

THE HIGH COURT
JUDICIAL REVIEW

[2014 No. 456 JR]

BETWEEN

MICHAEL MURRAY
AND

APPLICANT

IRISH PRISON SERVICE AND THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENTS

JUDGMENT of Mr. Justice Noonan delivered the 15th day of July, 2015.

Introduction

1. In these proceedings, the applicant seeks:

1. An injunction restraining the respondents from intercepting and recording any telephone communications between him and his solicitors save in accordance with law;
2. An injunction restraining the respondents from intercepting and recording any telephone communications between the applicant and any third party save in accordance with law;
3. A declaration that the first respondent its servants or agents, including prison governors, or any of them, have acted in excess of the powers conferred on it and the prison governors for whom it is responsible and/or has acted outside of the scope of the Prison Rules 2007 – 2013;
4. Damages for interference with the applicant's right to privacy and for interference in breach of his legal and constitutional rights;
5. A declaration that the applicant is entitled to be informed as to the details and the content of such phone calls as have been unlawfully recorded by or on behalf of the respondents.

Background Facts

2. In July, 2013, following his trial in the Central Criminal Court, the applicant was convicted of rape, attempted rape, aggravated sexual assault, sexual assault, removal of a child from the control of a parent contrary to s. 17 of the Non-Fatal Offences Against the Person Act 1997, theft and other offences. All of these convictions are under appeal. Between May and July, 2013, the applicant was detained in Cloverhill Prison in Dublin pending and during his trial. Following his conviction, he is currently imprisoned at the Midlands Prison, Portlaoise, County Laois.

3. It is common case that in May and July of 2013, certain of the applicant's phone calls made from Cloverhill Prison were recorded by the first named respondent. These included a number of phone calls between the applicant and his solicitors. The applicant claims that the recording of phone calls between him and his solicitors was unlawful and arising out that, he seeks the reliefs above referred to.

The Evidence

4. The applicant, who represented himself in these proceedings, has not sworn any affidavit. His application is grounded solely upon an affidavit of his former solicitor, Joanne Kangley sworn on the 28th July, 2014. In that affidavit, Ms. Kangley verifies the facts set out in the statement required to ground the application for judicial review. The statement of grounds contains an allegation that on or about the 11th April, 2014, the applicant and one of his solicitors, namely Messrs. M.S. solicitors were informed by the first named respondent that an anomaly had occurred within the Irish Prison Service prisoner phone system whereby telephone calls of a number of prisoners to their solicitors were, *inter alia*, inadvertently recorded. The applicant was informed that he was among the prisoners currently in custody who was affected by the stated anomaly. The applicant further asserts in his statement of grounds that the telephone system operated throughout the Irish Prison Service permits the recording of telephone communications between a prisoner and other parties with two exceptions, first in respect of calls to a solicitor and second in respect of calls to the Samaritans.

5. In the course of his oral submissions to the court, the applicant put before the court, without objection, a document entitled "Application for Phone Calls" which, although related to the Midlands Prison, was said by the applicant to typify the format used throughout the prison service including in Cloverhill Prison.

6. The purpose of this form is to permit the applicant to make phone calls from the prison to a maximum of twelve different external numbers designated 1-12. In each case, the applicant is required to fill in the phone number, the person's name and that person's relationship to the prisoner. It would appear that apart from those twelve contacts, an additional contact number is automatically provided to the Samaritans and the form states that Samaritan calls are not recorded.

7. The blank form shows that in column one, the word solicitor appears in brackets. At the end of the blank columns, the form states:

"The first number must be your solicitor must be 'LANDLINE ONLY'".

The following statement also appears at the foot of the form:

"All calls except those to the Samaritans and your solicitor will be monitored and recorded."

The form then goes on to provide:

"I have read the above and agree to same:"

with a space for the prisoner's signature and date of request.

8. Ms. Kangley further refers to correspondence relating to the foregoing matters.

9. A replying affidavit was sworn by Walter Burke deputy manager, operations directorate, Irish Prisons Service. He avers that the prison telephone system is operated in accordance with the powers granted to the governor of a prison pursuant to rule 46 of the Prison Rules 2007 (as amended). Those rules, which relate to telephone calls, provide *inter alia* as follows:

"(7) The Governor may, for the purposes of maintaining good order and safe and secure custody or ensuring that a prisoner does not make any telephone calls to which paragraph (8) applies, intercept a telephone communications message made during a telephone call, provided that the prisoner or the person with whom he or she proposes to communicate is informed before any communication takes place that any telephone communications message made during the course of the telephone call may be intercepted."

10. Sub rule (8) specifies various types of telephone communications considered inappropriate.

11. Mr. Burke avers that in or about March, 2014, it came to light that telephone calls in and out of Garda stations in the State had been subject to recording without the knowledge of persons making those calls and as a result of that, checks were made in Irish Prisons on foot of which it was discovered that some prisoners had their telephone calls with solicitors recorded inadvertently. He says that this occurred because some solicitor contact numbers were put on lines outside of line number one being the designated solicitor's telephone line which enjoys privacy privileges not found on other lines. This issue is currently the subject matter of two independent inquiries.

12. Following an examination of the recorded phone calls, but not their content, Mr. Burke says that it appeared that the applicant had twelve telephone calls to solicitors inadvertently recorded due to an anomaly within the prisoner telephone system. A more detailed examination of the telephone records however revealed that only seven of those calls were actually to solicitors. Five out of those seven were made between the applicant and Mr. Andrew Valley of Partners at Law Solicitors and two of the calls were between the applicant and Messrs. M.S. Solicitors. The remaining five calls were between the applicant and a forensic computer company in the United Kingdom, in respect of which the applicant was not entitled to privacy under the Prison Rules.

13. Although these calls were inadvertently recorded, Mr. Burke avers that the content of the calls was not accessed by prison staff or any other party.

14. Mr. Burke exhibits a letter from the Director General of the Irish Prison Service, Michael Donnellan, of the 10th April, 2014 addressed to the applicant's former solicitors, Messrs. M.S., in which Mr. Donnellan states that the inadvertent recording came about as a result of the fact that the applicant had more than one solicitor listed on his prisoner phone card. The letter said that two calls were made to M.S. Solicitors and Mr. Donnellan offered to make copies of these available if required. He apologised for the occurrence. He assured M.S. Solicitors that under no circumstances was any access given to the phone calls to An Garda Síochána or anyone else. A letter in the same terms was written to Mr. Valley and the applicant was also written to. Although these letters to the applicant stated that six of the twelve phone calls were inadvertently accessed by staff or the Irish Prison Service, this was subsequently corrected in a letter from Mr. Burke on the 15th May, 2014 to Partners at Law Solicitors and a letter of the 11th July, 2014 to Ms. Kangley. She subsequently, in early 2015, ceased representing the applicant. It appears that a number of other solicitors were approached by the applicant but declined to represent him.

15. At para. 19 of his affidavit, Mr. Burke avers as follows:

"19. I believe that the applicant has suffered no prejudice or harm by reason of his calls with solicitors being inadvertently recorded. As has been confirmed to the applicant none of the calls with his solicitors were accessed by servants or agents of the first named respondent or the second named respondent. Further no details of those calls have been provided to any third party, including An Garda Síochána. I believe that the applicant is wrong to assert that the said recordings have any impact on him in the preparation of his appeal against his conviction and sentence that is pending before the Court of Appeal."

Submissions

16. In the course of his oral submissions to the court, the applicant drew particular attention to two phone calls to his solicitors on the 7th of May, 2013 and another two phone calls to his solicitors on the 23rd of July, 2013. The two phone calls of the 7th of May, 2013 were timed at 15:02:57 and 18:32:11 respectively. The applicant said, although on what basis is unclear, that the earlier phone call was not recorded but the later was. Both calls were made from lines other than the designated solicitor line, number one.

17. It would appear that the applicant was seeking to suggest that this implied that the later phone call was recorded deliberately and not inadvertently. He made the same point in relation to the two phone calls of the 23rd of July, 2013 timed at 17:42:29 and 18:42:50 respectively. With regard to the latter two phone calls, the applicant put before the court a transcript of day 21 of his trial on the 24th of July, 2013 and said that in the course of the call on the previous day that had been recorded by the first respondent, he had discussed privileged matters in relation to his defence with his solicitor relating to a proposed witness to be called for the defence the next day.

18. Although the applicant's statement of grounds contained a complaint that apart from the issue of recording calls with solicitors, the Prison Rules 2007 do not permit blanket recordings, this was not pursued in argument by the applicant and no complaint was advanced in respect of the recording of any particular telephone call apart from those with solicitors.

19. Mr. Smyth SC on behalf of the respondents submitted that the case had never been made by the applicant until alleged before the court in oral submissions that the recording of the phone calls had occurred other than inadvertently. The problem appeared to

have arisen because the applicant had more than one solicitor but in any event, the issue had subsequently been addressed by the authorities by providing up to four different lines for communicating with different solicitors. He submitted that as there was no evidence that the calls had been accessed by anyone, the applicant had suffered no prejudice as a result of the events complained of.

Discussion

20. It is beyond dispute that the recording of the applicant's phone calls to his solicitors was inappropriate and ought not to have occurred. There is however undisputed evidence that neither the respondents or anyone else accessed these phone calls or became aware of their content. Similarly, the evidence is unchallenged that the recordings were made inadvertently. What impact or otherwise any of these matters could have on the applicant's trial and subsequent conviction is not an issue for this court.

21. Suffice it to say that the applicant has not put before the court any evidence to demonstrate the slightest prejudice arising from what appears to have been a technical infringement at best of his rights. The evidence establishes that once the first named respondent became alive to the inadvertent recording of phone calls between prisoners and their solicitors, the parties concerned were notified and steps were immediately taken to rectify the position. This is not disputed.

Conclusion

22. Accordingly, it seems to me that there is no ongoing or threatened infringement of the applicant's rights in this matter and indeed that was the position when these proceedings were initiated. In my view therefore the claim for injunctive relief is entirely moot and the same must apply in relation to declaratory relief. No declaration is required to vindicate the applicant's rights. No issue of damages can arise in circumstances where no prejudice or loss has been demonstrated by the applicant. Similarly, as there has been no deliberate violation of the applicant's rights, the issue of exemplary or punitive damages could not arise even if claimed.

23. Finally, with regard to information as to the details and content of the phone calls, I am satisfied that the applicant has been furnished with all necessary material regarding the detail of the calls and has been provided with a means to access the contents thereof, even though the respondents have not themselves had done so.

24. Accordingly, I am satisfied that there is no basis for granting any of the reliefs sought by the applicant and I will therefore dismiss this application.