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## *DONALDSON v UNITED KINGDOM*: NO RIGHT FOR PRISONERS TO WEAR EASTER LILIES

### Facts

In the recent case of *Donaldson v United Kingdom*<sup>1</sup> the European Court denied a claim from an imprisoned Irish Republican that HMP Maghaberry prison violated Article 10<sup>2</sup> and Article 14<sup>3</sup> of the European Convention on Human Rights when it asked him to remove an Easter lily from his clothing. The Easter lily has long been regarded as a symbol commemorating Irish Republican combatants who died during or were executed after the 1916 Easter Rising, a rebellion against the British Government's rule in Ireland.<sup>4</sup>

In this case, the applicant, who is currently serving a 12-year sentence at Roe House, a segregated wing of HMP Maghaberry for Republican prisoners, affixed an Easter lily to his outer clothing on Easter Sunday in March 2008. A prison officer asked him to remove the Easter lily and when he refused he was charged with disobeying a lawful order under the Prison and Young Offenders Centre Rules (Northern Ireland) 1995, which prohibits prisoners from wearing emblems outside their cells. In HMP Maghaberry an exception was made with respect to the wearing of a shamrock on St Patrick's Day and the wearing of poppies on Remembrance Sunday as these emblems were deemed to be 'non-political and non-sectarian'.

<sup>1</sup> *Donaldson v United Kingdom* [2011] ECHR 210.

<sup>2</sup> Freedom of expression:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

<sup>3</sup> Prohibition of discrimination:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

<sup>4</sup> BBC News, 'NI Prisoner Donaldson Loses Easter Lily Court Case', [www.bbc.co.uk/news/uk-northern-ireland-12386408](http://www.bbc.co.uk/news/uk-northern-ireland-12386408) (accessed 13 February 2012).

## **Relevant Law in Northern Ireland**

Paragraph 4.12 of the Northern Ireland Prison Service Standing Orders, dated 3 July 1997, states:

Prisoners may not wear emblems, nor should they be displayed by prisoners in their cells.

On 15 March 2000 the Governor of HMP Maghaberry issued a notice to prisoners concerning the wearing of shamrocks on St Patrick's Day and poppies for Remembrance Day. The notice stated:

These emblems are non-political and non-sectarian and will, in future, be permitted to be worn at the appropriate time by any prisoners who wish to wear them.

This notice echoes the guidance issued to employers by the Northern Ireland Equality Commission, which provided as follows:

There are some individual emblems and symbols that, through their history and associations, and whether intended or not, have come to have a significance that has the potential to make those of a different identity feel uncomfortable or unwelcome.

In this category are likely to fall a variety of symbols and emblems with the potential to cause disharmony, and especially those that have been directly linked to community conflict in Northern Ireland and/or to local politics. These include: Badges and insignia, e.g. Easter Lilies, Orange symbols.

## **Domestic Proceedings**

The applicant applied for leave to bring judicial review proceedings challenging the Northern Ireland Prison Service's policy. The High Court in Northern Ireland, in April 2008, refused his application for leave to apply for judicial review. The judge held that any interference with the applicant's Article 10 rights was minimal and justifiable having regard to the contingencies of ensuring an objectively based prison service. He ruled that previous domestic jurisprudence on the issue, which had arrived at the same conclusion, had not been wrongly decided.<sup>5</sup> The applicant subsequently appealed to the Court of Appeal, which, following the hearing, reserved judgment. In its judgment of 3 April 2009, the Court of Appeal indicated that as all the material relied upon was before it, it would apply the procedure under Order 53 rr 3 and 5(8) of the Rules of the Supreme Court (Northern Ireland) 1980, which permitted it to treat the application as an appeal rather than as a renewed application for leave. Consequently, it granted the applicant leave to apply for judicial review and dismissed the appeal on its merits. It found that

<sup>5</sup> *Donaldson, Re Leave to Apply for Judicial Review* [2008] NIQB 42 (4 April 2008), paras 9 and 15.

the policy preventing the wearing of Easter lilies was proportionate to the objective of preventing or maintaining good order in prison<sup>6</sup> and stated:

The case for an objective policy on emblems as part of the necessary aim to prevent disorder within a prison and which is applicable throughout the prison, including separated regimes, is substantial if not more so. In my view the policy which is minimally restrictive, complies with Article 10 of the Convention.<sup>7</sup>

The applicant was advised that he was unlikely to be granted leave to appeal to the Supreme Court, and, as such, did not apply for it.<sup>8</sup>

### Previous Jurisprudence in Northern Ireland

In Northern Ireland, bans on wearing symbols associated with paramilitary groupings, such as Orange lilies and Easter lilies, have previously been held not to breach the European Convention. In all cases the defendants relied on Article 10.<sup>9</sup> In the case of *Re Byers*<sup>10</sup> the applicant was being held in an integrated prison and he was asked to remove an Easter lily. When he refused he was charged with a disciplinary offence. The High Court in this case found that the ban on the wearing of Easter lilies in communal areas did not violate his rights under Article 10 of the Convention as the interference with his freedom of expression was prescribed by law and was necessary to prevent potential conflict within the prison.

In the case of *In Re McCafferty*<sup>11</sup> the applicant was held being held, like Donaldson, in Roe House, the segregated wing of HMP Maghaberry. He brought judicial review proceedings after he was asked to remove an Easter lily following Mass on Easter Sunday. The applicant argued that the prison policy of permitting the wearing of Easter Lilies in cells but not elsewhere made no sense, particularly in the separated wing since only other Republicans and members of staff would see the emblem.<sup>12</sup> The Prison Service argued that it could not be ruled out that prisoners held in segregated wings would not come into contact with other prisoners.<sup>13</sup> Moreover, they argued that there was a need to protect the rights of persons, other than prisoners, who could come into contact with a prisoner wearing an emblem and to ensure a neutral working environment for prison officers. The Prison Service stated that any relaxation of the rules for separated Repub-

<sup>6</sup> *Donaldson* (n 1) para 8.

<sup>7</sup> *Ibid.*

<sup>8</sup> *Donaldson* (n 1) para 9.

<sup>9</sup> Brice Dickson, *The European Convention on Human Rights and the Conflict in Northern Ireland* (Oxford University Press, 2010) 291.

<sup>10</sup> *Re Byers* [2004] NIQB 23.

<sup>11</sup> *Re McCafferty* [2008] NIQB 96.

<sup>12</sup> *Ibid.*, para 3.

<sup>13</sup> *Ibid.*, para 4.

lican prisoners alone would be detrimental and would have an unwelcome impact on Prison Service policy, the imperative of which is to provide as equal and common a set of conditions as possible for all prisoners.

The High Court concluded that while there was force in the applicant's argument that a prisoner in the separated regime is in a different position from prisoners in the integrated section of the prison, the policy operated by the Prison Service was soundly based as it was entitled to ensure an objectively based system throughout the prison.<sup>14</sup>

### Article 10

The European Court noted in this case that the domestic courts accepted that the policy of the Prison Service interfered with the applicant's rights under Article 10 of the Convention. However, this interference had been prescribed by law for the prevention of crime and disorder. The general question for the Court, therefore, was whether the interference was in pursuit of a legitimate aim and whether it was necessary in a democratic society.<sup>15</sup>

In assessing whether the interference was in pursuit of a legitimate aim, the Court noted the British Government's justification that the measure was necessary to prevent disorder and crime between Loyalist and Republican prisoners.<sup>16</sup> The Government argued that integration, even if the prisoner was held in a segregated wing, could not be excluded.<sup>17</sup> In addition, the Government submitted that segregated prisoners came into regular contact with prison staff and the Equality Commission for Northern Ireland had stated that the wearing of political and sectarian emblems was not conducive to a neutral and harmonious working environment, and this included the wearing of Easter lilies.<sup>18</sup> The European Court accepted this argument and accepted that the aim was to protect the rights of others.<sup>19</sup>

The Court then considered whether the measure was necessary in a democratic society. In doing so it considered whether the reasons used to justify the interference were 'relevant and sufficient' and 'proportionate to the legitimate aims pursued'.<sup>20</sup> The Court evaluated the significance of the Easter lily, and noted that in Northern Ireland many emblems are not simply an expression of cultural or political identity but are inextricably linked with the conflict there and, as such, their public display could be divisive and make existing tensions worse.<sup>21</sup>

<sup>14</sup> *Ibid*, para 10.

<sup>15</sup> *Ibid*, para 16.

<sup>16</sup> *Ibid*, para 22.

<sup>17</sup> *Ibid*.

<sup>18</sup> *Ibid*; see also Northern Ireland Equality Commission, 'Promoting a Good & Harmonious Working Environment', p 6, [www.equalityni.org/archive/pdf/Harmonyatwork.pdf](http://www.equalityni.org/archive/pdf/Harmonyatwork.pdf) (accessed 13 February 2012).

<sup>19</sup> *Ibid*, para 23.

<sup>20</sup> *Chauvy v France* (2005) 41 EHRR 29, para 70.

<sup>21</sup> *Ibid*, para 28.

The Court recognised that the level of offence caused by a particular emblem cannot alone set the limits of freedom of expression;<sup>22</sup> however, it also recognised that ‘in times of conflict, prisons are characterised by an acute risk of disorder and emblems which are more likely to be considered offensive are also more likely to spark violence and disorder if worn publicly.’<sup>23</sup> Secondly, the Court noted that the interference complained of was relatively narrow as it did not apply to prisoners inside their cells. Therefore, as long as the applicant remained in his cell, he was permitted to wear the Easter lily.<sup>24</sup>

## Comment

Prisons in Northern Ireland have often been flashpoints for serious disturbances, which have had repercussions throughout the community. Apart from the infamous Dirty Protests and Hunger Strikes, and the violence related to these,<sup>25</sup> there have been more recent disturbances from Loyalist and Republican prisoners. To name a few recent instances, during the 1990s there were numerous riots in the Maze prison (many of these related to a prison policy of not segregating Loyalist and Republican prisoners), and the homes of prison staff were targeted.<sup>26</sup> In 2004 there were riots and arson attacks in Maghaberry prison, as well as fighting between Loyalist and Republican prisoners.<sup>27</sup>

It is accepted that Loyalist and Republican prisoners can come into contact with one another at Maghaberry prison, even though they are in segregated areas of the prison. This is acknowledged by the Northern Ireland Prison Service in its publication *Compact for Separated Prisoners: An Explanatory Booklet*,<sup>28</sup> which is issued to prisoners who wish to relocate to segregated wings. Given this, and the fact that segregated prisoners come into contact with prison staff, we may conclude that the interference was proportionate. As the interference also amounted to relatively minor interference with Mr Donaldson’s right to freedom of expression (he was allowed to wear the lily inside his cell),<sup>29</sup> it is correct to say that the interference was in pursuit of a legitimate aim.

As the Easter lily commemorates the Irish Republican dead, this emblem certainly has potential to cause offence. Is the interference necessary in a democratic society? States Parties to the European Convention are granted a margin of appreciation to decide what emblems may or may not cause offence. In this instance, given the contentious nature

<sup>22</sup> *Ibid*, para 29; see also *Vajnai v Hungary* (2010) 50 EHRR 44, para 55.

<sup>23</sup> *Ibid*.

<sup>24</sup> *Ibid*, para 30.

<sup>25</sup> For an account of the Dirty Protest and Hunger Strikes see Richard English’s chapter titled ‘The Prison War 1976–81’ in R English, *Armed Struggle: The History of the IRA* (Macmillan, 2004/Oxford University Press, 2003) 187.

<sup>26</sup> [www.british-prisons.co.uk/prisons/Northern%20Ireland/3.htm](http://www.british-prisons.co.uk/prisons/Northern%20Ireland/3.htm) (accessed 13 February 2012).

<sup>27</sup> [www.guardian.co.uk/uk/2004/jan/16/northernireland.prisonsandprobation](http://www.guardian.co.uk/uk/2004/jan/16/northernireland.prisonsandprobation) (accessed 13 February 2012).

<sup>28</sup> Northern Ireland Prison Service, *Compact for Separated Prisoners: An Explanatory Booklet*, para 2.4, [www.irishfreedomcommittee.net/POWs/compact.pdf](http://www.irishfreedomcommittee.net/POWs/compact.pdf) (accessed 13 February 2012).

<sup>29</sup> *Ibid*, para 30.

of the emblem being worn and the effect it might have on the general populace of the prison, prisoners and prison staff alike, it is correct to deduce that the interference is necessary. The fact that the interference is limited to prisoners wearing Easter lilies outside their cells lends credence to this argument. However, arguably implicit in the European Court's reasoning is the argument that the poppy is not a contentious emblem. This was challenged by Donaldson under Articles 10 and 14.

### Articles 10 and 14

Using Article 10 read together with Article 14, the applicant complained that he was discriminated against when compared to others wishing to wear political symbols connoting a different political ideology, stating that he was being treated differently from prisoners who wished to wear a poppy.

The European Court recalled that the Prison Service policy reflected that of the Fair Employment Commission, which differentiated between the Easter Lily and the Poppy on the basis that the Easter lily was an emblem directly linked to the community conflict over the past 30 years whereas the poppy was an emblem which distinguished one community from the other in Northern Ireland but was not directly connected with the conflict.<sup>30</sup> The Court therefore held that prisoners wishing to wear a poppy on Remembrance Sunday were not in an analogous position to the applicant and found the complaints under Article 14 read together with Article 10 of the Convention to be manifestly ill-founded.

### Comment

The wearing of the Easter lily *and* the poppy can be contentious in Northern Ireland, with the effect that this judgment is likely to raise a few eyebrows. As Brown and MacGinty have pointed out, the wearing of the poppy, or the Easter lily, has caused regular political rows and even workplace lockouts.<sup>31</sup> Many Irish Nationalists and Republicans note that the poppy can be just as synonymous with the conflict in Northern Ireland as the Easter lily. They argue (and are correct in doing so)<sup>32</sup> that the Poppy is worn as a mark of respect not only for those who died in the First and Second World Wars, but also for British forces who were killed or wounded whilst on active service in other countries, such as Ireland.<sup>33</sup> The debate has moved beyond Irish Republican circles; for example, in 1995 there was a live public debate about the role of the poppy, provoked by BBC Northern

<sup>30</sup> *Ibid*, para 38.

<sup>31</sup> Kris Brown and Roger MacGinty, 'Public Attitudes toward Partisan and Neutral Symbols in Post-Agreement Northern Ireland' (2003) 10(1) *Identities: Global Studies in Culture and Power* 83, 102–3.

<sup>32</sup> See [www.britishlegion.org.uk/can-we-help/who-we-help](http://www.britishlegion.org.uk/can-we-help/who-we-help) (accessed 13 February 2012).

<sup>33</sup> An Phoblacht, <http://apnnonline.com/?p=55500> (accessed 13 February 2012); not all nationalists follow this line of thinking, and in November 2010 the nationalist SDLP leader, Margaret Ritchie, became the

Ireland presenter Donna Traynor refusing to wear a poppy on air, having earlier in the year refused to wear a shamrock on St Patrick's Day.<sup>34</sup>

The wearing of the Easter lily, on the other hand, does not find common consensus even amongst Nationalists. Indeed, according to Irish Republican sources, the wearing of the Easter lily may be the preserve of those who support Sinn Fein or those who adopt a less moderate position within the Irish Nationalist spectrum.<sup>35</sup> For example, when Margaret Ritchie recently wore a poppy, Sinn Fein member Alex Maskey expressed uncertainty as to whether she would also wear an Easter lily.<sup>36</sup>

The European Court does not seem to consider that not everyone in Northern Ireland views wearing a poppy as inoffensive. However, the wearing of the poppy is much more in the 'mainstream' than the wearing of the Easter lily. Ultimately, the European Court stepped away from the issue and granted a margin of appreciation to the Contracting State to make this decision. It is not the first time that a state has denied the wearing of a symbol and the European Court has granted a margin of appreciation to permit the prohibition. In *Leyla Şahin v Turkey*,<sup>37</sup> the applicant, a medical student at the University of Istanbul, was refused admission to lectures, courses, an exam and tutorials for wearing the Islamic headscarf which she was prohibited from wearing due to University policy. In this case, the applicant complained that a rule prohibiting students at the University of Istanbul from wearing such headscarves in class or during exams was contrary to Article 9.<sup>38</sup> The Turkish Government strongly contested the claim because the Islamic headscarf was associated with extreme 'religious fundamental movements' which posed a threat to Turkish society.<sup>39</sup> The Grand Chamber held in this case by 16 votes to one that the headscarf ban could be justified under Article 9(2). The Court was mindful of the impact that wearing the headscarf might have on others and ruled that the relevant dress restrictions were proportionate to the legitimate aim of upholding public order and protecting the rights and freedoms of others.<sup>40</sup>

first nationalist to wear a poppy as a gesture of 'reconciliation and reaching out' ([www.bbc.co.uk/news/uk-northern-ireland-11733457](http://www.bbc.co.uk/news/uk-northern-ireland-11733457)).

<sup>34</sup> Richard S Grayson, 'The Place of the First World War in Contemporary Irish Republicanism in Northern Ireland' (2003) 25(3) *Irish Political Studies* 325, 332.

<sup>35</sup> [www.anphoblacht.com/news/detail/18577](http://www.anphoblacht.com/news/detail/18577).

<sup>36</sup> [www.u.tv/News/SDLP-leader-to-wear-historic-popy/63130f8f-f62d-4069-b175-970c0482a59c](http://www.u.tv/News/SDLP-leader-to-wear-historic-popy/63130f8f-f62d-4069-b175-970c0482a59c).

<sup>37</sup> *Leyla Şahin v Turkey* (2005) 41 EHRR 8.

<sup>38</sup> Article 9 reads:

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others.

<sup>39</sup> *Leyla Şahin v Turkey* (2005) 41 EHRR 8, paras 90–93.

<sup>40</sup> *Ibid*, paras 114–15.



Although there are similarities between these two cases, the threat to public disorder was much more real in the *Donaldson* case and so it is not surprising that the European Court granted a margin of appreciation to the UK in making this decision. The European Court was correct in doing this. The margin of appreciation doctrine is designed to provide flexibility in resolving conflicts emerging from diverse social, political, cultural and legal traditions of Contracting States within the European context.<sup>41</sup> There could hardly be a better case for its use here. One of the rationales behind the doctrine relates to the fact that national authorities are in a better position than an international judge to assess the concrete circumstances of a case.<sup>42</sup> Central to the Court's judgment is the idea that States enjoy broad discretion when assessing potentially controversial emblems,<sup>43</sup> and it is commendable that the Court recalled the Equality Commission for Northern Ireland's policy on flags and emblems before making its decision.<sup>44</sup> The decision is fair and impartial, and does not run counter to the standards set in law. It is therefore argued here that denying this claim was the correct decision.<sup>45</sup>

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41 Onder Bakircioglu, 'The Application of the Margin of Appreciation Doctrine in Freedom of Expression and Public Morality Cases' (2007) 8(7) *German Law Journal* 1.

42 *Ibid.*

43 <http://hrbrief.org/2011/04/right-to-freedom-of-expression-narrowed-at-european-court> (accessed 13 February 2012).

44 See [www.equalityni.org/archive/pdf/Harmonyatwork.pdf](http://www.equalityni.org/archive/pdf/Harmonyatwork.pdf) (accessed 13 February 2012).

45 Mr Donaldson's complaint under Art 6 § 1 was declared inadmissible for failure to exhaust domestic remedies.

\* Thanks to Professor Brice Dickson for comments.