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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

AN APPLICATION FOR JUDICIAL REVIEW BY

DARREN HART

WEATHERUP J

Restriction of Association under Rule 32

[1] This is an application for judicial review of a decision of the Governor of HMP Magheraberry to place the applicant in the Special Supervision Unit by imposing Restriction of Association under rule 32 of the Prison and Young Offenders Centre Rules (Northern Ireland) 1995 and further of the decisions of the Independent Monitoring Board (IMB) in connection with the applicant being placed under rule 32. Ms Quinlivan appeared for the applicant, Dr McGleenan for the Prison Service and Mr Dunlop for the Independent Monitoring Board.

[2] Rule 32 is not a disciplinary measure but a management measure. It may be considered when information has been received about a prisoner and removal from association is in the interests of good order and discipline. The person providing the information may wish to maintain confidentiality. Disciplinary procedures will not be appropriate or possible. The prison authorities have to consider the interests of the prisoner and the person providing the information and the management of the prison system. Invoking Rule 32 in the interests of good order and discipline may result in limited information being disclosed to the prisoner, thus limiting the prisoner's right to make representations on the reasons for the decision. In such circumstances it is essential for the achievement of procedural fairness that those responsible for the decisions, being the Governors and the staff at Prison Service headquarters, and the supervision of the system, being the IMB, should apply close scrutiny to the information available to them but not made available to the prisoner.

[3] A case conference was held in relation to the applicant on 3 November 2008 to consider whether the applicant should be made subject to rule 32 for the maintenance of good order and discipline. Minutes of the meeting were recorded by prison staff. The applicant's alleged activities involved drug dealing, intimidation, bullying and threats to staff. The meeting was chaired by Governor Jeanes and was attended by the Lifer Governor, a representative from Dunlewey, a prison officer from the Security Department, a prison officer from the applicant's house, the Governor Residential and a psychologist. The prison officer from the Security Department disclosed intelligence relating to the applicant's involvement in assaults, drugs, threats and bullying. Landing staff reported agreement with the security assessment and the Governors reported on their interviews with staff and prisoners relating to the applicant. The meeting recommended the applicant's Removal from Association under rule 32.

[4] Governor Jeanes informed the applicant on 4 November 2008 that he would be subject to Restriction of Association under rule 32 for a period of 48 hours. The 'Record of Governor's Interview' states that Governor Jeanes explained to the applicant that a case conference had considered intelligence which indicated that the applicant was bringing drugs into the prison, bullying prisoners and indirectly threatening staff. The applicant stated that he was drugs free but declined to undergo a drugs test.

[5] Consideration was then given to extending the Removal of Association beyond 48 hours. The applicant was interviewed on 5 November and advised that the extension of rule 32 was being considered and in response he stated that any comments that he would have to make on the matter would be made by his legal team. The Rule 32 Review Assessment Committee was chaired by Governor Cromie on 6 November. The committee recommended the extension of rule 32 for 28 days on the same grounds as those relied on for the original decision and on the further grounds of providing respite for prisoners and staff and providing the applicant with the opportunity to rehabilitate from his drug misuse. The recommendation was considered by Governor Gray of Prison Service headquarters and he approved the extension of rule 32 for a further 28 days. At interview with the applicant on 6 November, Governor Gray recorded that the applicant had no particular issues to raise but the applicant stated that he would be taking the matter to judicial review. The applicant denied involvement with drugs. Although not recorded in the notes of interview the applicant contends that he raised with Governor Gray that two named prisoners might be prepared to make false allegations against him.

[6] By letter dated 7 November 2008 the applicant's solicitors sought further particulars and the sources of the information relied on by the prison authorities in deciding to remove the applicant from association. No reply

was received to that request prior to the grant of leave to apply for judicial review on 20 November 2008.

[7] A review of the applicant's Removal from Association was conducted on 25 November 2008. The case conference was also attended by James McAllister, Chair of the Independent Monitoring Board. The prison officer from the Security Department briefed the meeting on the available security information. The meeting recommended the continuation of Removal from Association to the original authorised date on 4 December. The recommendation was considered by Governor Maguire of Prison Service headquarters who authorised the applicant's continuing Removal from Association. In the record of interview with the applicant on 25 November it is stated that Governor Maguire explained to the applicant that the review had taken place because the Independent Monitoring Board had not been involved in the earlier decisions. The applicant made no representations in respect of his continued Removal from Association.

[8] Governor Jeanes chaired a further case conference on 1 December 2008. It was recommended that the applicant be removed from rule 32 on 2 December and the applicant was returned to Bann House on that date. The reasons for there being no further extension of the applicant's Removal from Association concerned his willingness to engage with the Dunlewey programme on drug education, his signing of an anti bullying monitoring plan and the completion of a negative drugs test on 27 November 2008.

The requirements of Rule 32

[9] Rule 32 of the Prison and Young Offenders Centre Rules (Northern Ireland) 1995 provides as follows (with Independent Monitoring Boards having replaced Boards of Visitors) -

> (1) Where it is necessary for the maintenance of good order or discipline, or in his own interests that the association permitted to a prisoner should be restricted, either generally or for particular purposes, the governor may arrange for the restriction of his association.
>
> (2) A prisoner's association under this rule may not be restricted under this rule for a period of more than 48 hours without the agreement of the Secretary of State.
>
> (2A) The governor shall inform a member of the [independent monitoring board]-
>
> (a) that he has arranged for the restriction of the association of the prisoner, and

(b) of the date, time and location of the first review of the restriction of the prisoner's association.

(2B) The governor shall inform a member of the [independent monitoring board] of the matters in paragraph (2A) as soon as practicable and in any event no later than 24 hours after the prisoner's association is restricted.

(2C) The governor shall keep a written record of all contact and attempted contact with members of the [independent monitoring board] under this rule.

(2D) Unless it is not reasonably practicable, a member of the [independent monitoring board] shall be present at all reviews of the restriction of the association of the prisoner.

(2E) The governor shall as soon as reasonably practicable inform a member of the [independent monitoring board]:

(a) of any changes to the date, time or location of the first review of the restriction of the association of the prisoner,

(b) the date, time and location of any subsequent reviews of the restriction of association of the prisoner, and

(c) any changes to the date, time or location of any subsequent reviews.

(2F) The [independent monitoring board] shall satisfy itself that:

(a) the procedure in this rule for arranging and reviewing the restriction of the association of the prisoner has been followed, and

(b) the decision of the governor to restrict the association of the prisoner is reasonable in all the circumstances of the case.

(2G) In order to satisfy itself of the matters in paragraph (2F) the [independent monitoring board] shall be entitled to inspect the evidence on which the governor's decision was based, unless such evidence falls within paragraph (2H).

(2H) Evidence falls within this paragraph if:

(a) it should not be inspected by the [independent monitoring board] for the purpose of safeguarding national security;
(b) its inspection by the [independent monitoring board] would, or would be likely to prejudice the administration of justice;
(c) its inspection by the [independent monitoring board] would, or would be likely to endanger the physical or mental health of any individual; or
(d) its inspection by the [independent monitoring board] would, or would be likely to endanger the safety of any individual.

(2I) If the [independent monitoring board] is not satisfied of any of the matters set out in paragraph (2F) it shall draw this to the attention of the governor, in writing, who must, review the procedure for arranging and reviewing the restriction of the association of the prisoner, review his decision to restrict the association of the prisoner and take such other steps as are reasonable in all the circumstances of the case.

(2J) The governor must take the steps in paragraph (2I) promptly and in any event within seven days and the [independent monitoring board] shall not refer a matter to the Secretary of State under paragraph (2K) until the governor has taken the steps in paragraph (2I) or the end of the seven days whichever is earlier.

(2K) If after drawing a matter to the attention of the governor under paragraph (2I) the [independent monitoring board] is still not satisfied of any of the matters set out in paragraph (2F) it shall draw this to the attention of the Secretary of State in writing.

(2L) If a matter is referred to the Secretary of State under paragraph (2K) he must consider the matter and take such steps as are reasonable in all the circumstances of the case.

(3) An extension of the period of restriction under paragraph (2) shall be for a period not exceeding one month, but may be renewed for further periods each not exceeding one month.

(4) The governor may arrange at his discretion for such a prisoner as aforesaid to resume full or increased association with other prisoners and shall do so if in any case the medical officer so advises on medical grounds.

(5) Rule 55(1) shall not apply to a prisoner who is subject to restriction of association under this rule but such a prisoner shall be entitled to one hour of exercise each day which shall be taken in the open air, weather permitting.

The grounds for Judicial Review.

[10] The applicant's grounds for judicial review are –

(1) That there was no or no sufficient evidence to justify the decision to place the applicant on rule 32.

(2) That in deciding to place the applicant on rule 32 the applicant was not given any or adequate reasons.

(3) That the decision was unfair and unlawful in that the applicant was not informed of the allegations made against him or given an opportunity to respond to those allegations.

(4) That the investigation leading to the decision was conducted in breach of the principle of audi alteram partem and the Governor failed to give the applicant any opportunity to rebut the allegations made against him as such decision was unfair and unlawful.

(5) That the conduct of the investigation into allegations against the applicant and the decision to place the applicant on rule 32 were unlawful in that the Governor failed to conduct a hearing in which the applicant was entitled to examine or have examined witnesses against him.

(6) That the decision amounts to an interference with the applicant's Article 8 rights in that it denies him the opportunity of socialising with other prisoners. The decision was conducted in a manner which was procedurally unfair and the applicant's Article 8 rights have been breached.

(7) The punishment imposed upon the applicant was unfair and unjust in all the circumstances.

(8) That contrary to the requirements of rule 32(2A) the respondent failed to inform the Independent Monitoring Board of the date, time and location of the first review of the restriction of the applicant's association.

(9) That the Independent Monitoring Board should have been in attendance at the review hearing on 6 November 2008 and that in their absence and absent any basis for contending that it was not reasonably practicable for them to attend, the continued detention of the applicant in the SSU on rule 32 was unlawful.

(10) That the Independent Monitoring Board have not subjected the decision to any or any adequate scrutiny and have certainly not subjected the decision to the anxious scrutiny necessary to ensure procedural fairness to the applicant.

(11) That there is no evidence of the Independent Monitoring Board having taken any or any adequate steps to satisfy themselves that the applicant should have been placed on rule 32 or to monitor the decision and the decision making process surrounding the restriction of association of the applicant.

Rule 32 decisions that rely on intelligence information.

- The qualified right to know the reasons for the decision

[11] The approach to the use of intelligence as a basis of Removal from Association under rule 32 was considered in Conlon's Application [2002] NICA 35 and Henry's Application [2004] NIQB 11. Procedural fairness requires that a prisoner removed from association under rule 32 has 'a right to know and to respond' to the reasons for his removal. The Governor should at an early stage, but not necessarily before the removal of a prisoner from association, give, where possible and where necessary, sufficient reasons for removing him from association and affording the opportunity to make representations about its justification. Whether this applies to the extension of a period of removal from association depends on the circumstances and comprehensive rules can not be laid down. The prisoner should be given sufficient information to permit him to understand why it has been decided that he should be removed from association. However in some cases it may not be possible to disclose to the prisoner the information upon which the decision is based. That may arise where all or some of the information relied on is based on intelligence. In most such cases the gist of the reasons for removal from association could be given.

[12] What is required in order to comply with the obligation to provide the gist of the reasons for removal? The decision maker should provide sufficient information, subject to the requirement to protect sources and processes, to enable the applicant to understand the nature of the allegations and to respond. This exercise involves a balance of competing interests between the applicant's right to know and to respond and the right to protection of the person providing the information and the public interest in securing relevant information and the maintenance of good order and discipline in the prison. The starting point is the provision of sufficient information to enable the prisoner to understand the reasons for removal, if so required. Where such disclosure is subject to constraint by reason of other interests the decision maker is required to make a judgment as to the extent to which the provision of information should be limited in order to protect the rights of others. The decision maker must be accorded a discretionary area of judgment in relation to the extent to which the release of information should be limited. If an applicant requires information or further information in order to understand the reasons for removal then that should be requested.

[13] In the present case some of the information was based on intelligence from the security officer. The applicant was initially informed that the intelligence related to drugs, bullying and threats. No particulars were provided to the applicant and no particulars were requested. The applicant was not told of information about involvement in prisoner assaults, although that is referred to in the case conference notes.

[14] The applicant did not make any request for further information until the solicitor's letter of 7 November requested information and sources. The applicant's solicitor received no further information in response to that request until further disclosure was made in the course of the application for judicial review. The request for the identity of sources has not been met and could hardly have been expected. The request for further information was met eventually by the disclosure of the minutes of case conferences in the course of the judicial review. The initial disclosures to the applicant at the interviews concerned general allegations about drugs, bullying and threats. When the minutes of the case conferences were disclosed it was not considered necessary to redact any part of the minutes. While the minutes do contain the record of the discussion about the applicant and the restriction of association, they do not contain any further details of the alleged drug dealing or assaults or bullying or threats. Such disclosure might have taken place on an earlier occasion in response to the solicitor's letter. Whether such further disclosure orally or in writing represents a failure on the part of the decision to comply with the obligation to provide sufficient information to the prisoner depends on the contents of the further information. In the present case it is difficult to conclude that the contents of the minutes advanced the request for information to an extent that would have enabled the applicant to have any fuller understanding of the allegations or to make any further representations.

- The right to make representations about the reasons for the decision.

[15] With the right to know the reasons comes the applicant's right to respond. When the applicant was interviewed by the Governor on 4 November the applicant disputed the drugs allegation and did not make any further representations about the allegations. At the interview on 5 November the applicant reserved his comments for his legal team. At the interview on 6 November the applicant indicated that he was taking the matter to judicial review. In effect the applicant did not seek any further information during the interviews but indicated that the matter was being left to lawyers. The applicant addressed the allegations in his affidavit. He referred to an adjudication for assault and an allegation of assault on another prisoner, which he denied. The allegation of bullying was denied and the applicant pointed out that he had not been placed on "bully watch", which he stated would be normal practice after such allegations. The allegation concerning drugs was denied. The allegation concerning threats to staff was denied.

- The right to have representation taken into account

[16] If an applicant responds then the response should be taken into account in the making or the review of the decision. At the interview of 6 November the applicant contends that he complained to Governor Gray about the possibility of unreliable sources providing information. It is not clear to what extent, if at all, Governor Gray caused any inquiries to be made in relation to that issue. This raises not only the requirement of taking into account the applicant's response but also the operation of the scrutiny of the information relied on in making the decision. It is not known whether any enquiries were made in response to that suggestion by the applicant or whether the persons named were a source of any of the information concerning the applicant.

[17] By the date of the second review hearing the applicant had filed an affidavit in the judicial review proceedings and the affidavit was faxed to the prison on 24 November so that its contents might be taken into account at the second review the following day. In the event the meeting occurred first thing the following morning and the affidavit was not before the meeting. It was not unreasonable to find that the applicant's affidavit did not reach the meeting.

- Scrutiny of the information not disclosed to the prisoner.

[18] In circumstances where sufficient information cannot be disclosed a countervailing requirement of procedural fairness concerns the scrutiny of the

intelligence material relied on in the making of the decision. Where sufficient information cannot be disclosed to a prisoner the right to know and to respond to the adverse case is diminished. To restore the balance of procedural fairness it is necessary to provide for a system of scrutiny of the information that cannot be released to the prisoner. Thus Henry's Application [2004] NIQB 11 provided for the requirements of procedural fairness in such circumstances, in that case under the former rule 32 scheme involving the Board of Visitors. First of all there must be anxious scrutiny of the information by those charged with making the decisions to restrict association, whether as Governors in the prison or at Prison Service headquarters. In addition those with a supervisory role, who are now represented by members of the IMB, must have access to the information and be able to subject it to such scrutiny as they consider necessary.

[19] The initial case conference was attended by the security officer who briefed the meeting on the available intelligence. Those making the decision had access to the security information. The security officer also attended the first review case conference which recommended the extension of restriction of association for 28 days. However the decision on extension was made by Governor Gray from Prison Service headquarters further to his examination of the documents. It is not clear to what extent he had access to the intelligence information, beyond the record that appears in the minutes of the meetings to the effect that there was such intelligence. If a decision maker is to take account of intelligence information that will not be disclosed to a prisoner then the decision maker must become familiar with and scrutinise the intelligence information and nor merely rely on a general report that there is intelligence of drugs or bullying or threats, as the case may be.

[20] Similarly the security officer attended the further review case conference on 25 November 2008 which recommended continuing restriction of association. However the decision on continuing restricted association was taken by Governor Maguire of Prison Service headquarters and again it is not clear to what extent he had access to the intelligence information beyond the references in the minutes of the case conferences to the effect that there was such intelligence.

[21] Further it was to Governor Gray at the interview of 6 November that the applicant complained about the possibility of unreliable sources. This raises not only the requirement of taking into account the applicant's response but also the operation of the scrutiny of the information relied on in making the decision. It is not known whether any enquiries were made in response to that suggestion by the applicant or whether the persons named were a source of any of the information concerning the applicant.

- Role of the Independent Monitoring Board.

[22] Rule 32 provides for the role of the IMB and some of the requirements are of particular relevance in the present case. First the Governor must inform the IMB as soon as practicable and in any event within 24 hours of the restriction of association and of the first review (Rule 32(2A)). This notice was given by the Governor to IMB headquarters on the afternoon of 4 November and a notice was relayed back to the IMB office in the prison on the same afternoon.

[23] Secondly, unless it is not reasonably practicable, a member of the IMB shall be present at all reviews (Rule 32 (2D)). No member of the IMB was present at the first review on 6 November. Mr McAllister, chairman of the IMB, was present in the prison on 5 November but did not become aware of the notice that the applicant was on rule 32. No explanation can be given for the notice not coming to the attention of Mr Mc Allister when he visited the prison on 5 November. No member of the IMB was present in the prison on the date of the review on 6 November. In the absence of notice of the applicant having been placed on rule 32 and of the first review coming to the attention of a member of the IMB in the prison prior to the review hearing on 6 November it was not reasonably practicable for a member of the IMB to be present at the review. However, adequate arrangements should have been in place to bring the facts to the attention of a member of the IMB and if reasonably practicable a member should have been present at the review on 6 November. Administrative steps have been taken to prevent a recurrence.

[24] Thirdly, a member of the IMB must be satisfied that the procedures have been followed and the decisions to restrict association are reasonable (Rule 32 (2F)). The guidelines issued to the IMB for notification and monitoring under rule 32 state that a member of the IMB will speak to the prisoner and scrutinise the paper work authorising initial segregation, the Governor's authority for initial segregation and the reason for initial segregation (para 2). The guidelines further state that prisoners in segregation are seen on each rota visit and any views or observations recorded (para 4). As is apparent from the absence of the IMB from the first review there was no such scrutiny prior to the first review on 6 November. Nor does it appear that there was any such scrutiny until the second review on 25 November. There does not appear to have been any IMB contact with the applicant prior to the further review on 25 November, a review which was arranged after the role of the IMB had been raised at the leave hearing on this application for judicial review. IMB staff attended the prison on 7 November, on 8 November when the applicant was noted to be in the exercise yard and on 13 November. Mr McAllister and Denis Constable, Vice Chairman of the IMB, attended the prison on 24 November when it is stated that the applicant indicated that he did not wish to see members of the IMB. However the applicant denies that he refused a visit from members of the IMB and states

that he was not aware of their attendance, although the applicant speculates that the attendance of the IMB may have coincided with a legal visit the applicant undertook that afternoon.

[25] A review hearing took place on 25 November and Mr McAllister attended. The security officer was present to brief the case conference on the intelligence available. A member of the IMB is entitled to inspect the evidence on which the decision to restrict association was based, with exceptions for national security, administration of justice, physical or mental health and individual safety, none of which is stated to have applied in the present case. The IMB member was party to the recommendation to continue rule 32 and accordingly was satisfied on the security briefing. Accordingly I conclude that the IMB member would have been equally satisfied with the security briefing had he been present at the first review on 6 November.

[26] Since the hearing of this application the House of Lords last week issued its opinion in Secretary of State for the Home Department v AF and Others [2009] UKHL 28 in relation to control orders under the Prevention of Terrorism Act 2005. The issue was whether the procedure that resulted in the making of the control orders satisfied the right to a fair trial under Article 6 of the European Convention. The Judge making the control orders had relied on material received in closed hearing and not disclosed to the applicants. The context was different to the present case but it was established that, even when there were national security grounds for withholding information, a party was entitled to know the essence of the case against him, at least where he was at risk of consequences as severe as those normally imposed under a control order (per Lord Phillips at paragraph 65). The cases were referred back to the Judge to consider whether there was any other matter whose disclosure was essential to the fairness of the trial.

The additional grounds for judicial review.

[27] The above discussion covers many of the applicant's eleven grounds for judicial review and the following additional matters arise.

Ground (5) claims a right to a hearing at which witnesses would be examined by the applicant. Such an exercise is clearly not a practicable approach to reliance on information that cannot be disclosed to a prisoner. Again the countervailing safeguards must lie in the mechanism for scrutiny of the information.

Ground (6) claims a breach of the right to respect for private life under Article 8 of the European Convention in removing the applicant from association. There is no engagement of Article 8 where imprisonment necessarily interferes with the right to respect for private life. Assuming for

present purposes that Article 8 is engaged when a prisoner is removed from association, any interference would be justified where it accorded with the 1995 Rules and with the requirements of procedural fairness. Accordingly Article 8 adds nothing to the other grounds relied on by the applicant.

Ground (7) claims unfair punishment. Rule 32 involves a management measure and not a punishment. I am satisfied in the present case that, despite the shortcomings that arose, Rule 32 was invoked for proper purposes.

Areas of concern.

[28] The circumstances of the present case give rise to a number of areas of concern. It is not proposed to make an Order but rather to repeat some of the concerns emerging from the facts of this application so that they might be addressed in further placements under rule 32. The areas of concern include the following.

In relation to the qualified right to know, the delayed response to the solicitors letter requesting particulars of the information on which removal was based.

In relation to the right to respond, which to be meaningful must involve the response being taken into account, whether the Governor at first review followed up the applicant's comments as to the reliability of sources.

In relation to effective scrutiny by decision makers, a matter of critical importance where there is information that cannot be disclosed to the prisoner, whether the Governor extending the removal at the first review has access to the security information that was not disclosed to the applicant; whether the Governor deciding the second review had access to the security information not disclosed to the applicant.

In relation to supervision by the IMB, also of critical importance where there is information that was not disclosed to the prisoner and the IMB are statutory monitors of the decision making, the Governors notice that the applicant was placed on Rule 32 not coming to the attention of the members of the IMB visiting the prison; the failure of the IMB to contact the applicant for almost 3 weeks while he was on Rule 32; the failure of the IMB to scrutinise the information relied on to place the applicant on Rule 32 until the second review on 25 November.