

Judicial Communications Office

30 May 2019

COURT DELIVERS REASONS FOR DISMISSING APPEAL

Summary of Judgment

The Court of Appeal¹ today delivered its reasons for dismissing an appeal against a decision by the Prison Service to refuse an application for temporary release.

Background

On 23 February 2017, Vincent Kelly (“the appellant”) applied for temporary release from prison to attend his son’s confirmation on 13 March 2017. He was informed by the Northern Ireland Prison Service (“NIPS”) on 27 February 2017 that his application was refused. The appellant sought leave to challenge the decision by way of judicial review. Leave was granted but the substantive application did not come before a judge until after the confirmation had taken place without the appellant attending.

The judge at first instance found that NIPS had made errors on the basis that it had not exercised discretion in compliance with domestic law contained in the Prison and Young Offenders Centre Rules (Northern Ireland) 1995 (“the Prison Rules”) and quashed the NIPS’s decision of 27 February 2017. The appellant had not raised the issue of whether the NIPS’s decision was in breach of Article 8 of the ECHR at first instance but appealed the trial judge’s decision on this ground. The Court of Appeal questioned whether for that reason alone the appeal should be dismissed as the appellant had succeeded on other grounds at first instance so in that sense the appeal was academic. It also commented that the issue regarding a breach of Article 8, which the appellant was seeking to argue for the first time in the Court of Appeal, is amply governed by existing authorities.

Procedure

Before addressing the issue as to whether the appellant should be allowed to advance a new case on appeal, the Court dealt with a number of procedural matters.

Order 53 Rule 3(2) of the Rules of the Court of Judicature (Northern Ireland) 1980 provides that an application for leave to apply for judicial review must be made *ex parte* by lodging a statement setting out the name and description of the applicant, the relief sought and the grounds on which it is sought, and an affidavit or affidavits, as the case may require, verifying the facts relied on. The Court commented that the only document in this case which purported to be an affidavit on behalf of the appellant was the unsworn draft affidavit (“the draft affidavit”) of his solicitor. The draft affidavit was based on what the appellant had told his solicitor. It did not give any details of the appellant’s family life such as his son’s name or age, where his son lived, where his son’s mother lived, whether the son lived with his mother or what part the appellant had played in the life of his son. Furthermore it did not state if there were any siblings, whether the appellant had attended any of the siblings’ confirmations or first communions, whether he had attended baptisms or birthdays, whether he sent birthday cards to his son, whether there had been any family proceedings, whether

¹ The panel was Lord Justice Stephens, Lord Justice Deeny and Sir Richard McLaughlin. Lord Justice Stephens delivered the judgment of the Court.

Judicial Communications Office

any of the children were known to Social Services or whether his son had visited him in prison. The documents accompanying the application did state the approximate age of the appellant's son and gave an address in Belfast at which he resided but apart from that, and the fact that the appellant was the father, no details were given or could be obtained from the papers. The Court noted, however, that the draft affidavit revealed that the appellant wished to serve his prison sentence in the Republic of Ireland as opposed to in Northern Ireland. It said that would inevitably have taken him further away from his family and gives some indication as to the strength of his family life.

The Court added that no explanation had been provided for the failure to provide an affidavit verifying the facts. This raised an issue about whether the appeal should be dismissed on this point alone but the Court declined to do this without hearing full submissions. The Court also considered the question as to whether in a judicial review application the affidavit verifying the facts requires to be sworn by the applicant, rather than by another person on the applicant's behalf. Order 53 Rule 3(2)(b) does not expressly require the applicant to verify the facts but the position was set out in case law where it was stated that the grounding application should only be sworn by the applicant's solicitor where the solicitor is unable to gain access to his client. The Court said it did not consider it to be a requirement that the affidavit is sworn by the applicant but if it is not then that is a matter to be taken into account in evaluating the evidence. It can also be taken into account in that remedies on judicial review are discretionary and a failure of an applicant to swear an affidavit verifying the facts could, depending on the context, be a significant feature in the exercise of discretion.

The Court further noted that Order 59 Rule 3(2) provides that a notice "of appeal may be given either in respect of the whole or in respect of any specified part of the judgment or order of the court below; and every such notice must specify the grounds of the appeal and the precise form of the order which the Appellant proposes to ask the Court of Appeal to make." The case made on behalf of the appellant in this case was that "[the trial judge] found that the decision was contrary to the requirements of Rule 27 of the 1995 Rules, it is a clear and necessary implication of such a finding that the NIPS failed to adhere to the "prescribed by law" condition contained in Article 8(2) ECHR." The Court said this raised the simple and obvious point that an interference with Article 8 ECHR has to be in accordance with the law which requires compliance with domestic law. It said the notice of appeal did not in clear terms identify this as the ground of appeal and it did not specify the form of the order which the appellant proposed to ask the Court of Appeal to make. A proposed amended notice of appeal was submitted immediately prior to the Court of Appeal hearing in which the form of the order sought was that the court should grant "a declaration that the respondent had acted contrary to the requirements of Article 8(1) ECHR and such interference was not consistent with Article 8(2) ECHR." The Court did not consider that the proposed amended Notice of Appeal complied with Order 59 rule 3(2).

Article 8 ECHR

Article 8(1) ECHR provides that "everyone has the right to respect for his private and family life, his home and his correspondence." Under Article 8(2) in order for a public authority to justify an interference with that right it has to establish amongst other matters that the interference "*is in accordance with the law.*" The European Court of Human Rights ("ECtHR") has considered the general principles governing whether the interference found was "in accordance with the law." The principles include that the interference must have some basis in domestic law and that there must be *compliance with the domestic law.* The ECtHR also gave consideration to requirements over and above compliance with domestic law two of which were that the law must be adequately accessible and that a norm cannot be regarded as "law" unless it is formulated with sufficient precision to enable

Judicial Communications Office

the citizen to regulate his conduct. The Court said the issue that the appellant wished to raise for the first time in this appeal related to *compliance with domestic law*. It noted that there is ample authority for the proposition that for an interference to be “in accordance with the law” there has to be compliance with domestic law. The appellant in this case sought to submit that if the NIPS’s decision was not in compliance with the domestic law (in Rule 27 of the Prison Rules) then the interference with the right to respect for private and family life could not be in accordance with the law. The appellant submitted the trial judge ought not only to have quashed the decision on the basis of the construction which he adopted of Rule 27 but he should also have done so on the consequential basis that the interference with Article 8 ECHR not being in compliance with domestic law was not in accordance with the law.

The Court said that the proposition that there has to be compliance with domestic law in order for an interference to be in accordance with the law is wholly unexceptionable and one with which the judge would have agreed if the point had been made to him. The appellant, however, relied on the construction of Rule 27 of the Prison Rules. The Court said the paucity of evidence in relation to the appellant’s family life confirmed that the whole argument before the judge related to Rule 27 and there was only the faintest of reference to Article 8 ECHR. Furthermore the judge was referred to none of the authorities which the Court noted in its judgment.

The stance of the Court of Appeal towards a point which was not raised at first instance

The appellate court has a discretion to allow a point to be taken which could have been made at first instance but was not, if three conditions are met. The three conditions are that the other party: has had adequate opportunity to deal with the point; has not acted to his detriment on the faith of the earlier omission to raise it; and can be adequately protected in costs. The Court said that in this case, the proceedings were by way of judicial review and the appellant’s ground of appeal involved a pure point of law. It considered, however, that NIPS cannot be adequately protected in costs as the appellant is legally aided. It said this matter should have been raised and simply disposed of with no additional cost at first instance. On this appeal NIPS was precluded from immediately enforcing an order for costs against the appellant who was legally aided. The Court said there was no realistic prospect of it ever being able to enforce such an order, which meant that one of the three conditions had not been met. On that ground alone the Court dismissed this appeal.

The Court added that it was clear that even if all three conditions are met there is still a general discretion to exclude the point. It noted, however, that the discretion to hear disputes, even in the area of public law, must be exercised with caution and appeals which are academic between the parties should not be heard unless there is a good reason in the public interest for doing so. The Court commented that this appeal was entirely academic:

“The confirmation has taken place and the appellant did not attend. The impugned decision has been quashed. The point which the appellant wishes to raise on appeal is amply covered by authorities. That point is not contested by NIPS nor could it sensibly be contested. The only reference by the judge to Article 8 ECHR was obiter. There is absolutely no good reason in the public interest for hearing the appeal.”

Conclusion

The Court dismissed the appeal. The Court held that the point raised was not raised at first instance and it did not consider in the exercise of discretion that the appellant should be permitted to raise it on this appeal.

Judicial Communications Office

NOTES TO EDITORS

1. This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Judiciary NI website (www.judiciary-ni.gov.uk).

ENDS

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