THE HIGH COURT

JUDICIAL REVIEW

[2013 No. 663 JR]

BETWEEN

JIMMY CASH

APPLICANT

AND

GOVERNOR OF WHEATFIELD PRISON

RESPONDENT

JUDGMENT of Ms. Justice Murphy delivered on the 19th day of December, 2017.

1. This is an application for judicial review in which the applicant seeks a declaration that the failure of the respondent to provide appropriate medical treatment to him is contrary to Rule 102 of the Prison Rules 2007.

2. On 2nd September, 2013, the applicant brought an *ex parte* application for leave to apply for judicial review before White J. seeking orders of *mandamus* compelling the respondent to provide to the applicant the level of medical treatment envisaged in Rule 33 of the Prison Rules 2007, together with an order of *mandamus* compelling the respondent to respond to queries made on behalf of the applicant by his solicitor regarding the applicant's health and welfare. In addition, various declaratory reliefs were sought. The relevant part of Rule 33 of the Prison Rules 2007 provides:-

> *"Entitlement to Health Services*
>
> *(1) Each prisoner shall be entitled, while in prison, to the provision of healthcare of a diagnostic, preventative, curative and rehabilitative nature (in these Rules referred to as "primary healthcare") that is, at least, of the same or a similar standard as that available to persons outside of prison who are holders of a medical card."*

White J. ordered that the application for leave be made on notice to the respondent.

3. The matter next came before the court on 6th September, 2013 on notice to the respondent and time was given for the respondent to file an affidavit in answer to the plaintiff's application for leave to seek judicial review. A lengthy affidavit was filed on behalf of the respondent from a doctor on the respondent's medical team which set out in detail the medical team's interactions with the applicant between March and August, 2013. The evidence of the doctor was supported by documentary exhibits.

4. The matter came before Ryan J. on 25th September, 2013. Leave was not granted in respect of any alleged failure to comply with Rule 33 of the Prison Rules 2007. Ryan J. did however grant leave to seek a declaration that the failure of the respondent to provide appropriate medical treatment to the applicant was contrary to Rule 102 of the Prison Rules 2007.

5. Following the making of that order, a motion was brought to amend the original application to reflect the terms of the order made by Ryan J. An amended statement of grounds was filed on 28th January, 2014 and a statement of opposition was filed on 3rd March, 2014.

6. Compliance with Rule 102 is therefore the matter at issue on this application. Rule 102 provides as follows:-

> *"Information about prisoner requiring medical attention*
>
> *(1) The Governor shall -*
>
> *(a) upon being informed that a prisoner requests or is in need of medical attention, or*
>
> *(b) upon forming the view that a prisoner -*
>
> *(i) requires medical attention, or*
>
> *(ii) requires, on medical grounds, special care, or to be kept under observation,*
>
> *inform the prison doctor, nurse officer or other member of the prison healthcare staff thereof, and shall keep a record of the prisoner's name, the nature of the information received, the name of the person who has been informed and the time when this was done.*
>
> *(2) The prison doctor, nurse officer or other member of the prison healthcare staff shall, as soon as practicable, assess a prisoner in respect of whom information has been received under paragraph (1).*
>
> *(3) In the case of a medical emergency involving a prisoner, or where a prisoner is otherwise in need of urgent medical attention, a prison doctor, nurse officer or other member of the prison healthcare staff shall, immediately upon receiving information under paragraph (1), attend the prisoner and administer or arrange for the administration of medical care to him or her."*

Background and chronology

7. The applicant was born on 22nd May, 1989.

8. The applicant had a number of committals to prison between February and August, 2013. He was detained at both Cloverhill Prison and Wheatfield Prison during that time.

9. The events giving rise to the present application began on 19th February, 2013 when the applicant was involved in a high speed, head-on road traffic collision in the course of which he was ejected from his vehicle. He presented at St. Vincent's Hospital emergency department with a number of injuries including head, facial, neck and back injuries. He spent a number of days in St. Vincent's Hospital, including a period in the intensive care unit.

10. On 28th February, 2013, the applicant absconded from hospital. According to the prison medical records, the applicant informed medical staff that he had not attended any follow up appointments following his departure from St. Vincent's Hospital and prior to his committal to Cloverhill Prison.

11. The medical records show that at approximately 10 pm on 27th March, 2013 the applicant was committed to Cloverhill Prison. He was seen and treated by a nurse officer at the prison and no complaint was made by him on that occasion. Certain injuries were noted in the committal interview, particularly in relation to the applicant's musculoskeletal medical history. The applicant informed the nurse that he had two broken bones in his neck and one in his back. It was noted that the applicant was wearing a neck brace, that he had been in St. Vincent's Hospital "*three weeks ago*" following a road traffic accident, and that he had left the hospital of his own accord. The applicant also informed the nurse that he had been taken to Cavan Hospital by the gardaí on the day of his committal and had discharged himself against medical advice. The nurse officer requested that the applicant be put in a single cell to be reviewed by the prison doctor the following day.

12. On 28th March, 2013, the applicant was seen by prison doctor, Dr. Moola who noted that a neck brace was in situ, that the applicant gave conflicting dates regarding his injury but that he generally appeared well. He also noted that he would investigate what had occurred in relation to the accident. Later that same day, a nurse officer recorded that she had spoken with St. Vincent's Hospital regarding the applicant's road traffic accident and had been informed that he was "*brought to A/E following ejection from high-speed RTA on M50 on 19/2/2013".*

13. The applicant was released on bail on 12th April, 2013. He had been in Cloverhill Prison for 16 days.

14. On 29th April, 2013, the applicant was again committed to Cloverhill Prison. The applicant was seen by a nurse officer who completed his committal interview and medical notes. The applicant informed the nurse officer that he had been involved in a road traffic accident "some six weeks ago"; that he had injured his head, neck and back; that he had self-discharged and that he had not attended for any follow up. He complained of discomfort in his ankle which was noted to be slightly swollen. It was also noted that the applicant did not know the name of his G.P. The previous references to the road traffic accident in the applicant's medical records were also noted.

15. On 30th April, 2013, the applicant was seen by prison doctor, Dr. Moola who noted his previous history and that he no longer had a neck brace in situ.

16. On the following day, 1st May, 2013, a nurse officer attended to the applicant as he had banged his head and had a small abrasion. The medical records show that when offered paracetamol, the applicant became annoyed and told the nurse to "*keep it*". The nurse also recorded that the applicant showed no signs of head injury other than the abrasion.

17. In May, 2013, the applicant was convicted of road traffic offences in Cloverhill Court and sentenced to eleven months imprisonment.

18. On 8th May, 2013, the applicant requested medical attention and was seen by the prison doctor in Cloverhill Prison. The doctor noted his complaint of "*pain in the occipital part of the head and neck*" and prescribed him Keral tablets. The medical records also noted that St. Vincent's Hospital would be contacted regarding follow up appointments. At 15:35, a prison nurse recorded that she had attempted to speak to the medical records personnel at St. Vincent's Hospital, that she had left a message and would try to contact them again the following day.

19. On 10th May, 2013, the applicant was transferred from Cloverhill Prison to Wheatfield Prison, presumably on the basis that he was now a sentenced prisoner, no longer on remand. He was seen by a nurse officer who completed his committal interview and medical notes. The nurse noted the road traffic accident and that the applicant had attended St. Vincent's Hospital and had discharged himself. She also noted that the applicant was complaining of pain and gave him paracetamol.

20. The following day, 11th May, 2013 the applicant was seen by prison doctor, Dr. Yeung, who again noted the occurrence of the road traffic accident, that the plaintiff had discharged himself from St. Vincent's Hospital and that he had no complaints. The doctor also noted that on examination, the applicant was able to move his neck fully and was not in obvious pain. His note also recorded that a nurse officer was to contact St. Vincent's Hospital.

21. On 14th May, 2013, the applicant was seen by another prison doctor, Dr. Hussein who noted that he complained of back pain but appeared to be walking normally. He prescribed paracetamol for the applicant.

22. On 19th June, 2013, the applicant was seen by prison doctor, Dr. Penev and complained of back pain. The doctor again noted the applicant's involvement in the road traffic accident and his self-discharge from St. Vincent's Hospital. The doctor prescribed Ponstan. Later that day, a nurse officer contacted St. Vincent's Hospital and noted "*Records unavailable as secretary on leave until 25th of June. Note left in diary for follow up."*

23. On 21st June, 2013, the applicant complained of headaches. He was seen by a nurse officer and was given paracetamol.

24. On 26th June, 2013, the applicant was seen by prison doctor, Dr. Suto who noted the occurrence of the road traffic accident and the injuries suffered by the applicant. He also noted that the applicant complained of lower back pain, right pelvic bone pain and right leg pain. The applicant was given a support bandage for his right ankle and prescribed Ponstan. A nurse officer followed up later that day with a call to St. Vincent's Hospital and was informed that they had no record of having treated the applicant. The nurse officer also called Tallaght Hospital and was informed that they had no records of having treated the applicant.

25. The evidence indicates that the applicant did not seek any further medical intervention from the prison services until his solicitor wrote on 22nd August, 2013 complaining of missed hospital appointments.

26. On 22nd August, 2013, almost two months since the applicant had last sought medical assistance, his solicitor wrote a facsimile letter to the respondent seeking details of his client's treatment. This letter stated:-

> *"Mr. Cash instructs our office that he is having severe back pains due to a serious road incident to which you are aware of. There have been hospital appointments made to which he has not been taken to. Our client also instructs us that there have been several eye and ear hospital appointments made for him to which he has not been brought to either."*

27. Four days later, on 26th August, 2013, the applicant's solicitor wrote a further facsimile letter marked "*URGENT – PLEASE RESPOND*" which stated:-

> *"Please note that we are awaiting a response to our letter dated 23rd August, 2013 [sic], regarding urgent medical treatment for our client.*
>
> *Please inform us of the position as a matter of urgency."*

28. On the same day, Dr. Suto was made aware of the letter of the applicant's solicitor of 22nd August, 2013 by Assistant Governor O'Reilly. Dr. Suto reviewed the applicant's medical file. He noted that at no stage did it appear from the applicant's medical records that hospital appointments had been missed. Having suggested in his first affidavit that he had consulted personally with the applicant on 26th August, 2013, Dr. Suto clarified in his second affidavit that he did not conduct a personal assessment of the applicant, but rather assessed the position through an examination of his medical file and the contents of the letter of complaint. He took the view that there was no necessity to further physically examine the applicant at that stage. However, he wrote a referral letter to Tallaght Hospital seeking a radiological examination of the applicant in order to be certain as to any potential bony injury. An appointment for the applicant was subsequently confirmed for 21st October, 2013.

29. Dr. Suto immediately replied to Assistant Governor O'Reilly stating that the applicant was under the medical review of the prison medical staff, that he was satisfied with his treatment and that if any further information were required in relation to the applicant's medical history then the applicant's consent would be needed. Dr. Suto confirmed on affidavit that the applicant had not asked to see a prison doctor since 26th August, 2013, being the date when Dr. Suto reviewed his medical file. He averred that a prisoner would ordinarily see a prison doctor within one working day of a request being made.

30. A week after his original communication, on 29th August, 2013, the applicant's solicitor again wrote to the respondent in a facsimile communication marked "*URGENT – PLEASE RESPOND*":-

> *"We write in connection with the above prisoner, a client of this office.*
>
> *Mr. Cash instructs our office that he is suffering from severe back pains for which he has not received adequate treatment. We are instructed that there have been hospital appointments made which have not been facilitated. Our client also instructs that there have been several eye and ear hospital appointments which have not been facilitated. We wrote to you on 22nd August, 2013, to draw your attention to this. Please arrange for a hospital appointment for our client so that he may receive the medical attention that he requires.*
>
> *We remind you that rule 33 of the Prison Rules 2007 provides that a prisoner is entitled to the same level of healthcare as any citizen in possession of a medical card.*
>
> *We ask that you acknowledge receipt of this letter and inform us of the treatment Mr. Cash receives as a matter of urgency. If this is not done we will have no choice to commence proceedings in order to ensure Mr. Cash is provided with the medical attention he requires. We will use this communication to fix you with the costs of any such proceedings."*

31. On 2nd September, 2013, Assistant Governor O'Reilly sent a letter to the applicant's solicitor as follows:-

> *"In relation to your client Jimmy Cash I have spoken with the medical team and the doctor and I was awaiting response thus the delay in responding to you.*
>
> *I have been advised by the doctor that in his professional opinion your client is receiving the appropriate treatment for his current ailment.*
>
> *All appointments that are made for his treatment by the medical team will be attended by your client.*
>
> *We are meeting all requirements for your client's care as provided for under the Prison Service Rules and will continue to do so as requested by the medical team in Wheatfield."*

32. On the same day, 2nd September, 2013, the applicant's solicitor made an ex parte application to the High Court seeking leave to apply for judicial review in respect of the following reliefs:-

> *"(i) An order of mandamus, by way of application for judicial review, compelling the Respondent to respond to the queries made regarding the Applicant's health and welfare on the Applicant's behalf by the Applicant's solicitor*
>
> *(ii) A declaration, by way of application for judicial review, that the Respondent has a duty to respond when concerns are raised in respect of the wellbeing of a person in his custody when those concerns are raised by the prisoner's solicitor.*
>
> *(iii) A declaration, by way of application for judicial review, that the failure of the Respondent to provide appropriate medical treatment to the Applicant is contrary to rule 33 of the Prison Rules 2007.*
>
> *(iv) An order of mandamus, by way of application for judicial review, compelling the Respondent to provide the level of medical treatment envisaged in Rule 33 of the Prison Rules 2007 to the Applicant.*
>
> *(v) Such further or other relief as this Honourable Court shall deem meet.*
>
> *(vi) Costs."*

The application was grounded on the affidavit of John Quinn, solicitor for the applicant, who averred that his means of knowledge was his client's instructions. White J. ordered that the respondent be put on notice of the application.

33. Two days later, on 4th September, 2013, the applicant's solicitor received the response of Assistant Governor O'Reilly. The following day, on 5th September, 2013, the prison authorities obtained consent from the applicant for the release of his medical information and records.

34. On 10th September, 2013, the applicant swore a verifying affidavit in respect of the statement of grounds filed with his application. He confirmed that he had read the statement and that its contents insofar as it related to his own acts and deeds were true, and insofar as it related the acts and deeds of any other person he believed them to be true. This is the only evidence from the applicant placed before the Court on this application.

35. Ten days later, on 20th September, 2013, the applicant's solicitor visited him in Wheatfield Prison whereupon he avers that he was instructed by the applicant that he was still in pain and required medical treatment.

36. The matter came before the High Court on 25th September, 2013. The applicant was granted leave to seek judicial review limited to a declaration that the failure of the respondent to provide appropriate medical treatment to the applicant was contrary to Rule 102 of the Prison Rules 2007. The applicant's scheduled release date at the time of the application for leave was listed as 7th January, 2014. However, when the matter came on for hearing on 21st July, 2014, six months after the scheduled release date, counsel for the applicant informed the Court that the applicant was currently serving a sentence of some duration and would be in custody for some time, and that therefore the issue of compliance with Rule 102 was not moot.

Submissions of the parties

1. Preliminary objection - Mootness
37. The respondent submitted that having regard to the purpose of Rule 102, and the fact that the applicant continued to be detained by the respondent, and in the absence of any ongoing complaint by the applicant regarding prison healthcare, the issue pleaded in the current case was moot. Counsel for the respondent drew attention to the fact that there had been no complaint on the part of the applicant in the current proceedings that there was an ongoing need for medical attention. The applicant, on the other hand, submitted that this case could not be considered moot for the applicant because he was still a prisoner, and he was still receiving care at the time of the hearing and further that the prison had engaged with the issue by examining the applicant's case on paper and referring him for radiological examination. The applicant also relied on the *dictum* of O'Malley J. in *Dundon v. Governor of Cloverhill Prison & Ors*. [2013] IEHC 608:-

> *"61. It is clear that the policy of the courts is to decline to hear cases which are purely hypothetical or academic. It is, however, equally clear that a case is not moot if the controversy still affects or potentially affects the rights of the parties.*
>
> *62. The applicant in this case is still a prisoner and is still subject to the provisions of the Prison Rules in whichever institution he is detained. He has a real and ongoing interest in the manner in which they are applied to him. Having regard to the history of the case, it may be said that the possibility that he will again be subjected to restrictive conditions is not, to use the language of O'Brien v PIAB, so remote as to be purely hypothetical.*
>
> *63. It also seems that this is the sort of situation where, if the court does not relax the strict rules of the doctrine, this important issue might not be capable of being determined. In this regard I have in mind the fact that the Governor in this case has told the court that he invoked Rule 62 as a "pragmatic" reaction to the initiation of litigation, hoping to thereby save the time and expense involved. (From the respondents' point of view it was necessary to establish this as a fact lest it be thought that there was any concession involved as to the lawfulness of the previous regime.) I do not want to be taken as deciding in this case that that was necessarily improper but it points to the possibility that in cases such as this the issue is one that may "evade capture", in the American phrase, if an overly strict view is taken of mootness."*

2. Compliance with Rule 102
38. Rule 102 is set out in full at para. 6 above.

39. The applicant complained that the treatment he had been receiving was insufficient on the basis that at the time of his original complaint on 22nd August, 2013 he was still suffering from his medical conditions and required further referral. He argued that the requirement for such a referral was evident from the fact that he had been referred for radiological examination on 26th August, 2013 and that if it were the case that the treatment afforded him was sufficient and appropriate, the radiological examination would have taken place much earlier and should not have required correspondence from his solicitor to bring it about. Thus, he argued that Rule 102 was engaged. The applicant submitted that the Court could infer the inadequacy of the treatment on the basis of the immediate referral for radiological examination on 26th August, 2013 following queries from his solicitor. This was in the context, he asserted, of serious injury and an absence of notes on the medical file for two months prior to the letter of complaint.

3. Information within the meaning of Rule 102
40. The first question which arose was whether the Governor was "*informed that a prisoner requests or is in need of medical attention*" within the meaning of Rule 102(1). It was agreed by both sides that the applicant's solicitor sent facsimile letters to the prison on 22nd, 26th and 29th August, 2013. The applicant claimed that the correspondence from his solicitor could clearly be taken as an indication that Mr. Cash was in need of medical attention and thus Rule 102 was engaged.

41. However, the respondent, while recognising that the applicant's solicitor's letter was capable of constituting a request for medical attention pursuant to Rule 102(1), submitted that the correspondence sent by the applicant's solicitor did not in fact amount to such a request in the circumstances of the case. The respondent advanced two reasons for this submission.

42. First, the respondent stated that it was somewhat odd that the applicant instructed his solicitor, who represented him in criminal proceedings, to effectively become his informant under Rule 102(1), in circumstances where the applicant was capable of conveying such a request personally and had had a lot of prior interaction with the prison healthcare staff. They were aware of his lower back pain as a result of the road traffic accident and the applicant had been previously assessed by prison doctors in relation to such matters.

43. Second, the respondent submitted that it was clear from the beginning of such correspondence that it related to missed appointments and that there was no reference to Rule 102 in the correspondence. The failure to bring the applicant to appointments was denied by the respondent who further claimed that no evidence of such had been produced by the applicant at the hearing of the application for leave, during which this aspect of the correspondence was not pursued. The respondent further submitted that this is a case in which there was ongoing treatment by the prison service in other prisons in respect of which no complaint has been made. He suggested that the evidence indicated that there was no oral complaint made by the prisoner to prison staff in Wheatfield Prison and that this is not a case in which it could be said that the applicant had tried to obtain treatment and had not been given such treatment or was not seen. He stated that regardless of the letters amounting to notification under Rule 102, there is a distinct difference in the rule between situations which require immediate attendance and situations such as this case which do not. The respondent further stated that the applicant had not put forward any evidence to suggest that his care by prison healthcare staff was less than what is required under Rule 33 which provides:-

> *"Entitlement to Health Services*
>
> > *(1) Each prisoner shall be entitled, while in prison, to the provision of healthcare of a diagnostic, preventative, curative and rehabilitative nature (in these Rules referred to as "primary healthcare") that is, at least, of the same or a similar standard as that available to persons outside of prison who are holders of a medical card."*

44. The applicant further submitted that no record or file entry had been produced to show compliance with Rule 102(1)(b)(ii). The respondent argued that the specific leave granted in this case does not relate to the keeping of a record because the reality is that the correspondence sent by the applicant's solicitor was kept by the prison and recorded the events in question. It was the respondent's case therefore that there is no issue in relation to the keeping of a record.

4. Assessment

45. The parties differed on the nature of the assessment required following receipt of information that a prisoner requires medical assistance.

46. Rule 102(2) provides that:-

> *"The prison doctor, nurse officer or other member of the prison healthcare staff shall, as soon as practicable, assess a prisoner in respect of whom information has been received under paragraph (1)."*

The respondent argued that this rule should be interpreted in light of Rule 102(3). Rule 102(3) deals with emergency situations and provides that:-

> *"In the case of a medical emergency involving a prisoner, or where a prisoner is otherwise in need of urgent medical attention, a prison doctor, nurse officer or other member of the prison healthcare staff shall, immediately upon receiving information under paragraph (1), attend the prisoner and administer or arrange for the administration of medical care to him or her."*

47. The respondent contrasted Rule 102(2) with Rule 102(3). In a non-urgent situation Rule 102(2) requires an assessment "*as soon as practicable*". In the case of a medical emergency, Rule 102(3) requires immediate attendance on the prisoner. The respondent submitted that the legislature, through the statutory instrument, has drawn a distinction between the response required in emergency and non-emergency situations. The respondent submitted that the present case was not an emergency situation because it related to an ongoing situation in which the records showed that the applicant had been seen and treated by prison medical staff and had informed medical staff of the occurrence of the road traffic accident. The respondent therefore submitted that there had been an assessment in this case under Rule 102(2). He further submitted that such assessment did not require a physical attendance or examination, particularly in circumstances where there had been ongoing engagement by the prisoner with the prison medical staff.

48. The applicant contended that the respondent's interpretation of Rule 102(2) does violence to the plain and ordinary language used in the rule, since the ordinary meaning of the phrase "*assess a prisoner*" is assess a prisoner and not a prisoner's file. The applicant further argued that the prison staff are under an obligation to ensure that the rights of a prisoner are vindicated within the prison setting and that an interpretation of Rule 102(2) which asks the Court to insert "*assess a prisoner's file*" as opposed to "*assess a prisoner*" would not be in keeping with the obligation of the organs of the State to properly vindicate the rights of prisoners as recognised in *State (Richardson) v. Governor of Mountjoy* [1980] I.L.R.M. 82 and *Connolly v. Governor of Wheatfield Prison* [2013] IEHC 334. Counsel for the applicant drew the Court's particular attention to the decision of *S.O. v. Clinical Director of the Adelaide and Meath Hospital of Tallaght* [2013] IEHC 132 in which Hogan J. found that a failure to conduct a personal assessment of the applicant on the part of the doctor who recommended an involuntary admission of the application under s. 10 and s. 14 of the Mental Health Act 2001, rendered such admission unlawful. The applicant argued that there is an equivalent position in terms of assessments under Rule 102(2). The applicant also claimed that it is a matter of some concern that it would be represented on affidavit that the applicant had been examined on 26th August, 2013 when in fact such was not the case.

5. Conduct of the applicant

49. Finally, the respondent submitted that in exercising its discretion in this case, the Court should have regard to the fact that the applicant had absconded from St. Vincent's Hospital on 28th February, 2013 and had not attended for any follow up prior to his committal to Cloverhill Prison a month later on 27th March, 2013. He had been seen and treated in Cloverhill Prison and no complaint was made. He was re-committed to Cloverhill Prison on 29th April, 2013, having been granted bail on 12th April, 2013. He was again seen by medical staff and no complaint was made. He was transferred to Wheatfield Prison on 10th May, 2013 where he was seen on a number of occasions by healthcare staff including doctors and no complaint was made until the correspondence of his solicitor on 22nd August, 2013. Proceedings were first threatened in the solicitor's correspondence of 29th August, 2013 and by the following Monday 2nd September, 2013 papers had been drafted, sworn and an application for leave brought before the High Court. Allegations as to missed hospital appointments were not evidenced in any way and the Court had no material affidavit evidence of any of the matters alleged from the applicant.

Discussion

50. This application was launched on the basis of three letters sent in quick succession by the applicant's solicitor on 22nd, 26th and 29th August, 2013. Those letters were answered by the respondent on 2nd September, 2013 which response was received by the applicant's solicitor on 4th September, 2013. By then the applicant had already been before the court applying for leave to seek judicial review. White J. directed that the application for leave be made on notice to the respondent. The three letters and the grounding affidavit make it clear that the applicant's claim alleging inadequate treatment is made pursuant to Rule 33 and is based on an alleged failure by the respondent to facilitate hospital appointments which had been made for the applicant. I quote from the

applicant solicitor's letter of 29th August, 2013:-

> *"Mr Cash instructs our office that he is suffering from severe back pains for which he has not received adequate treatment. We are instructed that there have been hospital appointments made which have not been facilitated. Our client also instructs us that there have been several eye and ear hospital appointments which have not been facilitated."*

At para. 6 of the applicant's grounding affidavit his solicitor avers:-

> *"I say that I am instructed that the applicant has further medical difficulties with his eyes and ears which has required the scheduling of hospital appointments, and that these appointments have not been facilitated by the Respondent."*

The letter of 29th August, 2013 went on to request:-

> *"Please arrange for a hospital appointment for our client so that he may receive the medical attention that he requires."*

51. There is no evidence before this Court to support the complaints which formed the foundation of this application for judicial review. The applicant has not proved a single hospital appointment, let alone an instance where he was denied the facility of attending a hospital appointment. Nor has an explanation been proffered as to how the complaint was launched in the absence of evidence to support it. The evidential lacuna in this case is the absence of any evidence on the substance of the complaint from the applicant, Mr. Cash. There is a one paragraph affidavit purporting to verify the statement of grounds. It was sworn on 10th September, 2013, eight full days after the *ex parte* application for leave was made and four days after the application on notice was made. It should not have been difficult to add a paragraph to that affidavit itemising the fact of the missed hospital appointments, if such were in fact the case.

52. Applications to court which are fact dependent, such as this one, should be based on the direct evidence of the applicant and not the hearsay evidence of "*instructions*" given to his solicitor. This Court has frequently been told by solicitors and counsel that the practice of grounding applications for judicial review or Article 40 applications on solicitors' affidavits arises from difficulties in accessing their clients in custody for the purpose of taking instructions and swearing affidavits. The Court is not in a position to assess whether this is a genuine issue but if it is, then the Court has no doubt that the law can provide a remedy for any prisoner denied proper and appropriate access to his lawyers. One way or another, the practice of issuing applications on the hearsay evidence of solicitors should cease.

53. A notice of motion returnable for 6th September, 2013 was served on the respondent. Thereafter, a lengthy affidavit from one of the prison doctors sworn on 11th September, 2013 was filed on behalf of the respondent in answer to the complaint made. It set out and exhibited documentary evidence of the applicant's interaction with the prison medical services from March to August, 2013 and pointed out that the medical staff at Wheatfield Prison had not been informed of any medical appointments arranged for dates when the applicant was in custody. The doctor further averred that he had arranged a referral to Tallaght Hospital seeking a radiological examination of the applicant as had been requested in the letter of complaint.

54. Ultimately, the application for leave came before Ryan J. on 25th September, 2013. On that date, the applicant's solicitor filed a supplemental affidavit. There is no reference to missed medical appointments in the supplemental affidavit. However, in answer to an averment in the respondent's affidavit that the prison medical team had been told that "*St Vincent's University Hospital had no record of ever treating the applicant*", he exhibits the applicant's medical notes from his stay in St. Vincent's Hospital from 19th February, 2013 to 28th February, 2013 on which latter date the applicant absconded from the hospital. The solicitor's affidavit does not disclose how or when he came into possession of those records. The covering letter from St. Vincent's Hospital is not exhibited. It appears to the Court that if those records were in his possession on 2nd September, 2013 when he sought leave *ex parte*, or on 6th September, 2013 when he sought leave on notice, they should have been disclosed.

55. In any event, the applicant's solicitor went on to aver that he had visited the applicant in Wheatfield Prison on 20th September, 2013 when the applicant instructed him that he was still in pain and required medical treatment and that he had not been seen by the respondent's deponent Dr. Suto since June, 2013. The affidavit is silent as to whether the applicant had requested medical attention in the intervening period.

56. At the hearing before Ryan J., the entire basis of the application for leave to seek judicial review shifted from a complaint of a failure to comply with Rule 33 of the Prison Rules to the much narrower ground of a failure to comply with Rule 102 of the Prison Rules. That rule requires the prison authorities to act on information that a prisoner needs or requests medical attention. Leave was granted by Ryan J. to apply for a declaration by way of judicial review that the failure of the respondent to provide appropriate medical treatment to the applicant is contrary to Rule 102 of the Prison Rules 2007.

57. Relief pursuant to Rule 102 had not been sought in the original application, and so the granting of leave on that basis derived from the Court's inherent jurisdiction to grant further or other relief as the Court shall deem meet. Following the order of Ryan J., a motion was brought to amend the original application to reflect that order. Interestingly, the amended statement of grounds filed on 28th January, 2014 persists in the allegation that the applicant's solicitors' letters of 22nd, 26th, and 29th August, 2013 were not responded to, when it is clear from the applicant's solicitor's supplemental affidavit of 25th September, 2013 that he had received a response from the respondent Governor on 4th September, 2013. That response stated:-

> *"Dear Sir/Madam*
>
> *In relation to your client Jimmy Cash I have spoken with the medical team and the doctor and I was awaiting response thus the delay in responding to you.*
>
> *I have been advise [sic] by the doctor that in his professional option [sic] your client is receiving appropriate treatment for his current ailment.*
>
> *All appointments that are made for his treatment by the medical team here will be attended by your client.*
>
> *We are meeting all requirements for your clients care as provided for under the prison service rules and will continue to do so as request [sic] by the medical team in Wheatfield."*

58. The respondent filed a statement of opposition and a supplemental affidavit of Dr. Lazlo Suto on 3rd March, 2014. The respondent raised a preliminary objection of mootness on the ground that the applicant's sentence had expired in January, 2014. The statement

of opposition put the applicant on full proof of the alleged failure to comply with Rule 102 and pleaded in the alternative that if there was an obligation to assess pursuant to Rule 102(2):-

> *"…then same was complied with by the Prison Doctor by reviewing the Applicant's case and/or by reviewing the applicants medical file and/or by referring the Applicant to Hospital for radiological examination…"*

59. The supplemental affidavit of Dr. Suto clarified what had been done by the medical staff in response to the applicant's solicitor's letters. It acknowledged that the averment in his original affidavit that he had seen the applicant on 26th August, 2013 was incorrect. What had in fact occurred was that the applicant's medical file was reviewed by him in the context of the complaints made and a decision taken by him to refer the applicant for radiological examination in the context of the request made in the same correspondence.

Decision

Mootness
60. The Court is satisfied that the issue of compliance with Rule 102 was not moot at the time of the hearing of this application. The applicant was still a prisoner who prior to his incarceration had suffered multiple serious injuries in a road traffic accident. The Court's determination on the issue of compliance with Rule 102 still affected or potentially affected his rights as a prisoner. The issue was therefore neither purely hypothetical nor academic.

61. Adopting and adapting the findings of O'Malley J. in *Dundon v. Governor of Cloverhill Prison & Ors* [2013] IEHC 608 referred to at para. 37 herein, at the time of the hearing the applicant was still a prisoner subject to the provisions of the Prison Rules. He had a real and ongoing interest in the manner in which they were applied to him. Having regard to the history of the case and to the extent of the injuries suffered by him in the pre-incarceration road traffic accident, it could be said that the possibility of the need to rely on the provisions of Rule 102 was not so remote as to be purely hypothetical. The respondent in his statement of opposition in effect denied the applicability of Rule 102 to the applicant's situation and further put him on full proof of the alleged failure to comply with same. Were the Court to hold that the issue was moot because at the time of the hearing there was no current complaint about the provision of medical services to the applicant, then the issue of the operation of Rule 102 in respect of the applicant might "*evade capture*", to use the American phrase referred to by O'Malley J. in *Dundon*.

Information within the meaning of Rule 102
62. Rule 102 is mandatory. It provides that the Governor **shall** take certain steps upon being informed that a prisoner requests or is in need of medical attention [emphasis added]. The rule does not prescribe nor circumscribe the sources from which information may derive that a prisoner needs (as opposed to requests) medical attention. A prisoner may not be aware that he needs medical attention and the rule allows for information to be provided to the Governor by persons other than the prisoner. One can readily envisage a multiplicity of sources from which a Governor might receive such information. A prison officer might have a concern that a prisoner in his care needs medical attention. A fellow prisoner equally might bring the need for medical attention of a prisoner to the Governor's notice. A family member is an obvious potential source of information that a prisoner needs medical attention.

63. In the instant case the applicant, who absconded from hospital care on 28th February, 2013, had given an address in Walkinstown as his home address on admission to hospital. If the hospital for example, sent details of medical appointments to the applicant at that address and if the occupant in turn forwarded those details to the Governor, the Court has no doubt that that would constitute "*information*" within the meaning of Rule 102. The evidence of course is that no such information was sent to the Governor.

64. The letters sent by the applicant's solicitor are, in the Court's view, "*information*" within the meaning of Rule 102(1)(a). They convey to the Governor information to the effect that the applicant has severe back pain as a result of a road traffic accident and that the prison authorities have failed to take him to various hospital appointments. The last letter, dated 29th August, 2013, specifically requests that a hospital appointment be made for him.

65. What then is the duty of the Governor upon receipt of such information? He must, pursuant to Rule 102(1):-

> *"…inform the prison doctor, nurse officer or other member of the prison healthcare staff thereof, and shall keep a record of the prisoner's name, the nature of the information received the name of the person who has been informed and the time when this was done".*

The applicant alleged a breach of Rule 102(1) which requires the Governor to keep a record of his actions in response to the receipt of information that a prisoner needs medical attention. The original fax from the applicant's solicitor, while dated 15th August, 2013, was sent to the Governor on either Thursday 22nd August, 2013 or Friday 23rd August, 2013. It was forwarded by the Governor to Dr. Suto of the prison medical team and was received by him on Monday 26th August, 2013. Having conducted an assessment, Dr. Suto responded in writing to the Governor who in turn responded to the applicant's solicitor on 2nd September, 2013. There is a record of these transactions on the prisoner's medical file. The record includes the prisoner's name, the nature of the information received namely that he was suffering severe back pain and had missed hospital appointments and the name of the person who had been informed, being Dr. Suto and the time when it was done, being 26th August, 2013. This in the Court's view satisfies the Governor's obligation to keep a record within the meaning of Rule 102(1). The terms of the rule do not require that the Governor keep a personal log of such events, but merely that he shall keep a record. The most appropriate place to keep such a record is on the prisoner's medical file where the data is available for those who can most benefit from it, namely the medical team to whom the care of prisoners is entrusted.

66. In this case, out of the blue, the Governor receives a solicitor's letter complaining that a prisoner is in pain and has not been taken to multiple hospital appointments made for him. The letter contains no details of the nature or dates of the alleged missed appointments. It would be difficult in the light of such bald unspecific assertions for the Governor to come to a view that the prisoner required either medical treatment or special care or observation. The Governor did what in the circumstances of the case was mandated by Rule 102(1), namely passed the information to the medical team pursuant to Rule 102(1) for them to assess the prisoner in respect of whom the information had been received. In the Court's view this was an entirely appropriate step for the Governor to have taken and was in compliance with the duty imposed on him by Rule 102.

Nature of Assessment
67. Rule 102(2) provides that the prison doctor, nurse officer or other member of the prison healthcare staff shall as soon as practicable assess a prisoner in respect of whom information has been received. Counsel for the applicant submitted that the assessment required by the rule was a physical assessment of the prisoner. Counsel for the respondent in reply contrasted the use of

the phrase "*attend the prisoner*" in Rule 102(3) which deals with medical emergencies, with the use of the phrase "*assess a prisoner*" in Rule 102(2) in respect of information received that a prisoner needs medical attention. He submitted that a physical examination is not required to discharge the prison authority's obligation under Rule 102(2).

68. It appears to the Court that the nature of the assessment required in any particular case very much depends on the nature of the information received. In some cases the information received might warrant a physical assessment of the prisoner, in others it may not. The analogy sought to be drawn by the applicant with the facts in *S.O. v. Clinical Director of the Adelaide and Meath Hospital of Tallaght* [2013] IEHC 132 is entirely misplaced. In that case, Hogan J. was dealing with the nature of the assessment required before a person could be deprived of liberty by being involuntarily committed to hospital under the Mental Health Act 2001. Unsurprisingly, having regard to the seriousness of the potential outcome for the patient, Hogan J. held that the medical assessment in that instance had to be a personal assessment.

69. In this case the assessment was conducted by a prison doctor by reference to the medical file of the applicant. The information in respect of which he was conducting his assessment was contained in the applicant's solicitor's letter of 22nd August, 2013 (wrongly dated 15th August, 2013) which stated:-

> *"Mr Cash instructs our office that he is having severe back pains due to a serious road incident to which you are aware of. There have been hospital appointments made to which he has not been taken to. Our client also instructs us that there have been several eye and ear hospital appointments made for him to which he has not been brought either.*
>
> *We would be obliged if immediate attention was given to our client with regard to the above. Please reply in writing with what action you intend to take regarding the care of our client."*

The validity or otherwise of the information received would be most readily ascertainable from the prisoner's medical file which would show the treatment afforded to him and whether medical appointments had been missed while he was incarcerated.

70. The medical file revealed, as set out in the chronology, that the applicant had engaged extensively with the prison medical services while on remand and in the early months of his sentence. His history and complaints had been noted; medication was administered. The Court notes that despite repeated efforts the prison service medical team were unable to access the applicant's medical notes from St. Vincent's Hospital. This is a matter of some concern. Where prisoners are moved from care within the general population to care within the prison service, it is important that the prison service be made aware of any ongoing care requirements. The fact that the applicant was unlikely to engage with medical services while in the community does not alter the desirability of his care being properly transferred to the prison service during his incarceration. That being said, the Court notes that there were some unusual circumstances in this case which may have made the finding of the applicant's hospital records more difficult. First, Mr. Cash was not able to provide to the prison service the date of his accident and admission to hospital. He gave differing timeframes for his admission at different encounters with the prison medical team. Second, Mr. Cash did not provide the name of a G.P. either to the hospital or to the prison service medical team, even though he is according to the hospital notes, the holder of a medical card. A patient's G.P. is among other things a useful link between hospital services and patients. A G.P. would have been a useful source of information for the prison medical team. Third, and perhaps most significantly Mr. Cash gave different home addresses to the hospital and the prison service. In his hospital admission notes he gave his home address as Warrenstown Walk, Blanchardstown. In his committal notes in both Cloverhill Prison and Wheatfield Prison, he gave his home address as Belgard Park, Dublin 24. These factors may explain the failure to locate the applicant's hospital notes.

71. It appears to the Court that the most striking fact to emerge from the medical file is that from 26th June, 2013 to 22nd August, 2013 (the date of his solicitor's first letter) the applicant sought no assistance from nor made any complaint of pain or discomfort to the prison service medical team, a team which he had earlier accessed on a frequent basis. In the absence of any evidence from Mr. Cash explaining his failure to seek assistance from the prison medical team during that two month period, the Court is entitled to and does draw an inference, that he did not seek their assistance because he did not need to do so. The uncontroverted evidence of Dr. Suto is that a prisoner will ordinarily see a prison doctor within one working day of a request being made. No request was received from the applicant, Mr. Cash, which casts serious doubt on his alleged instructions to his solicitor that he was in serious pain at anytime during that period.

72. The prison medical file, the contents of which were uncontested by any evidence, also makes it clear that the prison service was not notified of any hospital consultations. The Court can readily accept, having regard to the extensive injuries suffered by the applicant in the road traffic accident, that notwithstanding his absconding from hospital care, hospital appointments may have been sent out to the address in Walkinstown which he had given to the hospital as his home address. The Court has no evidence as to who resides at that address nor what was done with any appointment letters which may have been sent there. What the Court does know from the evidence is that the prison service was not notified of any such appointments. The applicant's solicitors' letters and grounding affidavit are somewhat vague on this issue and do not disclose where, when, or how the solicitor and the applicant became aware of alleged missed appointments. The solicitor in his grounding affidavit resorts to the stock phrase "*my client instructs*" or the even less informative "*I am instructed*".

73. If a solicitor becomes aware that there are specific medical appointments to which his client has not been taken then the appropriate step is for him to inform the Governor pursuant to Rule 102 including the necessary details of the appointments missed, so that appropriate action can be taken by the prison medical team. In this case, copies of the appointment letters identifying the individual consultants if such exist should have been furnished to the Governor. No such information was furnished. The Court asked counsel for the applicant during the hearing why the grounding affidavit contained no details of the missed appointments. He replied to the effect that he was limited in his submissions to the contents of the affidavits. Had the applicant's solicitor furnished detailed information about missed appointments to the Governor and had the Governor failed to act on that information, then the applicant might well have had a good claim for judicial review. However that did not happen in this case. Indeed, it is difficult to avoid the conclusion in this case that the applicant's solicitor was more interested in setting up a judicial review application than in ensuring the best medical care for his client.

Action taken after assessment

74. Having conducted his assessment, the prison doctor, to the extent that patient confidentiality allowed, reported back to the Governor that the medical team were satisfied that the applicant was being appropriately cared for. In the light of the complaint made, he also arranged for a radiological examination of the applicant. Counsel for the applicant seized on this as evidence of an acknowledgement of the inadequacy of treatment. The Court strongly disagrees. In his initial letter the applicant's solicitor asked for a written indication of the prison service's intentions in respect of his client and in his final letter of 29th August, 2013 he asked that his client be referred for a hospital appointment. When the prison service complied with his request he tries to use it against them. That is, to put it simply, unfair. Were the Court to draw the inference invited by counsel for the applicant that compliance with a request

for a service was an admission of prior inadequacy, then the prison service would be stymied in complying with any request however reasonable, for fear that it might be construed as some kind of an admission of liability. That would be a wholly undesirable state of affairs. The medics in the prison service should be free to assess the needs of a prisoner openly and honestly without having to concern themselves with how their actions might be construed by the prisoner's lawyers.

75. For the reasons set out above, the Court is satisfied that the Governor of Wheatfield Prison complied with his obligation pursuant to Rule 102(1) by referring the information received from the applicant's solicitor to the medical team for assessment pursuant to Rule 102(2). The assessment carried out by Dr. Suto of the medical team in Wheatfield Prison was entirely appropriate to the information furnished by the applicant's solicitor to the Governor. The applicant's apparent persistence in complaining of pain to his solicitor instead of to the medical team in Wheatfield Prison, as evidenced by his solicitor's supplemental affidavit of 25th September, 2013 remains unexplained. For all of the foregoing reasons, the Court refuses the application.