Neutral Citation: [2014] IEHC 371

THE HIGH COURT

JUDICIAL REVIEW

[2014 No.7 JRP]

BETWEEN

WILLIAM BODEN AND GARY KINSELLA

APPLICANTS

AND

THE COMMISSIONER OF AN GARDA SIOCHANA AND THE GOVERNOR OF MIDLANDS PRISON

RESPONDENTS

JUDGMENT of Mr. Justice Barr delivered on the 24th day of July 2014

1. This is a personal application by prisoners William Boden and Gary Kinsella, who are at present incarcerated in Midlands Prison, Co. Laois. The applicants, who describe themselves as unrepresented, indigent prisoners, are seeking an order of *mandamus* by way of judicial review compelling the Governor of Midlands Prison, and the Commissioner of An Garda Siochana, to permit them to access the gardaí in order to file criminal complaints against the Governors of both Midlands and Arbour Hill Prisons. The applicants do not specify the nature of the criminal complaints they wish to make.

2. This informal system, whereby any prisoner in the State may write to the Central Office of the High Court and make a complaint, has been described in the following terms by Charleton J. in *Walsh v. The Governor of Midlands Prison & Ors* [2012] IEHC 229:

> *Sometimes these complaints are serious. Each such complaint is investigated and where necessary a report is sought from the governor of the relevant prison. A ruling is then made on the complaint in open court. This is a highly effective means of ensuring that prisoners are not isolated and that they have an ultimate authority to which to turn on matters of law. The informality of the system is of core benefit to its administration. Nothing about that informal procedure disables any form of judicial review under Order 84 of the Rules of the Superior Courts. Nor could that system undermine the entitlement of an interested party to apply for habeas corpus by way of an application to a judge of the High Court in the ordinary course. The procedure is in addition to other rights and procedures. It amounts to an exceptional means of access to the High Court that is for the benefit of prisoners.*

3. The applicants in this case complain that the respondent governor's failure to afford them speedy and easy access to a member of the gardaí, in the same way as those who are not incarcerated, is unfair, unjust, and contrary to Article 40.1 of the Constitution. They assert that that the State and its agents are obliged to provide prisoners with equal access to the gardaí. The applicants further seek an order granting solicitor/counsel under the Custody Issues Scheme.

4. The applicants state that they wish to gain access to a member of the gardaí at Portlaoise Garda Station in order to file their criminal complaints against the Governors of the Midlands Prison and of Arbour Hill Prison. The applicants complain that there are no arrangements in being whereby unrepresented prisoners can personally make telephone contact with a garda station with a view to filing a criminal complaint. As a result, they say they were compelled to seek the assistance of the Governor of Midlands Prison. The applicants claim that they sought the governor's permission on the 12th March, 2014, to gain access to the gardaí in Portlaoise Garda Station. They say that the respondent governor informed them that he could not assist them and instead advised them to seek assistance from the Garda Commissioner, and to do so in writing. The applicants state that they wrote to the Commissioner on the 15th March, 2014, seeking assistance in this regard. On the 23rd March, 2014, the applicants state that they received a written response from the Commissioner's private secretary, Superintendent Frank Walsh, explaining that their written request had been forwarded to the Assistant Commissioner in charge of policing in the Laois area, who would be in touch with the applicants in due course. As of the date of this application, 5th April, 2014, the applicants claim not to have heard from the Assistant Commissioner.

5. The applicants further claimed that the Governor of Midlands Prison has arranged for other prisoners to access the gardaí in Midlands Prison and for the gardaí to access prisoners. The applicants claimed that the governor has also arranged to have prisoners unlawfully removed from Midlands Prison to the Criminal Courts of Justice, Parkgate Street, Dublin 8, at the oral request of the gardaí. The unsworn draft affidavit grounding this application provides no evidence to support these allegations against the respondent governor.

6. The core of this claim, however, is the applicants' assertion that they have a Constitutional right to access to the gardaí, which they say is being denied. And yet, according to the applicants' own account, they have written to the Garda Commissioner, who has passed their case to the Assistant Commissioner for the Laois area. The applicants do, therefore, have access to the gardaí by way of correspondence. This is sufficient to ensure that the applicants' right of access to the gardaí is observed while they are detained in prison. If the applicants are dissatisfied with the response, or lack of response, that they receive from the gardaí, it is open to them to make a complaint about this to the Garda Siochana Ombudsman Commission. The applicants, in light of the able submissions they have made in this case, are clearly capable of putting in writing any complaint that they wish to make to the gardaí.

7. Furthermore, the applicants' case is somewhat premature. If the Assistant Commissioner received the applicants' case around Sunday, 23rd March, 2014, which the applicants' account seems to suggest, this means they only allowed him around 12 days to respond before instituting these proceedings by letter dated 5th April, 2014. In so doing, they did not allow the Assistant Commissioner a reasonable time to make contact with the applicants. It is quite possible that the Assistant Commissioner has been in touch with the applicants since the institution of these proceedings.

8. Finally, the affidavit grounding this application appears to be deficient insofar as it was not sworn in accordance with Order 40 of the Rules of the Superior Courts. As McGovern J. held in *Stephen Walsh v. The Minister for Justice & Ors.* [2013 No. 19 JRP], which

concerned an application similar in form to the present one:

> *The affidavit grounding the application does not meet the basic requirement of being sworn as is required under O. 40 of the Rules of the Superior Courts. The applicant has previously brought applications before the courts grounded on unsworn draft affidavits and the applicant, on those occasions, similarly failed to provide reasons for failing to do so (2011 No. 2514SS, High Court, McGovern J, 11th January, 2012). It is not apparent as to whether the applicant has the funds necessary to pay for the swearing of an affidavit. Therefore, no basis can be discerned on foot of which the court may exercise its discretion to admit the "affidavit" in its technically deficient form. While the court has given due consideration to the various assertions contained therein, given this procedural neglect there is, in any event, no evidence properly before the court upon which relief could be granted, even had there been any substance to the application.*

Similarly, at para. 2 of his judgment in *Stephen Walsh v. Governor of Midlands Prison* [2011 No. 2514 SS], McGovern J. stated with regard to the issue of the affidavit not having been properly sworn:

> *The application is not properly brought in that the affidavit has not been sworn as is required under the Rules. In paragraph 3 of his unsworn affidavit, the applicant states, "the Legal Aid Act does not cover a complaint of this great constitutional nature nor the rip off fees being currently sought by the State arranged Visiting Commissioner of Oaths... " This seems to suggest that the State has provided a Visiting Commissioner of Oaths. The applicant's failure to have the affidavit sworn is not properly explained. He offers no information as to whether he has even limited funds to pay for the swearing of the affidavit and what funds were being sought (if any) for that purpose. It is impossible for the Court to adjudicate on that issue in the absence of such evidence. The burden of laying evidence before the Court rests on the applicant.*

9. In this case, the court has g1ven all due consideration to the applicants' complaints. The complaint about access to the gardaí is without merit since the applicants, by their own account, have been able to write to the Garda Commissioner, who promptly passed their case to the Assistant Commissioner for the Laois area. The applicants did not allow the Assistant Commissioner a reasonable period to reply before instituting these proceedings. It is open to them to make a complaint to the Garda Síochana Ombudsman Commission if they are dissatisfied with the response they receive. In any case, even if the applicants' complaints had merit, there is, in light of the unsworn affidavit, and the applicants' failure to provide any explanation for this, no evidence properly before the court upon which relief could be granted.

10. Accordingly, the relief sought must be refused.