of no force or effect.

[4] The grounds of appeal are –

1. the learned trial judge erred in law in his construction of rule 18 of the Prison and Young Offenders' Rules (Northern Ireland) 1995 and did so, in particular, by considering that the payment of prison earnings fell within the purview of that rule (paragraph 29 of the judgment);

2. relatedly (sic), the learned judge erred in law in failing to conclude that the respondent, by treating prison earnings and cash received by prisoners at the prison as identical for the purposes of the policy, had itself erred in law and/or had left a relevant consideration out of account;

3. the learned trial judge erred in law and/or in fact in concluding that "there are sufficient exception in the policy and there is sufficient discretion in the Governors to arrive at a proportionate response in each individual case " (paragraph 32 of the judgment);

4. the learned judge erred in considering that the interference with the appellant's rights under Article 8 of the convention was proportionate (paragraph 38 of the judgment), particularly having regard to his finding that (subject to insignificant exceptions) all the money acquired by the appellant was earned by him inside the prison;

5. the learned trial judge erred in law in failing to conclude that the respondent had unlawfully breached a legitimate expectation requiring consultation with the appellant in advance of the introduction of the policy impugned in these proceedings (paragraph 38 of the judgment).

[5] For the reasons given by Coghlin LJ between paragraphs 1 and 39 of his judgment I would dismiss grounds 3,4 and 5. Grounds 1 and 2 appear to be the relevant grounds on the question of vires.

[6] As recounted by Coghlin LJ the second appellant earned approximately £25 per week on prison work. His visitors have been few – his daughter, her mother and his daughter's boyfriend. The original request to the Prison Service to send out £250 to his daughter was made on 2 June 2008. The reason given was to facilitate her holiday from 27 June 2008. Governor Kennedy who dealt with the request held that it did not fall within the exceptional circumstances provided for in the policy and refused the request. In the course of rejecting the second appellant's application for judicial review Stephens J held that Rule 18 of the Prison Rules was not restricted to cash received from outside the prison and that it applied to earnings accrued within the prison.

[7] Part III of the Prison rules under the Heading Reception, Transfer and Discharge include Rules 17 and 18. These provide -

> "Prisoners' property on reception
>
> 17.- (1) Any property or clothing which a prisoner is not allowed to retain for his own use shall be taken into safe custody under the authority and responsibility of the governor.
>
> (2) If clothing is in an infested or in a state of total disrepair it may be destroyed, in which event the details shall be recorded and the prisoner informed.

(3) 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 the prison.

(4) If a prisoner has any form of medicine in his possession on reception it shall be for a health care professional to decide on its use or disposal as the case may be.

(5) In the absence of a health care professional a health care officer may perform the duty referred to in paragraph (4).

Money and articles received at a prison

18.- (1) Any money or other article (other than a letter or other communication) sent to a prisoner through the post office or otherwise received at prison shall be dealt with in accordance with the provisions of this rule and the prisoner shall be told how it is dealt with.

(2) Any cash shall, at the discretion of the governor, be-

(a) dealt with in accordance with rule 17(3); or

(b) returned to the sender if his name and address are known; or

(c) where the sender's name and address are unknown, otherwise dealt by the Department of Justice provided that in relation to a prisoner committed to prison in default of payment of a sum of money, cash received at the prison shall be applied in or towards the satisfaction of the amount due from him unless the prisoner objects.

(3) Any security for money shall, at the discretion of the governor, be-

(a) placed with the prisoner's property; or

(b) returned to the sender if his name and address are known; or

(c) encashed and the cash dealt with in accordance with paragraph (2) of this rule.

(4) Any other article to which this rule applies shall, at the discretion of the governor, be -

(a) delivered to the prisoner or placed with his property; or

(b) returned to the sender if his name and address are known; or

(c) if the sender's name and address are not known or if the article is of such a nature that it would be unreasonable to return it, sold or otherwise disposed of, and the net proceeds of any sale dealt with in accordance with paragraph (2) of this rule."

[8] It was submitted by Mr Scoffield that 'prison earnings' should be distinguished from what he referred to as 'private cash' which was a sum sent in or brought in to the prison from outside as distinct from sums earned within the prison. He relied on the specific wording of Rules 17(3) and 18. In addition he prayed in aid Rule 26.11 of the European Prison Rules which provides –

> "Prisoners shall be allowed to spend at least a part of their earnings on approved articles for their own use and to allocate a part of their earnings to their families."

He argued that Rules 17(3) and 18 provided authority for money, whether brought into the prison by a prisoner on his reception or sent to the prisoner through the post office or otherwise, to be paid into an account under the control of the governor. It was submitted that no such authority existed in respect of earnings accrued through prison work, to be paid into the account (IPC).

[9] Mr Maguire QC accepted that the Prison rules made no specific provision in respect of how a prisoner might spend his earnings from prison work. He drew attention to the wide and general terms of sections 1, 2 and 13 of the Prison Act (Northern Ireland) 1953. Section 1 and 2 provide that the [Secretary of State] shall be the authority responsible for the general regulation, direction and superintendence of prisons and prisoners, and that he has all such powers as appear to him to be necessary for, inter alia, the proper administration of any prison and for the making of and giving effect to arrangements for the welfare, employment and training of prisoners. Section 13 empowers the [Secretary of State] to make Prison Rules.

[10] Rule 34 prohibits bringing drugs into prison. Rule 51 makes provision for prisoners to work while in prison. The relevant paragraphs are –

> "51(1) Work of a useful nature or other purposeful activities shall be provided to keep prisoners actively employed during their normal day.
>
> (2) Any prisoner may be required to work by the governor unless excused by the medical officer on medical grounds.
>
> (10) The Secretary of State may make arrangements for prisoners to earn money for work carried out under this rule."

Rule 10 makes provision for a system of privileges within the prison.

> "Privileges
>
> 10. – (1) There shall be established at every prison a system or systems of privileges appropriate to the classes of prisoners held there.
>
> (2) The system of privileges shall have regard to prisoners' personal possessions, private cash and prison earnings in addition to access to other facilities.
>
> (3) Where an order for the forfeiture of privileges is made by a governor under Rule 39(1) of these Rules, it shall apply only to those privileges specified in the order."

Part IV of the Prison Rules makes provision for Discipline and Control and empowers the Governor to impose punishments for offences contrary to prison rules. These include stoppage of earnings or portion thereof, forfeiture of a proportion of earnings, stoppage of all or any privileges other than earnings for a period not exceeding a certain number of days. Read together earnings are a privilege which can be forfeited for breach prison rules.

[11] Stephens J held that the words 'otherwise received at prison' in Rule 18 covered earnings paid in respect of prison work. For the reasons given by Coghlin LJ I do not think Rule 18(1) is open to that interpretation.

[12] Except on medical grounds a prisoner has no option but to work if the governor requires him to do so. Such work is paid in accordance with arrangements made by the Secretary of State (Rule 51(10)). No direct evidence was given as to any such arrangements made by the Secretary of State, but it is clear from the IPC accounts of both appellants that money has been credited regularly to their IPC for prison earnings. It is probably a reasonable inference that the crediting of the IPC for earnings is in accordance with arrangements made by the Secretary of State. If it was not, it is clear that the second appellant has acquiesced in regular credits for prisoner earnings being made to that

account over a long period of time. That account is under the control of the Governor. It was not suggested otherwise. Indeed Morgan J in his judgment in the application by the first appellant stated that it was common case that by virtue of Rule 17(3) and Rule 18 that the Governor has control of the credit within an IPC account. Where amounts are credited to that account from different sources, whether in the possession of the prisoner on reception or otherwise, the account comprises what may be referred to as mixed funds. It seems to me to be unrealistic to consider that the amount credited in the account remains identifiable by reference to its source, once it is credited to the account; equally so, if the account has one source, which is highly unlikely. From that account debits are made for such items as television rental, tuck-shop purchases, and phone airtime. It would seem that without such an account a prisoner would be unable to pay for such items. The second appellant's account was exhibited. This demonstrated that he had used the account regularly to pay for television rental, phone time and tuck-shop purchases.

[13] The vires challenge to the policy as set out in the Notice of Motion and the Order 53 statement was that the restriction on payments out of the account was unlawful, not that earnings could not be credited to it. There was no challenge to the arrangements whereby earnings are credited to an IPC account. Mr Scoffield's argument, which does not reflect the Order 53 statement, requires prisoner earnings credited to the account to remain as prisoner earnings for all purposes. Once money is credited to the account from whatever source, it becomes a credit in that account under the control of the Governor and to which any policy, otherwise lawful, can be applied. When framing a policy relating to the account there is no necessity to take into consideration the source of the amounts credited to it. What is relevant is the account itself and whether it is in credit. For the reasons given by Coghlin LJ between paragraphs 1 – 39 I am satisfied that the policy restricting sending money out was lawful. Furthermore, the restriction in the policy on sending money out from the IPC, regardless of its source, is not ultra vires the Prison rules.

[14] Ground 1 of the Notice of Appeal relates to the trial judge's interpretation of Rule 18. This rule is not open to the interpretation placed on it by the trial judge and the appellant is entitled to succeed on ground 1. Ground 2 alleges that the judge erred in treating prison earnings and cash received by prisoners as identical for the purposes of the policy. For the reasons given above I would dismiss this ground. The application for judicial review was directed solely to the policy relating to sending money out. None of the grounds set out in the application have been made out. I would dismiss both appeals.

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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

Phillips' (Ralph) and McKinstry's (James Junior) Applications [2011] NICA 68

IN THE MATTER OF AN APPLICATION BY RALPH PHILLIPS FOR JUDICIAL REVIEW

AND

IN THE MATTER OF AN APPLICATION BY JAMES JUNIOR McKINSTRY CRAIG FOR JUDICIAL REVIEW

Before Higgins LJ, Coghlin LJ and Sir John Sheil

COGHLIN LJ

[1] These appeals were heard together since both involve a challenge to the validity of a policy introduced by the Northern Ireland Prison Service ("the Prison Service") in April 2008 and raise a number of common points of law. Ralph Phillips appeals from a decision of Morgan J delivered on 30 June 2009 and was represented before this court by Ms Anyadike-Danes QC and Mr McQuitty. James Junior McKinstry Craig appeals from a decision of Stephens J delivered on 9 April 2010 and was represented by Mr Scoffield. Mr Maguire QC and Ms Murnaghan represented the Prison Service for the purposes of both appeals. The court is grateful to counsel for the care and clarity with which they prepared and presented their written and oral submissions.

Background Facts

[2] In or about the summer of 2007 the Deputy Director of Operations for the Prison Service, Max Murray, instructed the Head of Security Information Branch, Patrick Gray, to carry out a review of management arrangements for reducing the supply of illegal drugs to prisoners. Governor Gray then carried out an extensive review including numerous security audits. These involved, inter alia, cross referencing intelligence held on prisoners suspected of involvement in drug dealing, intimidation and extortion with the traffic in and out of their Inmates

Personal Cash ("IPC") accounts. Investigations confirmed that, in particular, prisoners suspected of dealing in drugs regularly received payments into their IPC accounts from the families of other prisoners and/or anonymously. The records of prisoners considered to be vulnerable to bullying and intimidation were also cross referenced with the IPC accounts of prisoners suspected of carrying out such activities. Examination of this information revealed that it was common place for visitors to vulnerable prisoners to leave money at reception for the benefit of those suspected of bullying.

[3] It was estimated that at Maghaberry Prison alone about £700,000 had been received for prisoners during the year 2007. The vast majority of this money was passed in cash through visitors' reception. A small amount, often anonymous, was posted into the prison. There appeared to be a relatively common practice of payments being made into IPC accounts with the sums being subsequently "turned around" and passed back out of the accounts to visitors. In some instances prisoners were receiving up to six payments a day by way of cash lodgements from visitors to other prisoners and prisoners were also found to be leaving out payments to individuals by whom they had not been visited. Most of the money was not traceable as signatures were often illegible or the money was anonymously posted into the prison. Governor Gray concluded that there was clear evidence that the then current system was facilitating payment for drugs and, possibly, money laundering as well as giving rise to bullying, extortion and intimidation of vulnerable prisoners.

[4] In due course, Governor Gray furnished his report to Mr Murray and it was ultimately supplied to the Prisons Minister, Paul Goggins. On 14 April 2008 a new policy was promulgated with regard to IPC accounts. The relevant sections of that policy were as follows:

> "1. IPC accounts will be limited to a maximum of £500.
>
> - Where a prisoner's account is in excess of £500 on 14 April the account will be frozen i.e. no money will be accepted at visitors' reception from a visitor to the prisoner. This will remain the case until the balance of the account comes down below £500.
> - Prisoners' earnings will continue to be credited to the account.
> - Such accounts should reduce through normal spending.
> - Visitors' reception staff need to have access to IPC account balances.
>
> 2. Money for prisoners will only be allowed to be left at visitors' reception by a visitor to that particular prisoner within the limits of the prisoner's account.

- No money should be accepted at visitors' reception from any person not being a visitor to the prisoner.
- A visitor means a 'domestic visitor' and not a person visiting in an official capacity.

3. Prisoners will not be allowed to pass any money out of prison to any person without the written permission of the Governor.

- Current arrangements facilitated by the prisons to local newsagents will continue as normal.
- 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. Prisoners will be able to purchase gift vouchers and post them out for such occasions.

4. No money for any prisoner will be accepted by post.

- Money includes cash, cheques, postal orders and money orders.
- Where any money for a prisoner is received at the prison through the post it should be recorded at the point of opening and forwarded to the Cashier/IPC clerk.

5. Governor's discretion in case of genuine hardship.

- It is accepted that there may be cases of genuine hardship where for example a prisoner does not have domestic visits and therefore no means of having money left into his account. In such cases the Governor may consider a request from a prisoner to be allowed to have a sum of money (agreed) posted into the prison.
- The Governor should only agree to such requests in exceptional circumstances. It is important that this does not in any way become a routine practice. The prisoner must make any such request in writing to the Governor.

. . .

- There will undoubtedly be other issues that arise as the new arrangements are progressed. These will have to be discussed and agreed while maintaining a level of oversight and management of the arrangements to ensure that the purpose and effect of the new arrangements is not diluted."

The appellant Ralph Phillips

[5] The appellant Ralph Phillips is presently serving a life sentence at Her Majesty's Prison Maghaberry. On 21 May 2008 the appellant Phillips submitted a request ". . . to leave £50 of my money out for my daughter's birthday at the end of June". The appellant maintained that, since he had been in custody, it had been his practice to send out a small amount of money for his two children on their birthdays and that he had observed this practice for approximately 4 years. It appears that all such previous requests of this nature had been granted. Despite the fact that this appellant was seeking to leave money out for his daughter's birthday and family birthdays were prima facie ruled out by the impugned policy, Governor Kennedy carried out a careful investigation of the merits of the request. A review of this appellant's IPC account confirmed a series of payments in from his visitors. The sums varied in amount from £10 to £50. Such payments continued to be made despite the fact that the appellant was in receipt of initially £11 and subsequently £20 per week in prison earnings. In such circumstances Governor Kennedy considered that the appellant would have been able to redirect some of these deposits towards family presents. On 13 June 2008 the request was refused by Governor Kennedy who stated that it did not meet the required exceptional circumstances criteria and he referred to the terms of the policy introduced in April 2008. In response to a further letter from the appellant's solicitors Governor Cromie wrote on 30 June 2008 stating that:

> "The passing out of money by prisoners is only allowed in exceptional circumstances. This is due to a new NIPS policy aimed at reducing the ability of prisoners to pay off drug debts. Whilst there is no inference that your client would be personally involved in payment for drugs, his request does not meet the test of exceptional need i.e. there is no claim of hardship of family or dependants."

On 4 July 2008 the appellant submitted a complaint seeking a reconsideration of his request in the course of which he provided further details of the economic situation of his daughters. He claimed that the financial situation of his family constituted "exceptional circumstances" and alleged that refusal of his request and the policy in general constituted breaches of Article 8 and Article 1 of the First Protocol. In the light of those representations Governor Kennedy revisited his original decision but having done so, he concluded that it should stand.

The appellant James Junior McKinstry Craig

[6] This appellant is also currently serving a sentence of life imprisonment at HMP Maghaberry. This appellant works in the prison and receives a wage of approximately £25 per week. During his time in custody his visitors have been restricted to his daughter, her mother and his daughter's boyfriend. The original Prison Service documentation indicated that on 2 June 2008 this appellant made a request to be allowed to leave £250 out for his daughter who was going on holiday on 27 June. He noted that he had a visit booked for 22 June. In his affidavit grounding the original judicial review application this appellant asserted that the Governor had misunderstood the situation in so far as his request had been to leave money out for "the support" of his daughter rather than to assist with her holiday arrangements. He maintained that, over the years, his practice had been to leave out sums of money for the support of his daughter. At first instance Stephens J found that, subject to insignificant exceptions, all the money acquired by this appellant was earned by him inside the prison.

[7] This appellant's request was refused by Governor Kennedy on 29 July 2008. Governor Kennedy analysed the appellant's IPC account which did not indicate payment into the account by any of the appellant's visitors and confirmed a pattern of leaving out money, presumably for his daughter, before the introduction of the new policy. Governor Kennedy also confirmed that the appellant only had the three visitors to which he had referred and that he had previously tested drugs free and apparently been well behaved. Governor Kennedy was aware of the potential confusion as to whether the money was to be left out for the purpose of a holiday and, in the circumstances, reconsidered the request but, having done so, concluded that the general support of the appellant's child would not, without more, fall within the sort of "exceptional circumstances" contemplated by the policy. It appears that, at the time of making his decision about this appellant's request, Governor Kennedy was responsible for the majority of decisions relating to requests made under the new policy. In his initial affidavit he gave two examples of requests that did fall within "exceptional circumstances" one being a request to send out money to pay for heating oil for the wife of a prisoner, with the cheque being made payable to the oil company, and another being permission to send money out to pay a prisoner's rent in order to avoid eviction upon his release. Requests that were not considered to fall within exceptional circumstances included permission to send money out to discharge a rates bill and to pay for car insurance for a prisoner's wife.

The statutory framework

[8] It was accepted that the following articles of the European Convention of Human Rights and Fundamental Freedoms ("the Convention") were relevant:

"Article 8

Right to respect for private and family life

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

2. 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.

Protocol 1 Article 1

Protection of property

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

[9] Rule 26.11 of the European Prison Rules ("EPR") provides as follows:

"Prisoners shall be allowed to spend at least a part of their earnings on approved articles for their own use and to allocate a part of their earnings to their families."

[10] Relevant provisions of the Prison and Young Offenders Centres Rules (Northern Ireland) 1995 ("the Prison Rules") made in accordance with section 13 of the Prison Act (Northern Ireland) 1953 ("the Prison Act") are as follows:

"Prisoner's property on reception

17-(1) Any property or clothing which a person is not allowed to retain for his own use shall be taken into safe custody under the authority and responsibility of the governor. . .

(3) 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 the prison.

Money and articles received at a prison

18-(1) Any money or other article (other than a letter or other communication) sent to a prisoner through the post office or otherwise received at the prison shall be dealt with in accordance with the provisions of this rule and the prisoner shall be told how it is dealt with.

(2) Any cash shall, at the discretion of the governor, be –

(a) Dealt with in accordance with Rule 17(3); or

(b) Returned to the sender if his name and address are known; or

(c) Where the sender's name and address are unknown, otherwise dealt with subject to any discretion by the Secretary of State.

Work

51-(1) Work of a useful nature or other purposeful activities shall be provided to keep prisoners actively employed during their normal day.

. . .

(10) The Department of Justice may make arrangements for prisoners to earn money for work carried out under this rule.

Status of governor

116-(1) The governor shall be in command of the prison.

. . .

(5) The governor shall ensure the safe custody and proper disposal or use of all monies, equipment and materials in the prison and shall keep whatever records and accounts are required by direction of the Department of Justice."

The decisions at first instance

[11] On 30 June 2009 Morgan J dismissed the application for judicial review by the appellant Phillips. The learned trial judge rejected the submission on behalf of the applicant that the policy was disproportionate in so far as it involved interference with the rights of the applicant in accordance with Article 8 and Protocol 1 Article 1 of the Convention. He observed that, in his view, it was important to recognise that the test was not whether lip service had been paid to the recitation of Convention rights but whether the evidence established that the public authority, firstly, had particular skills in relation to the matters in respect of which the balance was to be struck and, secondly, whether it had carefully balanced the considerations which lay at the heart of the decision making process. With regard to the submission that the respondent had failed to properly observe its duty to consult Morgan J recorded that such an argument had not been part of the applicant's original case and that the applicant had not contended that there was a duty to specifically consult him in relation to the preparation of the instruction to governors. He accepted that the duty to consult could 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 but, since he did not consider that either of those considerations had arisen, he saw no basis for concluding that any duty of consultation had either been imposed upon or accepted by the Prison Service.

[12] On 9 April 2010 the application for judicial review initiated by the appellant Craig was rejected by Stephens J. In the course of delivering his judgment Stephens J recorded that, in the absence of any relevant material contained in either the applicant's correspondence or affidavit, he was not persuaded that the payments that the applicant sought to make amounted to financial support of significance for his daughter as opposed to gifts and tokens of his appreciation and love. The learned judge also noted that, since the date of the judgment delivered by Morgan J, the respondent had introduced a scheme in September 2009 in accordance with which prisoners could choose items from the Argos catalogue to be sent to their family and friends. He recorded that the applicant Craig had chosen not to explain to the prison authorities or to the court why the selection of a gift, either by him or by his daughter, from the Argos catalogue would not perform the function of enabling him to make gifts to his daughter or, indeed, to indirectly provide her with financial support in so far as such gifts might relieve her of the obligation to purchase a particular item. He found as a fact that there was an adequate range of gifts in the Argos catalogue to perform the function of enabling the applicant to demonstrate his love and emotional support for his daughter.

[13] Stephens J rejected the submission made on behalf of the applicant Craig that Rule 18 was restricted to cash received "from outside the prison" and did not apply to money earned within the prison system. The learned trial judge looked carefully at the arguments relating to proportionality of the policy and he

accepted that intense scrutiny was required in relation to Convention rights with the need to focus on the balance between the applicant's rights and the duty to prevent crime within the prison. Despite the urgency of addressing crime within the prison, Stephens J expressed the view that the balance would have been disproportionate without the implementation of the Argos scheme. He also rejected a similar argument to that advanced in Phillips' case that the respondent had failed to properly consult with prisoners prior to the introduction of the impugned policy. He noted that the duty to consult was an aspect of fairness and, after referring to a quotation from Lord Diplock's judgment in Bushell and another v. Secretary of State for the Environment [1981] AC 75, he stated that he did not consider that there was a duty to consult with prisoners some of whom were involved in criminal activity inside the prison and others who might be the subject of abuse and bullying.

The grounds of appeal

[14] The appellant Phillips' ground of appeal may be summarised as follows:

(i) The learned trial judge erred in finding that there was no duty to consult and, further, if the respondent had been subject to such a duty it had not been properly and effectively discharged.

(ii) The decision by the respondent to adopt the impugned policy had not been proportionate in the circumstances. In particular, in circumstances in which no express consideration had been given by the respondent to the extent of interference with the applicant's convention rights in accordance with Article 8 and Article 1 of the first Protocol, the learned trial judge had afforded excessive deference to the respondent.

(iii) The learned trial judge failed to consider the appellant's legitimate expectation.

(iv) The learned trial judge erred in rejecting or failing to consider that the impugned policy constituted an unlawful fettering of the respondent's discretion.

[15] The appellant Craig's grounds of appeal may be summarised as follows:

(i) The learned trial judge erred in law in his construction of Rule 18 in so far as he held that it applied to payment out of sums earned in the prison.

(ii) The learned trial judge erred in holding that the impugned policy was proportionate in the circumstances.

(iii) The learned trial judge erred in failing to conclude that the respondent had unlawfully breached a legitimate expectation requiring consultation with the appellant in advance of the introduction of the impugned policy.

Consultation

[16] Logically, the first question to be considered is whether the respondent was under a legal duty to consult with prisoners, or any particular category thereof, prior to introducing the impugned change of policy. It is clear that the respondent was not subject to any specific statutory or regulatory duty to embark upon consultation and both appellants rely upon the concept of legitimate expectation in support of their arguments that the respondent had acted unfairly in failing to do so.

[17] In R (Bhatt Murphy) v. Independent Assessor [2008] EWCA Civ 755 Laws LJ observed at paragraph 50:

> "A very broad summary of the place of legitimate expectations in public law might be expressed as follows: the powers of public authorities to change policy is constrained by the legal duty to be fair (and other constraints which the law imposes). A change of policy which would otherwise be legally unexceptionable may be held unfair by reason of prior action, or inaction, by the authority. If it has distinctly promised to consult those affected or potentially affected, then ordinarily it must consult (the paradigm case of procedural expectation). If it has distinctly promised to preserve existing policy for a specific person or group who would be substantially affected by the change, then ordinarily it must keep its promise (substantive expectation). If without any promise, it has established the policy distinctly and substantially affecting a specific person or group who in the circumstances was in reason entitled to rely on its continuance and did so, then ordinarily it must consult before effecting any change (the secondary case of procedural expectation). To do otherwise, in any of these instances, would be to act so unfairly as perpetrate an abuse of power."

Earlier in the same judgment, at paragraph 49, the learned Lord Justice had made the following observations in relation to what he described as "the secondary" case of legitimate expectation:

> "49. I apprehend that the secondary case of legitimate expectation will not often be established. Where there has been no assurance either of consultation (the paradigm case of procedural expectation) or as to the continuation of the policy (substantive expectation), there will generally be nothing in the case save a decision by the authority in question to effect a change in its

> approach to one or more of its functions. And generally, there can be no objection to that for it involves no abuse of power. Here is Lord Woolf again in ex parte Coughlan (paragraph 66):
>
> > 'In the ordinary case there is no space for intervention on grounds of abuse of power once a rational decision directed to a proper purpose has been reached by lawful process.'
>
> Accordingly, for this secondary case of procedural expectation to run, the impact of the authority's past conduct on potentially affected persons must, again, be pressing and focused. One would expect at least to find an individual or group who in reason have substantial grounds to expect that the substance of the relevant policy will continue to enure for their particular benefit: not necessarily for ever, but at least for a reasonable period, to provide a cushion against the change. In such a case the change cannot be lawfully made, certainly not made abruptly, unless the authority notify and consult."

[18] In these appeals it is common case that no distinct promise of consultation had been made by the respondent nor had the respondent, in the absence of such a distinct promise, observed a regular practice of consultation with regard to any change or amendment to the relevant policies. Mr Scoffield, on behalf of the appellant Craig, submitted that his was ". . . one of those cases where a long-standing practice has engendered a legitimate expectation which could not be frustrated without providing prisoners such as the appellant with an opportunity to make representations in advance." He referred to the observations of Lord Diplock in Council of Civil Service Unions v. Minister of the Civil Service [1985] AC374 at 408 and to paragraph 16 of Morgan J's judgment at first instance in the case of Phillips.

[19] However, it is important to remember that the duty to consult must always be considered in the context of the relevant legal and factual circumstances and it is recalled that in the GCHQ case the evidence confirmed that, since GCHQ began in 1947, prior consultation had been the invariable rule when conditions of service were to be significantly altered. Mr Scoffield also adopted the contentions advanced by Ms Daynes in support of a "secondary case of procedural expectation" in her original skeleton argument on behalf of the appellant Phillips. However, once again, the significance of context should not be overlooked particularly with regard to the principal authorities upon which reliance was placed. In Bhatt Murphy all three individual applicants had spent time in custody, none was eligible for compensation under the statutory scheme, all three had instructed solicitors before 19 April 2006 and been advised that they had potential claims under the discretionary scheme but no applications had been submitted to the Secretary of State upon their behalf prior to that date. At the relevant date all the solicitors had been engaged on retainers on terms that

their fees would be charged at the firm's standard fee rates for private work in the expectation that the costs would be met by the Independent Assessor. Nevertheless, all of the claims were rejected by Laws LJ as not being sufficiently exceptional to come within the secondary class of procedural expectation. In Re Neale's application [2005] NI QB 33, upon committal to prison, four prisoners had each received what Deeny J considered to be properly described as a "clear and unambiguous representation" as to the date upon which they would first be eligible for home leave and the amount of home leave for which they would be eligible. The Prison Service then purported to change the policy relating to home leave arrangements with retrospective effect with regard to the four applicants. In the circumstances the learned trial judge considered that each of the prisoners had brought themselves within the third of Lord Woolf's categories in Coughlan by establishing that they enjoyed substantive legitimate expectations of the continuance of the original policy. Deeny J also remarked that the applicants had a strong case for claiming a legitimate expectation to be consulted about the retrospective nature of the new policy within Lord Woolf's category *(b)*. However, it is important to note that in that case there had been consultations with a wide range of people, including prisoners, about the policy in general although no consultation had taken place with prisoners particularly affected by the retrospective implications of the change.

[20] In dealing with this aspect of the application brought by the appellant Craig, Stephens J referred to the decisions in the GCHQ case and to that in Bushell in which Lord Diplock had expressed the principle of fairness at 95E-96A in the following terms:

> ". . . what is fair procedure is to be judged . . . in the light of the practical realities as to the way in which administrative decisions involving forming judgments based on technical considerations are reached."

The learned trial judge then made the following observations:

> "In the circumstances of this case I do not consider that there was a duty to consult with prisoners some of whom are involved in criminal activity inside the prison and others who could be abused and bullied as part of the consultation process."

I respectfully agree. I bear in mind that it is necessary, in the circumstances of any particular case, to establish that the failure to consult was so unfair as to amount to an abuse of power. In the context of these appeals I do not consider that the appellants have established that they come within a sufficiently distinctive or specific group and it would be neither realistic nor practical to require the respondent to embark upon a formal consultation exercise with prisoners in general many of whom are likely to have been either the instigators or the victims of the activities that the policy was designed to prevent. It is to be

noted that in this case prisoners in Maghaberry, including the two appellants, were given four weeks notice of the proposed change in policy but neither of the appellants availed themselves of the opportunity to advance any relevant representation or challenge relating to the proposals during that period.

[21] In her revised position paper on behalf of the appellant Phillips, dated 5 March 2011, Ms Daynes adopted a somewhat different focus in relation to the issue of consultation. She emphasised that the appellant's primary complaint was that the respondent *had embarked* (my emphasis) on a consultation process in respect of the formulation and introduction of the impugned policy but that process had been defective. In her submission, whether or not there had been a duty to consult was, in fact, irrelevant.

[22] In support of that submission Ms Daynes referred to a number of excerpts from the affidavits filed on behalf of the respondent which she submitted confirmed that the respondent had set out to consult. These included:

(i) The statement by Governor Gray in his affidavit of 17 October 2008 at paragraph 12 that . . . "the question of driving the trade in drugs out of the prison was something I specifically took into account before I made my conclusions. In particular I consulted with the Independent Monitoring Board, the Board of Visitors, the Prison Ombudsman and voluntary organisations such as Dunlewy, Opportunity Youth and Northlands in order to obtain their views on the proposed change in policy".

(ii) The statement by the same deponent in his affidavit of 21 February 2009 . . . "to the best of my understanding consultation means 'a conference at which advice is given or views are exchanged'. Relying upon the decision in Re The Christian Institute and others [2007] NIQB 66 paragraph 20, Ms Daynes argued that seeking the view of relevant bodies was, in itself, *prima facie* evidence of a consultation process

(iii) The assertion by Governor Gray at paragraph 8 of his affidavit of 7 January 2009 and paragraph 9 of his affidavit of 21 February 2009 that . . . "the respondent consulted widely in respect of the proposed change to the IPC policy".

(iv) The observation by Governor Gray at paragraph 3 of his affidavit of 7 January 2009 that . . . "the meeting of 18 October 2007 was the principal consultation with the Ombudsman's Office, it having occurred prior to the introduction of the impugned policy."

(v) Overall, Ms Daynes contended that it would be unrealistic for a senior and experienced officer such as Governor Gray to use the term "consultation" in the context of these proceedings in the course of three separate affidavits unless he had in mind a formal process of consultation.

[23] While he accepted that, in the circumstances, the use of word "consultation" may have been somewhat loose, Mr Maguire, on behalf of the respondent, rejected any suggestion that the respondent had considered itself to be subject to a self-imposed duty to consult or had embarked upon a formal consultation process.

[24] It is common case that the respondent did not issue any formal consultation documents or fix a specific period over which consultation was to take place. There is no evidence that the respondent sought to conduct a consultation in accordance with the requirements set out by Lord Woolf at paragraph 108 of his judgment in Coughlan. Ms Daynes relied upon such omissions in support of her argument that, having set out to consult, the respondent conspicuously failed to do so in an acceptable manner. However, I note that the term 'consultation' is not a term of art. The respondent's case is that its concern was limited to affording an opportunity to the various bodies referred to by Governor Gray in his affidavits to engage in an exchange of views as to the proposed change of policy. At paragraph 12 of his first affidavit filed on 17 October 2008 Governor Gray described his activities in the following terms:

> "The question of driving the trade in drugs out of the prison was something that I specifically took into account before I made my conclusions. In particular, I consulted with the Independent Monitoring Board, the Board of Visitors, the Prison Ombudsman and the voluntary organisations such as Dunlewy, Opportunity Youth and Northlands in order to obtain their views on the proposed change in policy . . . during these meetings we alerted them to the possibility that the problems of paying for drug debts might be diverted to outside the prison, however, the overwhelming reaction was very supportive and positive."

He expressed a consistent view in the first affidavit that he swore on the 8 October 2009 in the case of Craig. In that affidavit he explained that he had taken specific account of the possibility that the new policy might drive the trade in drugs out of the prison and consequently alerted the Independent Monitoring Board, the Board of visitors, the Prison Ombudsman and Organisations such as Dunlewey, Opportunity Youth and Northlands of the proposed changes. In the same affidavit he made clear his view that it had not been necessary to consult with individual prisoners.

[25] It is not without significance that the ground relying upon a failure to properly consult interested parties was not included the Order 53 statement submitted on behalf of the appellant Phillips until March 2009 subsequent to the filing of Governor Gray's third affidavit and shortly before the hearing at first instance. In the course of his judgment Morgan J observed at paragraph [16]:

> "[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."

Such a finding was consistent with the affidavits filed on behalf of the respondent. No application to cross examine Governor Gray was made on behalf of the appellant and, in such circumstances, the court must view the respondent's affidavits in bonam partem.

The proportionality of the change in policy

[26] It was common case between the parties that the change in policy imposing restrictions upon the use of the IPC accounts interfered to some extent with the prisoners' Convention rights afforded by Article 8 and Article 1 of Protocol 1 of the European Convention. However, there was also no dispute that, in effecting the change, the respondent was pursuing a legitimate aim in seeking to effectively reduce criminal behaviour in the prison including drug dealing, money laundering, bullying and intimidation.

[27] While accepting that, in the circumstances of these particular appeals, Article 1 of Protocol 1 did not significantly add to the Article 8 rights of the appellants, both Ms Daynes and Mr Scoffield emphasised the importance of recognising that the latter informed the Prison Rules and the EPR. Particular reference was made to Rule 2(1)(*j*) of the Prison Rules providing that prisoners retain all rights and privileges except those that are removed as a necessary consequence of their imprisonment and that prisoners shall be given facilities to maintain links with their families and encouraged to do so in preparation for eventual release. Both counsel also relied upon the terms of Rule 65 of the Prison Rules:

> "65(1) Special attention shall be paid to the maintenance of relationships between a prisoner and his family.
>
> (2) Prisoners shall be encouraged and assisted to establish and maintain such relations with persons and agencies outside prison as may, in the opinion of the governor, best promote the interests of his family and his own social rehabilitation."

They also referred the court to rule 26.11 of the EPR.

[28] In dealing with the Phillips application at first instance Morgan J accepted that the challenge had been rightly characterised as one grounded on proportionality. In that context Morgan J recorded the submission on behalf of that applicant that the failure of the decision maker to expressly refer to a consideration of the relevant Convention rights meant that the assessment made by that decision maker should carry less weight with the court. After referring to quotations by Lord Roger and Lord Hoffman in Miss Behavin' Ltd v Belfast City Council [2007] NI 89 Morgan J observed at paragraph 13 of his judgment that:

> "[13] In drawing up the policy the matters to be balanced were the adverse effect on individual prisoners on the one hand and, on the other, 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."

He noted that the Governor had looked carefully at all the circumstances surrounding the request made by the appellant Phillips and that he was entitled in examining the extent of any interference with private or family life to take into account the option available to the applicant of redirecting money sent in by his visitors directly to his child. In such circumstances, Morgan J did not consider that any interference with his Convention rights was other than modest and clearly outweighed by the need to address criminal behaviour within the prison affecting good order and discipline.

[29] In her submission before this court Ms Daynes argued that, in the context of a failure by the respondent to refer to any consideration of the relevant Convention rights engaged during the course of formulation of the policy, the learned trial judge had been misled into affording an excessively high degree of deference to the respondent. Ms Daynes referred the court to the observations of Lord Bingham at paragraph 31 of his judgment in R (Begum) v. Denbigh High School [2007] 1 AC 100 and to those of Baroness Hale at paragraph 37 of her judgment in the Miss Behavin' application.

[30] The passage and implementation of the Human Rights Act 1998 ("HRA") has generated a great deal of legal debate, both professional and academic, about the principle of proportionality. Much of that debate has concerned concepts such as "margin of appreciation", "deference", "discretionary area of judgment",

etc. The breadth of the debate may be illustrated by a consideration of the judgments of their Lordships in R (Pro Life Alliance) v. British Broadcasting Corporation [2004] 1 AC 185 and, in particular, the judgments of Lord Walker and Lord Hoffman – see also the guiding principles set out in the dissenting judgment of Laws LJ in International Transport Roth v Home Secretary [2003] QB 728 at paragraphs 81 – 87 and the helpful observations of Lord Carswell in Tweed v Parades Commission for Northern Ireland [2007] NI 66 at paragraphs [35] – [36]. Ultimately, as in so many other areas of public law "context is everything" and the task of the court in applying the principle of proportionality is to do so having careful regard to all the relevant factual circumstances which will include the nature of the decision, the reason/s for the decision and any relevant degree of experience, skills or expertise enjoyed by the decision maker/public body concerned. Both the identity of the decision maker and the subject of the decision are likely to be relevant. There can be little doubt that the Prison Service is likely to have much more intimate and detailed knowledge and experience of prison regimes and the conditions under which they function effectively in order to preserve security than is available to the court. In this case the decision makers also had the benefit of the careful investigation, analysis and report prepared by Mr Gray. The particular Convention right under consideration may also be relevant. In R (on the application of Bloggs 61) v Secretary of State for the Home Department [2003] 1 W.L.R. 2724 the Court of Appeal considered that it was appropriate to show some deference to and/or recognise the special competence of the Prison Service despite being required to consider the fundamental and unqualified right to life afforded by Article 2. We remind ourselves that the transfer of sums of money in and out of the prison is only one aspect, albeit a significant aspect, of maintaining respect for a prisoner's private and family life and that Article 8 is a qualified right which is limited to the protection of *respect* (my emphasis) for privacy and family life which may have to give way to the interests set out in Article 8(2). Ultimately, although it is important not to usurp the power given to the original decision maker, the decision must remain one for the court before which the case is heard and the limit of deference is legality. The specific identity, skills and experience of the executive body concerned is but one factor to which appropriate weight will be given according to the circumstances in determining whether the particular executive action was proportionate. As Lord Bingham observed in Huang v Secretary of State for the Home Department [207] 2AC 167 at paragraph [16]:

> "The giving of weight to factors such as these is not, in our opinion, aptly described as deference: it is performance of the ordinary judicial task of weighing up the competing considerations on each side and according appropriate weight to the judgment of a person with responsibility for a given subject matter and access to special sources of knowledge and advice."

[31] In the course of the development of the impugned policy Governor Gray held a meeting with various security agencies the minutes of which record that

the Article 8 rights of prisoners and their families would be given consideration. Specific reference to a relevant Convention right or an omission to do so may be a factor to be given greater or lesser weight depending upon a consideration of all of the circumstances but the substance of the decision is and remains paramount. Paragraph [31] of the judgment in Denbigh High School has to be considered in the context of a passage that commences at paragraph [29] in the course of which Lord Bingham emphasised the importance that Strasbourg attributes to the substance or practical outcome of a decision rather than the quality of the decision-making process. In Miss Behavin similar views were expressed by Lord Hoffman, at paragraph [15], by Lord Mance, at paragraph [44], and Lord Neuberger, at paragraph [90], in the course of rejecting the argument that the council's decision had been irretrievably flawed because it had failed to specifically refer to the relevant rights. I respectfully endorse the view expressed by Morgan J at paragraph 12 of his judgment at first instance when he said:

> "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 had 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."

[32] The Prison Service clearly did enjoy relevant particular skills and experience and the careful investigation and report carried out by Governor Gray illustrates the extent to which the service went to ensure that it was as fully informed as possible about the problem that it faced. The policy that was ultimately adopted admitted of exceptions examples of which were provided by Governor Kennedy and was subject to review in the light of the way in which it was found to operate in practice.

[33] It is clear that Governor Kennedy took into account the status of both appellants as life sentence prisoners and carried out a careful analysis of their IPC accounts. He reviewed his original decision in the context of the further representations from the appellant Phillips including a complaint that the initial refusal and policy were in breach of Article 8 and Article 1 of Protocol 1 of the Convention and, having done so, he confirmed his original decision.

[34] In the case of the appellant Craig Governor Kennedy took into account the fact that the prisoner's visitors did not leave money in for his IPC and that an analysis of that account confirmed that he had previously left out sums, presumably for his daughter. He noted that the prisoner was well behaved, had tested drug free and that he only had three visitors. He re-visited the original decision made by Governor Jeanes in the light of the prisoner's representations

which included his assertion in his affidavit that the money left out was for maintenance of his daughter rather than a holiday and that there had been violations of his Convention rights to use his money as he wished and respect for his family life. Having done so he affirmed his original view.

[35] In the course of his submissions relating to the proportionality of the impugned policy Mr Scoffield, on behalf of the appellant Craig, submitted that any deference attributed to the respondent as a "democratic" institution was "trumped" by the fact that the appropriate balance between Article 8 rights and the general interest had already been struck by the legislature in rule 65 of the Prison Rules. However, the respondent accepted that any assessment of the proportionality of the policy should be considered within the context of the prison regime which includes the relevant rule structure. One of the consequences of imprisonment is that the prisoner relinquishes his ability to exercise control over his possessions within the regime save insofar as may be permitted by the relevant rules. On the other hand it is also important to bear in mind that such deprivation is likely to increase the importance to the prisoner of the limited degree of control that remains. As Kerr J observed in the course of giving judgment in Re Murdoch's application [2003] NIJB 214 at paragraphs 18 and 19:

> "[18] It is inevitable that imprisonment will bring about a restriction on the prisoner's private life. The context for the examination of whether a particular restriction is proportionate must be that imprisonment, to be effective, necessarily involves curtailment of those incidents of life that are freely available to those who do not commit crime. It follows that each restriction does not have to be justified on an individual basis according to whether it is impractical not to allow the particular freedom claimed.
>
> [19] The Prison Service correctly recognises in its policy on the maintenance of family relationships that it is important to maintain close ties between the prisoner and his family. This does not mean that every restriction on those ties that cannot be justified on the ground that it is impractical to permit it must be regarded as disproportionate. That is not to say that the feasibility of allowing a particular facility is irrelevant; merely that it cannot be regarded as determinative of the issue."

Fettering Discretion

[36] Both Ms Daynes and Mr Scoffield submitted that the respondent had fettered its discretion in the course of formulating the impugned policy. That submission focused upon paragraph 3 of the policy which provided as follows:

"3. Prisoners will not be allowed to pass any money out of the prison to any person without the written permission of the Governor. Current arrangements facilitated by the prisons for payments to local newsagents will continue as normal.

- 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."

Mr Scoffield, on behalf of the appellant Craig, relied upon the observations of Kerr J in Re Herdman's application [2003] NIQB 46 at paragraph [20] arguing that the policy was "intrinsically inflexible in erecting an unacceptable high threshold" and pointing out that "exceptional circumstances" were only defined in a negative manner and, as such, excluded the very type of event that would be most likely to be regarded as representing a significant expression of a prisoner's Article 8 rights. He also drew the attention of the court to paragraph 50.4 of Michael Fordham's Judicial Review Hand Book (5th Edition) which provides:

"**50.4 Fetter by inflexible policy**

A public body vested with discretionary powers should not operate a policy the nature or application of which is over rigid so as automatically to determine the outcome, thus evidencing a closed mind."

[37] Mr Scoffield noted that, at paragraph [32] of his judgment, Stephens J had concluded that there were sufficient exceptions in the policy and sufficient discretion in the Governors to arrive at a proportionate response in each individual case. Mr Scoffield submitted that the learned trial judge had misled himself in so far as he relied upon paragraph 5 of the impugned policy in reaching such a conclusion. He argued that the discretion permitted to the Governor in cases of genuine hardship at paragraph 5 was limited to the payment of money into the prison rather than the payment out of sums from prison earning for which Mr Craig sought permission.

[38] By way of response Mr Maguire rejected the submission that the respondent had fettered its discretion and referred the court to the affidavit sworn by Governor Kennedy on 13 October 2009. In that affidavit Governor Kennedy acknowledged the fact that Mr Craig's visitors did not leave money in for him and that an analysis of his IPC account confirmed that he was a life prisoner who had left out money from his prison earnings, presumably for his

daughter, before the introduction of the new policy. He recorded that the applicant had only three visits, that he was well behaved and had tested drugs free as a result of the regime upon which he was held. Governor Kennedy considered the application "on all of its merits", taking into account the representations made on behalf of the appellant and revisiting his original decision in the context of those representations. Mr Maguire rejected any suggestion that the respondent had adopted a "closed mind" attitude and he relied upon the discretion afforded in exceptional circumstances at paragraph 3 together with the discretion in cases of genuine hardship provided for in paragraph 5 of the impugned policy. Mr Maguire drew the attention of court to the views expressed by Lord Scarman in Re Findlay [1985] AC 318 when he referred with approval to a quotation from Lord Reid's judgment in British Oxygen Company Limited v. Board of Trade [1971] AC 610 at 625:

> "What the authority must not do is to refuse to listen at all. But a Ministry or large authority may have had to deal already with a multitude of similar applications and then they will almost certainly have evolved a policy so precise that it could well be called a rule. There can be no objection to that, provided the authority is always willing to listen to anyone with something new to say – of course I do not mean to say that there needs to be an oral hearing."

Lord Scarman himself then went on to say:

> "The question, therefore, is simply: did the new policy constitute a refusal to consider the cases of prisoners within the specified classes? The answer is clearly 'no'. Consideration of a case is not excluded by a policy which provides that exceptional circumstances or compelling reasons must be shown because of the weight to be attached to the nature of the offence, the length of the sentence and the factors of deterrents, retribution, public confidence all of which it was the duty of the Secretary of State to consider."

[39] In my view it is important that the impugned policy, together with its application in practice, should be viewed as a whole and that individual paragraphs should not be analysed in isolation. The detailed investigations and report carried out by Mr Gray and his associates confirmed the existence of an extremely serious problem resulting from the unrestricted inflow and outflow of IPC funds in the context of drug dealing, money laundering, bullying and intimidation within the already difficult atmosphere of the prison. Despite having been made in respect of a family birthday, the appellant Phillips' request was considered and reconsidered in the context of the alleged breaches of his Convention rights and whether it came within the category of "exceptional circumstances." While Craig's request did not come within the prima facie

excluded categories, it was also the subject of similar careful consideration and reconsideration. The meeting at Maghberry on the 4 September 2008 demonstrated a willingness on the part of the respondent to review the operation of the policy in practice. As indicated earlier, there can be no doubt that the aim sought to be achieved was legitimate. In that context I do not consider that it could be said that the overall balance struck between individual and public interests was disproportionate or indicative of a "closed mind".

The vires argument

[40] On behalf of the appellant Craig Mr Schoffield advanced a separate submission based on the distinction between what he termed "private cash," that is funds sent or brought into the prison from outside, and prison earnings. He accepted that Rules 17(3) and 18 of the Prison Rules provided authority for sums brought into the prison by a prisoner on reception or sent to the prisoner, whether by post or otherwise, to be placed under the control of the governor. However he contended that there was a crucial distinction between such sums and earnings paid in return for work in the prison by the prisoner in respect of which the Rules provided no such authority. In support of this proposition Mr Schoffield relied on the relevant wording of Rules 17 and 18, the separate references to private cash and prison earnings contained in Rule 10(1) and the specific provision in Rule 51(10) enabling the Department of Justice to make arrangements for prisoners to earn money in return for work which was quite distinct from and unrelated to Rules 17 and 18. He drew the attention of the court to Rule 26.11 of the EPR with its requirement that prisoners *shall* (my emphasis) be allowed to allocate part of prison earnings to the family and further submitted that such a distinction was clearly recognised in cases such as Duggan v Governor of Full Sutton Prison and another [2004] 1 W.L.R 1010 at paragraphs [12], [14] and [32].

[41] On behalf of the respondent Mr Maguire accepted that the prison rules did not contain any specific provision permitting the governor to control how a prison might spend his prison earnings although I note that the respondent does seem to have relied upon rule 18 before the learned trial judge. Such a concession had already been made by Mr Murray at paragraph 11 of his affidavit of 14 January 2010. However, it is to be noted that in the same paragraph Mr Murray drew attention to rule 116(5) which provides that "…the governor shall ensure the safe custody and proper disposal and use of all monies….in the prison" contending that the governor was thereby authorised to direct how a prisoner would be permitted to deal with any prison earnings including any desire to transfer sums outside the prison. In a supplementary written submission Mr Maguire also referred the court to a number of general powers afforded to the Secretary of State by sections 1 and 2 of the Prison Act for the regulation welfare, employment and training of prisoners. Section 13 of that Act provides that the Secretary of State may make rules to be styled "prison rules" for:

(a) the administration, regulation and management of prisons;

(b) the classification, segregation, accommodation, maintenance, clothing, treatment, training, employment, discipline, punishment and control of persons required to be detained in prison.

In addition to Rules 17, 18 and 116, Mr Maguire also drew the attention of the court to Rules 34, 51 and 67 of the Prison Rules.

[42] This vires argument did not form part of the case made before Morgan J by the appellant Phillips. In that case a Mr P S Maguire of the Prison Service had written to the appellant's solicitors stating that the Governor's authority for the change in policy with regard to the management of inmates' accounts was Rule 17 (3) and Rule 18. At paragraph [9] of the judgment in that case the trial judge recorded that:

> "It is common case 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."

However, no issue in relation to prison earnings as opposed to "private cash" arose in Phillips' case.

[43] The vires argument was advanced by Mr Schoffield at the first instance hearing before Stephens J who considered it between paragraphs {26] and [30] of his judgment. In rejecting that argument the learned trial judge accepted the submission that prison earnings fell within the category of any money "…otherwise received at the prison…" contained in Rule 18(1). Stephens J considered that one method of money being received at the prison was the receipt of earnings by the prisoner in return for prison work. He distinguished the decision in <u>Duggan</u> as being concerned with different issues and prison rules applicable in England and Wales but not in Northern Ireland.

[44] In my view, in the context of these proceedings, there is substance in the distinction identified by Mr Scoffield between "private cash" and "prison earnings". In the Phillips case the letter from Governor Maguire to the appellant's solicitors, subsequently confirmed in the Governor's affidavit of 16 October 2008, unreservedly grounded the authority for the impugned change of policy upon the powers afforded to the Governor by Rules 17 and 18. Rules 17 and 18 come within Part 111 of the Prison Rules which is headed "Reception, Transfer and Discharge" and they must be interpreted accordingly. It seems to me the phrase "otherwise received" contained in Rule 18 should be interpreted in accordance with the *eiusdem generis* principle of interpretation to mean received 'otherwise than through the Post Office' to include, for example, money or other articles brought to the prison by a visitor or a friend or a courier or transmitted to the prison by some means other than the Post Office. In such

circumstances, I am respectfully unable to agree with the conclusion reached by Stephens J at paragraph [29] of his judgment.

[45] In my view there is a clear inference that, despite the fact that, unlike the case of Phillips, the case of Craig was limited to payments out from prison earnings, no consideration appears to have been given to that distinction, or its potential significance, by the respondent in the course of either developing or implementing the impugned policy. Such an omission is understandable in the context of the careful and extensive review carried out by Governor Gray which focused exclusively upon the very large sums that visitors, identified or anonymous, were circulating through prisoners' accounts. As Governor Gray observed in his affidavit his researches confirmed that those suspected of dealing in drugs regularly received payments into their accounts from the families of other prisoners or anonymously. His conclusion was that the primary method of payment for drugs was through visitors paying money into the dealers IPC accounts and/or money being paid directly into a prisoner's account who then passed it out to the dealer's visitors. As I have noted above he felt that the fact that so much of the turnover of the £700,000 was donated to prisoners anonymously and in cash at reception gave genuine concern that the prison was inadvertently facilitating money laundering. His investigation confirmed that "the norm is that where payments are being made to accounts regularly the money is being 'turned around' and passed back out of the account to visitors." While he did recommend that prisoners should not be allowed to pass *any money* out of the prison to *any person* (my emphasis), neither his report nor his affidavit contained any reference to prison earnings being used for unlawful purposes.

[46] When the vires argument was first advanced in Craig's case the respondent did not maintain that the distinction had been appreciated when the policy was being developed or implemented. As I have noted earlier, both the respondent's Deputy Director of Operations, Mr Murray, and Mr Maguire accept that the Rules do not contain any relevant specific provision. A number of alternative sources of power have been suggested to the court including, for example, Rule 116 which occurs in part XV under the heading "Special Rules Relating to Governors" and the sub heading "*Status of Governor*". However, since the distinction itself does not appear to have been originally appreciated by the respondent, it also seems clear that it gave no consideration to any of these alternatives. The distinction is important not only because, in my view, it constitutes a specific factor that ought to have been taken into consideration but also because such consideration might have had additional implications, for example, for the approach to the concept of proportionality in Craig's case.

[47] In the circumstances, I am persuaded that in the case of Craig the respondent failed to take into account an important factor in the course of developing and implementing the impugned policy, namely the significance of the distinction between "private money" and "prison earnings" and what power, if any, entitled the respondent to apply the impugned policy to the latter. Accordingly, I would allow the appeal of Craig and quash the respondent's decision in his case. For the reasons given above I would dismiss the appeal of Philips.

Neutral Citation No. [2011] NICA 68

Ref: **SHE8355**

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

Delivered: **22/11/2011**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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Phillips' (Ralph) and McKinstry's (James Junior) Applications [2011] NICA 68

IN THE MATTER OF AN APPLICATION BY
RALPH PHILLIPS FOR JUDICIAL REVIEW

AND

IN THE MATTER OF AN APPLICATION BY
JAMES JUNIOR McKINSTRY CRAIG FOR JUDICIAL REVIEW

____

Before Higgins LJ, Coghlin LJ and Sir John Sheil

____

SIR JOHN SHEIL

[1] I agree with the decisions of Higgins LJ and Coghlin LJ that the appeal of Phillips should be dismissed.

[2] I agree with the decision of Coghlin LJ that the appeal of Craig should be allowed for the reasons stated by him in his judgment.

[3] I would only add that it is to be noted that Rule 18(1) of the Prisons and Young Offenders Centres Rules (Northern Ireland) 1995 and the heading thereto uses the phrase –

"received *at* prison" and not the phrase "received *at or in* prison".