

THE HIGH COURT

JUDICIAL REVIEW

[2017 No. 1004 J.R.]

BETWEEN

ALAN LYONS

APPLICANT

AND

THE GOVERNOR OF SHELTON ABBEY PRISON,

THE IRISH PRISON SERVICE, IRELAND AND

THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Ms. Justice Meenan delivered on the 28th day of March, 2019**Background**

1. The applicant is a prisoner, currently detained in Wheatfield Prison, serving a sentence of life imprisonment for murder. This sentence was imposed in 2000 at which stage the applicant had already spent two years in prison on remand. Thus, at this stage, the applicant has spent some twenty years in prison.

2. The applicant was transferred to Shelton Abbey Prison in September 2016. Shelton Abbey is an open prison where the rules are more relaxed and trust is placed in the prisoners to obey and observe the rules. The period spent in Shelton Abbey helps prepare long-term prisoners, such as the applicant, for "temporary release". The transfer to Shelton Abbey in September 2016 was a positive step for the applicant. The applicant's stay at Shelton Abbey was unfortunately short lived and he was transferred back to Wheatfield Prison on suspicion of being under the influence of an intoxicant. The applicant denied this and a urinalysis test was carried out upon his return to Wheatfield Prison that was negative for intoxicants.

3. On 18 May 2017 the applicant was again transferred to Shelton Abbey. The applicant was making good progress as a prisoner and had achieved an "enhanced status". It should be noted that the applicant positively engaged in various activities aimed at his rehabilitation and improving his educational status. Despite this, on 28 July 2017, the applicant was transferred back to Wheatfield Prison. It is the circumstances of this transfer that give rise to these proceedings.

Events of 28 July 2017

4. The events that gave rise to the applicant's transfer back to Wheatfield Prison are set out in an affidavit of Mr. Patrick Corcoran, Assistant Governor of Shelton Abbey Prison ("the Assistant Governor"). In his affidavit, the Assistant Governor stated: -

"3. I say that on Friday 28th July, 2017 at approximately 12:15, I was outside the Assistant Chief Officer's Office in the main house, Shelton House, Shelton Abbey Prison, where I observed the applicant heading towards the kitchen servery to collect his dinner. The applicant appeared unsteady on his feet, so for this reason, I followed him to the kitchen servery area.

4. Having collected his dinner I engaged the applicant in conversation. The applicant was slurred in his speech and did not make any sense during this brief engagement.

5. On leaving the dining hall, I again observed the applicant, who still appeared unsteady on his feet. This time, the applicant engaged me in conversation and again his speech was slurred and he did not make any sense. I formed the opinion that the applicant was under the influence of an illegal substance. I was at this stage very concerned for his health and welfare."

and,

"7. I became very concerned for the health and safety of the applicant and for the safety of anyone else with whom he might engage. I had a particular concern that it might become ill or need medical treatment that night, over the weekend or in the days that followed. My concern was that health care staffing in Shelton Abbey is limited to day duty cover only. Moreover, Shelton Abbey is situated near Arklow in Co. Wicklow and the nearest hospital in the event of an emergency is Loughinstown Hospital in Dublin."

and,

"9. I say that an operational decision was made to transfer the applicant from Shelton Abbey Prison to Wheatfield place of detention in Dublin where 24-hour health care staffing is available. This was a necessary and proportionate response which was motivated out of concern for the applicant's health and welfare. The decision to transfer the applicant was not made as part of any disciplinary process and should not in any sense be regarded as the imposition of a punishment."

5. The applicant underwent a urine test upon his return to Wheatfield Prison which was negative. In response to this, the Assistant Governor, in a further affidavit, stated: -

"5. In response to the assertion at para. 15 of the applicant's written submissions that 'a urinalysis proved that Mr. Corcoran was incorrect; the applicant had not taken any illicit substance' it should be noted that urinalysis can only provide results in respect of the specific substances that it tests for. In light of the ever changing chemical constitution of some illegal drugs it is not possible to test for all illicit substances."

Judicial review proceedings

6. On 15 January 2018 the High Court (Noonan J.) granted the applicant leave to seek by way of judicial review, *inter alia*, the following reliefs: -

- "1. An order of *certiorari*, quashing the decision of the first respondent to transfer the applicant from Shelton Abbey Prison to Wheatfield Prison on 28th July, 2017.
2. A declaration by way of an application for judicial review that transferring the applicant from an open prison where he was an enhanced prisoner to Wheatfield Prison without reason and on foot of an unproven allegation that he had consumed intoxicants amounts to a breach of the applicant's constitutional rights.
3. An order of *mandamus* or in the alternative an injunction by way of an application for judicial review directing the respondents to return the applicant to Shelton Abbey Prison."

Cross-examination

7. Notices of cross-examination were served by the parties, the result of which being that both the applicant and the Assistant Governor gave evidence and were cross-examined. The Court was, therefore, in a position to make findings of fact. Having heard the evidence and having had the opportunity to observe both the applicant and the Assistant Governor during the course of the giving of this evidence, the Court makes the following findings of fact:

- (i) At approximately 12:15 on 28 July 2017 the applicant was unsteady on his feet;
- (ii) In a subsequent brief conversation between the applicant and the Assistant Governor, the applicant's speech was slurred and he did not make any sense;
- (iii) In a further encounter with the Assistant Governor, the applicant was still unsteady on his feet, his speech remained slurred and he continued to not make any sense;
- (iv) The applicant did not deny his condition was as is described by the Assistant Governor and he gave no explanation for it. In the course of the hearing before the Court, there was reference to the applicant having a certain medical condition but this did not go so far as to suggest that there was a medical reason for the condition of the applicant on 28 July 2017;
- (v) It is more than likely that the applicant's condition, as described by the Assistant Governor, was as a result of the applicant being under the influence of an intoxicant;
- (vi) Arising from the aforesaid, the Assistant Governor was very concerned for the health and welfare of the applicant;
- (vii) Medical cover and health care staffing in Shelton Abbey Prison are limited;
- (viii) Urinalysis can only provide results in respect of the specific substances that it tests for. It is not possible to test for all illicit substances.

Legal authorities

8. There have been numerous authorities on the approach which a court should take when a decision, such as this, is being challenged. It is clear that the courts should be slow to intervene in the decision making process of the Irish Prison Service ("IPS") in the absence of a clear violation of a prisoner's Constitutional rights.

9. Section 17(3) of the Criminal Justice Administration Act 1914, as adopted by s. 11 of the Adaption of Enactments Act 1922, provides: -

"Prisoners shall be committed to such prisons as the (Minister for Justice, Equality & Law Reform) may from time to time direct; and may on the like direction be removed therefrom during the term of their imprisonment to any other prison."

10. In *Murray v. Ireland* [1991] ILRM 465 Finlay J. stated, at p. 273: -

"The exercise of these powers of the Executive is of course subject to supervision by the Courts which will intervene only if it can be established that they are being exercised in a manner which is in breach of the constitutional obligation of the Executive not to exercise them in a capricious, arbitrary or unjust way. It is not, however, in my view, permissible for the Court to intervene merely on the grounds that it would, having regard to the practical considerations arising with regard to the running of prisons or the security of the detention of prisoners, have reached a different conclusion on the appropriateness of special arrangements for association or of temporary release."

11. While certain of a prisoner's Constitutional rights are clearly and necessarily restricted owing to their imprisonment, it has been stated on a number of occasions that other Constitutional rights remain intact. I refer to the decision of *Creighton v Ireland & Ors.* [2010] IESC 50 wherein Fennelly J. stated, at para. 4: -

"Nonetheless, the prisoner may continue to exercise rights 'which do not depend on the continuance of his personal liberty....' I would say that among these rights is the right to personal autonomy and bodily integrity. Thus, it is common case that the state owes a duty to take reasonable care of the safety of prisoners detained in its prisons for the service of sentences lawfully imposed on them by the courts."

12. The administration of the IPS requires those in authority to make difficult decisions. I refer to *Nash v. the Chief Executive of the Irish Prison Services & Ors.* [2015] IEHC 504 wherein the applicant, who was serving life sentences for multiple murders, sought an order quashing the decision of the IPS to refuse his request to be transferred from Mountjoy Prison to Arbour Hill Prison. By the time the matter came on for hearing, the applicant had been transferred to the Midlands Prison. While in the Midlands Prison the mental health of the applicant had deteriorated significantly to the point that he had become suicidal. The applicant maintained that he

ought to be transferred to Arbour Hill Prison. In giving judgment, Kearns P. stated: -

"It must be acknowledged that the function of the Executive in this sphere is self-evidently an important and integral aspect of the Executive function. Prisoners cannot expect or demand bespoke arrangements for where they serve their sentences, nor would it be appropriate for the courts to adopt the role of micro-managing criminal detention arrangements. Common sense and practicality strongly suggest that the courts should interfere with such matters as little as possible. Nonetheless, while decisions about prisoner safety are primarily a matter for prison authorities, they are not immune from judicial scrutiny."

and,

"So, the Court accepts that a balancing exercise, as argued for by Mr. Hartnett for the applicant, is appropriate. In this regard, however, it is essential to identify the critical public interest against which the facts of a particular case must be measured. It is nothing less than the ability of the Prison Service to function effectively. That being so, a great deal must be put in the scales to outweigh that societal interest. Accordingly, the Executive must be afforded an extensive measure of appreciation in what is an extremely difficult area. In *Dempsey v. Minister for Justice* [1994] 1 ILRM 401, Morris J. (at p.405) described the discretion which the Minister enjoys in respect of prisoner transfers in the following manner:-

'The transfer of prisoners from one prison to another is a statutory discretionary power performed by the Minister. In the exercise of this power she has very wide discretion. This discretion is conferred in the broadest possible terms.'

The courts should therefore intervene with the exercise of this particular power in only the gravest of cases."

Consideration of issues

13. Ms. Eilís Brennan, S.C., for the applicant, emphasised the potential adverse consequences that the applicant could suffer as a result of his transfer back to Wheatfield Prison. These consequences must be seen in the context of the applicant's positive prison record where he has been of good behaviour and availed of the opportunity for further education. Until the events of 28 July 2017 the applicant, as suggested by Ms. Brennan, was well on course to achieving temporary release having spent the last twenty years in prison. Given the potential serious consequences for the applicant arising from the circumstances of his transfer to Wheatfield Prison, it was submitted that the respondent ought to have dealt with the matter through the disciplinary process which is designed to deal with the taking of illicit substances. Had this course been adopted, the negative result of the urinalysis would have exonerated the applicant of any wrong doing.

14. Mr. Michael O'Higgins S.C., on behalf of the respondents, relied on the legal authorities which I have already referred to. In particular, he submitted that were this Court to intervene it would have to be established that the decision taken by the Assistant Governor was, in the words of Finlay J., "capricious, arbitrary or unjust".

15. Given the findings of fact which I have made, the Assistant Governor clearly had to take some form of action because of the condition in which he found the applicant to be on 28 July 2017. This condition was more than likely as a result of the applicant being under the influence of an intoxicant. As Shelton Abbey is an open prison with limited access to medical facilities it was, in my opinion, a reasonable and proportionate response to transfer the applicant back to Wheatfield Prison.

16. I do not consider that the Assistant Governor ought to have utilised the disciplinary process to deal with the situation created by the applicant. The disciplinary process was an option, but not the only one, and it was reasonable for the Assistant Governor to treat the applicant's transfer as being "an operational decision". At the time the Assistant Governor could not have known what the results of the urinalysis test would be. When the decision was taken, the Assistant Governor, in treating the matter as an operational one, was reducing the potential risk that the applicant could face from a disciplinary procedure. I am therefore of the view that the decision to transfer the applicant to Wheatfield Prison, and the reasons for same, fall well short of being "capricious, arbitrary or unjust".

Conclusion

17. By reason of the foregoing, the applicant is not entitled to the reliefs sought herein. The fact that the applicant's transfer from Shelton Abbey to Wheatfield Prison was for "operational" reasons should not have adverse consequences for him. I hope that the applicant will continue with the progress that he has made and will continue to avail of the educational opportunities available to him.

18. For the sake of completeness, objection was taken to these proceedings as being out of time. There clearly was a degree of confusion concerning the involvement of the applicant's former solicitors. This, however, would have been outside the control of the applicant. Thus, I do not regard time as being an issue.