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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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BETWEEN:

EOGHAN MacCORMAIC otherwise EUGENE MINDZENTY McCORMICK
and JOHN HENRY PICKERING

(Plaintiffs) Appellants;

and

GOVERNOR OF HM PRISON MAZE and
THE SECRETARY OF STATE FOR NORTHERN IRELAND

(Defendants) Respondents.

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CARSWELL J

The appellants are convicted prisoners who are serving sentences in HM Prison, Maze ("the prison"). They bring this appeal against the Deputy Recorder's dismissal of a civil bill brought by them for damages and a declaration, founded upon a complaint that the defendants have discriminated against them on the ground of their political opinions, in breach of the provisions of the Northern Ireland Constitution Act 1973.

The substance of the plaintiff's claim is conveniently summarised in paragraphs 1 and 2 of the particulars furnished by them:

> "The Plaintiffs and each of them suffered loss and damage in that they, as citizens of the Republic of Ireland, were and continue to be not permitted and prevented from conversing with other prisoners and with their visitors in the Irish Language, which is perceived to be their national language, and which is the first language of the state of which they are citizens, and in that they were and continue to be not permitted to pursue cultural and sporting activities which are uniquely Irish and in that they are not permitted to wear Irish cultural emblems and in that the rules governing the censorship publications and written communications in the Irish language

are discriminatory."

Mr MacCormaic, who appeared in person, enlarged upon this in his evidence. He said that his political philosophy is Irish Nationalism, and his culture Irish Nationalist, as a continuation of his political philosophy. One of the ways in which he hopes to achieve a united Ireland is by strengthening Irish culture. He is a fluent Irish speaker and writer, and reads Irish literature. Mr Pickering also stated in his evidence that he lived out Gaelic culture and played Gaelic games in prison. Both he and Mr MacCormaic can obviously speak English as fluently as other people in Northern Ireland, but expressed a preference for the use of Irish as their daily language. As Mr Sean MacMathuna, the General Secretary of the Gaelic League, put it in evidence, to restore the Irish language one has to promote it, by education, broadcasting, writing in the language, speaking it, and in general living one's life through the Irish language.

Mr MacCormaic alleged that the Northern Ireland Office, the Secretary of State's department which administers prisons, as part of its policy aimed at the removal of the characteristics of the former "special category" status, set out to neutralise the political and cultural activities of the Republic prisoners. The policy was represented as criminalisation, but was in fact deculturalisation. It wished, he claimed, to ensure the dominance of British culture, and to weaken the adherence to Irish culture, whose strength it saw as leading to a perception that sentenced prisoners were being held as political prisoners. To this end it took steps in a number of ways to weaken Irish cultural activities by making difficulties for those who followed them. This was, he

alleged, a systematic policy followed by the Northern Ireland Office in its administration of the prison. The acts of which he complained were done for the purpose of damaging or weakening the prisoners' Irish culture, and in this way were aimed at their political philosophy and so were discriminatory acts done on the ground of political opinion.

The six specific complaints made by the plaintiffs, on which they based their case of unlawful discrimination, were the following:

1. They were not allowed to write or receive letters in Irish.

2. They were not given proper facilities to play Gaelic football.

3. Wearing of the emblem known as the fainne was prohibited.

4. Conversation in Irish was not allowed during visits.

5. The use by prisoners of Irish forms of their names was not allowed.

6. There were long delays in the admission to the prison of literature written in Irish.

I shall examine these seriatim in due course.

The plaintiffs claim that the actions of the respondents are unlawful, in that they violate the provisions of section 19 of the Northern Ireland Constitution Act 1973. The material part of section 19(1) reads as follows:

> "It shall be unlawful for a Minister of the Crown ... to discriminate, or aid, induce or incite another to discriminate, in the discharge of functions relating to Northern Ireland against any person or class of persons on the ground of religious belief or political opinion."

If unlawful discrimination is established, accordingly, the

Secretary of State will be liable to the plaintiffs. It is unnecessary to consider the governor separately or to deal with the issue whether he comes within section 19, since in all relevant matters he was acting as agent of the Secretary of State.

"Discrimination" is defined in section 23(2) in the following terms:

> "For those purposes [ie the purposes of Part III of the Act] a person discriminates against another person or a class of persons if he treats that person or that class of persons less favourably in any circumstances than he treats or would treat other persons in those circumstances."

Unfavourable treatment of other persons amounting to discrimination is not per se made unlawful by section 19(1). For A's unfavourable treatment of B to amount to unlawful discrimination, it must be established that it was carried out on the ground of religious belief or political opinion. As Lord Lowry LCJ said in Armagh District Council v Fair Employment Agency [1983] NI 346, 355B:

> "Accordingly, it can be stated that, although malice (while often present) is not essential, deliberate intention to discriminate on the ground of politics, sex, colour or nationality (whatever is aimed at by the legislation) is an indispensable element in the concept of discrimination."

cf R v Birmingham City Council, ex parte Darshan Kaur (1990) The Times, 11 July.

For the plaintiffs to succeed they must establish

(a) that the defendants discriminated against the class of prisoners who were Irish Nationalists by treating them less favourably in some circumstances than they did other prisoners in the same circumstances;

(b) that that discrimination was deliberately done on the ground of the political opinion of those prisoners.

All the complaints made by the plaintiffs have to be tested against these criteria. However one describes the purposive element which must be found, it is clear that one has to look beyond the mere consequences of the defendants' acts. It is not enough for the plaintiffs to establish that those consequences operate unfavourably against Irish Nationalist prisoners; they have to show that in doing the acts in question the defendants intended to discriminate against those prisoners on the ground of their political opinion. The plaintiffs urged upon me that an inference of intention to discriminate on that ground may be drawn if the defendants' acts consistently operate to the disadvantage of that class of prisoners, and I shall bear this point in mind.

Letters in Irish

Under Rule 58(1) of the Prison Rules (Northern Ireland) 1982 the Secretary of State may, with a view of securing discipline and good order or the prevention of crime or in the interests of any persons impose restrictions on the communications permitted between a prisoner and other persons. By Rule 58(4) every letter or communication to or from a prisoner may be read or examined by a governor. Standing Order 5B26 provides that prisoners must correspond in English unless they are unable to do so.

The plaintiffs complained that this was a restriction on their ability to correspond with their families, if they were Irish-speakers. Mr MacCormaic also said that he was prevented from corresponding with newspapers and periodicals in Irish.

Mr D A Stanley, a principal officer in the Northern Ireland Office

in charge of the Regimes Development Branch of the Prison Service, stated that the restrictions were all imposed in the interests of good order and discipline, to ensure that nothing of an unacceptable nature was passed in and out. The Northern Ireland Office did not have sufficient staff fluent in Irish to be able to censor letters written in that language. The restriction applied to all languages. If a prisoner was unable to write or read English, special arrangements would be made for translation, whatever the language. Prisoners are allowed to write to newspapers, but not about matters concerned with their own cases, or matters which could affect good order and discipline. The restriction on writing to them in Irish was based on the same ground as that applying to private correspondence. I accept Mr Stanley's evidence on this point, and consider that the restrictions are imposed for reasons of security and the maintenance of good order and discipline, and not on the ground of political opinion.

Gaelic football

Both plaintiffs said that large numbers of prisoners had asked for facilities to play Gaelic football, but their requests were consistently refused. It was played informally by prisoners on tarmac-surfaced yards, which were unsuitable for the sport. There were all-weather pitches in the prison which could be used for the purpose. They were not an ideal surface, but the rules could be modified to suit the pitch, and the governing body of the game would allow this. That body saw itself as a Nationalist cultural association, part of a cultural movement, with Gaelic games as one of the instruments of its policy. The implication

which the plaintiffs sought to draw was that restrictions on such games were really aimed at the political beliefs of the prisoners who wished to play them.

Rule 49 of the Prison Rules requires the authorities to give each prisoner not less than one hour's exercise in the open air each day, and sporting activities form a substantial part of prison life. Mr Stanley said that there are two all-weather pitches in the prison, and that games on them have to be properly organised and refereed by physical training instructors. Association football was the only game which has hitherto been played on them, because it is the game which is common to all prisoners and the one for which qualified PTI's can be provided. The Northern Ireland Office did, however, have the objective of providing facilities for playing Gaelic football, in order to meet the demand, and had no a priori objection to it. It had made formal approaches to the Sports Council about bringing the game into prisons, and had looked at the possibility with it and with the GAA. The lack of provision of facilities for Gaelic football until now had not been the result of unwillingness on the part of the Northern Ireland Office to provide them, much less any hostility to the game or the political views of those who were keen to play it. I accept this, and consider that the lack of provision for Gaelic football is not something done by the Northern Ireland Office on the ground of political opinion.

Wearing of emblems

This complaint was rather overtaken by events, since by circular 36/90, issued in July 1990, prisoners were given permission to wear certain badges awarded for educational

achievement, including first aid badges, Duke of Edinburgh awards and fainnes for Irish speaking.

It is necessary nevertheless to inquire into the position which obtained between the issue of the civil bill and the date of the circular. Mr Stanley's evidence was that the previous practice was to ban the wearing of all badges of any kind, and that this was done in the interests of the maintenance of good order and discipline. The prison authorities considered that if any badges were allowed some prisoners would wear emblems designed to provoke other prisoners of different political opinions, and therefore it was best to ban all badges. It was decided that it was possible to relax the ban to some extent, and accordingly the fainne was one of the badges allowed under the altered rules. Although the plaintiffs challenged the correctness of this evidence and the bona fides of the Northern Ireland Office, I am satisfied that it represents the true reason for the previous rule banning the wearing of the fainne.

Visits

I referred above to Prison Rule 58(1), whereby the Secretary of State may impose restrictions on communications between prisoners and other persons, in the interests of good order and discipline. Standing Order 5A24 provides as follows in relation to visits:

> "All visits will be in the sight of a prison officer. Except where otherwise expressly stated in these Orders it is for the governor to decide what further measure of supervision is appropriate for the visit. For the majority of domestic visits it should be sufficient for officers to be present in the area where visits are taking place, but for some visits the governor may decide that it is necessary for the visit to be in the hearing

of an officer."

Standing Order 5A28(c) provides that except where the governor otherwise authorises, prisoners and visitors will converse in English unless the prisoner and his visitors are not capable of speaking in English.

The plaintiffs contended that since many visits take place out of the hearing of a prison officer there is no need for the restriction to conversation in English. It may be observed that where the conversation is indeed out of earshot it could for practical purposes be held in any language, and the prison authorities would be none the wiser. This tends to confirm the evidence given by Mr Stanley, that the purpose of the restriction is the maintenance of good order and discipline. It is not aimed against the use of the Irish language or any other language, but in order that the prison staff may know what is being said during those conversations where they are directed by the governor to listen. There are not sufficient staff available with the necessary knowledge of Irish for it to be possible to supervise visits when that language is spoken. I accept Mr Stanley's evidence that the maintenance of good order and discipline is the reason for the rule, and that the restriction is not on the ground of political opinion.

Irish forms of names

Circular no 36/88, issued on the use of the Irish language in prison matters, states that within prisons, in order to avoid confusion, prisoners must be referred to and addressed by the version of their names which appears on their original committal warrants. Prison records are nevertheless to include a reference

to the Irish version of a name where it is used by the prisoner, even though it does not appear on the inmate's committal warrant.

The plaintiffs challenged the bona fides of this practice, and claimed that it was further evidence of cultural and hence political discrimination. They claimed that the foolproof means of identification was by fingerprints, and that if the paramount object of the Northern Ireland Office was to ensure that the correct prisoner was to be released that could be achieved much better by such means.

Mr Stanley insisted that the reason for the rule remained valid, that it is essential to release the correct prisoner when his release is due, and that if prisoners could change their names it could lead to confusion and mistakes in identity. I am satisfied that this is the reason for the maintenance of the rule. I cannot and shall not attempt to judge the practicability of adopting any other practice, but it is obvious that if confusion is created by the use of different names at the time of releases there is room for mistakes over releases and possible escapes - by no means a merely theoretical possibility, as history has shown.

Books in Irish

This topic formed a large part of Mr MacCormaic's complaint. He stated in evidence that there was a shortage of books in Irish, and that the delays in having Irish language materials censored before admission to the prison were excessive to the point of deliberate discrimination against such literature. He said that some of the items sent to him had been delayed since March 1988.

The evidence on behalf of the Northern Ireland Office was that there were about 500 textbooks (being multiple copies of some

15 or 20 titles) for education in Irish, and about 150 to 175 other books in Irish in the prison library. They were provided by the Southern Education and Library Board, and censored by the Board in conjunction with the Northern Ireland Office censor.

Mr Stanley was unable to give details of the reasons for delay in specific cases, but said that there was only one censoring officer with sufficient knowledge of the Irish language, and he had also to deal with all English language publications. I accept that there are very considerable delays, which must be frustrating to the plaintiffs. I am not in a position to judge whether the Northern Ireland Office is handling this issue as well as it might, nor is it any part of my function to do so. My only concern in this appeal is to decide whether it is exercising discrimination against the Irish language and its speakers on the ground of political opinion. I do not consider that it has been established that it has been doing so. The delays may be due to inefficiency or lack of resources, or both, but not in my judgment to any deliberate attempt to discriminate on the ground of political opinion.

Counsel for the defendants contended, first, that there was no discrimination against any class of persons, and, secondly, that if the handling of the matters of which the plaintiffs complained did amount to discrimination within the meaning of the statutory definition, the defendants had not done so on the ground of political opinion. I am not persuaded of the correctness of his first point. It seems to me that one might classify prisoners who speak the Irish language as a class of persons, though I am less clear that those who wish to play Gaelic football are such a

class for present purposes. Such persons can perhaps say with reason that they are treated less favourably than prisoners who do not wish to speak or study Irish or play Gaelic games. It is not necessary for me to express a concluded opinion on this point, however, because I am quite satisfied that none of the matters of which the plaintiffs complain is being done or has been done on the ground of political opinion. When one looks at each of them, there is a sustainable reason for the restriction, based on grounds such as security, maintenance of good order and discipline, lack of resources or smooth running of the prison.

I am well aware that in some instances one may find a multitude of complaints about matters which can be justified individually, but which when taken together provide more convincing evidence of a discriminatory intention. I have considered the evidence as a whole with care in order to determine whether the restrictions when taken together demonstrate such an intention in the present case, taking into account the plaintiffs' complaint that they consistently operate to the disadvantage of Irish Nationalist prisoners. I have concluded that they do not. That is not to say that I am expressing judicial approval of each and every restriction or the way in which each has been handled. As I stated above, that is not my function. I have only to determine whether they constituted discriminatory acts done on the ground of political opinion. In my judgment they were not. I accordingly dismiss the appeal and affirm the dismissal of the civil bill.