Neutral Citation No. [2016] NIQB 10 | *Ref:* **DEE9868**

Judgment: approved by the Court for handing down | *Delivered:* **05/02/2016**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NOTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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Tiernan's (Francis) Application (Leave Stage) [2016] NIQB 10

IN THE MATTER OF AN APPLICATION BY FRANCIS TIERNAN LEAVE TO APPLY FOR JUDICIAL REVIEW

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DEENY J

[1] This is an application for leave to apply for judicial review. It is brought by Francis Tiernan, who is a serving prisoner in HMP Magilligan currently serving a total effective sentence of three years for the offence of conspiracy to use a false instrument and a related charge.

[2] His earliest date of release (EDR), is 18 April 2016. He became eligible for Home Leave on 18 December 2015 and currently enjoys extensive periods of Home Leave.

[3] He had applied for release on an additional scheme operated by the respondent, the Northern Ireland Prison Service, called "Conditional Early Release". He was found not eligible for that. In or about the same time, in December 2015 he was refused Christmas Home Leave, despite his poor health.

[4] The matter initially came before the court on 23 December 2015 with the applicant seeking to judicially review the refusal of conditional early release with a view to the court directing his release there and then. As this would have required a rolled up hearing the consent of the Prison Service was required which was not forthcoming. Indeed, in the events, that was an appropriate attitude and I cannot see that substantive relief could have been granted then.

[5] The matter was adjourned to 11 January 2016. However, on the night before that hearing an extensively amended Order 53 statement was served on behalf of the applicant. In part that reflected the fact that the Prison Service had addressed a principal grievance of the applicant between 23 December and 11 January. That grievance was that he had been refused conditional early release because he had not

achieved a low enough ACE Scheme mark. I was informed that ACE stood for Assessment Case Management and Evaluation System. The applicant conceived that he had not achieved this because he had not been given work to do by the prison authorities which prevented him getting a sufficiently low ACE mark. Following that criticism in the original papers the respondent did provide him with a place on a Victim Impact Programme. This was of some 23 sessions running to 21 March 2016. This was something he could attend despite his poor health.

[6] On 11 January the respondent objected to proceeding given the considerable change of front and new material and the matter was adjourned until 26 January 2016. On that occasion I had further written and oral argument from Ms Orla Rooney for the applicant and Mr Matthew Corkey for the respondent.

[7] I do not propose to go through the arguments of counsel in detail but suffice it to say they have all been taken into account in arriving at my decision.

[8] I bear in mind the applicant's submission taken from paragraph [14] In Re Campbell [2013] NIQB 32, citing Re Morrow and Campbell's Application [2001] NICA 261 (QBD):

> "On an application for leave to apply for judicial review an applicant faces a modest hurdle. He need only raise an arguable case; or, as it is sometimes put, a case which is worthy of further investigation."

I also bear in mind the repeated dicta of Kerr J, as he then was, when responsible for judicial review in this jurisdiction, that there is no point in granting leave for a full judicial review hearing unless there is a reasonable prospect of a useful benefit arising from the same for the applicant or the administration of justice.

[9] In this case it was common case that the respondent has a power pursuant to Article 19(1) of the Criminal Justice (Northern Ireland) Order 2008 to this effect:

> "The Department of Justice may release on licence under this Article a fixed-term prisoner at any time during the period of 135 days ending with the day on which the prisoner will have served the requisite custodial period."

It is common case here that that date would be 18 April 2016. Therefore the Prison Service, on behalf of the Department was right to address this issue in December 2015.

[10] In a letter of 7 December 2015 Governor P Cupples of the respondent sent to the applicant's solicitors a copy of the letter of 3 December 2013 refusing Francis Tiernan a conditional early release. That letter twice mentioned that he had

got an insufficiently low ACE score. It also referred to his poor physical health including his usual use of a Zimmer frame. It exhibited a document headed Conditional Early Release. This document is unobjectionable. No criticism seems to be made of it. On the text made available to the prisoner and subsequently to the court on the third page one finds a section of which I need to set out the first part:

> "Any prisoner not excluded once the statutory and non-statutory criteria are applied will be considered for early release based on the following factors. Again these conditions have been drawn up to engender public confidence in the scheme and are necessary in order to demonstrate that the offender poses a low risk of re-offending; that they have been of good behaviour whilst in custody; that they have approved, stable and supportive accommodation in the community; and that they fully complied with all conditions imposed during earlier periods of temporary release. If assessed as being suitable the offender must therefore be able to demonstrate that:
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> - They are assessed as presenting a low likelihood of re-offending."

The text then goes on to say that they must be in the highest prison regime which this prisoner is and to mention four other criteria with which he complies.

[11] However the attached letter, as I have mentioned, gave as a ground for refusing him CER that he did not have an ACE score of 15 or less. His ACE score was in fact 20 having been reduced from an earlier assessment of 25. I pointed out in court on the 11th that there was not any reference to this ACE evaluation in the document provided. Just before the hearing of 25 January the applicant was served with the affidavit of Alan Smyth, Head of the Licensing and Legislation Branch of the Department of Justice who made the affidavit on behalf of the Northern Ireland Prison Service. This was a helpful affidavit in a number of respects. However, at paragraph 4 of the affidavit it referred to pages 72 to 77 of the exhibited bundle AS1 being "a true copy of the Conditional Early Release Scheme". When one turns to that one finds the title has been changed to read 'NIPS Policy on Conditional Early Release'. Paragraph numbers and rubrics have been added to the earlier text. Of most relevance to this application before me the paragraph I quoted earlier has been numbered paragraph 10 and a new sub-paragraph has been added immediately following the first bullet point i.e. "they present a low likelihood of re-offending". This new text reads as follows:

> "Where an ACE score has been calculated this will need to be in the low category i.e. a score of 15 or less. However, in order to reflect the dynamic nature of

> this assessment process prisoners with an ACE score between 16 and 17 (at the low end of medium category) will also be considered. NIPS considers that a score of 18 or over represents an unacceptable level of risk of re-offending. Where an ACE score is unavailable the Governor will apply those additional tests currently used to determine whether a prisoner is eligible for temporary release, home leave and entry to the semi-open conditions in the Foyleview Unit."

[12] This version of the scheme therefore would justify the decision of the Governor to refuse CER, on behalf of the Department presumably, as the applicant's score was only 20. No explanation has been offered, albeit at this early leave stage, as to the differences between the two texts, save that we are informed that this is a pilot scheme which will be reviewed in 18 months. Ms Rooney urges on me that this provides a valuable opportunity not only for her client, who may well be released in any event before a hearing of this matter takes place, but to ensure the final scheme is one that is fair and that complies with the obligation on the respondent to give equal treatment pursuant to Article 14 of the European Convention on Human Rights and, if I may say so, to the duty of fairness at common law.

[13] Under the ACE Scheme one wants to have, if a prisoner, as low a score as possible. There are no minuses in the evaluation system. Even if one was badly disabled, and this man has a number of significant afflictions, that cannot reduce one's score although it may not add to it.

[14] Furthermore Ms Rooney makes a number of precise criticisms of how the marking is actually arrived at. The frequent misspellings in the document do not inspire confidence in the assessor.

[15] Mr Corkey contends that there has been a complete change of front by the applicant here but I find that as only so in part.

[16] It seems appropriate to address the amended Order 53 statement lodged with the court on the 11th of this month. I must respectfully say that the grounds set out at paragraph 3 of that document are to a degree arguments supporting a ground rather than grounds properly so called. But it seems to me that even in the original Order 53 statement and in this one the applicant was raising the issue that troubles the court. I would put it slightly differently from the applicant.

[17] In the interests of the administration of justice it seems to me right to recast her argument a little. I propose to give leave on a ground which is a composite of 3a, 3b and d (ix). In effect therefore that reads as follows:

"The Northern Ireland Prison Service, contrary to its obligations under Section 6 of the Human Rights Act 1998, acted incompatibly with the applicant's rights under Article 5 of the European Convention on Human Rights by interfering with his right to liberty which was not in accordance with the law or proportionate in that it fettered its discretion under Article 19 of the Criminal Justice (Northern Ireland) Order 2008 by relying solely in assessing the criterion of 'a low likelihood of re-offending' on a precise marking in an ACE valuation, which failed to adequately address all relevant considerations and in particular the health and fitness of the prisoner."

[18] I will now deal with the remaining grounds or purported grounds seriatim. On further examination of the papers and in the light of the affidavit evidence before me it transpires that, contrary to the understanding of the applicant's advisors, provisional work to a prisoner is not essential for him to lower his score. Taking on such work might have that effect although it could also have the effect of increasing an ACE score. The very reason for not providing work to this man was his poor level of fitness. Subsequently a course which he could attend was provided. I can see no purpose in pursuing Ground 3c. As Mr Corkey pointed out the circumstances here are very different from those before Treacy J in Tadas Lapas's Application [2013] op cit.

[19] The applicant's Ground 3d sets out what are really arguments in favour of his case which may properly be put but address surrounding merits rather than constituting a ground in law and I do not grant leave on that save as above. Likewise Ground 3e constitutes supporting arguments for the ground on which I have given leave.

[20] I do not grant leave on Ground 3f. As has been said several times before in these courts it is not the role of the High Court to micro-manage the Prison Service. It would be entirely inappropriate to do so. There are issues of allocation of resources there in which the court should be slow to act. I do not find that there is an arguable case that the Prison Service acted unlawfully in providing more than two ACE assessments of this man over the period of one year.

[21] Paragraph 3g echoes the point about work, which, having seen the ACE document and how it operates does not seem to be a matter on which leave should be granted. The same I find about Ground 3h. This is a middle aged man with four grown up daughters with one of whom he partly lives and partly with his partner who lives in the Republic of Ireland. He is in fact already on frequent home release leaves and I do not find there is a justifiable case with regard to any right enjoyed under Article 8 of the Convention. Paragraph 3i is merely a catchall phrase.

[22] The applicant also relies on a number of grounds pursuant to the Victim Impact Programme. I have to say that this section of the argument borders on the tendentious. The initial criticism was that work had not been provided for the applicant by the Northern Ireland Prison Service. They then provided him with an

opportunity to go on a programme equivalent to work. The applicant's counsel questioned whether he is fit to undergo that programme. There is an affidavit from him making very minor complaints about it such as the discomfort of the chair he sits on. These are de minimis matters. In any event he has made no complaint to the course organisers, as averred by Mr Smith. Furthermore his counsel acknowledges that he is happy to go on with the programme and to continue it. As I say it may deliver him a lower ACE score which would lead to a release about a month earlier than would otherwise be the case. It seems to me that the applicant here is seeking to approve and condemn simultaneously. I refuse leave on the grounds set out under the rubric Victim Impact Programme.

[22] As I am granting leave, contrary to the submissions made on behalf of the respondent, I will briefly address a few of the additional arguments of Mr Corkey. First of all I agree with his submission that in support of my decision above I should not grant leave with regard to the Victim Impact Programme because no useful relief could be achieved for Frances Tiernan before he is released and nothing of general application would emerge.

[23] I accept his point that the Department under the 2008 Order is given a discretion but it has chosen to use that discretion to release prisoners and having done so it must deal fairly with the prisoners on a consistent basis.

[24] I also accept his submission that the ACE Scheme is professionally validated by an academic from the University of Oxford and that it seeks to provide a consistent and transparent guide to decisions by Governors on behalf of the Department. But that is not an argument against trying to remedy what would appear to be a flaw in this current second version of the pilot scheme.

[25] He said at one point that the applicant was not offering an alternative method. Even if that is so, for the assistance of the Department I would suggest myself that within the new paragraph 10 it might be wiser with regard to the first bullet point to amend that. One might say that the Department will normally be guided by the ACE scores in the way that is described there "save in exceptional circumstances". It would then be for the Department to decide whether this man's health, combined with the other positive features in his favour amounted to exceptional circumstances. The defining of the discretion and the restriction of it to a very narrow marking score of 15, 16 or 17 carried out, not by the Department, but by a probation officer, operating a scheme designed to cover a wide range of factual situations, is open to the appearance of fettering a discretion, which would be unwise and potentially unlawful.

[26] Mr Corkey submitted that what the applicant was in truth doing was making a case for release under Article 20 of the 2008 Order. At first sight this seemed an appropriate argument but Ms Rooney pointed out by reference to the Department's own document as sent to the prisoner that release on compassionate grounds under Article 20 would only be considered "in exceptional circumstances i.e. where a

prisoner is nearing death and where his or her health has deteriorated to such an extent that he or she requires a level of round the clock intensive care that is impossible to deliver in a prison environment". That does not apply to this prisoner.

[27] I fully respect his argument that there are a very limited number of probation officers and that they have many of these ACE evaluations to complete for prisoners under extended custodial orders or like provisions. With respect that is something of a two edged sword as it might suggest that the Department should not be tying itself so tightly to precise scoring under this evaluation by one of these, no doubt very busy, probation officers.

[28] I would point out, that having given leave it is clearly open to the Department in this case, where it has amended the earlier release scheme once already to address this judgment itself and if it finds merits in the points that have won favour with the court at this leave stage to take appropriate steps which might obviate the need for further costs to be incurred.