Neutral Citation Number [2010] IEHC 529

THE HIGH COURT

2009 1316 JR

BETWEEN

JOHN FOY

APPLICANT

AND

THE GOVERNOR OF CLOVERHILL PRISON

RESPONDENT

JUDGMENT of Mr. Justice Charleton delivered on 29th day of June 2010

1. Has a remand prisoner, presumed in law to be innocent of the offence for which he has been remanded, an entitlement under the Constitution, or under the European Convention on Human Rights, to physical contact with his family when they come to visit him?

2. John Foy, the applicant, is now a convicted prisoner. He is serving a lengthy sentence for armed robbery. At the time of the events of which he complains, he was a remand prisoner in Cloverhill Prison. He was therefore presumed to be innocent of any offence. His subsequent plea of guilty indicates that he was not in fact innocent of the offences for which is now serving a sentence. For the purposes of this judgment, however, he was then entitled to the presumption of innocence in law.

3. Cloverhill Prison has a general policy of allowing visits by relatives to prisoners only in closed circumstances. This means that the prisoner is ushered into the area for the visit and sits at a counter. His family is brought to the other side. Between them there is a screen. This prevents any physical contact between the visitor and the prisoner. In addition to a screened visit, as so described, there is the possibility of a box visit. This colloquialism refers to a visit which may be allowed a prisoner whereby he, and his family, are all allowed to be present together in one small room. In contrast to the screened visit, in the box visit there is physical contact. The prisoner can hug his wife and children, hold hands, or sit his off-spring on his knee. Both kinds of visits are observed by prison officers, who can also hear what is said; unlike in a lawyer and prisoner consultation, which is private and is only observed visually through a window. It is likely that a prison officer, in both a box visit and a screened visit, will be expected to observe several sets of visits by relatives to prisoners.

4. Some people refer to what prisoners call a box unit as an open visit. Visits where contact can be made are the norm, as I understand the submissions of counsel, in most Irish prisons at the present time. Cloverhill Prison is, in the main, a remand prison; though there are a few sentenced prisoners there also; for various administrative or security reasons.

5. John Foy claims that to deprive him, as an innocent person, of physical contact with his family is to undermine his rights under Article 41 of the Constitution and under Article 8 of the European Convention on Human Rights.

Disputes

6. A number of issues have arisen between the parties. This has resulted in an exchange of alleged fact on affidavit. I will give some basic detail in relation to this.

7. On 23rd September 2009, John Foy's solicitors wrote to the governor of Cloverhill Prison. They complained that John Foy was visited every day by his wife but that she was only entitled to a screened visit; one without the possibility of physical contact. Reasons were sought for this situation. The governor replied, by letter dated 25th September 2009, that the policy of the prison was that visits were to be without physical contact. When a further protest, of a more detailed kind, was raised by John Foy's solicitors by letter dated 28th September 2009, the governor reiterated, in his reply of the 29th September 2009, that all visits were screened and without the possibility of physical contact. The letter went on to state, however, that a box visit, the kind involving physical contact within a small room, could be applied for by John Foy. Since this had not been applied for, the governor suggested that should such an application be made, he would review it on its merits.

8. When John Foy was first imprisoned on remand, a circular dated the 16th April 2001, seems to have governed box visits. It allowed prisoners to apply for a box visit and stated that such applications would be considered by the governor. This circular required prisoners to be inmates for not less than six months before a box visit might be allowed. A contact visit would only be granted on a Sunday and only nominated people would be allowed into the room. Shortly after the governor invited such an application, John Foy made one. It was allowed. A box visit took place a short time afterwards.

9. For reasons which appear to me to be coincidental with anything to do with the issues in his case, the governor of Cloverhill Prison, in or about this time, was becoming increasingly concerned with the regulation of visits. He decided to issue a visitor nomination form to each prisoner. This contained eight spaces in which the name of the proposed visitor, together with their address, relationship to the prisoner, and phone number could be entered. This nomination form required those attending to produce an acceptable form of identification with photograph. I am satisfied that most of the remand prisoners in Cloverhill Prison accepted this new system. In addition to the nomination of prisoners, it also provided for remand prisoner visits to be reduced from six fifteen minute visits per week, to four half an hour visits per week. This was a more efficient system and most of the prisoners accepted it, perhaps because it allowed more visiting time overall.

10. Possibly because John Foy had been upset by the insistence of the governor on screened visits within Cloverhill, apart from the box visit he had been granted on one occasion, he refused to sign the form. On at least two occasions his wife attended at the prison but, in the light of her husband's refusal to sign the nomination form, she was refused entry. Some words, and other unpleasantness, occurred in this context. It is unnecessary to go into this. Eventually, John Foy nominated in writing, on the visitor nomination form,

the persons from whom he wished to receive visits. These were his wife and other close relations. He refused to sign the form "as a protest". The governor, nonetheless, accepted the form as valid and, thereafter, matters proceeded in an orderly fashion. Then, John Foy, as the accused, pleaded guilty to the serious offences which I have mentioned. He was removed from Cloverhill Prison to another place of detention. There, it seems, the restrictions on physical contact on visiting may be less stringent.

Governance of Prisons

11. Prisons are operated by the Prison Service, under the general direction of the Minister for Justice, Equality and Law Reform. It is important that those who are inmates, and those who are in charge of their detention and rehabilitation, know the rules which are to govern their conduct. As far as can be foreseen in that way, important matters are clearly provided for in rules which are made under s. 35 of the Prisons Act 2007. The relevant rules here are the Prison Rules 2007 (S.I. No. 252/2007). These, among many other matters, regulate the entitlement of prisoners to visits, and the manner in which visits may be conducted. Provisions are made for prisoners who are on remand, and who are convicted, who are under eighteen, and who are adults. Under Rule 35, an adult convicted prisoner is entitled to receive one visit per week of not less than 30 minutes duration, by prior appointment. If a convicted prisoner is under eighteen, two such visits may be received. An unconvicted prisoner is entitled to be visited on every day except Sunday by "relatives or friends" for not less than fifteen minutes. No appointment needs to be made. The entitlement to one visit per day, excluding Sunday, is subject to the practicality of prison resources, however, but the rules provide that visits cannot be reduced to less than three days a week. The governor has an entitlement to allow more visits than are provided for under the rules, at his or her discretion, if it would assist "the prisoner's welfare or rehabilitation". Rule 35(5) allows the governor to restrict visitors to persons who are nominated by the prisoner. The governor may also restrict visitors to not more than three persons. A prisoner is not entitled to nominate hundreds of visitors, in that regard, because the governor has an entitlement to restrict the number of nominated visitor numbers provided he does not go below six nominated persons. The days and times of visits are published in the prison for the benefit of detainees. The prison authorities are required to assist prisoners who would like to receive a visit from some particular individual. Visits take place on the days and at the times designated by the governor. All visits are within the view and hearing of a prison officer, unless the governor otherwise decides. Before any visit, the governor is entitled to require a visitor to be asked to consent to the carrying out of a search. If this is refused, then the visit may be cancelled. Two provisions of r. 36 are important and I therefore quote these:-

> "(7)(a) A part of the prison designated under paragraph (6) for visits shall have facilities to allow a prisoner and visitor to see and talk to one another but which prevent, through the use of screens or otherwise, physical contact between a prisoner and a visitor.
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> (b) The Governor may allow physical contact between a prisoner and a visitor when he or she is satisfied that such contact will not facilitate the entry into the prison of controlled drugs or other prohibited articles or substances."

12. As I understand the Rules, every prison within the State is entitled to require visits, whether for remand prisoners or convicted prisoners, to take place without physical contact. Some prisons seem to operate a policy of generally allowing physical contact. This, under the Rules, is a matter for the discretion of the governor. What norm is applied is, under the Rules, a matter for the governor.

13. In addition, under rule 72, the governor of a prison has general authority to manage the prison. This gives him or her an entitlement to decide on general matters of prison governance which are not already pre-decided by being made subject to specific prison rules. Apart from that, the manner in which the rules are implemented is a matter for decision by the governor. The discretion of the governor, in that regard, is untrammelled provided he does not, by his management, overturn the Prison Rules. Since these establish certainty, clarity of entitlement and a code of conduct for both inmates and correctional officers, in managing the prison, the governor should in general look to the Rules and then apply them as fairly and as humanely as is possible.

Family Rights

14. Article 41 of the Constitution recognises the family as a moral institution which possesses rights that can neither be given away nor removed by law. The State is obliged to protect the family as the necessary basis of social order because it is, as the Constitution declares, "indispensable to the welfare of the Nation and the State". Article 8 of the European Convention on Human Rights, to my mind, does not add anything that is relevant.

15. It is beyond argument that the imprisonment of a relative strikes at the integrity of the family. Since one of the primary functions of the family, under the Constitution, is the guardianship and education of children, it follows that the absence of a parent in prison undermines, in terms of both time, space and authority, the ability of the family to fulfil that role. It is therefore argued that any prison governor, in making a choice as between a visit with, or without, physical contact for family members, in other words as between r. 36(7)(a) or (b) of the Prison Rules, should take the entitlements of the family under the Constitution into account. It is submitted that the ordinary, and humane, manner of visiting a family member must recognise that physical contact between family members is one of the human norms in demonstrating affection and support. Whereas, it is urged, a prison governor is entitled to take security considerations into account, the governor must also look to his duty to uphold the family as the foundation of social order.

Prison and Restrictions

16. Its seems to me to be right that the Prison Rules make a distinction between the entitlement to visits of those prisoners who are convicted and to visit those who are presumed to be innocent and are on remand in custody. It would be naive to assume, however, that simply because a presumption in law exists that remand prisoners are innocent, that they are removed from the temptations that beset convicted prisoners as to substance abuse, indiscipline and escape. The only information that I have on this issue is that provided by the governor of Cloverhill Prison. I am satisfied from his affidavit evidence that the decisions which he made by requiring the nomination in writing by prisoners of prospective visitors, and the modification of visiting times and duration of visits for remand prisoners, are within the discretion which he had in governing the prison under the Rules.

17. The governor has also said that particular problems arise within the context of a remand prisoner which makes the management of a detention facility such as Cloverhill Prison more acute. At paragraph 11 of his affidavit dated the 10th June 2010, Sean Quigley, the governor of Cloverhill Prison, states:-

> "As previously stated by me in these proceedings, screened visits provide a safe environment where all prisoners are treated equally. I further say and believe that the measures invoked… to ensure the proper and secure operation of this prison conform with proven best practice in security and safety operations. In this regard I say and believe the prisons rules of 2007 expressly provide for screened visits. Though I can, and have on occasion, permitted box visits where satisfied it is appropriate to do this by way of exception to the general practice. In this regard I should state that the logic of screened visits is to prevent the unlawful or unauthorised smuggling into the prison of drugs or other prohibited articles or substances. I am aware that this is a problem which is often particularly acute in a remand prison (such as Cloverhill) where pressure is brought to bear on young, inexperienced and vulnerable prisoners to facilitate such

> smuggling. In an effort to minimise this, a decision to establish screened visits as… the norm in Cloverhill was taken at its inception [as a remand prison] in 1999… As previously indicated, however, box visits can be applied for and are allowed. I am aware of similar restrictions in other jurisdictions. In this regard therefore I ask the court to have regard to my twenty-seven years in the prison service which has assisted me informing my decision to provide screened visits as set out above."

18. The fact of imprisonment, of necessity, curtails the exercise of the rights guaranteed to the family under Article 41 of the Constitution. One of the entitlements of a married couple is to beget children. Imprisonment, however, undermines that right, since conjugal visits are not provided for in the Prison Rules, and since the passage of time will lead to ageing and increased infertility. Nonetheless, this restriction, or even destruction, of a fundamental family right can be lawful within the context of a harmonious interpretation of the Constitution; *Murray v. Ireland*, [1985] I.R. 532. Among the fundamental rights retained by prisoners are those to legal and medical assistance and to access the courts. There is no entitlement to expose the health of a prisoner to risk unless there is a situation of compelling justification or necessity; *The State (Fagan) v. The Governor of Mountjoy Prison,* (Unreported, High Court, McMahon J., 6th March, 1978) at 17. Such measures incidental to imprisonment as are necessary for the proper implementation of an order made by a court, whether for remand of an accused or sentence of a convict, are within the entitlement of the governor in the management of a prison.

19. Imprisonment cannot amount to an unlawful infringement of the rights of the family if the order to imprison is validly made and the conditions of detention humanely recognise such rights as the prisoner retains within the context of the reasonable management and governance of a lawful place of detention. The courts, the trial of crime, the classification of offences into serious and less serious, the implementation of penalties, and the commutation of sentences, are all provided for in the Constitution. Imprisonment is, of necessity, the imposition of unwanted discipline, by way of punishment, or in the case of remand, an administrative measure on those in respect of whom facts have been found by a court of appropriate jurisdiction in accordance with the scheme provided for under the Constitution. In the case of convicted prisoners, they have been found guilty beyond reasonable doubt of offences warranting imprisonment. In the case of remand prisoners, the restrictions on their liberty are heavily circumscribed by both the relevant rules of court and the entitlement which they have to bail absent the prosecution proving as a probability a risk of absconding, interfering with witnesses, or the commission of serious crime. In Murray v. Ireland, Costello J. put the scheme under the Constitution in the following way, at pp. 542 to 543:-

> "When the State lawfully exercises its power to deprive a citizen of his constitutional right to liberty, many consequences result, including the depravation of liberty to exercise many other constitutionally protected rights, which prisoners must accept. Those rights which may be exercised by a prisoner are those (a) which do not depend on the continuance of his personal liberty (so a prisoner cannot exercise his constitutional right to earn a livelihood) or (b) which are compatible with the reasonably requirements of the place in which he is imprisoned, or to put it another way, do not impose unreasonable demands on it… This means that the fact of imprisonment does not in itself amount to an unconstitutional infringement of a prisoner's rights."

Balance

20. It is contemplated by an order of remand for an unconvicted prisoner, or a sentence of imprisonment for a convicted prisoner, that family rights under Article 41 of the Constitution will be curtailed. Remand is, of its nature, a relatively short-term, though serious, disruption. Imprisonment is only ordered by a court in the context of the serious infringement, through the commission of crime, of the constitutional rights of another person. Should that imprisonment be lengthy, it will invariably involve a serious attack on the bodily integrity of another person; for example, a rape victim or a victim of sexual violence; or in the case of non-violent crime, a deceitful undermining of the entitlement of the victim to security in property or the inviolability of the home. John Foy's sentence for armed robbery resulted in a serious sentence. That sentence would only have been possible because of his own conduct.

21. The Court does not thereby come to the facile conclusion that a convicted prisoner has undermined, through his own conduct, the right to contact with his own family. Rather, the Court is of the view that all of these matters as to the remaining rights of prisoners and the proper management of a prison are questions of balance. On the one hand, such family rights as can be validly exercised in a practicable and reasonable way within prison should be recognised as part of the balance. On the other hand, how rights fit within the proper governance of a prison are matters for those who run the prison. The prison governor has a duty to control the incidents of detention whereby a prison confines the prisoners, makes reasonable efforts to keep them safe, assists in their rehabilitation and recognises that if convicted, despite their wrong, they are part of a wider community which retains the rights declared by the Constitution on the basis of human dignity and redemption.

22. Exercising that balance is essentially a matter for the prison governor. It is unfortunate that, in the context of remand, those who are presumed to be innocent may be, as a matter of fact, subject to more restrictions as regard contact visits than those who are convicted and serving sentences of imprisonment in other prisons. But the balance between what is possible in terms of upholding rights and, on the other hand, maintaining the purpose of imprisonment within good order, is for the governor. Such decisions as he or she makes are subject to judicial review. Where such decisions are within the scope of the authority of the governor, as conferred by the Prison Rules, it is difficult to establish an arguable case. It is only possible to mount a challenge to the decision of a governor where it is shown to both infringe a right and, as to the balance of the exercise of that right with the duty of the governor to ensure proper order within the prison, to fly in the face of fundamental reason and common sense. Such cases are, of their nature, difficult to prove. A prison governor is entitled to some measure of latitude in judgment as to the decision which he or she makes.

23. Where there is a general prohibition of contact visits, within the context of the serious problem which Governor Quigley outlines in his affidavit, that is a decision within the realm of the measure of appreciation which a governor should be afforded. It is not appropriate for the Court to substitute its own judgment as to where the appropriate balance should be struck in the context of prison governance and discipline, rather, it seems to me, that it is the duty of the Court to interfere only within the context of its entitlement. This entitlement does not arise absent proof of such unreasonable conduct by a prison governor which has the result of undermining the reasonable and practicable exercise of such constitutional rights as survive imprisonment and which flies in the face of fundamental reason and common sense as to the balance which the decision strikes. This has not been proved in this case.

24. Any such challenge requires evidence. Here, the evidence is one-sided. The point is therefore incapable of being decided in favour of John Foy. He, in addition, asserts a right to physical contact as part of the constitutional entitlement to family rights which survives imprisonment. It would be difficult to argue against the proposition that physical contact is part of the proper nurturing of a young infant. In human society, however, that role can be interchanged between, for instance, a mother and an aunt or grandmother. Within the context of imprisonment, the possibility for such physical contact is necessarily limited. Here, there are weighty factors to justify that restriction, and these are uncontradicted. There is no material to justify the Court proceeding to go beyond the expression of an opinion towards the declaration of a right absent expert evidence which would show that physical

contact between an imprisoned father and minors is essential to the authority of the family. That evidence is not present in this case and the Court is not entitled to speculate what its effect might be. The case presented might, however, be stronger were it to be the case that, without good reason, an individual prisoner were restricted permanently from any physical contact with any relative or friend outside a prison. The Prison Rules clearly provide discretion to the governor in that regard to exercise in appropriate circumstances and subject to the safeguards that are necessary to protect good order and discipline within the prison.

25. Some appropriate measure of deference by the court should also be afforded to a prison governor. The decisions which are made by a governor result from many years of experience of practical work within a context that demands expertise through experience. The Court should never shirk its responsibility to make a decision where unreasonableness leading to the unlawful depravation of a constitutional right has been shown. The analysis which the Court can bring to bear on the problem is, however, limited to the facts of particular cases. Decisions, within the context of prison governance and discipline, are required, under the spirit within which the Prison Rules operates, to be taken even-handedly. Few factors would seem to undermine prison security more surely than either the victimising of prisoners or the establishment of favourites through arbitrary decisions. Any such policy would fall within the terms of unreasonableness as it is circumscribed by administrative law. On the other hand, the review by courts on the basis of substituting the court's own view for decisions with which a court is not fully in accord, also carries a significant danger. As O'Connor J. stated in Turner v. Safley (1987) 482 U.S. 78 at 89:-

> "Subjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration. The rule would also distort the decision making process, for every administrative judgment would be subject to the possibility that some court somewhere would conclude that it had a less restrictive way of solving the problem at hand. Courts inevitably would become the primary arbiters of what constitutes the best solution to every administrative problem, thereby "unnecessarily perpetuat[ing] the involvement of the federal courts in affairs of prison administration" *Procunier v. Martinez*, 416 U.S. 407."

26. It seems to me that once a decision is made in curtailment of such rights as continued notwithstanding the fact of imprisonment by way of remand or conviction, and which reasonably relate to the management of a prison and which are not arbitrary, discriminatory or wholly unreasonable, judicial review is not possible.

Conclusion

27. In the result, the entitlement of the governor of Cloverhill Prison to protect its environment of detention and rehabilitation has led to a general decision whereby screened visits of remand prisoners to their families are the norm. In the context of the problems described, this decision cannot be regarded as unreasonable. A sufficient level of flexibility remains within the system so as to allow for contact between a prisoner and his family where security risks are adjudged to be at an appropriately low level and where such an occasion can fit within the demands for personnel, facilities and rostering of supervision in the context of the governance of the prison as a whole. The application for judicial review is therefore refused.