THE HIGH COURT

[2018 No. 759 J.R.]

BETWEEN

MARTIN GREENE (SUING BY HIS MOTHER AND NEXT FRIEND JULIE GREENE)

APPLICANT

AND

THE DIRECTOR OF OBERSTOWN CHILDREN'S DETENTION CENTRE, THE MINISTER FOR CHILDREN AND YOUTH AFFAIRS, IRELAND

RESPONDENTS

JUDGMENT of Mr. Justice Noonan delivered on the 22nd day of February, 2019

1. This application is brought in these judicial review proceedings for discovery of one category of documents:

> "All external and internal reviews, reports, papers and/or memoranda relating and/or referring to the adequacy of the second named respondent's response to disturbances by detainees, including but not limited to the Goldson/Hardwick Operational Review of Oberstown Children Detention Campus."

2. The applicant is a minor who is currently detained in Oberstown Children's Detention Centre pursuant to three detention orders made by the Children's Court in 2018. During three periods in 2018, the applicant was segregated from other children at Oberstown for defined periods. He alleges that this constituted an ad hoc punishment regime. As well as seeking to quash the relevant order, the applicant seeks orders of mandamus compelling the first respondent to provide reasons for his segregation, to make certain procedural provisions with regard to segregation and also various declarations seeking to vindicate the applicant's rights under the Constitution and the European Convention on Human Rights.

3. The applicant claims that he was subjected to punishment without being accorded fair procedures such as the right to make representations and the giving of reasons for his segregation. In their statement of opposition, the respondents take no issue with the allegations of fact contained in the applicant's statement of grounds. Both parties agreed in submissions before me that there are no issues of fact in these proceedings. In essence the respondents deny that the applicant's segregation was a punishment but rather was required in the interests of his own safety and the safety of others. The respondents claim that the applicant was at all times aware of the reasons for his segregation. The respondents deny that any of the applicant's rights were infringed.

4. The primary document identified in the category of discovery sought, the Goldson/Hardwick Review, was, according to the evidence of Pat Bergin, the first named respondent, based on visits to the campus by two English academics in November 2016 whose report was presented to management in February 2017. Mr. Bergin avers, without contradiction, that the policies and practices that were reviewed in this report are not the policies and practices that were in effect during the periods in 2018 of which the applicant complains. A new segregation policy has been in operation in Oberstown since early 2017. As I have said, Mr. Bergin's evidence in this respect is not contradicted.

5. This application is grounded upon an affidavit of the plaintiff's solicitor, Matthew Kenny. The reason advanced by the applicant why this category of discovery is necessary appears at para. 9 of Mr. Kenny's affidavit where he says:

> "Discovery of this category is necessary and relevant to establish that the respondents were aware that the punishment regime adopted by the first named respondent was devoid of procedural fairness and was not in keeping with best practice."

6. Beyond that, Mr. Kenny does not identify any reason why this discovery is necessary other than a general assertion that it will assist the applicant in preparing his case. Mr. Kenny says that he believes that the documentation is very likely to contain material which would support the applicant's contention, but does not explain what that material might be or how it would support such contentions.

7. In his replying affidavit, Mr. Bergin also avers that the Review was obtained in confidence and subject to legal advice that it should not be published in full but the recommendations contained in the Review were in fact published.

8. It has often been said that discovery in judicial review proceedings is exceptional and will be rarely ordered. As noted by Geoghegan J. in delivering the judgment of the Supreme Court in Carlow Kilkenny Radio Ltd v. Broadcasting Commission of Ireland [2003] 3 I.R. 529, discovery will not normally be regarded as necessary in judicial review applications based on procedural impropriety as ordinarily that can be established without the benefit of discovery.

9. All the authorities are at one in suggesting that discovery will normally only be necessary if there is a factual dispute between the parties, which the court cannot resolve without the benefit of discovery.

10. In *R. v. Secretary of State for Health ex parte Hackney London Borough & Ors* [1994] Lexis citation 1574, Bingham MR said:

> "The basic approach is that discovery and production will be ordered in judicial review proceedings where they are necessary for disposing fairly of the application but not otherwise …I think it is broadly true to say that discovery will be regarded as necessary for disposing fairly of the action, or application, if a party raises a factual issue of sufficient substance to leave the court to conclude that it may, or will, be unable to try the issue fairly, fairly that is to all parties, without discovery of documents bearing on the issue one way or the other."

11. That judgment was approved in this jurisdiction in *KA v Minister for Justice, Equality and Law Reform* [2003]2 I.R. 93, *Evans v. University College Cork* [2010] IEHC 420 and *Barry v. Governor of Midlands Prison* [2018] IEHC 713.

12. These and other relevant principles were identified by Reynolds J. in her judgment in *Flynn v. Charities Regulatory Authority* [2018] IEHC 359 where she said (at p. 4):

"a) discovery is generally neither necessary nor appropriate in judicial review proceedings;

….

(e) generally, the only instance in which discovery may be necessary or appropriate is where the court is required to resolve a conflict on the evidence as set out on affidavit;

…

(g) discovery is not appropriate to facilitate a party verifying or challenging the accuracy of an opponent's affidavit."

13. Similar views were expressed by McDermott J. in his judgment in *McEvoy v. GSOC* [2018] IEHC 203 at pp. 18-19.

14. The applicant of course bears the onus of establishing both relevance and necessity. In my view the applicant has established neither. Mr. Bergin's uncontroverted evidence is that insofar as the report in issue deals with relevant practices and policies in 2016, entirely different policies obtained in 2018. I fail to see therefore how the report can have any relevance to the issues canvassed in these proceedings. For that reason, the application falls at the first hurdle.

15. It must also fail because as I have already explained, there is no factual dispute between the parties and thus the applicant has not demonstrated the necessity for the discovery. No substantive reason is identified by the applicant either in the grounding affidavit or the original letter seeking discovery. The Chief State Solicitor on behalf of the respondents in replying to the request for discovery identified the failure of the applicant to point to any facts in dispute that required resolution by reference to the category in question and no issue has been taken with that.

16. The foregoing comments apply equally to any other document within the requested category.

17. It is therefore unnecessary to consider the confidentiality issue other than noting that, whilst a claim of confidence is not an answer to a request for discovery, it is nonetheless a factor to which the court can have regard in assessing the necessity for and proportionality of the discovery sought.

18. For these reasons therefore I propose to refuse this application.