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*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Ref: LAR11320

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Delivered: 29/09/2020

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

**IN THE MATTER OF AN APPLICATION BY ELIZABETH STERRET FOR
LEAVE TO APPLY FOR JUDICIAL REVIEW**

**Robert McTernaghan (instructed by Fisher & Fisher Solicitors) for the Applicant
Laura McMahon (instructed by The Departmental Solicitor) for the Respondent**

LARKIN J

[1] This is an application by Elizabeth Sterrett who is currently a prisoner in HM Prison Hydebank. She seeks leave to apply for judicial review in respect of (as appears from paragraph 3.1 of her statement filed pursuant to Order 53 rule 3(2)(a) RCJ (NI)) “the omission and failure to make a decision” on her application for compassionate temporary release. On November 4 2019 the applicant applied for such release in order to visit her grandmother who was then terminally ill but by the date of her grandmother’s decease which occurred on November 12 the application of November 4 2019 had still not been determined. It may have been some, but it cannot have been much, consolation to the applicant that her application for compassionate temporary release to attend the funeral of her grandmother was considered and granted with proper dispatch, even if, in the event, the applicant was only able to attend the interment of her grandmother’s remains rather than, as she had, doubtless, hoped, the funeral service also.

[2] Although the Northern Ireland Prison Service attributes the delay in making a decision to “an administrative oversight on the part of staff in forwarding the application from the landing to the decision maker” (NIPS letter of February 6 2020) the applicant in her first unsworn affidavit at paragraphs 12 to 29 offers an account inconsistent with a mere oversight.

[3] I was helpfully taken to the NIPS document entitled ‘Changes to the Compassionate Temporary Release Scheme (CTR).’ This document rightly acknowledges the place of Article 8 ECHR in the architecture and operation of the

scheme. I do not understand the applicant to challenge the scheme; her complaint is rather that its operation in early November 2019 resulted in a breach of her Convention rights.

[4] This is a complaint with firm support in the Strasbourg jurisprudence. In *Giszczyk v Poland* (Fourth Section) (November 8 2011) the European Court of Human Rights found two breaches of Article 8 in the failure to allow a sentenced prisoner to visit his dying daughter and, of particular relevance for this application, “to provide a timely and adequate reply to the applicant’s request for compassionate leave to attend the funeral of his daughter.” (Paragraph 3 of the holding).

[5] The application for leave is resisted by the Northern Ireland Prison Service on three main grounds. It is said that the application is out of time; that it is moot; and that there existed such a suitable alternative remedy as to make this an unsuitable case for leave.

[6] I can deal with the last of those objections shortly. Given that this is a challenge to what is characterised as unlawful delay in processing an application for temporary compassionate release, the suggestion that the applicant ought to have resorted to an internal process culminating in an invocation of the Prison Ombudsman seems to me to be quite unrealistic.

[7] There is force in Ms McMahon’s criticism that this application, at least as respects the claim for mandamus, raises no larger public law question such as requires adjudication even though that remedy, in the present circumstances, could not be practically useful or appropriate. The issue between the parties, as stated above, is about the lawfulness in Convention terms of what happened to Ms Sterrett’s application of November 4 2019; it is not about NIPS policy but about NIPS operations or conduct inconsistent with that policy. This criticism will, as appears below, help to shape the outcome of this application.

[8] The application for leave was made on March 16 2020. This was the culmination of a process that had begun with a letter sent in accordance with the Pre-Action Protocol on January 17 2020. But that letter was itself sent more than two months after the death of the applicant’s grandmother on November 12 2019 which, by any reckoning, was the point by which the applicant was the victim not only of delay but deprived of any last, precious visit to her grandmother.

[9] A reply to the Pre Action Protocol letter was sent by Northern Ireland Prison Service on February 6 2020 and the application for leave was made on March 16 2020. I note that in its letter of February 6 Northern Ireland Prison Service asserts “the Applicant has been aware from 17 December that NIPS has taken steps to address what was an administrative oversight by staff.”

[10] In so far as the challenge compels (to quote from paragraph 4.1 (i) of the Order 53 statement) “the Respondent to implement a new robust CTR policy that

protects the rights of prisoners” December 17 2019 may be regarded as the point from which time begins to run against the applicant, and, as respects the order of mandamus, the application can be regarded as (just) within time.

[11] The claim for a declaration and damages cannot, I think, benefit from this starting point. It seems to me that the wrong done to the applicant was to deprive her of a decision on her compassionate temporary release application – and thus, in practical terms, an unreasoned refusal of that application – before the death of her grandmother which occurred on November 12 2019.

[12] But a declaration and a claim for damages for breach of a Convention right, here Article 8 both alone and with Article 14 ECHR are not, outside the confines of judicial review, subject to a three month time limit. It would be open to the applicant, and it would have been open to her in March of this year, to have simply issued an action for damages for the claimed breach of her Convention rights.

[13] This is relevant to the issue of extending time. Bearing in mind, as I must, the overriding objective in Order 1 rule 1A RCJ when considering whether there is good reason to extend time under Order 53 rule 4(1), it does not seem to me to constitute just treatment of litigation to unnecessarily stop proceedings on the ground that time is spent when the same issue can be litigated in fresh proceedings where time is not yet spent. I extend time in respect of the claim for a declaration and damages. I do not consider that any extension is required in respect of the claim for mandamus.

[14] In *Re Malone’s Application* [1988] NI 67 judicial review was held not to lie in respect of a refusal by the Queen’s University of Belfast to permit Mrs Malone to remain in employment after the age of sixty. What was worse from Mrs Malone’s perspective was that the Court of Appeal also held that her judicial review proceedings could not be continued as if they were proceedings begun by writ. Kelly LJ drew attention to the then English rule permitting such a continuation (Order 53 rule 9(5)) and the absence of any equivalent in Northern Ireland at that time “or anything like it” ([1988] NI 67 at 84).

[15] That absence of an equivalent no longer exists. Rule 9(5) of the RCJ (NI) provides:

“Where the relief sought is a declaration, an injunction or damages and the Court considers that it should not be granted on an application for judicial review but might have been granted if it had been sought in an action begun by writ by the applicant at the time of making his application, the Court may, instead of refusing the application, order the proceedings to continue as if they had been begun by writ; and Order 28, rule 8, shall apply as if the application had been made by summons.”

[16] This rule seems apt for the circumstances of this application. There is here a claimed breach of rights under Article 8 ECHR both alone and together with Article 14 ECHR. The applicant has an undoubted right to have a judicial determination of these claims which rest importantly on facts that are in dispute and will best be resolved by oral evidence.

[17] In these circumstances, I take the following course: I refuse leave to apply for an order of mandamus but grant leave to apply for a declaration that the Northern Ireland Prison Service has acted unlawfully in its delay, amounting to a practical refusal of the applicant's application for temporary compassionate release to visit her dying grandmother, and for damages in respect of that delay both founded on Article 8 ECHR. I order, pursuant to Order 53 rule 9(5) RCJ (NI) that these proceedings, that is, the claim for a declaration and damages, continue as if they had been begun by writ.

[18] The applicant, now to be referred to as the plaintiff, shall file a statement of claim within seven days on the Northern Ireland Prison Service. The Northern Ireland Prison Service, the defendant, shall enter its defence within seven days.

[19] The case should be listed before me for directions in three weeks.