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(subject to editorial corrections)**

ICOS No:

Delivered: 04/01/2024

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

**KING'S BENCH DIVISION
(JUDICIAL REVIEW)**

**IN THE MATTER OF AN APPLICATION BY MATTHEW JOHNSTON
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW**

**Karl McGuckin (instructed by Phoenix Law Solicitors) for the Applicant
Matthew Corkey (instructed by the Departmental Solicitor's Office) for the Proposed
Respondent**

Delivered Ex Tempore

HUMPHREYS J

Introduction

[1] I am grateful to counsel for assembling this matter at short notice and for making cogent submissions on the issues which arise in this case.

[2] In the circumstances of this application for leave to apply for judicial review which relate to a funeral which is due to take place tomorrow at 1pm at St Michael's in Finaghy, I propose to treat the application on a rolled-up basis, to consider the question of leave and, if necessary, the disposal of the judicial review application.

[3] The applicant is a sentenced prisoner. He was arrested in November 2017 and charged with serious firearms offences. He pleaded guilty to the possession of a firearm and ammunition in suspicious circumstances in June of this year. He was sentenced under the provisions of the Counter Terrorism Act. He is obliged under those provisions to serve two thirds of his sentence in custody before he is eligible to apply to the Parole Commissioners for release. His custody expiry date on that basis is 11 May 2024 but that date will only trigger his eligibility for release rather than his actual release.

[4] He wishes to attend his Aunt Margaret Reid's funeral, sadly she passed away on New Year's Eve. Her remains are presently at the family home at French Park in Belfast and will remain there until tomorrow when they will make their way to the church in Finaghy and ultimately for interment at Milltown Cemetery.

The Application for Temporary Release

[5] The applicant applied on 1 January to the prison service for temporary release, not strictly speaking under the Compassionate Temporary Release Scheme, which only relates to the funerals of immediate family members, but more generally under the Rule 27 discretion to release prisoners temporarily which is enjoyed by the prison service. In his application he stated that he was very close to his aunt, he wishes to say his goodbyes to her as part of his religious beliefs and practices and part of his right to family life.

[6] When the application was received it was considered that same day, 1 January, by a Mr Bagguley, who is the residential manager. He recorded in the application that the applicant had no disciplinary issues, had not had any adverse findings in drug testing and that the applicant's previous compassionate bail and/or temporary release history was not known.

[7] The duty governor who made the decision, which is recorded in a letter of today's date, 4 January 2024, set out the basis for his decision including details of the application itself and he also recorded the history of the offending, the duration of the sentence and the fact that the applicant is subject to the Multi-Agency Review Arrangements (MARA) and he meets the definition of a terrorist risk offender.

[8] The factors which were taken into account by the governor in arriving at his decision are set out in this correspondence and they are threefold. Firstly, that he considered the sentence and length of time still to serve weighs against temporary release. Secondly, that the applicant's status as a Category A prisoner weighs against temporary release on the basis that the escape of a Category A prisoner would be highly dangerous to the public, the police or the security of the state. Thirdly, that during the custodial period the applicant had had no periods of temporary release and the lack of any form of temporary release weighed against temporary release at this time. Those are the only three factors identified in that part of the decision letter. The governor goes on to state that:

"In light of all the relevant information in your application and the relevant factors considered, have been taken into consideration and been weighed in the balance in the decision making process. In the circumstances the prison service was not persuaded to exercise this discretion to grant temporary particularly in light of the high risk to public safety, the high risk to staff safety and the risk of absconding."

[9] Reference is made to the fact that police had advised the prison service that the locations for the funeral arrangements presented a significant risk to prison staff. Obviously, the article 2 rights of members of the prison service are a relevant factor for the governor to take into account in the decision making process.

[10] It is well-established through a series of cases over the last 10 years or more in this jurisdiction including *Re McGlinchey's Application* [2013] NIQB 5, *Re Smith's Application* [2014] NIQB 50 and *Re Kelly's Application* [2017] NIQB 99 that it is incumbent upon decision-makers in this arena to consider the Convention rights of prisoners and, particularly, the article 8 right to family life, which is not, of course, a fundamental right, it is a right that can be interfered with, but if it is to be interfered with it must be done in a proportionate manner, recognising that there is a legitimate aim and it is in accordance with law.

[11] In this case there is no dispute that the applicant's article 8 rights are engaged. He, in all normal circumstances, would be expected to attend the funeral of his aunt with whom he has said he enjoyed a close relationship. The question is, in the exercise of the discretion by the governor, whether the refusal of temporary release constitutes a disproportionate interference with that article 8 right. The starting point has to be that the decision maker enjoys a margin of appreciation. The courts are not here to substitute their views for those of prison governors who have expertise in this area and who are required by the prison rules and by Parliament to make these decisions. However, the court will scrutinise any interference with Convention rights carefully and will particularly examine whether or not the balancing exercise that is required to be carried out in any proportionality case has been done so in a lawful fashion.

[12] In order to carry out the balancing exercise it is necessary for a decision-maker to identify the factors which weigh in favour of the grant of temporary release against those factors that weigh against and then make a decision according to each of those factors such weight as he sees fit. If the decision-maker does that then the court will necessarily afford a margin of appreciation and as counsel have observed will be slow to intervene on *Wednesbury* grounds.

[13] In this case the factors that have been identified against the temporary release of the applicant are clearly set out in the four page document of 4 January 2024. What does not appear anywhere in that document is a single factor which might be said to weigh in favour of the grant of temporary release. I did read out the paragraph towards the end of the document whereby the governor says that all information has been taken into account and weighed in the balance. But what it does not specify in the document is a factor such as the clear disciplinary record enjoyed by this prisoner during his time in custody. This court is very familiar with poor behaviour and an adverse disciplinary record during the period of custody being used a factor against temporary release and, therefore, it must follow as a matter of logic that a clear disciplinary record, an ability to adhere to rules and to behave in a certain fashion

would be a factor in favour of such release. But there is no reference whatsoever to that in the decision-making analysis.

[14] Equally, we now know and there is evidence to the effect that this applicant was, in fact, released compassionately on two occasions whilst a remand prisoner. Once to attend his daughter's confirmation and, secondly, to attend another family member's funeral, that of his uncle. Those releases, whilst on a compassionate bail basis, took place whilst he was remanded in custody on these charges. It is unclear to me why in those circumstances the prison document on application for temporary release would record that the compassionate bail history was not known. One would have thought, and it must follow, that the prison service had access to information at least to say that there had been, in the past, compassionate bail granted by the courts. Whether or not that was a successful or unsuccessful or indifferent release may have required some further investigation but there is no doubt that time existed between 1 January and 4 January for all proper and relevant enquiries to have been made and for that information to be presented before the governor.

[15] As it stands, the governor made a decision on the basis that there were no periods of temporary release during this custodial period. But, moreover, states that the lack of any form of temporary release weighs against your temporary release at this time. Had the governor been properly informed of the periods of compassionate bail and had that information before him, that would have been a relevant factor to take into consideration in favour of the grant of temporary release.

[16] Now that omission could have been cured because I am told that before noon today Phoenix Law sent the pre-action protocol letter and in that letter Mr Booth states categorically reminding the governor that there had been two previous compassionate releases in respect of the confirmation and the funeral and that at all times Mr Johnston abided by the conditions and was unaccompanied during both releases. When I asked counsel representing the prison service today what action was taken on foot of this additional information, which may not have been known to the governor at the time he made his original decision, no explanation was given to me as to why that was not taken into account in a reconsidered decision, it being accepted that this was relevant information for the decision-maker to take into account.

[17] The factors that are taken into account which weigh against the decision are all set out in the letter of 4 January. The status of Category A is clearly a relevant matter for the governor to take into account. The nature of the offending, again, is a relevant matter to take into account. It seems to me that the length of time still to serve being only a period of four months does not seem to obviously weigh against temporary release, but that might be a matter that falls into the general mix that the governor is entitled to take into account.

[18] However, the decision-making process as set out in the letter of 4 January is fundamentally flawed. There has been a failure to take into account relevant factors in favour of the applicant's release and, therefore, it cannot be said that the balancing

exercise which has to be carried out in any case where there is an interference with an article 8 right has been done so lawfully. In common law terms, there is a failure to take into account material considerations which gives rise to a species of *Wednesbury* unreasonableness, but in Convention rights terms, it cannot be said by a decision-maker that he has acted proportionately when he has failed to take into account the very factors which I have identified as weighing in favour of a decision to release.

[19] Phoenix Law has made an additional offer which was that Mr Booth, an officer of this court, would attend and chaperone the applicant during his period of release. This is a matter that the courts have regarded in the past as being of significance, it is once again, a relevant factor to be taken into consideration in favour of temporary release. It will not, of course, give rise to an automatic right to be released but it will at least be an issue that decision-maker ought to take into the reckoning. In this case, I am simply told that having been made aware of this proposal the governor was not minded to change his decision on the basis of a chaperone. That stands in contrast to the chaperone decision made by Mr Justice Colton on Saturday, the prisoner being released with two chaperones in that case, one of whom was an officer of the court, the same officer of the court, indeed, and that he attended his period of temporary release and was returned without incident.

Conclusion

[20] In those circumstances, where there has been a failure to take those considerations into the reckoning there has been a breach of the applicant's article 8 rights and I, therefore, grant leave to apply for judicial review and I allow the application. In terms of the relief to be granted it seems clear from what has been said today by counsel for the respondent that the governor has turned his face against the proposal made in the Phoenix Law letter and, therefore, I do not consider it appropriate to remit the matter to the decision-maker for further consideration, as that seems to me to be a door that has been closed this afternoon by the governor. What I propose to do is make an order of mandamus requiring the applicant to be released from HMP Maghaberry for the sole purpose of attending at the wake and/or funeral of his aunt, Mrs Margaret Reid.

[21] The period during which the applicant should be released should be between 11:30am and 5pm tomorrow, Friday 5 January 2024. I make it clear that there is a condition attaching to this order that the applicant be returned to HMP Maghaberry by 5pm tomorrow. There will also be a condition attaching to that order that at all times the applicant be accompanied by Mr Gavin Booth of Phoenix Law, if that cannot be fulfilled then the order falls away. I will also make it a condition that the applicant does not consume any alcohol during his period of temporary release. I also specify that the only premises where the applicant should be in attendance are at 144 French Park in Belfast, St Michael's Chapel on Finaghy Road North and at Milltown cemetery, and he is not to be at any other venue save for the purposes of travelling between those three locations. There must be no contact with the media and no engagement on any social media platform.

[22] I would be grateful if following tomorrow's funeral, Mr Booth would make contact with the judicial review office simply to confirm that everything went according to plan.