Neutral Citation: [2016] IEHC 273

THE HIGH COURT

Record No. 2015 320 JR

BETWEEN

COLM HOGAN

APPLICANT

- AND -

THE GOVERNOR OF MOUNTJOY PRISON

RESPONDENT

JUDGMENT of Mr Justice Max Barrett delivered on 26th May, 2016.

Part 1

Overview

1. During his time in Mountjoy Prison, Mr Hogan was found by the prison authorities to have shouted at a nurse on a single occasion in March 2015.He was subsequently punished for this by the loss of one evening's exercise. Apprehensive as to the implications of this breach of prison discipline on his chances of early release, then due in November 2015, Mr Hogan contacted his solicitors to help him determine how he was positioned. His solicitors sought a copy of certain material from the prison authorities. Despite a good faith effort by the prison authorities to provide such material as they could, the precise material sought was not forthcoming on demand. As a result, these judicial review proceedings were commenced. But they became moot when Mr Hogan was released from prison in September 2015, pursuant to a discretionary direction of the Minister for Justice (and the Minister alone) under s.2 of the Criminal Justice Act 1960, as substituted by s.1 of the Criminal Justice (Temporary Release of Prisoners) Act 2003. Mr Hogan's lawyers are now seeking the costs incurred by them in moot proceedings founded ultimately on what the prison authorities found was a single shouting incident that happened 14 months ago.

Part 2

Facts

2. Mr Hogan was involved in a verbal altercation with a prison nurse on 11th March, 2015.At the time, he was a prisoner in Mountjoy Prison. On 12th March, 2015 he was brought before the prison governor for a disciplinary hearing. After that hearing, the Governor concluded that a disciplinary incident had occurred and imposed punishment which saw him lose a single evening's exercise. Mr Hogan sought a review of this decision, as is his right under the prison rules. On 19th March, 2015, the sanction was upheld. Apprehensive as to the implications of the incident for his early release, then due in November 2015, Mr Hogan contacted his solicitors to find out how he was positioned. It is not clear whether Mr Hogan or his solicitors ever sought to elicit a straight answer to this matter by putting the question straight to the prison authorities. Regardless, on 10th and 17th April, the solicitors for Mr Hogan sought access to:

> *"1. A copy of the P19 [disciplinary notice] in respect of the alleged incident, endorsed with the details of the proceedings and the results thereof.*
>
> *2. If the P19 is not so endorsed, a copy of the contemporaneous record taken of the proceedings.*
>
> *3. A copy of the CCTV of the alleged incident;*
>
> *4. Details of the standard of proof employed in reaching the determination of this matter together with an account of the enquiry held into this allegation and what witnesses gave evidence."*

3. The letter of 17th April contained a threat as to the commencement of judicial review proceedings if the material sought not forthcoming. However, in truth this letter was premature as it had crossed in the post with a letter of 15th April, 2015 from the Governor's Office. This letter read as follows:

> *"I refer to your letter of 10th inst. We do not issue copies of P.19s directly to solicitors or copies of CCTV.*
>
> *This P.19 disciplinary report was appealed by your client by way of a Petition to the Minister and the sanctions imposed were affirmed on appeal. (I attach a copy for your information).*
>
> *The standard of proof for disciplinary hearings is on the balance of probability.*
>
> *Your client upon request may be reissued [with a] copy of the P.19 disciplinary report."*

4. It is hard to see in this letter anything other than a good faith effort by the prison authorities to provide the fullest possible response to the request made by the solicitors. The letter even indicates that while the prison authorities cannot provide a copy of the P19 directly, it can be sourced by Mr Hogan himself (and, it follows, can be provided by him to his solicitors). Moreover, there is no sense from this letter that the door is closed to future correspondence or such further information as the solicitors might seek to request, such as whether Mr Hogan's breach of prison discipline would jeopardise his early release prospects. So it is perhaps surprising that two months later, and without any intervening correspondence of any nature, leave to bring these judicial review proceedings was sought.

Part 3

The Decision in Egan

5. Counsel for Mr Hogan points to *Egan v. Governor of Wheatfield Prison* [2014] 1 I.R 64 as offering a basis for these judicial review proceedings. That was a case in which a prisoner was disciplined on 30th June, 2013, for smuggling contraband into Wheatfield Prison and sanctioned by way of a 56-day forfeiture of evening recreation, the making and receiving of telephone calls or letters, and receiving ordinary visits. He appealed this decision and the relevant documentation was received by the designated Prison Service officer on 4th July. On 11th July, Mr Egan's solicitors sought certain information (including CCTV evidence) of the Governor. On 16th July, they pushed for an answer. All they got was a letter acknowledging receipt of this second letter. On 27th July, Mr Egan's solicitors wrote a letter seeking a comprehensive reply to their correspondence. By 12th August, the date on which leave to apply for judicial review was sought and granted, Mr Egan was 43 days into his 56 days of punishment, there was no sign of an answer to his appeal, and his solicitors had not yet received any meaningful response to their correspondence. In an affidavit sworn in the course of the judicial review proceedings, the prison governor averred that Mr Egan's solicitors had separately been told on repeated occasions that the proper way for them to proceed was to make Freedom of Information requests. In his judgment, McDermott J. clearly considered, at 73, that the manner in which the Prison Service had conducted itself was not an appropriate way of dealing with solicitors for a man who had been suffering a deprivation of important access visits and a loss of letter and telephone privileges. McDermott J. also appears to have considered that the prison authorities had been less than frank as to why the appeal process had stalled, concluding, at 73, that the officer tasked with the appeal "*believed that the solicitors'* correspondence did not warrant the courtesy of a reply because they were going to get a stock answer that the matter should be dealt with under the Freedom of Information Act".

6. It is hard to think of a case that could be further removed in its facts from Mr Hogan's case that that presented by *Egan*:

- Mr Egan faced a harsh 56-day punishment that commenced immediately and had lasted 43 days by the time his judicial review proceedings were commenced. Mr Hogan suffered the loss of a single evening's exercise.

- Mr Egan's solicitors wrote at least three times to the prison authorities seeking information and not getting any meaningful reply. Mr Hogan's solicitors had only to write once (albeit that they elected to write twice) before receiving an entirely helpful reply.

- Mr Egan's solicitors were fed or due to be fed a stock response about FOI requests. Mr Hogan's solicitors were given a focused reply that responded in a meaningful and helpful manner to the letter received.

- Mr Egan's appeal had not yet concluded, some 43 days after his punishment had commenced. Mr Hogan's appeal concluded seven days after his disciplinary hearing.

- Mr Egan's judicial review application came at the end of a process in which his solicitors had been frustrated at every turn by the prison authorities in their efforts for their client. Mr Hogan's judicial review application came as a surprise some two months after the prison authorities had sent a helpful reply.

7. It is in the context of what, to use a colloquialism, was the 'complete run around' suffered by Mr Hogan's solicitors that McDermott J. observed as follows, at 73:

> *"A solicitor acting on behalf of a prisoner should not be denied access to the essential documents to which his client was privy, whether because they were served upon him, such as the P19, or created by him, such as the petition. The denial of these basic documents to the applicant's solicitors was calculated to inhibit or frustrate the applicant's right to seek and obtain legal advice concerning these matters….The court accepts that there may be issues concerning prison order, discipline or security which preclude the furnishing of certain materials, such as the C.C.T.V. footage or other relevant material, or there may be an issue arising in respect of disclosing footage or documents identifying third parties, who may have rights to be protected".*

8. This Court respectfully agrees with McDermott J. that prison authorities must behave responsibly towards solicitors acting for prisoners. The reverse also applies, of course, and nothing in *Egan* suggests otherwise. A solicitor is expected to engage meaningfully with prison authorities, or such other person with whom that solicitor may be required to engage in the course of advancing her or his client's interests, and to act appropriately and proportionately upon such information as is received. Here, the Governor's Office indicated itself to have a general policy of not issuing P.19s but indicated a simple and straightforward manner in which Mr Hogan could himself lay his hands on same (and thereafter provide it to his solicitors). Here, the CCTV footage was declined but it is not difficult to imagine what entirely reasonable concerns regarding prison order, discipline or security, not to mention data protection obligations, would justify such a refusal. Here, details of the standard of proof were sought and supplied. Here, the Governor's Office had sought to be helpful. A question arises whether, before judicial review proceedings were commenced, it would not have been better for Mr Hogan's solicitors to engage further with the prison authorities to determine (1) why the contemporaneous record had not been supplied, and (2) what the basis was for the refusal of the CCTV footage. There may be cases in which the urgency of a situation demands that matters come quickly to court before such further engagement – though it is notable that even in a case which presented with the heightened concerns that arose in Egan, the solicitors did not come to court until they had met with a series of rebuffs. It might not unreasonably be contended that a case in which a man suffered one evening's loss of exercise for what the prison authorities had found to have been a shouting incident, and who wanted to know if this was going to have implications for his early release, does not present even with the urgency that presented in *Egan*.

Part 4

Micro-management

9. It is important that the courts be open to proper complaints by prisoners about aspects of their treatment in prison. Prison walls keep prisoners in; they do not keep the law out. But while great events always start small, not every small event encompasses greatness. Judges cannot double-job as micro-managers of the Irish prison system. As Charleton J. noted in *Foy v. Governor of Cloverhill Prison* [2010] IEHC 529, paras.25–26:

> *"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."

10. As these proceedings have become moot, no substantive issue arises for adjudication by the court. All that remains is the question of costs. And still the court reads the above-quoted text and wonders at what reliance might have been placed by the court on Foy had these proceedings gone to full hearing.

Part 5

Supreme Court Guidance

11. How to deal with costs in the context of proceedings that have become moot is the subject of the Supreme Court's decision in *Cunningham v. President of the Circuit Court* [2012] 3 I.R. 222. So far as it deals with the issue of mootness, the judgment of Clarke J. for the court in that case might perhaps be summarised as follows:

I. General Rule as to Costs.

[1] Subject to certain exceptions, the normal rule is that costs follow the event. (paras. 18-19).

II. General Rules as to Costs in Moot Proceedings.

[2] The problem with the costs of proceedings which have become moot is that there will be no event which those costs have to follow. (para.22).

[3] A court should ordinarily lean in favour of making no order as to costs in cases which have become moot as a result of a factor outside the control of the parties. (para.24).

[4] A court should ordinarily lean in favour of awarding costs against a party through whose unilateral action the proceedings have become moot. (para.24).

III. Intervening Actions of Statutory Officer or Body.

[5] The mere fact that a statutory officer or body adopts a changed position which renders judicial review proceedings moot does not, of itself, necessarily mean that it is appropriate to characterise the proceedings as having become moot by reason of a unilateral act of one body. (para.26).

[6] If there were no change in underlying circumstances and if the statutory officer or body simply changes his or its mind or adopted a new and different view, it might be appropriate to characterise the proceedings as having become moot by reason of a unilateral act of one body. (para.27).

[7] Where there is an underlying change of circumstance, it is necessary to consider the extent to which it can properly be said that the proceedings have become moot (a) by reason of the unilateral act of one party, or (b) by reason of a change in the underlying circumstances outside of the control of either party. The result of any such analysis should play an important role in the court's consideration of the justice of where the costs of the proceedings rendered moot should lie. (para.27).

[8] Where (a) the immediate or proximate cause of proceedings becoming moot is the action of a statutory officer or body but (b) it is sought to argue that the true underlying reason is an external factor outside the control of that officer or body, it is incumbent on the officer or body concerned to place before the court sufficient evidence to allow the court to assess whether and to what extent it can fairly be said that there was a sufficient underlying change in circumstances as to justify, in whole or in part, it being appropriate to characterise the proceedings as having become moot by reason of a change in external circumstances . (para.27).

Part 6

Conclusion

12. The court must admit to some surprise that a single shouting incident engaged in by Mr Hogan should ever have caused these proceedings to ensue. Be that as it may, the court must find the facts and law as it finds them. Looking first to the facts, these proceedings became moot because Mr Hogan was released a month or so earlier than anyone expected. The decision that he should be released early was a discretionary decision that was taken by the Minister for Justice alone, pursuant to s.2 of the Act of 1960, as amended. It was not a decision of the Governor of Mountjoy Prison, the respondent to these proceedings, albeit that he may have

provided certain information to the Minister that assisted her in the proper exercise of a discretion that is vested in her alone and a decision that is taken by her alone. The result of the foregoing is that the early release of Mr Hogan was not the responsibility of either of the parties to these proceedings, unless one takes the rather fantastic view that the responsibility rests with (a) the Governor, because, albeit that he acted under ministerial direction, he turned the key in the lock of the outside door to Mountjoy Prison, or (b) Mr Hogan, because he did not object to his being released early. Neither (a) nor (b) appeals to the court as a matter of logic. Looking then to the principles identified in Part 5, this is a case which comes clearly within [3]. As a result, the court will make no order as to costs.