Neutral Citation No. [2011] NIQB 107 | *Ref:* **TRE8370**

Judgment: approved by the Court for handing down | *Delivered:* **15/11/2011**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

_____

Irwin's (Michael) Application [2011] NIQB 107

IN THE MATTER OF AN APPLICATION BY MICHAEL IRWIN FOR JUDICIAL REVIEW

_____

TREACY J

Introduction

[1] The applicant is a serving sentenced prisoner at HMP Magilligan. He was convicted in England of importing 1.1kg of cocaine in 1997 and was transferred here having commenced his sentence in England. At the date of hearing he was housed in Halward House in Magilligan prison.

Order 53 Statement

[2] In his Order 53 Statement the applicant seeks a declaration that the Northern Ireland Prison Service ("NIPS") policy of carrying out routine headcounts and body checks of prisoners in their cells at HMP Magilligan on a two-hourly basis between approximately 10.00pm and 7.00am is unlawful and *ultra vires.*

[3] The ground on which the relief is sought is:

> **"The NIPS in carrying out routine headcounts and body checks of prisoners in their cells in HMP Magilligan on a two-hourly basis between 10 pm and 7 am approximately is unlawful and ultra vires in that its use is not justified on either safety or security grounds and amounts to a**

disproportionate interference with the Applicant's Article 8 Convention Rights."

Background

[4] The respondent's policy is that 'head counts' are carried out on a minimum of 3 occasions during the night guard period. The policy instructs officers to carry out checks quietly, using torchlight, and to use the cell light 'only when it is not possible to be satisfied that all is not well in the cell'. A 'head count' is intended to 'establish that the prisoner is present and accounted for.

[5] These night checks are carried throughout HMP Magilligan but not in 'Foyleview' or 'Alpha' nor are they applied in H2. During the night guard period, the applicant has access to a call bell within his cell if he wishes to make contact with prison officers for any reason. The call bell facility is also available to other prisoners.

[6] The applicant's experience of these 'head counts' has been that they are intrusive, noise being occasioned when the observational flap of his cell, and those of surrounding cells, are accessed by prison staff, and when the prison officers carry out the checks and also when cell lights are switched on more frequently than the policy would suggest. The implementation of the policy causes him sleeplessness for which he, in turn, has been prescribed medication. He is subject to a level of scrutiny which is unnecessary in his view as he is not a 'Prisoner At Risk' nor has he ever been.

[7] Night checks of this nature were not carried out in those English prisons in which the applicant was detained before transfer to Northern Ireland. The respondent has identified the night checking regime in HMP Wakefield but it applies to Category A and B List prisoner only, not to Category C prisoners. Nights checks of this nature are not carried out in Scotland either.

[8] At para 15 of the respondent's Affidavit it is stated that the Prison Service consider that there remains a need for safety checks and head counts during the night guard period on grounds of safety of the prisoners and security of the prison

[9] The respondent justifies the night-checking policy on the basis that the vast majority of prisoners who commit suicide have not previously been identified as being at risk and are not subject to enhanced supervision. And it also relies on an observation in the WHO report, exhibited at page 190, that the profile of those who do commit suicide looks more 'normal' than the profile of those who will attempt suicide.

Policy Framework

[10] The Respondent has a number of interrelated policies which address the issue of safety checks and head counts of prisoners. On 25 October 2010 the Prison Service issued a revised Instruction to Governors (IG 25/10). This revised IG was issued in response to recommendations raised by the Prisoner Ombudsman in a report into a complaint by the Applicant. This document was entitled "Prisoner Head Counts and Safety Checks". The stated purpose of the IG was to clarify the meaning and application of prisoner head counts and safety checks. The document states that the purpose of a safety check is to establish that a prisoner is present and that bodily movement can be observed. In relation to head counts, IG25 gives the following instruction to officers:

> **"Head counts during silent hours should be carried out as quietly as possible, taking care not to deliberately waken prisoners. Preferably, observations should be completed using torchlight via the observation flap in the cell door. Only when it is not possible to be satisfied that all is well in the cell, should the light be switched on."**

[11] Governor's Order S7 (replacing an earlier version) was issued on 9 December 2010.The subject matter was *Night Guard Body Checks, Head Counts, Pegging and Reporting Procedures by Night Guard Staff.* This revised S7 states:

> **"At the commencement of Night Guard Duty and before the day staff go off duty, NCOs must carry out a full head count and body check to confirm the presence and wellbeing of all prisoners.**
> **…..**
>
> **NCOs must carry out a peg and head count as follows:**
>
> **One head count between 2300-2400 hours.**
> **One head count between 0200-0300 hours.**
> **One head count between 0500-0600 hours.**
>
> **Details of findings must be recorded in the Night Guard Journal.**
> **Any unusual activity, including medical emergencies, uncovered during head counts must be managed in accordance with Governor's Orders, Local Instructions and laid down procedures. Torches will be used to check cells by NCOs and**

cell lights will only be used when staff concerns are aroused. "

[12] On 10 February 2011 the Prison Service published the *Revised Suicide and Self Harm Policy*. This policy was supported by a Standard Operating Procedure (SOP). The policy document identifies specific responsibilities for different categories of officer including the Night Guard Manager (Annex F) who is tasked with visiting each residential area three times during the night and with providing a briefing to the Duty Governor about concerns about any individual prisoners identified during the Night Guard.

[13] The staff responsibilities outlined in the *Suicide and Self Harm Policy* are reinforced by the SOP Chapter 6 of which addresses the issue of safety checks and head counts stating:

> **"As an integral part of their core duties, Residential staff are required to carry out safety checks and head counts. This applies to any part of the prison at any time of the day or night and for any activity that prisoners may attend or participate in.**
>
> **In any situation and at any time, staff must know where prisoners are and be able to confirm that they are alive and well.** ***The purpose of a safety check is to establish that a prisoner is present and alive. The purpose of a head count is to establish that a prisoner is present and accounted for.***
> **….**
>
> **During the night guard period and in addition to the safety checks a minimum of three head counts will be completed, in line with local Governors Orders. NCOs will ensure prisoners are accounted for and that there is no activity giving rise to concern that the person is at risk or attempting to undermine the security, good order and control of the prison.**
>
> **Night custody head counts when prisoners are asleep should be made as quietly as possible, taking care not to deliberately waken prisoners. Preferably, observations should be completed using torchlight via the observation flap in the door. Only when it is not possible to be satisfied that all is well, should the light be switched on."**

Parties Submissions

[14] The applicant contends that the impugned checks constitute an interference with his Art 8 Convention rights and that such interference has not been justified on either safety or security grounds and is disproportionate. He relies on the alleged absence or paucity of evidence as to the efficacy of the impugned measures in achieving the legitimate aim to which they are directed submitting that there was little evidence that the night checking policy enhances prisoners' security or prison safety. It was also contended that the measures were disproportionately intrusive.

[15] It was contended there was no real attempt to weigh the competing interests at stake in the devising and implementation of the impugned policy or to assess the proportionality of the night-checking policy by carrying out an evidence-based review of the policy, for example. This despite the recommendations of the CJI/HMCIP and the Prisoner Ombudsman and, more latterly, the general comments of the *Report on the Northern Ireland Prison Service: Conditions Management and Oversight of all Prisons,* Interim Report, February 2011 (see pages 1, 12, 38 and 54 in particular), explaining that, in the opinion of the report's authors, one of the problems in the current prison regime is a pre-occupation with security-related matters, a pre-occupation which has continued since the conclusion (or de-escalation) of the 'Troubles' and can have an adverse impact on the regime to which lower-risk category prisoners are subject. The applicant acknowledged that the instructions issued to prison officers about how these checks are to be carried out have emphasised the need to do so without disturbance to prisoners and that a contract to carry out remedial works to observational flaps has now been concluded following the recommendation in the Prison Ombudsman's February 2010 report. The applicant however contended that these changes do not address the fundamental issue posed by the official reports listed above viz, whether these checks serve any necessary purpose at all.

[16] In this context the applicant relied upon ***Dickson*** asserting that the absence of an assessment (of the Article 8 issues) was central to the Court's determination that the policy under scrutiny there fell outside the margin of appreciation (para85).Further the applicant submitted that no particular reason or explanation has been advanced as to why 'Foyleview', 'Alpha' and H2 prisoners are not subject to the night checking regime, nor whether that aspect of the policy (i.e. that it does not apply across the entire prison) has been subject to an 'Article 8-type assessment'.

[17] The respondent submitted relying primarily on ***MacKenzie v Governor of HMP Wakefield*** **[2006] EWHC 1746** and ***R (Gillan) v Commissioner for the Metropolis*** **[2006] UKHL 12** that such intrusion as the night checking involved did not reach the level of seriousness to constitute an "interference" breaching Article 8. In the alternative it was contended that if there was an

interference that it was in accordance with law, in pursuit of a legitimate aim and not disproportionate.

Article 8

[18] Not every restriction of personal autonomy, privacy or freedom of a sentenced prisoner in custody will necessarily constitute an *interference* with Article 8.

[19] In ***Napier v Scottish Ministers*** **[2004] SLT** it was held that Article 8 is likely to be engaged in certain prison contexts. Lord Bonomy, with reference to Article 8 stating:

> **"in applying this right to the situation where a public authority has responsibility for the control and care of a person in an institution, "private life" includes the conditions in which the person is held and the circumstances in which he has to undertake the particularly personal, regular activities of daily life, such as discharging bodily waste and maintaining a standard of cleanliness particularly where he suffers from a serious skin complaint which requires a regular regime of care. That is self-evident."**

[20] In ***MacKenzie*** the applicant challenged the practice of hourly night checks conducted upon Category A prisoners in Wakefield prison contending that the policy of conducting such checks was unlawful and in breach of Articles 3 and 8 of the Convention. Collins J rejected the Article 3 claim concluding that while night checks may cause inconvenience and may cause a nuisance if sleep is disturbed, it fell far below treatment that could be considered a breach of Article 3.

[21] In respect of Art 8 Collins J held that the policy in question was in accordance with law given that it was approved in Orders made pursuant to the Prison Rules and Prison Act. Significantly, he found that, *on the facts of the case*, notwithstanding that there was evidence of some sleep disturbance, there was no interference with the applicant's private life. The learned judge stated:

> **"It is not necessary for me to go into the details or to examine the circumstances in which it can be said that there has been an interference with the right to private life under Article 8. Suffice it to say, for the reasons that I have given, it seems to me that the application of this particular policy and the night-**

> **time checks does not create such an interference, even in the case of a vulnerable person such as the claimant, *provided that it is applied in the way that it ought to be applied*; I have no evidence before me that it is not now being so applied."**

[22] The Respondent submits that this reasoning is applicable to the present case where it is asserted the facts are materially indistinguishable. There may be considerable force in this submission but I am prepared to proceed on the basis that interference has been established and concentrate instead on examining the issue of justification pursuant to Article 8(2) of the Convention. Any interference must be justified by the prison authorities and the actions taken which amount to interference must be related to the justification offered. In Dickson ***v UK*** the ECHR stated :

> **"68. Accordingly, a person retains his or her Convention rights on imprisonment, so that any restriction on those rights must be justified in each individual case. This justification can flow, *inter alia*, from the necessary and inevitable consequences of imprisonment (§27 of the Chamber judgment) or (as accepted by the applicants before the Grand Chamber) from an adequate link between the restriction and the circumstances of the prisoner in question. However, it cannot be based solely on what would offend public opinion."**

[23] In ***De Freitas*** **[1999] 1 AC 69**, the Judicial Committee stated that the proportionality of an interference with Article 8 fell to be considered by asking whether:

(i) the legislative objective is sufficiently important to justify limiting a fundamental right;
(ii) the measures designed to meet the legislative objective are rationally connected to it; and
(iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.

[24] At paras 72 *et seq* of the judgment in ***Re Christian Institute*** **[2007] NIQB 66** Weatherup J analysed the requirements of proportionality and at para83 set out the factors which should be taken into consideration in determining whether a particular action was disproportionate:

(1) The overarching need to balance the interests of society with

those of individuals and groups.

(2) The recognition of **the latitude** that must be accorded to legislative and **executive** choices in relation to the balance of public and private interests.

(3) The legislative objective being sufficiently important to justify limiting the fundamental right.

(4) The measures designed to meet the legislative objective being **rationally connected to it, that is, the measures must not be arbitrary, unfair or based on irrational considerations**.

(5) The need for proportionate means being used so as to impair the right or freedom no more than necessary to accomplish the objective, that is, that the measures are the least intrusive, in light of both the legislative objective and the infringed right. **The Court should consider whether the measures fall within a range of reasonable alternatives, rather than seeking to ascertain whether a lesser degree of interference is a possibility.**

(6) The need for **proportionate effect** in relation to the detrimental effects and the advantageous effects of the measures and the importance of the objective.

Discussion

[25] Are the three head count checks conducted during the night guard a disproportionate interference with Article 8 rights?

[26] Prisoner safety and prison security is the primary responsibility of the Respondent. The court has a necessarily limited role in reviewing measures which are bona fide intended to discharge the legitimate aim of securing the safety and security of inmates and staff within the Northern Ireland prison service establishments.

[27] The use of such checks is clearly within the range of reasonable alternatives open to Prison Service to achieve the legitimate aim. It is not the function of the court to "don the garb of policy-maker, which they cannot wear", as Laws LJ memorably expressed it in ***Begbie***, by micro-managing issues regarding the measures taken to enhance prisoner safety and security. The threshold for intervention is limited by the recognition first that the primary responsibility for prisoner safety and security rests with the prison authorities. Secondly in recognition of that primacy the choice of measures to discharge that responsibility rests with those authorities. This reflects the legal position but it is also consonant with fact that in this area the respondent

is particularly well placed to decide what measures are required to safeguard prisoner safety and security. Thirdly if the measures selected are within the range of reasonable alternatives the court is unlikely to find an impugned measure disproportionate.

[28] The Respondent relies on the latitude (or deference) referred to by the Court in ***Christian Institute***. "Deference," Jonathon Sumption Q.C reminds us in the F A Mann Lecture 2011, "as others have pointed out, has unfortunate overtones of forelock-tugging cravenness". But he continues by acknowledging that "it is a perfectly acceptable word, so long as one remembers that the judge is not deferring to the minister. He is deferring to the constitutional separation of powers which has made the minister the decision-maker, and not him." The safety and security of a prison is a matter plainly within the expert domain of the respondent. The applicant's invitation to the Court to effectively supplant the judgment of the respondent on this issue would, if accepted, represent an impermissible extension of the courts *supervisory* role.

[29] In the present case the Respondent reviewed the matter and implemented modifications to the policy in light of criticisms advanced by the Prisoner Ombudsman and has also made physical modifications to the cell doors in Halward House in order to mitigate any adverse effects from the safety checks and body counts. Further criticisms can be taken up in a similar manner. The respondent has nonetheless adjudged that the impugned measures are required for prisoner safety and security. The measures are plainly rationally connected to that aim and there is no question of bad faith. Should the Respondent consider on review that the regime might in its judgment be relaxed without compromising prisoner safety or prison security there is no reason to doubt that they would take the necessary implementing measures. However the operational requirements of the prison particularly in terms of safety and security of prisoners is quintessentially a matter for the prison authorities. It is not disputed that the impugned measures are in accordance with law and pursue a legitimate aim. Adopting the approach to proportionality summarized at para 24 above I conclude that the impugned measures are rationally connected to the legitimate aim and are not disproportionate.

Conclusion

[30] I therefore conclude that any interference is justified in accordance with Article 8(2) of the Convention.