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| *Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* 30/05/2019 |

**IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND**

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**VINCENT KELLY**

**Appellant:**

**-and-**

**PRISON SERVICE OF NORTHERN IRELAND**

**Respondent:**

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**Before: Stephens LJ, Deeny LJ and Sir Richard McLaughlin**

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**STEPHENS LJ (delivering the judgment of the court)**

**Introduction**

[1] The appellant's sole issue on this appeal was not raised nor decided by the judge at first instance. The question arises as to whether on that ground alone the appeal should be dismissed particularly given that the appellant succeeded on other grounds at first instance so in that sense the appeal is academic and also given that the issue now sought to be argued for the first time in this court is amply governed by existing authorities.

[2] The appellant is Vincent Kelly who brings this appeal in respect of that part of the judgment of Maguire J dated 26 October 2017 in which he determined that the decision of the Northern Ireland Prison Service ("NIPS") made on 27 February 2017 denying the appellant's request for a period of temporary release in order to attend his son's confirmation on 13 March 2017 was not disproportionate or in breach of Article 8 or 9 ECHR. In other parts of his judgment Maguire J having identified errors made on behalf of NIPS found in favour of the appellant on the basis that the decision-maker had not exercised discretion in compliance with domestic law contained in the Prison and Young Offenders Centre Rules (Northern Ireland) 1995 ("the Prison Rules"). He granted an order of certiorari quashing the decision dated 27 February 2017.

[3] Despite the appellant having succeeded before Maguire J this appeal was then launched by a Notice of Appeal dated 29 November 2017 relying on the ground that

"the learned judge erred in law in determining that the (appellant's) Article 8 Rights had not been breached by (NIPS) following a finding that the decision making process was unlawful." The Notice went on to "*pray* … that *the judgment* of the learned be set aside insofar as there was no finding that the unlawful decision making process accordingly breached the (appellant's) rights under Article 8 ECHR" (sic and with emphasis added).

[4] It can be seen that the appeal is limited to the appellant's contention relating to Article 8 ECHR. It can also be seen that having achieved an order from Maguire J quashing the decision the only order sought is in relation to the judge's judgment.

[5] There was no cross appeal brought by NIPS in relation to the judge's construction of Rule 27 of the Prison Rules. Therefore, there is no issue on this appeal in relation to the judge's determination that the impugned decision should be quashed.

[6] At the conclusion of the hearing we dismissed the appeal. We now give our reasons.

[7] Mr Ronan Lavery QC and Mr Bassett appeared on behalf of the appellant in this court but not before Maguire J. Mr McGleenan QC and Ms McMahon appeared on behalf of the respondent in this court and Ms McMahon appeared before Maguire J.

**Factual Background**

[8] The appellant was charged with and subsequently pleaded guilty to possession of a firearm with intent to endanger life. He was sentenced to a determinate custodial sentence of 9 years 6 months (half in custody and half on licence). His date of release on licence was 19 May 2019 though as from 19 September 2018 he has been eligible for pre-release home visits. Whilst in prison he has been accommodated in Roe House.

[9] On 23 February 2017 the appellant applied for temporary release on 13 March 2017 from prison in order to attend his son's confirmation at St Paul's Church, Falls Road, Belfast. The application was made by completing a Prison Service form "IG12/07."

[10] By letter dated 27 February 2017 Mr Smyth, Head of Licensing Legislation and Public Protection informed the appellant that his application for temporary release was refused. The appellant's solicitor sent a pre-action protocol letter on 9 March 2017 and no reply having been received judicial review proceedings were commenced on 13 March 2017. The ex parte docket dated 10 March 2017 grounding the application applied for "judicial review of a decision of *the Home Office to remove the applicant from the United Kingdom*" (sic and with emphasis added). The Order 53

statement sought relief in relation to the decision of NIPS dated 27 February 2017 "whereby it denied the (appellant) compassionate temporary release to attend his son's Holy Confirmation on Monday 13 March 2017." The application for leave to apply for judicial review was determined by Morgan LCJ who granted leave but did not grant any other relief. The confirmation took place on 13 March 2017 and the appellant was not in attendance.

[11] The only document which purported to be an affidavit on behalf of the appellant in relation to both the application for leave and in relation to the substantive hearing was the unsworn draft affidavit ("the draft affidavit") of his solicitor, Michael Brentnall. The draft affidavit was based on the hearsay account of what the appellant had told his solicitor. It did not give any details of the appellant's family life such as his son's name or age, where his son resided, where his son's mother resided, whether the appellant and the mother were married, whether they lived together, whether the son resided with his mother or what part the appellant had played in the life of his son. Furthermore it did not state whether there were any siblings, whether the appellant had attended any of the siblings confirmations or first communions, whether he had attended baptisms or birthdays, whether he sent birthday cards to his son, whether there had been any family proceedings, whether any of the children were known to Social Services or whether his son had visited him in prison. The documents accompanying the application did inform as to the approximate age of the appellant's son and did give an address in Belfast at which he resided. Apart from that and the fact that the appellant was the father no details were given or could be obtained from the papers. However, the draft affidavit did reveal that the appellant wished to serve his prison sentence in the Republic of Ireland as opposed to in Northern Ireland. That would inevitably have taken the appellant further away from his family and gives some indication as to the strength of his family life.

[12] In essence as far as the application based on family life was concerned everything was left on the basis that a court would infer that ordinarily a father and son would be intimately involved in each other's family life. It is wholly inadequate to leave these matters to inference. Rather there is a clear requirement for direct evidence.

[13] The application for judicial review came into the list of Maguire J after the confirmation had taken place. Maguire J stated that ordinarily that would be an end to the matter as the issue as between the parties would usually be viewed as academic. However, exceptionally he considered that there was good reason in the public interest to hear the substantive judicial review. He identified the reason as being that the "legal provisions at issue in the proceedings arise regularly for consideration by judges exercising the judicial review jurisdiction and it was thought that it might be of value to consider them in a case where the court was able to provide a judgment without the usual pressure of events which bear down on it when it is dealing with an application which has come before it at very short notice

in respect of a period of temporary release which is sought to enable the applicant to attend an event within hours or a day or two of the initiation of the proceedings."

[14] On 27 March 2017 prior to the hearing before Maguire J an affidavit was sworn by Mr Smyth and filed on behalf of NIPS. In that affidavit Mr Smyth referred to Rule 27(2) of the Prison Rules which provides that 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" (emphasis added). In his affidavit Mr Smyth primarily concentrated on the application of Rule 27(2) and the question as to whether an attendance at a confirmation service was a special purpose within that rule. In addition Mr Smyth stated that the applicant's ECHR rights under Article 8 and Article 9 were also considered and taken into account in order to ensure that the outcome was proportionate in the circumstances.

[15] On 26 October 2017 Maguire J gave judgment quashing the decision of NIPS dated 27 February 2017. The judge determined the application on the basis of the construction of Rule 27 of the Prison Rules. There was no contention before the judge that if he determined that the decision was not in accordance with Rule 27 then that he should also determine the case in favour of the appellant under Article 8 ECHR as the interference with family life would not have been in accordance with the law. None of the authorities relied on in this court were opened to the judge. Obiter he referred to the Article 8 ECHR ground which had been faintly mentioned before him. The judge stated that he did not consider "that the substance of the decision made was disproportionate or a breach of Article 8 … of the Convention." Such was the paucity of the evidence before him as to the family life of the appellant or of his son that such an outcome in relation to the substance of the decision was wholly to be expected. However, what it did not do nor had it been argued before the judge was to declare that as the decision was not in accordance with the law so that it also was in breach of Article 8 ECHR. That point simply was not raised for determination before the judge and was not determined.

[16] The appellant had succeeded at first instance but despite that success he has brought this appeal in relation to a point that had not been argued at first instance and which it is proposed should be raised at this stage for the first time on appeal. That raises the question as to whether the appellant should be allowed to proceed in that way.

**Procedure**

[17] Before addressing the issue as to whether the appellant should be allowed to advance a new case on appeal we address a number of procedural matters.

[18] The ex parte docket dated 10 March 2017 was inaccurate presumably relying on but failing to adapt a precedent from a totally different case. There should have been but there has not been an application to amend to correct the error.

[19] Order 53 Rule 3(2) of the Rules of the Court of Judicature (Northern Ireland) 1980 provides that an "application for leave must be made ex parte by lodging in the Central Office - (a) a statement setting out the name and description of the applicant, the relief sought and the grounds on which it is sought, and (b) *an affidavit or affidavits, as the case may require, verifying the facts relied on*" (emphasis added). There was no affidavit verifying the facts relied and that remains the position in this court. No explanation has been provided for this failure. That raises an issue about which we have not heard full submissions, namely whether on that ground alone this appeal should be dismissed. Absent full submissions we decline to determine the appeal on that point alone.

[20] There is another issue in relation to the draft affidavit in that it is a draft to be sworn not by the appellant but by his solicitor. At the point of the application for leave the pressure of time may have been such that an affidavit could not be sworn by the appellant though we remain to be persuaded that this was so. However, there was plenty of time between leave being granted and the hearing before Maguire J for this to be done. We make it clear that there should have been an affidavit from the appellant.

[21] We have given consideration to the question as to whether in a judicial review application the affidavit to be lodged verifying the facts relied on requires to be sworn by the applicant, rather than by another person on behalf of the applicant. Order 53 Rule 3(2)(b) does not expressly require the applicant to verify the facts which is in contrast to Order 54, Rule 1(3) which requires an affidavit supporting an application for a writ of habeas corpus to be made by the person restrained see *Re Copelands Application* [1990] NI 301 at 305E. In *Re Cullens Application* [1987] NIJB 5 and in relation to a judicial review application governed by Order 53 Lord Lowry LCJ giving the judgment of this court said:

> "And finally, we wish to deprecate a procedure which is becoming too common in applications by persons in custody, namely, the swearing of the grounding affidavit by the applicant's solicitor from information and belief instead of by the applicant. This should be done only where the solicitor is unable to gain access to his client, and the Court will rely on the prison authorities to facilitate access by solicitors to their clients in these circumstances."

That condemnation has informed practice in judicial review applications which practice continues and for good reason. For instance in relation to this application an affidavit should have been sworn by the applicant particularly as there is an

obligation of disclosure at the ex parte stage. However, whilst it is practice we do not consider that it is a requirement that the affidavit is sworn by the applicant but rather if it is not, then that is a matter to be taken into account in evaluating the evidence. It can also be taken into account in that remedies on judicial review are discretionary. A failure of an applicant to swear an affidavit verifying the facts could, depending on the context, be a significant feature in the exercise of discretion.

[22] The fact that there was no affidavit sworn by the applicant is not in accordance with practice clearly set out by Lord Lowry LCJ.

[23] In relation to an appeal to this court Order 59 Rule 3(2) provides that a notice "of appeal may be given either in respect of the whole or in respect of any specified part of the judgment or order of the court below; and every such notice must specify the grounds of the appeal and the precise form of the order which the appellant proposes to ask the Court of Appeal to make." The case made on behalf of the appellant was encapsulated in the skeleton argument dated 22 February 2019 that "since (Maguire J) found that the decision was contrary to the requirements of rule 27 of the 1995 Rules, it is a clear and necessary implication of such a finding that the NIPS failed to adhere to the "prescribed by law" condition contained in Article 8(2) ECHR." This raised the simple and obvious point that an interference with Article 8 ECHR has to be in accordance with the law which requires compliance with domestic law. The Notice of Appeal did not in clear terms identify this as the ground of appeal and it did not specify the form of the order which the appellant proposed to ask the Court of Appeal to make. A proposed amended Notice of Appeal was submitted to this court immediately prior to the hearing in which the form of the order sought was that this court should grant "a declaration that the respondent had acted contrary to the requirements of Article 8(1) ECHR and such interference was not consistent with Article 8(2) ECHR." We do not consider that this proposed amended Notice of Appeal complies with Order 59 rule 3(2).

**Article 8 ECHR**

[24] Article 8(1) ECHR provides that "everyone has the right to respect for his private and family life, his home and his correspondence." Under Article 8(2) in order for a public authority to justify an interference with that right it has to establish amongst other matters that the interference "*is in accordance with the law.*" In *Malone v United Kingdom* (1985) 7 EHRR 14 at paragraphs [66] – [68] the ECtHR considered the general principles governing whether the interference found was "in accordance with the law." Those principles included that the interference in question must have some basis in domestic law and that there must be *compliance with the domestic law*. The ECtHR also gave consideration to requirements over and above compliance with domestic law two of which were that the law must be adequately accessible and that a norm cannot be regarded as "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct. However, the issue that the appellant wishes to raise for the first time on this appeal

relates to *compliance with domestic law*. There is ample further authority for the proposition that for an interference to be "in accordance with the law" there has to be compliance with domestic law, see *Perry v United Kingdom* (2004) 39 EHRR 3 at paragraphs [44] – [49], *Khan v United Kingdom* (2001) 31 EHRR 45 at paragraph [26] and *Halford v United Kingdom* (1997) 24 EHRR 523 at paragraph [49]. The appellant seeks to submit for the first time in this court that if the impugned decision was not in compliance with the domestic law in Rule 27 of the Prison Rules then the interference with the right to respect for private and family life could not be in accordance with the law. The appellant submits the judge ought not only to have quashed the impugned decision on the basis of the construction which he adopted of Rule 27 but he should also have done so on the consequential basis that the interference with Article 8 ECHR not being in compliance with domestic law was not in accordance with the law.

[25] The proposition that there has to be compliance with domestic law in order for an interference to be in accordance with the law is wholly unexceptionable. It is one with which Mr McGleenan on behalf of NIPS agreed and with which the judge would have agreed if the point had been made to him. Rather before the judge the appellant relied on the construction of Rule 27 of the Prison Rules. The paucity of evidence in relation to the appellant's family life confirms that the whole argument before the judge related to Rule 27 and there was only the faintest of reference to Article 8 ECHR. Furthermore the judge was referred to none of the authorities which we have set out in the previous paragraph.

**The stance of this court towards a point which was not raised at first instance**

[26] In *R (on the application of Humphrys) v Parking and Traffic* [2017] R.T.R. 22 at paragraph [29] the Court of Appeal in England and Wales stated that:

> "It is, however, clear from the authorities that, where submissions which could have been made at first instance but were not, if allowing them on appeal would not require further factual findings on areas not covered by the judgment below, and where the point which had not been raised at first instance is a pure question of law, although the appellate court retains a discretion to exclude it, provided three conditions are met, the usual practice of this court is to allow the point to be taken: see *Pittalis v Grant* [1989] Q.B. 605 and *Crane (t/a Indigital Satellite Services) v Sky In-Home Ltd* [2008] EWCA Civ 978 at [23]. The three conditions stated by Nourse LJ in *Pittalis v Grant* are that the other party: (a) has had adequate opportunity to deal with the point; (b) has not acted to his detriment on the faith of the earlier omission to raise it; and (c) can be adequately protected in costs."

[27] In this case, the proceedings are by way of judicial review and the appellant's ground of appeal involves a pure point of law. However, we consider that NIPS cannot be adequately protected in costs as the appellant is legally aided. This matter should have been raised and simply disposed of with no additional cost at first instance. On this appeal NIPS is precluded from immediately enforcing an order for costs against the appellant who is legally aided. There is no realistic prospect of it ever being able to enforce such an order. One of the three conditions identified by Nourse LJ has not been met. On that ground alone we dismiss this appeal.

[28] In addition it is clear that even if all three conditions identified by Nourse LJ are met there is still a general discretion to exclude the point. In *R v Secretary of State for the Home Department, ex parte Salem* [1999] 2 AER 42 at 47 Lord Slynn stated that "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, …." This appeal is entirely academic. The confirmation has taken place and the appellant did not attend. The impugned decision has been quashed. The point which the appellant wishes to raise on appeal is amply covered by authorities. That point is not contested by NIPS nor could it sensibly be contested. The only reference by the judge to Article 8 ECHR was obiter. There is absolutely no good reason in the public interest for hearing the appeal.

**Conclusion**

[29] The point raised was not raised at first instance and we do not consider in the exercise of discretion that the appellant should be permitted to raise it on this appeal.

[30] We dismiss the appeal.

[31] As the appellant is legally aided we make an order that the appellant pays NIPS's costs of this appeal to be agreed or taxed in default of agreement such order for costs not to be enforced without further order of this court.