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*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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RE WILLIAM JAMES FULTON FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

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GILLEN J

[1] The applicant in this matter is William James Fulton, a life sentence prisoner currently detained at Her Majesty's Prison Maghaberry. He seeks leave to bring a judicial review of a number of provisions in a policy document emanating from the Northern Ireland Prison Service ("the Respondent") entitled "Compact for Separate Prisoners: An Explanatory Booklet" ("The compact"). In addition he sought declaratory relief that a decision of a Governor of HMP Maghaberry demoting him to basic level as an integrated prisoner following his refusal to comply with a random drugs test, was unlawful ("the impugned decision ").

Background

[2] The applicant is serving his life sentence as an integrated prisoner within the prison population. Prisoners are divided into two groups. Sentenced integrated prisoners are subject to Progressive Regimes and Earned Privileges (PREPS). This entails prison staff engaging with prisoners and writing reports on their behaviour. There is also a separated group of prisoners in separated wings who are so separated on the basis of paramilitary connection following the implementation of the Steele Review by Government. Staff do not report on prisoners in the separated wings. Instead the prison uses formal disciplinary procedures to deal with any offence of which they might be accused. In line with the Prison Service policy on drug taking, all prisoners in Maghaberry may be subject to drug testing according to a letter of 29 January 2008 from the Prison Service Northern Ireland which was before me.

[3] On 20 April 2007 Mr Fulton refused to undergo a random urine test for drugs. It is his case that he did so because he perceived there to be an unfair distinction being made between integrated prisoners and those, who by virtue

of an association with a paramilitary group, chose to live within the separated regime. It was the applicant's case that within the separated prison a different regime operates in respect of privileges. He asserts that the main difference between the two regimes is that whilst a three tier system for prisoners operates in the integrated population namely "basic", "standard" and "enhanced" the separated prisoners are subject to a two tier system whereby prisoners are classified as "standard" or "upper". There is no "basic" classification within the separated regime. He asserts therefore that if a separated prisoner is in breach of prison rules and adjudicated upon he can only be reduced to "standard" status, unlike those within the integrated population who can fall lower by being reduced to the "basic" level. He argued that because separated regime prisoners cannot drop to the basic level, there is less to lose by failure to comply with prison rules than in the integrated prison population.

[4] Mr McQuitty on behalf of Mr Fulton went on to argue that there were a number of distinctions between the two regimes which he claimed were adverse to those living in the integrated system. These included a reduction of one gym session per week, loss of television, reduced earnings and earlier lock up. I shall return to this issue later in this judgment.

[5] Since the impugned decision, the applicant has advanced from reduced status through to enhanced status and therefore no longer suffers any of the alleged disadvantages. It is the applicant's case that nonetheless the court should continue to hear this matter with the primary focus now on the Compact document and the material provisions of it.

The granting of leave

[6] In order for leave to be granted in judicial review, a judge needs to be satisfied that there is a proper basis for claiming judicial review. It is wrong to grant leave without identifying an appropriate issue on which the case can properly proceed. It is not enough that a case is potentially arguable or that the papers disclose what might on further consideration turn out to be an arguable case. What is meant by an arguable case for judicial review is where a cause has a realistic prospect of success. There must be a real or a sensible prospect of success for leave to be granted. This must include some arguable vitiating flaw such as unlawfulness, unfairness or unreasonableness.

The applicant's case

[7] In the course of a comprehensive skeleton argument augmented by oral submissions Mr McQuitty on behalf of the applicant made the following points:

[8] The compact was in breach of Articles 8 and 14 of the European Convention on Human Rights and Fundamental Freedoms ("the Convention"). Relying on Napier, Petition for Judicial Review (2004) Scot. CS Mr McQuitty submitted that the factors at issue for the applicant (lock up times, money, gym access and leisure activities) are within the remit of Article 8 in respect of the need to protect the private life of a prisoner.

[9] He invoked Article 14 of the Convention on the back of the principle that the facts of the case came within the "ambit" of Article 8 (see Botta v Italy (1998) 26 EHRR 241). He argued that there was discrimination in this instance in that the individuals in the integrated and separated system were "relevantly similar" and that there was no objective or reasonable justification for the distinction. Any differential treatment was disproportionate between the legitimate aim and the means chosen to pursue it.

[10] Relying on the well trodden principle in Michalak (2003) 1 WLR 617 ("Michalak's case") he submitted that the facts fell within the ambit of Article 8, that there was a difference in treatment in respect of that right between the applicants and others put forward in comparison, that the treatment was on one of the proscribed grounds namely a political opinion of the applicant, that the two sets of prisoners were in an analogous situation and that the differences in treatment were not objectively justifiable.

[11] In addition Mr McQuitty submitted that the impugned provisions of the compact were arbitrary, inconsistent, contrary to the principles of equal treatment and irrational. In affording to separated prisoners "a bedrock" level of privileges similar to the standard level for integrated prisoners, it was substantively unfair to then proceed to determine that those privileges could not be lost to the same degree as an integrated prisoner for the same disciplinary offence.

[12] Counsel relied upon Section 24 of the Northern Ireland Act 1998 which provides that the Respondent has no power to do any act that is incompatible with any of the Convention rights so far as it discriminates against a person or class of persons on the grounds of political opinion.

[13] Finally, counsel argued that the impugned provisions offended against prison rules that prisoners should not be unnecessarily deprived of the benefits of association with other persons.

Conclusion

[14] I have come to the conclusion that this application for leave for judicial review should be dismissed for the following reasons.

The Salem principle

[15] R v Secretary of State for the Home Department, ex p. Salem (1999) 1 AC 450 is an authority for the proposition that the discretion to hear disputes, even in the area of public law, needs to be exercised with caution. Cases which are academic between the parties should not be heard unless there is a good reason in the public interest for doing so. Examples include where a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future. It is thus not the function of the courts to decide hypothetical questions which do not impact on the parties before them (see Lord Hutton in Rushbridger v HM Attorney General (2004) 1 AC 357 at paragraph 35.

[16] I therefore have to consider whether or not there is a question here involving the general public interest notwithstanding that the applicant in this case will no longer be directly affected by the outcome. I do not consider that this issue is one of general public interest. Essentially it involves a management decision within the prison. The difference between the two categories is an administrative classification dealing in this case with a problem that arose on facts existing prior to April 2007. It does not raise a question of substantial legal or practical importance in that context. The applicant cannot be granted a remedy which will be of any value to him or the decision-maker in this instance. I respectfully adopt the view expressed by Lord Woolf CJ in R (Cronin) v Sheffield Magistrates' Court (2003) 1 WLR 752 at paragraph 30 where he said:

> "It is very important, in my judgment, that the limited resources which are available from public funds for testing points of principle are confined to cases where it is really necessary. If it is decided that a case justifies the expenditure of public funds, then in my judgment it is important that those who appear supported by public funds, if they are provided with additional information which makes it clear that the point is one which so far as a particular is concerned is of very limited significance, then the question of proceedings should be reconsidered."

Any analysis of the compact document eg. paragraphs 2.2, 2.3 and 2.4 makes it clear that there are variations between integrated and separated prisoners with benefits or disadvantages arguably accruing to one or other in certain circumstances with no discernible overall advantage to either group . It is not a matter of sufficient public interest to justify expending judicial time and public money determining the relative weight to be given to some specified

advantage in a particular circumstance when no benefit will accrue at this time to the applicant.

[17] If I am wrong in this conclusion, I have in any event concluded that the applicant has not made out an arguable case in this instance on the grounds set out in the Order 53 statement. I am not persuaded that the alleged disadvantages of loss of a gym session, television or of a lock up period amount either to freestanding breaches of Article 8 of the Convention or come within the ambit of that article in order to permit the invocation of Article 14 even on a benign interpretation. In R (On the Application of Clift) v Secretary of State for the Home Department and Others (2007) 2 AER 1 the House of Lords dealt with a judicial review concerning the early release scheme of prisoners. At paragraph 13, Lord Bingham said:

> "Plainly, expressions such as 'ambit', 'scope' and 'linked' used in the Strasbourg cases are not precise and exact in their meaning. They denote a situation in which a substantive Convention right is not violated, but in which a personal interest close to the core of such a right is infringed. This calls, as Lord Nicholls said in M v Secretary of State for Work and Pensions (at 14) for a value judgment. The court is required to consider, in respect of the Convention right relied on, what value that substantive right exists to protect."

[18] The jurisprudence of the European Commission and Court of Human Rights has consistently recognised that the Article 8 rights of prisoners must be considered in the context of administrative and security requirements, the prevention of disorder and crime and the protection of the rights and freedoms of others. Limitations on the rights available to prisoners under Article 8 exist for a wide variety of administrative or security reasons. The context of the instant case is that this applicant underwent the disadvantages of which he complains because he was in breach of prison discipline and refused to undergo a drugs test. In R (On the Application of Countryside Alliance and Others) (2007) UKHL 52 at paragraph 10 Lord Bingham said of Article 8:

> "The content of this right has been described as 'elusive' and does not lend itself to exhaustive definition. This may help to explain why the right is expressed as one to respect, as contrasted with the more categorical language used in other articles. But the purpose of the article is in my view clear. It is to protect the individual against intrusion by agents of the State, unless for good reason, into the private

> sphere within which individuals expect to be left alone to conduct their personal affairs and live their personal lives as they choose."

I consider therefore that there is a threshold that has to be reached before Article 8 can be invoked. In the context of a prison where ,by its very nature, prisoners will be subject to certain restrictions on their private life, I do not believe that the catalogue of infringements which the applicant complains of crosses that threshold or brings him within the ambit of Article 8. They lie outside the private sphere of a person's existence within a prison which is protected by Article 8.

[19] In any event I have no doubt that even if the rights were engaged the administrative decisions taken by the Prison Service to deal with integrated and separated prisoners instanced in this case are proportionate and necessary for the proper running of this prison. Moreover courts should tread very carefully before delving into the minutiae of the daily routine of a prison (see also the views of Deeny J in Re Patrick Leonard (unreported) DEEC5573 delivered 8 November 2007 at paragraph 12).

[20] The applicant argues that he has been discriminated against contrary to Article 14 of the Convention as read with one of the other rights and freedoms namely article 8. Article 14 of the Convention does not confer a free-standing right of non-discrimination precluding discrimination only in the 'enjoyment of the rights and freedoms set forth in this Convention'. The court at Strasbourg has said this means that, for Article 14 to be applicable, the facts at issue must 'fall within the ambit' of one or more of the Convention rights. Article 14 comes into play whenever the subject matter of the disadvantage 'constitutes one of the modalities' of the exercise of a right guaranteed or whenever the measures complained of are 'linked' to the exercise of a right guaranteed: ***Petrovic v Austria*** (2001) 33 EHRR 307, 318, 319, paras 22, 28.

[21] Brooke LJ in ***Michalak's case*** as amplified in ***R (Carson) v Secretary of State for Work and Pensions*** [2002] EWHC 978 at para 52 set out four questions :

> (i) Do the facts fall within the ambit of one or more of the Convention rights?
>
> (ii) Was there a difference in treatment in respect of that right between the complainant and others put forward for comparison?
>
> (iii) Were those others in an analogous situation?

(iv) Was the difference in treatment objectively justifiable? i.e., did it have a legitimate aim and bear a reasonable relationship of proportionality to that aim?

[22] Additionally the court must ask whether the difference in treatment is based on one or more of the grounds proscribed in article 14 . Ghaidan v Godin-Mendoza (2004) 3 WLR 113 is authority for the proposition that the court must not be overly rigid in applying these tests and a question based formulation has been brought into question by the House of Lords in ***R(Carson) v Secretary of State for Work and Pensions*** [2005] UKHL ("Carson's case) 37 per, Lord Nicholls at p3 and Lord Hoffman at p33.

[23] Nonetheless a key component to be addressed before addressing discrimination is the identity and nature of the comparators (see Carson's case and ***R (Clift) –v- Secretary of State for the Home Department*** [2006] UKHL 54, at 27, 28, 43). The question of comparators is a question of fact but the difference must be a personal characteristic of each of the persons concerned and it is not sufficient to simply point to the fact that persons are dealt with differently as being a difference in itself.

[24] Where there is a breach of either provision the same may be justified. In these contexts proportionality means that there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The Court must ask if the reasonable relationship of proportionality exists.

[25] The next stage is the discretionary area of judgment that is given to the decision maker. In this case following an inquiry – the Steele Inquiry – the government has concluded that the concept of separated and integrated prisoners is acceptable. Government has the primary responsibility for deciding the best way of dealing with such political and prison management issues. The court's role is one of review and will arrive at a different conclusion from the government only when it is apparent that the government has attached insufficient importance to a person's Convention rights: ***Wilson v First County Trust Ltd (No 2)*** [2003} 3 WLR 589, paragraph 70.

[26] The court must carry out that balancing exercise which is seared through the Convention and HRA 1998 scheme. It entails applying the test of "*… whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights*" [see ***Sporrong and Lonnroth –v- Sweden*** (1982) 5 EHRR 35]. The role of the court is to review how the balance has been struck, according to the decision maker an appropriate degree of flexibility. In ***Re A and Others*** [2004] UKHL 56, which concerned terrorist detention legislation in the United Kingdom, Lord Bingham said at paragraph 38:

> "*Those conducting the business of democratic government have to make legislative choices which, notably in some fields, are very much a matter for them, particularly when (as is often the case) the interests of one individual or group have to be balanced against those of another individual or group or the interests of the community as a whole*".

See also Lord Carswell in ***Tweed –v- Parades Commission for Northern Ireland*** [2006] UKHL 53, paragraph 36:

> "*Along with the concept of proportionality goes that of a margin of discretion, frequently referred to as deference or, perhaps more aptly, latitude*".

[27] Applying these principles in this case therefore the applicant must be able to identify a comparator who has, or would have, been treated more favourably. I find no such comparator in this case. Differences regularly develop within a prison system. Some prisoners are treated in an open regime, other in more restricted secure circumstances. The current distinction between segregated and integrated prisoners was, according to Mr Dunlop who appeared on behalf of the proposed respondent, a product of the Steele Review after careful investigation and analysis. It was accepted by the Government and led to the Prison Service implementing the policy of the Compact. I consider that the difference in regime operation in this prison is no different in principle from open/closed/more secure regimes operating in prisons across the United Kingdom. The division is not made on the grounds of political opinion (both sets of prisoners may well hold the same opinion politically) but on the grounds of association with criminal paramilitary groups. By virtue of the collection of advantages and disadvantages which apply in this instance, it is impossible to say that one group has been discriminated against rather than the other.

[28] Even if I had considered that there was an arguable case that less favourable treatment was being accorded to one group rather than the other, I am satisfied that the purpose was for a legitimate objective namely the need to ensure appropriate order, discipline and management of the two groups within the same prison. It is an area almost uniquely within the remit of government in deciding the appropriate political and security factors which are in play in such a decision and in balancing the pubic interest against the need to secure a fair and equal approach in prisons. I consider the division of prisoners was a proportionate step in all the circumstances.

[29] For the reasons which will be clear from what I have said already, I therefore find no arguable case that there has been any element of substantive unfairness in terms of arbitrary, inconsistent, irrational or unequal treatment

accorded to the applicant in this matter. Since I have found no breach of the Convention rights, it follows therefore that I find it unarguable that there has been a breach of Section 24 of the Northern Ireland Act 1998. For the reasons set out in the earlier paragraphs I find it unarguable that there has been any breach of prison rules.

[30] For the sake of completeness I make it clear that I was not persuaded by Mr Dunlop's argument that this case should be dismissed for delay. Whilst an applicant for permission to apply for judicial review must be made promptly and in any event within three months from the date when the grounds for the applicant first arose, I do not consider that the six weeks delay between the date of the decision and the applicant approaching his solicitor lacked the necessary promptness required. Moreover thereafter I am satisfied that the complexities and problems of obtaining legal aid amount to an objective excuse for applying late in circumstances where there has been no prejudice to third party rights and where the public interest did require the application be permitted to proceed to the stage of considering the application of the Salem principle.

[31] I therefore dismiss the application.