

Judicial Communications Office

Thursday 5 May 2011

JUDGE RULES THAT FULL BODY SEARCHING PRISONERS ENTERING AND LEAVING THE PRISON IS LAWFUL

Summary of Judgment

Mr Justice Treacy, sitting today in the High Court, ruled that the routine full body searching of prisoners on each occasion when they enter or leave the prison is lawful. He also found that the policy of forcible full body searching of non-compliant prisoners is lawful and not incompatible with the European Convention on Human Rights (ECHR).

The challenge to the policy and practices of the NI Prison Service was brought by Brendan Conway. He had been refusing to comply with the policy of full body searches of prisoners entering and leaving the prison. As a consequence he had been adjudicated upon for offences of prison discipline and subject to forcible full body searching in line with prison policy. Mr Conway claimed that the policy of routine full body searching of prisoners entering and leaving the prison was unlawful, beyond the legal capacity (“ultra vires”) of the Prison Rules, and incompatible with the ECHR. He also claimed that the policy of forcible full body searching of prisoners who do not consent to such a search is unlawful and incompatible with the ECHR.

The court heard that the practice of full body searching of prisoners on entering or leaving the prison has formed part of the normal operations for many years. Where a prisoner refuses to co-operate with a search, but does not resist it, he or she is deemed to be “non-compliant”. In this instance the prisoner would be forcibly full body searched. The prisoner will be given a period of time for reflection on his or her decision not to co-operate before being searched by a specialised search team using recognised control and restraint techniques.

Full body searches are carried out routinely on prisoners newly committed from the courts, prisoners returning from court production, prisoners transferring from other establishments and those returning from home leave. Prisoners are also full body searched on discharge. This includes those being discharged from custody. The Prison Service state that this procedure is carried out to deter, detect and prevent the introduction and exportation of

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items and is considered to be a proportionate and necessary response to the threat posed to security and a good ordered prison community.

In its evidence, the Prison Service stated that during a full body search the prisoner is at no time required to be completely naked, nor is there any physical contact between staff and prisoner during the search. The process is normally over in minutes. The Prison Service also stated that the policy and procedure is analogous to that applied throughout the United Kingdom and the search methodology applied by the NI Prison Service is less intrusive than that applied in England and Wales and the Republic of Ireland.

Mr Justice Treacy considered the relevant provisions of the Prison Rules, and case law from the UK and the European Court of Human Rights (ECtHR). He said that the contention that full body searching was ultra vires the Prison Rules had not been advanced before either in the UK or at the ECtHR. He said that, if found to be illegal, it would have potentially calamitous consequences as everyone has been proceeding on the basis that there is lawful authority for such searches. Mr Justice Treacy said, however, that he was quite satisfied that the Prison Rules constitute ample authority for the conduct of full body searches:

“In my view the Rules empower and authorise such searches not least because it can never have been the intention of Parliament in Rules designed to ensure, inter alia, the security and safety of prisoners and staff alike that a yawning gap in prison security would thus be created.”

The judge also found that the Rules can apply on all occasions where there is contact between the prisoner and those outside the prison. This would mean that it is lawful for a prisoner to be searched when returning from home leave, from a hospital visit, or Court.

Mr Justice Treacy then considered whether the procedures of full body searching and forcible body searching are disproportionate under the ECHR. He concluded, with one caveat, that they are not and that compelling reasons of security justify the policy of full body searching of all prisoners entering or leaving the prison. The judge also concluded that the policy of forcible full body searching of non-compliant prisoners is not incompatible with the ECHR. He referred to the judgment of Lord Bingham in *Daly* [2001] 2 WLR 1622 in which he said:

“It must be recognised that the prison population includes a core of dangerous, disruptive and manipulative prisoners, hostile to authority and ready to exploit for their own

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advantage any concession granted to them. Any search policy must accommodate this inescapable fact ...”.

Mr Justice Treacy said that the adoption of a uniform practice/procedure to deal with non-compliant prisoners who are given every opportunity to have a lawful, justified full body search which does not involve physical touching of the prisoner by prison officers cannot be regarded as disproportionate. Mr Justice Treacy added, however, that it is fully incumbent on the NI Prison Service to keep the issue of full body searches under regular review taking into account any advances in technology or policy which might obviate or diminish the need for such searches.

The caveat to the findings concerns the full body searching of prisoners who are being discharged on acquittal or completion of their sentence. Although this was raised in the arguments before the Court, the judge said that he entertained significant reservations as to whether such a routine search on final discharge could be regarded as lawful or proportionate. Mr Justice Treacy asked the parties at the conclusion of the hearing to consider how this matter ought to be addressed.

NOTES TO EDITORS

1. This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Court Service website (www.courtsni.gov.uk).

ENDS

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