Neutral Citation No: [2017] NIQB 115 ***Judgment: approved by the Court for handing down (subject to editorial corrections)****	***Ref:*** **McC10489** ***Delivered: 29/11/2017***

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY ADRIAN WILLIAM HAYES

FOR JUDICIAL REVIEW

-v-

NORTHERN IRELAND PRISON SERVICE

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MCCLOSKEY J

Introduction

[1] The focus of this judicial review challenge by the Applicant, a detained prisoner serving a sentence of life imprisonment with a tariff element of 17 years following his conviction of murder in 2002, is twofold:

(a) Decisions of the Respondent, the Northern Ireland Prison Service (the "*Prison Service*"), dated 02 February 2017 and 31 March 2017 (the latter affirming the former), whereby the Applicant was effectively withdrawn from so-called "Pre-Release Testing" which denotes a mechanism involving both supervised and unsupervised periods of temporary release from prison in advance of final release. The two impugned decisions had the effect that the Applicant was required to reenter the programme from the beginning.

(b) A further, free-standing decision of the Prison Service dated 11 April 2017 which maintained the revision of the Applicant's security categorization from level D to level B, affirming an earlier decision also made in December 2015.

While the grounds of the Applicant's challenge were initially wide ranging, leave to apply for judicial review has been confined to two grounds:

(i) Procedural unfairness.

(ii) Infringement of the Wednesbury principle.

Factual Matrix

[2] The salient events in the factual matrix are the following:

(a) During 2015 the Applicant had completed six accompanied temporary releases and six unaccompanied day temporary releases, progressing to the stage where unaccompanied overnight releases became possible. The latter were scheduled to occur at monthly intervals between January and April 2016. There was further potential for two additional periods of 48 hours unaccompanied release, followed by transfer to an open prison facility.

(b) On 01 December 2015 the Applicant was carrying out authorized groundsman duties beyond and adjacent to the security perimeter of Maghaberry Prison, working alone and unsupervised. This resulted in him coming into possession of five separate wraps of herbal cannabis weighing 59.3 grams and cash of £150. His possession of these unauthorized items was exposed when he re-entered the prison. (I shall elaborate on this *infra*). He asserted duress from the outset.

(c) A disciplinary charge arising out of the above, which did not proceed ultimately, was preferred against the Applicant.

(d) As a result of the aforementioned event, the Applicant was withdrawn from the pre-release testing programme.

(e) As a further result of the same event, the Applicant's security grade was re-classified from level D to level B, on an unspecified date in December 2015.

(f) During recent months, the Applicant has been permitted to re-enter the pre-release testing programme, completing two further unsupervised 24 hours release and being scheduled to complete one more of these in advance of the Parole Commissioner's Hearing arranged for 21 December 2017.

(g) The Applicant was charged with the offence of possessing a Class B drug and was prosecuted summarily. On 19 January 2017 the Magistrates Court acceded to an application to stay the prosecution as an

abuse of process, based on failures by the prosecution to make necessary disclosure.

[3] It would appear that during the period December 2015 to February 2017 the twin issues of the Applicant's restoration to the pre-release testing programme and his security classification were effectively frozen by reason of the criminal proceedings. The Prison Service reacted with commendable speed to the abuse of process ruling, convening a case conference on 02 February 2017. The attendees were a prison governor, a member of the Independent Monitoring Board, a psychologist and a "support" prison officer. The materials available to this team included an updated probation report which recommended unequivocally the restoration of the Applicant to the pre-release testing programme.

[4] The minutes of the aforementioned case conference form part of the documentary evidence before the Court and are one of the more important elements thereof. I shall revisit this *infra*. I have considered the minutes of this meeting in full. Its outcome was that a "case conference" would be arranged.

[5] On 23 March 2017, again with impressive expedition, the Prison Service convened an "*extraordinary case conference*" in relation to the Applicant. The detailed minutes of this meeting are also one of the more important elements of the documentary evidence before the Court. These too I have considered in full. The outcome of the meeting, which was discursive and inquisitorial rather than determinative in nature, was that the relevant prison governor would review the issue of the Applicant's restoration to the pre-release testing programme imminently.

[6] The next material development was a Prison Service review of the Applicant's security classification, resulting in a decision dated 07 April 2017 affirming the earlier (December 2015) reclassification to level B, in the following terms:

> "*Due consideration is given to this review. Despite all representations this prisoner did traffic drugs into Mourne House. This gives concerns of how he should be managed in future. Remain at B at present.*"

At this stage the Applicant had just been restored to the pre-release testing programme, albeit it is clear that the clock had been substantially rewound: he had six hours accompanied temporary release on 02 March 2017 and this was followed by a repeat on 02 May 2017. By this stage these proceedings had been initiated (on 05 April 2017) and leave to apply for judicial review was granted on 16 May 2017.

[7] The grant of leave to apply for judicial review has stimulated several affidavits on behalf of the Prison Service and further affidavits sworn by the Applicant. I have considered these affidavits in full. I have also considered fully those items of documentary evidence not explicitly mentioned in my resume of the factual history above.

[8] There are two particularly important items within the documentary evidence. These are the written statements of the two prison officers with whom the Applicant interacted when he re-entered the prison having completed his groundsman's duties on 01 December 2015. These officers were "*tasked*" to submit the Applicant to a full body search by a prison governor (one of the Prison Service deponents) who (it is averred) had been briefed by a prison officer to the effect that the Applicant, while sweeping the ground, was "….. *seemingly paying unusual attention to his surroundings* …..". The first of the two search officers ("DM") states *inter alia*:

> "*On the way to the search area prisoner Hayes was asked if he had anything on his person and he said that he did have and that he was being put under a lot of pressure … The prisoner handed his hat over to Officer* ["SE"], *the hat contained a plastic bag that was taped closed with black tape. I also witnessed Hayes hand over a quantity of cash. The items were then placed on the floor outside the search area while we completed the search where nothing further was found. The prisoner reiterated several times that he was being put under a lot of pressure. He was asked who the items were for but said that he didn't know and that he had been instructed to place the package in the gardens area where someone else would retrieve it.*"

The second of the prison officers concerned, Officer "SE", states, *inter alia*:

> "*Whilst we were escorting the prisoner, he said that he needed to talk to us and that he was being put under a lot of pressure. I asked the prisoner if he had anything on him that he shouldn't have and he said that he did. I informed the prisoner that he could hand whatever he had over when we were carrying out the search. When we arrived at the search box ….. the prisoner handed his hat to me which contained a plastic bag that was taped shut with black tape. He also handed over a roll of cash which I took from him and placed into the hat along with the other package ….*
>
> *The prisoner said throughout the search that he was being put under a lot of pressure. He said that he didn't know who the package was for and that he had been instructed to leave the package in the gardens where someone else would retrieve it.*"

[9] Next I highlight the minutes of the case conference conducted on 02 February 2017. At the outset of this meeting, the chair, a prison governor, postulated two scenarios, namely those of the Applicant having acted under duress and not having acted under duress but purely for financial gain. The scenario of the Applicant having

acted under duress for no personal gain, financial or otherwise, was not recognized. At this point the minutes continue:

> "*The Chair advised that Mr Hayes has eroded any trust the NIPS had.*"

This was repeated, in these terms:

> "*The issue is that Mr Hayes has eroded all trust …..*
>
> *Psychology and the support officer* [two of the other three persons in attendance] *are in agreement with the Chair on the aspect of trust.*"

All of this was stated before the Applicant was invited to enter, following which he was questioned about the events under scrutiny.

[10] According to the minutes of the extraordinary case conference held on 23 March 2017, the next significant event in the chronology, following questioning of the Applicant about the index incident:

> "*The Chair* [a prison governor] *advised that Mr Hayes had been given a position of trust and that he had broken this trust through his actions.*"

This was followed by some further questions and answers. The minutes continue:

> "*The* [Prisoner Development Unit] *governor confirmed to the chair that the DST staff are confident the money was concealed down the front of Mr Hayes' trousers.*"

The term "*DST staff*" denotes the two prison officers who searched the Applicant upon re-entering the prison: see [8] above.

[11] The affidavit of the Prison Governor who authorized the full body search of the Applicant on 01 December 2015 and whose averments also address the impugned security reclassification decision of 07 April 2017 includes the following averments:

> "*At the time the Applicant was discovered bringing cannabis and money into the prison …..*"

And:

> "*I have* [now] *sought clarity from one of the search officers of the location of the items found on the Applicant on being searched and can confirm that the cannabis was located in-*

> *side a beany hat and the money was found concealed in the waist band of his trousers.*"

[I have inserted both the word "*now*" in parenthesis, this being uncontentious as between the parties.]

This Governor further avers:

> "*Consideration of the Applicant's security categorization was carried out by both* [Governor M] *and me. We considered all information in the review pack, including the Applicant's comments and his reference to the 'alleged incident on December 2015'. Even a year on, he failed/refused to take responsibility for his actions. We were both of the view that the indisputable fact was that the Applicant did bring drugs into the prison and that this did raise concerns as to how he should be managed from a security perspective.*"

This may be juxtaposed with the averments of another of the Prison Governors centrally involved in the impugned decisions and decision making processes:

> "*It is not in dispute that the Applicant attempted to bring drugs and money into prison. The Applicant alleges duress. The facts are that he claims he brought a package into the prison without knowing what it contained. He did not approach the first or second member of staff on entering prison and did not explain adequately why he did not. It has been presented that he hid the money and drugs separately about his person on entering the prison. When this matter was pressed with him his version appeared to evolve and culminated with him commenting that he did not remember fully. He did not report the alleged intimidation of him in the prison 6 – 7 months prior to the 01 December 2015 incident. He did not report the alleged intimidation of his family prior to the 01 December 2015 incident. Whatever the motivation for seeking to bring drugs and cash into the prison, NIPS considered that the Applicant exercised extremely poor decision making skills which required a build - up of trust and confidence to allow the Applicant to make better choices in the future coupled with ensuring any potential risk was minimized.*"

This deponent is the Prison Governor who chaired the extraordinary case conference on 23 March 2017 and who, per the minutes, stated that the Applicant "*…. had been given a position of trust and* [that] *he had broken this trust through his actions*".

[12] It is also appropriate to highlight the terms of the "Security Report", the author whereof is a prison officer, dated 23 June 2017. It is common case that this report will form part of the materials to be considered by the Parole Commissioners in their forthcoming review of the Applicant's case. This report contains the following passage:

> "*Adrian does not generally come to the attention of Security, however on 01/12/15 whilst employed on the grounds, he was caught with £150 and 59.3 gms of herbal cannabis on his person. The charge was thrown out on a technicality. He claimed he was under duress from other prisoners to bring the items into Wilson House.*"

I juxtapose this with the PBNI report prepared for the specific purpose of the Parole Commissioners' process. This contains the following passage:

> "*Whilst it is accepted that within a court of law Mr Hayes was never convicted of these charges, the prison can still take into account the nature of the allegations which still represent a significant breach of the trust placed in him on the basis that such an incident did happen (of bringing drugs into the prison) 'on the balance of probabilities'.*"

Consideration and conclusions

[13] I shall consider firstly the challenge based on the Wednesbury principle. This principle has three elements: irrationality, taking into account immaterial facts or factors and leaving out of account material facts or factors. The latter dimension is engaged by the Applicant's challenge.

[14] The decision making processes of the Prison Service under scrutiny in these proceedings are extensively documented. It is appropriate to acknowledge at once that there is clear evidence of the investment of care, time and attention by the officials concerned. However, the first public law misdemeanour, within the compass of the permitted grounds of challenge, which is immediately diagnosed is a failure to take into account, properly or at all, two critical pieces of evidence, namely the written statements of the two search officers (quoted above). This failure is unmistakable. It shines like a beacon. There is no acknowledgement of, or engagement with, these self-evidently critical pieces of evidence either expressly or obliquely in the extensive deliberations documented in the evidence. This failure is the obvious explanation for the various recorded descriptions, or summaries, of the incident which are manifestly irreconcilable with the witness accounts of the two officers concerned. This failure plainly infects all of the impugned decisions and its materiality is beyond peradventure. On this ground alone, none of the impugned decisions can withstand challenge.

[15] An assessment of the documented deliberations of the decision makers also exposes a clear failure to engage with the Applicant's defence of duress. Ms Herdman (of counsel), reminded the court that the leading statement of the ingredients of this defence in a prison adjudication context is that of Carswell J in Re Jameson and Green [Unreported 27 July 1993]:

> *"The requirements of the law relating to duress can be conveniently summarised in fairly brief compass:*
>
> *1. Where the issue of duress is raised in an adjudication, whether before its commencement in the prisoner's statement on form 1127 or at the hearing by the prisoner in his evidence or in questions asked of the witnesses, it is the duty of the governor to take it into account and deal with it in his findings. This applies whether the prisoner has pleaded guilty or not guilty, because he may have insufficient appreciation of the relevance of the issue of duress. It may in some cases even arise only after the governor has determined the issue and asked the prisoner if he has anything to say in mitigation. If he then raises the issue of duress, the governor should inquire into it and review his decision on the prisoner's guilt on the charge.*
>
> *2. Once the issue of the making of a threat amounting to duress has been raised, the governor must be satisfied beyond reasonable doubt that it has been ruled out. This may be done in either of two ways:*
>
> *(a) He may be satisfied beyond reasonable doubt that no such threat was really made.*
>
> *If so, he should spell this finding out in his decision.*
>
> *(b) He may be satisfied – again, he must be so satisfied beyond reasonable doubt – that if any threat was made, a reasonable person in the position of the prisoner would not have given in to the threat but would have resisted it. If he so finds, he should specify that clearly in his decision, preferably with sufficient reasons for this court to see why he came to that conclusion. Such a finding needs to be based upon sufficient evidence, and the governor should make sufficient inquiry into the circumstances during the adjudication to establish the facts necessary to found his conclusion. In some cases these may depend on his background knowledge of the running of the prison, and if so, he should preferably re-*

> *fer to them in the course of the hearing and give the prisoner an opportunity to deal with them.*
>
> *I acknowledge, of course, that the Prison Service was not in the shoes of a disciplinary tribunal or a criminal court adjudicating on the defence of duress. Notwithstanding, I consider that some appreciation of the ingredients of this defence was a necessary element of the legality of the impugned decisions. There is no evidence of this anywhere. There is, rather, evidence of a consistent cursory and dismissive attitude to the Applicant's protestations of duress, coupled with a predetermination of their lack of merit."*

[16] Related to [15], my evaluation of the documentary evidence, duly supplemented by the affidavit evidence, is that there was a manifest failure by the Prison Service to engage with the Applicant's protestations of duress. These were dismissed abruptly and out of hand. This is evidenced in particular by the demonstrable failure of the Prison Governor concerned to recognize the scenario that the Applicant might have been acting under duress without any element of financial gain: see [9] above. There was a consistent and clearly demonstrated failure on the part of the decision makers to either explore the contours of the defence of duress or to acknowledge the possibility that duress could provide the Applicant with an acceptable explanation of and justification for his undisputed conduct and, linked to this, a failure to examine the consequences of this from the perspectives of his placement in the pre-release testing programme and the re-classification of the Applicant's security level.

[17] I consider that there was a further manifest failure on the part of the Prison Service decision makers to engage with the outcome of the criminal proceedings against the Applicant. This is manifested most clearly in the dismissive statement in the security report - see [12] *supra* - that the charge against him was "*thrown out on a technicality*". I acknowledge the desirability of considering a linguistic formulation of this kind fairly and *in bonam partum* (Secretary of State for Education and Science v Tameside MBC) [1977] AC 1014, per Lord Wilberforce).

[18] However, considered in tandem with all the other evidence, in my judgement this I consider to be indicative of the deep seated view of the Prison Service officials concerned that the Applicant, who had not been the subject of any of any adverse verdict or adjudication in any due process forum, was guilty of the offence of possession unauthorized articles. This is the readily discernible undercurrent in the evidence of the Prison Service and the other materials highlighted above. It is unsustainable in law. One searches in vain for a clear acknowledgement that the Applicant was entitled to the presumption of innocence. On the contrary, the persistent undercurrent was one of a presumption of guilt. This may be viewed through the alternative public prisms of taking into account an improper consideration (one facet of the Wednesbury principle), irrationality and appearance of bias.

[19] Furthermore, I agree with Ms Herdman's submission that the materials documenting the impugned decision making processes of the Prison Service evidence a clearly identifiable pre-determination that the Applicant had, in substance, committed the offence – disciplinary and/or criminal – of unlawful possession of the unauthorized articles. The decision making agencies, in substance, assumed the role of the criminal court or adjudicating governor and found the Applicant guilty. This is unsustainable as the Applicant had none of the due process protections which a full criminal or adjudication process would have provided. Linked to this is the associated issue of pre-determination. While Ms McMahon on behalf of the Prison Service pointed to the exculpatory averments in the affidavit of the prison governor concerned, I consider that these are not reconcilable with the contemporaneous evidence highlighted above.

[20] My analysis above impels inexorably to the conclusion that the Applicant's challenge on the Wednesbury ground must succeed.

[21] I turn to consider the procedural unfairness ground. This is most patent in those records of the Prison Service and averments in its affidavits reproduced in [9] to [11] above. Stated succinctly, the Applicant was at no time given the opportunity to meet, consider and respond to those aspects of the case against him given expression in these materials. The materiality of these matters is beyond plausible dispute. The proposition that any further evidence emanating from the two key actors in the evidential matrix, namely the search officers, should have been disclosed to the Applicant is unassailable. But this did not occur. The conclusion that the decision making processes of the Respondent and the decisions which they yielded are contaminated by procedural unfairness follows inexorably.

[21] It follows that the Applicant's procedural unfairness ground of challenge also succeeds.

OMNIBUS CONCLUSION

[22] While I acknowledge that, at the interlocutory stage, one of the submissions advanced on behalf of the Prison Service was that these proceedings have been rendered academic and that the written argument of Ms McMahon (of counsel) also canvassed the suggestion that leave to apply for judicial review should be set aside, neither of these contentions – correctly – was advanced in oral argument. For the reasons appearing above, neither has any merit in any event.

[23] On the grounds and for the reasons elaborated above, the impugned decisions of the Prison Service are hereby quashed.