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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY MICHAEL SMYTH FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

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Stephen Gilmore, of counsel (instructed by Matthew Lyttle, Scullion & Green) for the Applicant
Matthew Corkey, of counsel (instructed by Karl Huddleston, Departmental Solicitor's Office) for the Respondent

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SIMPSON J

Introduction

[1] The applicant was a serving prisoner when these proceedings were commenced. He is no longer a serving prisoner. In April 2021 he was sentenced to a Determinate Custodial Sentence of 2 years and 9 months, comprising 1 year 4½ months in custody and the same period on licence. The sentence was imposed on the applicant for numerous offences of misrepresentation and fraud, involving five victims and amounting to some £13,500. In October 2021 the applicant was sentenced, for similar offences of misrepresentation and fraud involving one victim and amounting to some £18,500, to 8 months' imprisonment, consecutive to the April 2021 sentence.

[2] The applicant's Order 53 statement ("the statement") was wide-ranging and diffuse, challenging a number of matters, and including some challenges which were wholly baseless — eg a challenge relating to an ophthalmic appointment which had, in fact, been cancelled by the doctor who was to carry out the procedure and had nothing to do with the actions of the proposed respondent. The applicant also challenged the decision of the governor of HMP Magilligan to recall him from a placement at Kilcranny House, thereby ending the placement and, the applicant says, his opportunity for early release.

[3] In fact, this latter assertion is incorrect. The effect of the sentences referred to above in para [1] is that the applicant's release date is 20 November 2022. His release on that date is automatic so that his asserted loss of opportunity to remain at Kilcranny House has had no impact on his release date.

[4] During the course of the leave hearing I raised with the parties the issue of utility of these judicial review proceedings, in light of the fact that the applicant would be released from prison before any substantive hearing could be held. As a result of this the focus of the case changed dramatically; the focus now being that the respondent should have in place a written policy in respect of the Kilcranny House scheme ("the scheme"). Essentially, the applicant seeks a declaration that it is unlawful for the proposed respondent not to have in place a policy dealing with temporary release to Kilcranny House. This was not a ground contained in thestatement, but if the applicant succeeds in his application for leave, the court has the power to grant leave on a basis not appearing in the statement and direct that the statement be amended appropriately.

[5] I adjourned the leave hearing to permit the parties to file short written submissions on what appeared to be the only live issue in the case, and I offered the parties the opportunity, should either so desire, to make further oral submissions.

[6] Both counsel filed helpful written submissions, and indicated that further oral submissions were not thought necessary.

The Kilcranny House Scheme

[7] The basis on which a prisoner can be offered the opportunity to reside at Kilcranny House is rule 27 of the Prison and Young Offender Centre Rules (Northern Ireland) 1995 which governs temporary release. It provides, where material:

> "**Temporary release**
>
> 27.–(1) A prisoner to whom this rule applies may be temporarily released for any period or periods and subject to any conditions.
>
> (2) A prisoner may be temporarily released under this rule for any special purpose or to enable him to have health care, to engage in employment, to receive instruction or training *or to assist him in his transition from prison to outside life.*
>
> (3) A prisoner released under this rule may be recalled to prison at any time whether the conditions of his release have been broken or not.

…"
[Emphasis added]

[8] Kilcranny House, situated in the Coleraine area, is the regional training headquarters of Causeway Community Rescue Service ("CCRS"), a charity. It is a facility where prisoners may be sent for the purposes of taking part in a program of work in the community prior to imminent release from a custodial sentence. Any placement at the facility can only be made with the agreement of CCRS. In the pre-action protocol reply from the Departmental Solicitor's Office, acting on behalf of the proposed respondent, it is stated that Kilcranny House it is not staffed by members of the Northern Ireland Prison Service. The staff are neither trained to, nor expected to, exercise physical control or restraint over a prisoner. CCRS can, and sometimes do, refuse to provide accommodation to prisoners if they have any concerns about behaviour.

[9] According to the DSO letter when a prisoner is identified as a candidate to go to Kilcranny House, that prisoner attends an interview with the assigned governor. The interview involves a discussion about the rules and procedures associated with Kilcranny House and the expectations on the prisoner in terms of adherence to those rules.

[10] Exhibited to the applicant's first affidavit is a document entitled "Terms and Conditions of Temporary Release from HMP Magilligan to Kilcranny House." It is dated 4 July 2022 and is specific to the applicant's temporary release to the facility. The applicant signed the document. According to the DSO letter from the proposed respondent, the applicant was informed of these rules at a meeting with the relevant governor on 1 July 2022. It was at that meeting that he signed the Terms and Conditions. In his grounding affidavit the applicant says that he "discovered there was documentation I signed on the 4th of July 2022" but he asserts that this documentation confirmed that the induction training should have taken place. It is clear, however, that the document signed by him contained the Terms and Conditions and that he acknowledged having read and understood them.

[11] At that 1st July meeting, according to the DSO letter, the applicant was also told that he could not use his mobile telephone to make any call to a number which was not on his approved list of telephone numbers.

[12] The Terms and Conditions document states (para 1) that the applicant was to be "temporarily released from HMP Magilligan" from 5 July 2022 to 19 November 2022 " for the purpose of Kilcranny House Resettlement Scheme."

[13] The whole of the document is important, but I highlight a number of paragraphs which are particularly material to the present application:

> "3. Your placement in this accommodation is entirely at the agreement of the Causeway Community Rescue

Services. Therefore, if at any stage they indicate to NIPS that they wish to discontinue their offer of accommodation to you, NIPS will have no alternative but to organise for your return to Magilligan Prison.

4. It must be made clear that NIPS do not have any authority to insist on what prisoners the Causeway Community Rescue Services choose to admit and/or reside at Kilcranny House.

6. You may be recalled to the prison at any time for the breach of any of these terms and conditions of temporary release.

9. At all times whilst resident in the accommodation block located within the grounds of Kilcranny House and working on a voluntary basis in the CRS shop or the Charity grounds, you will be subject to the terms and conditions of release under rule 27 which will include being subject not only to prison rules but also to rules of the CRS.

10. You will not be permitted to leave the precincts of Kilcranny House grounds for any reason other than to attend work or seek emergency medical treatment without the express permission of the Alpha/Foyleview Governor…

13 … You will be required to sign a compact to authorise the use of a mobile telephone and to agree to the conditions of use … The mobile phone compact will form part of the overall rule 27 Terms and Conditions of Temporary release.

14. You will not absent yourself from either Kilcranny House or your work location without permission; should you do so you may be deemed to be unlawfully at large and subject to disciplinary proceedings under Prison Rules.

37. Your placement is subject to your behaviour not giving concern to the Causeway Community Rescue Service Charity. Should concerns arise and the charity request your removal from the scheme you will be returned to HMP Magilligan. The charity will not be required to provide you with a reason why they have

> requested your removal nor will HMP Magilligan be able to go against the wishes of the charity staff.

[14] On the final page of the document, in bold, italicised and underlined print, appears the following:

> "*It is a further condition of your temporary release that if you have any doubt or uncertainty about the scope or meaning of any of the conditions set out in this undertaking, you will seek guidance from the Alpha/Foyle Governor*."

[15] On that same page appears the following, in capital letters —

> "PENALTIES
>
> FAILURE TO COMPLY WITH THE CONDITIONS OVERLEAF AND THE SPECIAL CONDITIONS LISTED ABOVE MAY RESULT IN DISCIPLINARY PROCEEDINGS AND WILL RESULT IN YOUR REMOVAL FROM KILCRANNY HOUSE. IF YOU ARE RETURNED FROM KILCRANNY HOUSE FOR FAILING TO COMPLY WITH THE CONDITIONS YOU WILL NOT RETURN TO THE FOYLEVIEW COMPLEX."

[16] Again, on the same page, and immediately above the applicant's signature on this document the following appears:

> "I have read and understand these conditions, and I agree to comply with them during my temporary release from HMP Magilligan to Kilcranny House."

The factual circumstances following release to Kilcranny House

[17] In line with para 1 of the Terms and Conditions the applicant was released to Kilcranny House on 5 July.

[18] On 6 July he breached the terms of his temporary release by leaving Kilcranny House at around 3:00pm (he was not permitted to leave the premises before 5:30pm). He travelled to Coleraine and went to a restaurant in the town, before returning to the premises some hours later. Further, as explained in the pre-action protocol correspondence, on 7 July the applicant made a telephone call to PBNI in Downpatrick, a number which he was not permitted to call as it was not on the list of approved telephone numbers. This was a breach of the telephone compact referred to in para 13 of the Terms and Conditions.

[19] For this latter breach of his temporary release conditions the decision was taken to return him to custody. He returned to HMP Magilligan on 8 July.

[20] Following his return to prison, staff at Kilcranny House informed NIPS of the applicant's other breach of his temporary release conditions by absenting himself from Kilcranny House on 6 July without permission. In light of this behaviour the management of Kilcranny House indicated that they were not prepared to permit him to return to reside there.

[21] The proposed respondent in this case has no power to compel CCRS to permit the applicant to return to Kilcranny House.

[22] Therefore, for the period from 8 July 2022 until the date of his discharge from prison, the applicant would not have been able to return to Kilcranny House in any event and, as the DSO letter makes clear, there is no equivalent facility to Kilcranny House. Accordingly, although there are some factual differences between what the applicant says in his affidavits and the DSO letter and whether or not it was appropriate for the proposed respondent to return him to HMP Magilligan for the breach following his misuse of his mobile telephone, the reality is that he could not have gone back to Kilcranny House prior to his date of discharge from prison. As noted above, that fact had no impact on his date of discharge.

The parties' arguments

[23] In his further written submissions the applicant contends that it should be clear "how a prisoner can or will be selected to transfer to such a scheme, what will cause a termination of their placement there, what checks and balances are in place to protect the public and how that scheme interacts with the prison or the justice system."

[24] The applicant further contends that rule 27 does not apply in the circumstances of this case because, he argues, a placement in Kilcranny House is intended to be "a permanent move before release", not a temporary release. Even if, says the applicant, rule 27 does apply it is "in the wider public interest to ensure that there is a clear and accessible policy in place and to challenge the lack of such a policy especially as it relates to a fundamental freedom and human right which is being interfered with." Further, where there is a scheme which relates to allowing a prisoner back into the community, it behoves the proposed respondent to have a written policy in place.

[25] Put simply, the proposed respondent says that rule 27 provides the governor of HMP Magilligan a broad discretion as to the temporary release of prisoners and that it is not necessary to have a written policy dealing with temporary release to Kilcranny House, either at all or in light of the Terms and Conditions document discussed above.

[26] The proposed respondent further contends that since the applicant has now been discharged from custody, having completed his sentence, "a determination by the court regarding the lawfulness of there being a written policy in respect to conditions of residence at Kilcranny House will be of no utility to the applicant." In support of this argument the proposed respondent cites well known passages from a number of authorities, two of which are discussed below.

Discussion

[27] The issue for me at the leave stage of these judicial review proceedings is whether the applicant has crossed the threshold of "an arguable case having a realistic prospect of success" — see McCloskey LJ in *Ni Chuinneagain's Application for Judicial Review* [2022] NICA 56, para [42].

[28] There is no statutory obligation on the proposed respondent to promulgate a policy in relation to this aspect of temporary release. Neither party identified any legislation containing any such obligation, and I have not been able to identify any.

[29] In *R(A) v Secretary of State for the Home Department* [2021] UKSC 37 the Supreme Court stated (para [2]) that public authorities "*may find it helpful* (my emphasis) to promulgate policy documents to give guidance about how they may use" powers provided to them. From that statement it is clear that there is no non-statutory requirement to promulgate a policy in every situation.

[30] Thus, it is a matter of discretion for the public authority as to whether or not it promulgates a written policy. In the present case the proposed respondent has chosen not to publish any relevant policy.

[31] In Auburn, Moffett & Sharland *Judicial Review Principles and Procedure* the authors state (para 21.16):

> "In cases where a public authority has a power, the exercise of which involves interference with the individual's Convention rights, usually it will be able to justify such an interference … if it is 'prescribed by law' or 'in accordance with the law.' This requirement will only be met if the law as to the relevant power is sufficiently accessible to the individual and sufficiently precise to enable him to understand its scope and foresee the consequences of his … actions so that he … can regulate his … conduct accordingly."

[32] In my view, contrary to the submission of the applicant, rule 27 does apply to this situation. The rule specifically identifies one of the purposes of temporary release as being "to assist [the prisoner] in his transition from prison to outside life." The very use of the word temporary indicates that, contrary to the applicant's

submissions, it is not, and is not intended to be, a permanent state of affairs. Further, the prison rules clearly differentiate between release (which carries the inference that it is release from the prison premises), and discharge — see rule 28 — (which takes place following the completion of the relevant portion of a sentence).

[33] Rule 27 provides the prison authorities with a wide discretion as to who may be selected for participation in such a scheme. This is entirely appropriate, as it is the prison authorities who are in the best position to decide — from their knowledge of a prisoner gleaned during his time in custody and from their relationship with Kilcranny House — who would benefit from temporary release into accommodation such as is provided in Kilcranny House.

[34] Further, the entirety of the Terms and Conditions document which was signed both by the applicant and the governor makes the position clear. I have highlighted above some of the more material paragraphs. The interview with the relevant governor before the temporary release takes place is designed to ensure that a prisoner is well aware of the rules, terms and conditions. In this case the applicant signed the document thereby acknowledging that he had read and understood the conditions and that he agreed to comply with them.

[35] I consider that the combination of rule 27 and the Terms and Conditions document are sufficient to permit any prisoner to understand what is to be expected of him in relation to temporary release to Kilcranny House and in what circumstances he would be liable to be returned to prison. I am satisfied that the operation of the scheme is in accordance with the law.

[36] Accordingly, in the circumstances of this case I do not consider that the applicant enjoys an arguable case having a realistic prospect of success that it is unlawful for the proposed respondent not to have a written policy to deal with the scheme. On that basis I refuse leave.

[37] Further, I consider that the continuation of the case would serve no useful purpose.

[38] In *R v Secretary of State for the Home Department, ex parte Salem* [1999] 1 AC 450, 457A Lord Slynn said:

> "The discretion to hear disputes, even in the area of public law, must, however, 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, as for example (but only by way of example) when 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."

[39] In *Re McConnell's Application for Judicial Review* [2000] NIJB 116, 120d Carswell LCJ said

> "It is not the function of the courts to give advisory opinions to public bodies, but if it appeared that the same situation was likely to recur frequently, and the body concerned had acted incorrectly they might be prepared to make a declaration to give guidance which would prevent the body from acting unlawfully and avoid the need for further litigation in the future."

[40] I note also that in *JR 47's Application* [2013] NIQB 7 McCloskey J said, para [85]:

> "I remind myself that declaratory relief is not granted for the asking. Rather, a declaration is a discretionary public law remedy."

[41] The applicant relied on the decision in *R v Dartmoor Prison Board of Visitors, ex parte Smith* [1987] 1 QB 106 and the court's statement at 115F:

> "It seems to all the members of this court that the fact that [the prisoner] was no longer at risk of further disciplinary proceedings did not deprive the court of jurisdiction to hear this appeal, that there were in it questions of general public interest; and that, even if [the prisoner] is rightly to be regarded as having no interest in the outcome, the court should, in the exercise of its discretion, hear the appeal on the merits."

[42] *R v Dartmoor Prison Board of Visitors, ex parte Smith* involved the judicial review of a decision of the Board of Visitors of Dartmoor Prison that they had power to direct that the prisoner should be charged with a lesser offence than that which had been referred to them by the governor.

[43] The circumstances of that case were materially different from those in this case. First, the decision involved an appeal from a High Court judge who had made a decision which would bind further decisions of the Board of Visitors, unless varied or set aside by the Court of Appeal. Secondly, the Board's appeal to the Court of Appeal was as of right. Thirdly, the decision involved a question of construction of the relevant prison rules — as to whether a Board of Visitors had any power to substitute and convict of a lesser offence. Fourthly, the prison disciplinary system had been under consideration by the Prior Committee, and its report, Cmnd. 9641,

had been presented to Parliament in October 1985; new legislation was likely to be considered by the government and further clarification of the issues raised in the case was desirable in the public interest.

[44] It was in light of those factors that the court's statement, relied on by the applicant, was made.

[45] In the present case there is no evidence that there is a significant number of prisoners taking part from time to time in the scheme. There is no evidence of any problems with the operation of the scheme, which would require guidance from the court. There is no evidence that the combination of the Terms and Conditions and rule 27 is causing confusion or misunderstanding on the part of numbers of prisoners selected by the prison authorities for such temporary release, such that it would be in the public interest for the court to hear this (proposed amended) application.

[46] There is, in short, no evidence of any widespread or systemic problems with the operation of the scheme.

[47] In my view, the proceedings are entirely academic and I consider that there is no good reason in the public interest for this application, even with an amended Order 53statement, to be entertained.

[48] For this reason alone, I would refuse the application for leave.

Conclusion

[49] Accordingly, I refuse leave to apply for judicial review.

[50] I will hear the parties on the issue of costs.