THE HIGH COURT

JUDICIAL REVIEW

[2014 No. 465 JR]

BETWEEN

GERALD DUNNE

APPLICANT

AND

GOVERNOR OF WHEATFIELD PRISON,

IRELAND AND ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Ms. Justice Baker delivered on the 6th day of April, 2017.

1. The applicant is a prisoner in the custody of the first respondent in Wheatfield Prison, Clondalkin, County Dublin. The present proceedings arise out of the imposition by the first respondent of a sanction following a disciplinary hearing on 29th June, 2014. Leave was granted on 29th July, 2014 by me to seek judicial review by way of *certiorari* of the determination of the first named respondent and the imposition of the sanction. An order was made on 5th July, 2016, that the applicant have liberty to issue a notice of intention to cross-examine Assistant Governor Seán O'Reilly on his replying affidavit sworn on 6th February, 2015, arising from a perceived conflict of evidence on the affidavits. The hearing of the judicial review included oral testimony and cross-examination of Assistant Governor O'Reilly.

2. The first ground of review is that the inquiry was conducted in violation of fair procedures, in breach of natural and constitutional justice, in breach of s. 3(1) of the European Convention on Human Rights Act 2003, and in a manner incompatible with Article 6 of that Convention.

3. The second ground of review is that the first respondent acted unreasonably and irrationally in making the determination that the applicant was in breach of prison discipline, that the evidence had at the disciplinary inquiry did not substantiate the finding, and that the first respondent has wrongly interpreted the Prison Rules in its determination.

4. The claim regarding Part 3 of the Prisons Act 2007 ("the Act of 2007") by which an internal disciplinary inquiry is permitted is no longer being pursued, nor is the claim that the conduct of the disciplinary hearing requires, for the imposition of a sanction, proof beyond a reasonable doubt.

5. No relief is sought against the second and third defendants.

Material facts

6. On 13th June, 2014, the applicant was handed an article by his brother during a regular visit. The applicant says the article was a paper, a "money docket", a record of lodging of money to his prison account and which contained personal details and the home address of his brother. Having received the docket, the applicant tore it up and placed it in the bin in sight of the prison officers and CCTV cameras overseeing the visit. The applicant accepts that he received this article from his brother but says that he had permission from acting Assistant Chief Officer O'Shea to receive it, or in the alterative, that the docket was not a prohibited item, the receipt of which was not a breach of discipline.

7. The visit was interrupted and the applicant subjected to a full strip and squat search. A similar search was carried out at the end of the visit. Nothing was found on either search.

8. The first respondent denies that the applicant ever sought or obtained consent from acting ACO O'Shea to receive the item. There is also a dispute as to whether receipt of the money docket is a matter giving rise to a breach of discipline.

9. On 16th June, 2014, the applicant was given a P19 disciplinary complaint form in relation to the incident in which it was asserted that he had taken possession of a prohibited article in the course of the visit on 13th June, 2014. A short hearing was held at which the applicant denied the offence and sought sight of the CCTV footage of the visit. The hearing was adjourned to 29th June, 2014.

10. At the adjourned hearing on 29th June, 2014, the CCTV footage was played. The applicant denied that he had been in breach of the Prison Rules. A dispute has arisen with regard to the assertion by the applicant that he sought the attendance of acting ACO O'Shea at the hearing in support of his defence that permission had been granted by him.

11. Acting ACO O'Shea did not attend the disciplinary hearing and no evidence was available from him.

12. Following the conclusion of the hearing by Assistant Governor O'Reilly, a determination was made that the applicant had breached prison discipline and a sanction of 40 days of loss of privileges was imposed. The applicant asserts that he was at no time given the opportunity to make a plea in mitigation before the sanction was imposed. A dispute of fact arises also in regard to this assertion.

13. A dispute also arises as to whether the applicant has exhausted all internal remedies and in particular whether the applicant activated the power of review by way of application to the Minister for Justice, Equality and Law Reform ("the Minister") pursuant to s. 14(2) of the Act of 2007.

The construction of the Prison Rules

14. The complaint is set out in the P19 complaint form and the disciplinary offence of which the applicant was charged was "receiving an article on a visit contrary to Rule 54(1), alleged to be an offence against discipline in contravention of Schedule 1 of the Prison Rules 2007". The particulars of the offence are as follows:

"While viewing visits cameras at above time & date I observed the above named prisoner's visit of 13/06/14. I observed the visitor,

namely Mark Dunne, pass an article to the prisoner. The article was concealed in a piece of paper. The prisoner can clearly be seen take the article from the paper & put the article down the front of his trousers. I reported this to ACO Naughton & SO O'Shea i/c visits. The footage is saved on intellex."

The reporting officer is Officer Tansey and the P19 is dated 13th June, 2014.

15. The disciplinary hearing took place on 29th June, 2014, presided over by Assistant Governor O'Reilly, with Chief Officer Murphy and Assistant Chief Officer Gibney also present. The CCTV footage was played.

16. At the conclusion of the hearing, the applicant was found to have breached prison discipline by receiving an article without permission. No distinction was made in the ruling between the receipt of an article and the receipt of an article within or concealed in a piece of paper, and no argument was made in the course of the disciplinary hearing or in the hearing of the judicial review that the distinction is relevant. It is common case that no evidence was adduced that the applicant had received any item within the piece of paper shown on the CCTV footage, and the applicant admitted at all material times that he did receive a paper, what he says was a money docket and no more.

17. The first respondent argues that the receipt of any item without permission is a breach of prison discipline. Whether this is correct on a true construction of the Rules is the first matter to be determined in this judicial review.

18. The Prison Rules 2007 (S.I. No. 252 of 2007) made pursuant to s. 35 of the Act of 2007 came into operation on 1st October, 2007. A prisoner is guilty of a breach of prison discipline if he or she contravenes or fails to comply with any of the provisions of the Rules, and this is expressly provided in Schedule 1 to the Rules.

19. Rule 54(1) provides a prohibition on receipt by a prisoner of any article:

> "A prisoner shall not receive any article or thing from a person from outside of the prison without the permission of the Governor and no person shall, whether during a visit to which these Rules apply or otherwise, convey or attempt to convey any article or thing into or out of a prison or to a prisoner without such permission."

20. The first question to be determined is whether the first respondent acted lawfully in coming to a determination that the applicant had received a prohibited item within the meaning of Rule 54(1). The applicant argues that at best the evidence was that he received a money docket, and he has always admitted to having received a piece of paper which he says was paper generated within the prison and not a prohibited item. It is argued, therefore, that the first respondent acted unreasonably and irrationally in its interpretation of the Rule and in imposing the sanction.

21. Rule 54(1) must be seen in conjunction with Rule 9(1) which defines a prohibited article as follows:

> "Any article –
>
> (a) not included for the time being in a list prepared and published under Rule 8 (Prisoner's property),
>
> (b) the possession of which by a prisoner is considered by the Governor to present a threat to the maintenance of good order or safe or secure custody,
>
> (c) the possession of which in a part of the prison other than a part designated by the Governor is considered by the Governor to present a threat to the maintenance of good order or safe or secure custody, or
>
> (d) which is being used by a prisoner in a manner which is considered by the Governor to present a threat to the maintenance of good order or safe or secure custody,
>
> (in these Rules referred to as a "prohibited article") taken from a prisoner, or any article (in the case of an article sent to a prisoner or handed in for a prisoner by a person from outside the prison) not given to the prisoner, may be dealt with in accordance with this Rule."

22. No list has been prepared and published under Rule 8 to identify "prisoner's property". The first respondent argues, therefore, that, there being no list from which there can be identified items excluded from the definition of prohibited articles, all articles or items not expressly identified as belonging to the applicant, or identified as being his specific property, are characterised as prohibited articles.

23. The primary argument, however, relates to the terms of Rule 54(1) and whether receipt of a money docket is prohibited. A "money docket" is generated for the purposes of Rule 8 by which the prison is required to maintain an inventory of all articles including money brought into the prison by each prisoner or "handed in or sent to the prisoner for his or her use". It is a document generated within the prison.

24. The applicant argues that on a true construction, Rule 54(1) prohibits the receipt of any item when the item comes from outside the prison, but does not preclude the receipt of an item generated within the prison, albeit that item is handed over by a visitor. The first respondent argues that the receipt of any item from an outsider, a person from outside the prison whether during a visit or otherwise, is an offence.

25. The words of Article 54(1) are to be interpreted in accordance with the Interpretation Act 1937, as is expressly provided in Rule 2. On a literal interpretation it does not ready yield a clear meaning, and no punctuation marks help to indicate whether it is the item or the person delivering the item that is to come from "outside the prison". In one sense every person "comes" from "outside" the prison, but a less obtuse reading would suggest the distinction intended is between persons who work within the prison and visitors. An interpretation which yields the result that prohibits receipt of any item, whatever its provenance, from a visitor is not absurd. On such reading it may be an offence to receive a bar of chocolate from the prison shop from a visitor but not from a prison officer. However, an interpretation that prohibits receipt of an item from any person when the item is not a prison item or one generated within the prison is equally not absurd, and on such reading the receipt of a bar of chocolate from an outside shop from a prison officer may be an offence.

26. A purposive interpretation yields more clarity. The Rule is contained within part of the Rules dealing with "Searches and Prohibitions" and governs the transmissions of items to a prisoner from persons outside the prison, whether they be visitors, or

persons not visiting who seek to convey items into the prison by throwing those over the prison walls, or presumably by post or courier.

27. The Rule must be looked at as a whole and Rule 54(2) deals with the placing or conveying of an article in a place inside or outside of the prison with the intent that it shall come into the possession of a person in the prison:

> "No person, without the permission of the Governor, shall place any article or thing in any place inside or outside the prison or convey by throwing or otherwise into or out of the prison any article or thing with the intent that it shall come into the possession of a person in the prison."

28. The Rule prohibits the transmission of any item by a visitor or a person not employed within the prison, and it is the mode of transmission that governs the prohibition not the nature of the item.

29. A purposive reading of Rule 54(1) in my view is that it prohibits the receipt of any item conveyed by a person when that person is not a member of prison staff, not an "insider". This, in my view, means that if a visitor receives in the course of a visit an item from a prison officer or from another prisoner, that person, for convenience I shall call him or her "a visitor", may not transmit that item or thing to the prisoner without permission. The item does not have to come from outside the prison, but the transmission has to be by or through a visitor.

30. I conclude then that Rule 54 governs the receipt by a prisoner of any item from a visitor, and the prohibited items are not merely those which themselves are brought from outside the prison.

31. On the basis of that construction, therefore, I do not consider that the applicant has made out an argument that the decision of the Assistant Governor was plainly wrong or irrational in the sense in which is submitted by the applicant. I am satisfied that the first respondent was correct in his reading of the Rules, and that the item was received from the brother of the applicant in respect of which no permission had been obtained.

Unreasonable or irrational determination

32. Leave was granted to seek judicial review on the grounds that the first named respondent acted unreasonably and irrationally in the determination that it made having regard to:

> (a) the fact that the applicant was subjected to two intimate searches in the course of a visit from his brother, and immediately afterwards, and nothing was found;
>
> (b) the CCTV footage did not sustain a conclusion that the applicant had received a prohibited item from his brother;
>
> (c) that acting ACO O'Shea gave permission; and

33. The first two of these particulars relate to the weight or nature of the evidence, and insofar as the applicant argues that the decision was irrational or unreasonable, I am not satisfied that he has shown that there was no evidence before the Assistant Governor which permitted him to come to the conclusion he did. There was evidence including the CCTV footage, and the admission by the applicant himself of having received what he described as a money docket.

34. I return to the question of whether a procedural frailty is to be discerned on the ground that the applicant given permission to receive the item and not given the facility to cross-examine acting ACO O'Shea.

The conduct of the inquiry

35. The applicant does not deny that the first respondent was entitled to conduct the inquiry and to impose a disciplinary sanction should the offence be proven. The second ground of review is the argument that there was an absence of fair procedures in the conduct of the inquiry. The question requires that I determine a matter of disputed fact. Acting ACO O'Shea swore an affidavit in which he said at para. 4 that he:

> "witnessed the applicant receive an article, in contravention of the Prison Rules 2007, from his brother during the aforementioned visit, without the permission of the Governor, or myself or any other person on behalf of the Governor. After he received this article, I immediately approached the Applicant and asked him what he had received. The Applicant said the article was a money receipt which he then proceeded to tear up. Accordingly, I say that the ripping up of the article was carried out after I approached the Applicant as opposed to before as alleged by the Applicant. The applicant was subsequently subjected to search under normal procedures".

36. Whether the applicant received consent from acting ACO O'Shea is not a matter I must determine, and the leave relates to the process not the correctness of that assertion. On the application by the applicant for leave to cross-examine acting ACO O'Shea, on his affidavit sworn on 6th February, 2015, I refused the order as the determination of the question of whether he had given permission was not in issue in the application for judicial review which concerned itself with the question of whether permission had been sought and refused to cross-examine Mr. O'Shea in the course of the disciplinary proceedings, not the factual question of whether consent to receive the item has been given.

37. Leave was given to cross-examine Assistant Governor Seán O'Reilly who conducted the inquiry in regard to the events at the inquiry.

38. The factual questions arise from the contents of the affidavit of the applicant sworn on 25th June, 2015, the affidavit of Matthew Kenny, his solicitor sworn on 28th July, 2014, and the replying affidavit of Assistant Governor Seán O'Reilly sworn on 6th February, 2015, and may be summarised as follows:

> (i) Whether the applicant made a request that acting ACO O'Shea be called at the hearing of the disciplinary inquiry to deal with his assertion that he had given permission to the applicant to receive a money docket from his brother in the course of the visit.
>
> (ii) Whether the applicant, who admitted receiving the article, stated in the course of the inquiry that he had received permission from acting ACO O'Shea to receive the article.

39. The second question is subsidiary to the first, as the question for determination is whether a request was made that Mr. O'Shea

be examined with regard to the matter, and whether such request was made is predicated on the making of an assertion in the course of the hearing that permission had been given.

40. In para. 9 of the statement of grounds the applicant pleads that the first respondent acted otherwise than in accordance with the law and in violation of fair procedures in:

> (a) failing to hear the evidence of acting ACO O'Shea when the applicant had given evidence that acting ACO O'Shea had given him permission to take possession of the money docket that he took possession of;
>
> (b) not allowing the applicant to challenge the evidence presented against him in the disciplinary hearing, the subject of the proceedings herein, adequately or at all.

41. Paragraph 10 pleads that the applicant told Assistant Governor O'Reilly in the course of the disciplinary hearing, and after they had viewed the CCTV footage, that he had sought and received permission to take possession of the money docket from acting ACO O'Shea.

42. Paragraph 11 pleads as follows:

> "Notwithstanding the Applicant's statement in his defence, the Governor did not seek to hear or obtain any evidence from Acting ACO O'Shea."

43. The statement of grounds is verified in the verifying affidavit of the applicant.

44. Assistant Governor O'Reilly in his affidavit at para. 10 says the following:

> "The applicant was informed of his right to call a witness to give evidence if appropriate. The Applicant admitted receiving the article and did not state, at any time during the course of the inquiry, that he received permission from Assistant Chief Officer O'Shea to receive the article as alleged in the Statement of Grounds nor did he request Assistant Chief Officer O'Shea to attend as a witness. Had he stated this, I would have further adjourned the hearing until Mr. O'Shea was present."

45. Assistant Governor O'Reilly was cross-examined on his affidavit. He explained the paper in respect of which a breach of discipline was found was a "prison docket" prepared in the prison offices and that permission would have been given for the handing over of that paper by the visitor as a matter of course. He explained that the conviction or the finding of breach of discipline was made by him on the grounds that any article received without permission was a prohibited article.

46. His evidence is that the sole reference made by the applicant in the course of the disciplinary hearing to the nature of the item was the assertion by way of defence that the item was a minor matter of a money docket and not anything of a more serious nature. He says that the applicant never mentioned, by way of defence or otherwise, that he had permission from acting ACO O'Shea or anyone else to receive the item. He says that he would have noted something as important as reference to consent from an identified prison officer in his notes and that the first time this matter was brought to his attention was in the letter from the solicitor for the applicant sent on 8th July, 2014, where it was said that the process and procedure at the inquiry was in violation of fair procedures in that a material witness, acting ACO O'Shea, was not called.

47. The factual question for determination therefore, is whether the issue of consent arose in the course of the hearing in such a way as supports the argument that fairness required that the matter be further pursued or investigated by calling acting ACO O'Shea. The applicant argues that the evidence points to the question of consent being raised in the course of the hearing and that once this happened, the Assistant Governor was, as a matter of fair procedure, required to investigate that matter. Assistant Governor O'Reilly denies that the question of consent was ever raised, and says that he would have adjourned the matter for further hearing had the assertion now made been brought to his attention.

48. The applicant argues that the conflict of evidence must be resolved in his favour, and asks that I take particular regard of the fact that no application was made to cross-examine Mr. Dunne on his affidavit. Mr. Dunne's affidavit is a confirmation of the contents of the statement of grounds and there is no averment of an express request that acting ACO O'Shea be produced and required to give evidence. The height of the claim is that the first respondent breached fair procedures in failing to call Mr. O'Shea when the applicant had given evidence that permission had been received from him to take possession of the item in question.

49. I do not accept the argument of the applicant that the mere fact that Mr. Dunne was not sought to be cross-examined by the respondents means that I must accept his evidence because the evidence of the applicant is not that he sought the attendance of Mr. O'Shea at the hearing but that he had given evidence of consent, a full defence to the charge. Acting ACO O'Shea did not give evidence at the hearing and this is not in dispute. I do not consider that I can proceed to determine the factual question on the assumption that he did give consent.

50. I have the short contemporaneous note of the hearing and the formal report of the hearing prepared by Assistant Governor O'Reilly. I consider having heard his oral evidence that it is possible to ascertain the sequence of events at the hearing from the note and I conclude the following.

51. After the CCTV footage was shown to the applicant, he replied "I am still not guilty". In reply to the direct question whether he received an article, he said "yes it was only a money docket". He was then told he was not permitted to receive any article without the Governor's permission and the sentence immediately after that entry contains the finding of Assistant Governor O'Reilly, "I find you did receive an article".

52. I consider that the conflict of evidence is to be resolved in part by an examination of the matter in respect of which the applicant was charged. The alleged breach of discipline was of receiving an item within an item or within the piece of paper. The applicant defended himself by saying that he received merely a piece of paper without any content. I consider that the applicant's primary focus in his defence was the more serious allegation that he received a concealed item in a piece of paper as is evident from his own evidence that, immediately upon being confronted, he tore up the paper in front of the prison officers and the CCTV cameras but was nonetheless subjected to a full search. Having regard to the narrative in the statement of grounds which is confirmed by the affidavit evidence of the applicant, the applicant was well aware of the extent of the allegation made against him, and it is not credible that he would have been subjected to a body search in the course of a visit from his brother, and immediately after it concluded, if all that was ever in issue was whether he had received the paper which he had clearly ripped into pieces and thrown in the bin in the course

of the visit. The applicant knew what was in contention was whether he had an item concealed in a paper and it was that charge he was defending.

53. In those circumstances, I consider that the applicant sought to defend himself by asserting that the sole item he received from his brother was a piece of paper, or as he put it himself "only a money docket", a defence to a more serious charge, an admission of having received an item, albeit an item which in itself is accepted to be relatively innocent and a matter in respect of which consent would have been given as a matter of course. The suggestion that the applicant defended the charge against him on the basis that not only was there nothing within the paper, but that he had been given permission to receive the paper is a defence of such a different nature that it seems to me unlikely that the Assistant Governor who had spent nine years in that role and conducted many disciplinary hearings, on his own evidence between twelve and fourteen in any given week, would have failed to note this fact on the records. In fact, Assistant Governor O'Reilly is clear that had the question of consent been raised, he would have investigated the matter further.

54. The applicant was found to have been in breach of discipline in regard to a matter not the subject of the charge, and the finding and sanction were imposed in respect of receiving "only a piece of paper", and not an item concealed in that paper. I consider that I may draw an inference from the fact that the applicant admitted receiving the paper docket, that he tore it up in front of the prison officers, and that the Assistant Governor was clear in his evidence that he would not have refused the applicant a request to examine acting ACO O'Shea had one been made, and that he would have investigated the matter further had the specific defence now been asserted been made.

55. I can also draw an inference from the initiating letter of the applicant's solicitor. That letter of 8th July, 2014, makes no assertion that the applicant had been give permission to receive the item. Had such permission been received it would have been a full defence to the charge, and I do not consider it likely that an experienced solicitor would have omitted to say consent had been given. The reference to acting ACO O'Shea is that there was a breach of procedure in failing to call him, where he was described as a "material witness". The focus of this letter was a claim that fair procedure had not been achieved in that the applicant had not been permitted to challenge the CCTV footage, the only evidence presented against him, by acceding to a request to have it enhanced. The assertion is that the first respondent had acted unreasonably in making a determination where the only evidence was unclear CCTV footage and that insufficient weight had been given to the fact that the applicant was subjected to two intimate searches in the immediate aftermath of the alleged incidents. There is also objection on the grounds that mitigation had not been offered to the applicant prior to determining the punishment. That letter is almost contemporaneous with the date of the imposition of the sanction on 29th June, 2014. The response from Assistant Governor O'Reilly was that the CCTV footage was clear and that the applicant had admitted receiving something on a visit.

56. I accept that the contemporaneous notes of Assistant Governor O'Reilly are incomplete, and that his affidavit evidence is not fully borne out by either his memory or by those notes. In particular, the averment in para. 12 of his affidavit that the applicant had declined the opportunity to exercise his right to petition the Minister pursuant to s. 14 of the Act of 2007, is not borne out by the evidence, nor is his evidence that the applicant said that he could speak to his solicitor "when the parties met in the High Court". The contemporaneous note entered on the computer system shows that the applicant did say that he wished to petition the Minister.

57. I do not accept the evidence of Assistant Governor O'Reilly that no petition to the Minister was sought by the applicant. The opposite conclusion is to be drawn from the contemporaneous notes. The letter written by Assistant Governor O'Reilly on 10th July, 2014, in reply to the letter from the solicitors to the applicant says that the applicant did complete the form to petition the Minister. This directly conflicts with his affidavit evidence. I must conclude that the affidavit was prepared and sworn by Assistant Governor O'Reilly without him having first checked his notes or his correspondence. His affidavit evidence is not, therefore, reliable.

The findings of breach

58. I conclude on the evidence the applicant made no assertion in the course of the hearing that he had been given permission to receive the item in question. While I accept that the contemporaneous notes taken at the hearing by Assistant Governor O'Reilly are incomplete, and that his affidavit evidence is not wholly accurate, I can find no basis to conclude that the applicant did make an assertion in the course of the hearing that would have excused him entirely from the charge. I consider it more likely than not that, had the applicant sought to rely on permission from acting ACO O'Shea, he would have stressed the importance of the permission and protested not merely that all he had received from his brother was a piece of paper, but also that the receipt of the paper was permitted. That fact was too central to the entire charge to have been omitted from the written document prepared in the course of the hearing by Assistant Governor O'Reilly. The applicant himself does not seem to have instructed his solicitor on this ground, as the initiating letter makes no reference to permission which would have offered a complete defence. Any factor that would have been so influential in the conclusion of the case would, even if it had not been noted by Assistant Governor O'Reilly, in my view have formed the primary basis on which the solicitor would have challenged the finding and the sanction.

59. While the applicant says that he had been given permission to receive the item, he does not say that he sought the production of acting ACO O'Shea for the purposes of the hearing, and that factor lends weight to the view that had the applicant made the assertion that consent had been given, he would almost certainly have requested that the evidence of the person from whom he had obtained consent would have been sought. I consider it unlikely that the applicant would have left it to chance, or left it to the prison authorities, to produce evidence from acting ACO O'Shea when it was the applicant who needed this information and evidence to establish his innocence. I consider that the applicant has not made out a persuasive case that he raised the issue of consent at the hearing.

60. It must be borne in mind also that the onus is on the applicant to establish sufficiently on the evidence that there was a breach of his rights arising from the failure to fully investigate the matter raised in defence by him. As acting ACO O'Shea did not give evidence at the hearing, that evidence never came to form part of the inquiry, and the applicant must, therefore, have been aware immediately upon the conclusion of the hearing that, if he was correct in his assertion, there was a significant and fundamental gap in the evidence which had not been dealt with. The initiating letter from the solicitor does not point to this fact. I must also add to the weight of the argument the fact that Assistant Governor O'Reilly had made it clear on affidavit that had the question of consent been raised, he would have adjourned the hearing. More importantly, however, is the fact that the receipt of the money docket was regarded as a minor matter, a common or garden item, and consent would have been forthcoming to receive this paper had a request been made. The fact that the applicant was subjected to two intimate searches, one in the course of the visit from his brother and the other immediately thereafter, would suggest that the applicant knew that the assertion against him was of a more major breach of discipline, not receipt of a common or garden item. The question of consent, therefore, was essential to the entire incident of this brother's visit and the entire inquiry. I find it unconvincing therefore that no reference to that consent is contained in the initiating letter from the applicant's solicitor.

The plea in mitigation

61. I am satisfied on the facts, however, that the applicant was not afforded an opportunity to plead in mitigation. The best evidence of the conduct of the inquiry are the contemporaneous notes of the person conducting the inquiry, Assistant Governor O'Reilly, and his notes do not bear out the argument that any opportunity was given to the applicant to plead in mitigation.

62. I reject the evidence of Assistant Governor O'Reilly that he offered the applicant the opportunity of making a direct plea in mitigation. There is nothing in the contemporaneous notes to support this assertion. I reject his evidence that the evidence given by the applicant in the course of the hearing that what he had received was only a money docket was a plea in mitigation, and I accept the evidence of the applicant, that this assertion was made in defence of the more serious claim made against him not in mitigation. I do not accept the evidence at para. 12 of the affidavit of Assistant Governor O'Reilly that the applicant was "afforded all opportunity to provide any material in mitigation". The entry regarding this evidence comes immediately after the question posed to the applicant of whether he did receive an article. If the assertion by the applicant that all he had received was a piece of paper is to be seen as a plea in mitigation and not an acceptance of receipt of one item, then the hearing would have been flawed in failing to consider that any evidence had been offered by the applicant in defence of the claim.

63. If the assertion of Assistant Governor O'Reilly that his notes are complete is to be accepted, they do not bear out his affidavit evidence that the applicant was offered the opportunity to make an argument in mitigation.

64. I do not consider it relevant, as argued by the first respondent, that the applicant has not identified any matter that might have been argued by him in mitigation had he been offered the opportunity at the disciplinary hearing.

65. Accordingly, I am satisfied that the applicant has made out a case that procedures were not followed at the hearing and no opportunity was given to him to offer a plea in mitigation of sanction. Rule 67(11) of the Prison Rules provides that:

> "A prisoner shall be entitled to make a plea in mitigation to the Governor before the Governor imposes any penalty."

66. The Rules provide no consequence for failure on the part of the Governor to observe this requirement.

67. The sanctions permitted to be imposed by the Governor are set out in s. 13 of the Act of 2007 and include prohibition for a period of not more than 60 days on receiving visits and the use of telephone facilities. The sanction imposed by the Governor was one permitted by the Act of 2007, and this is not denied. Section 14 of the Act of 2007 permits the applicant to petition the Minister within seven days of the imposition of any sanction concerning any such sanction. The failure to offer the opportunity to plead in mitigation was referred to expressly in the initiating letter from the solicitor for the applicant sent to the Governor of 8th July, 2014. The grounding affidavit suggests that the applicant never received a confirmation that his request had been transmitted to the Minister nor had the results ever been communicated to him. The applicant has served most, if not all, of his punishment. The applicant has not sought to quash the sanction.

68. However, no evidence is before me as to the current stage at which the petition to the Minister had advanced, and the plea in mitigation can go to the extent of the sanction and not to the lawfulness of the sanction. The applicant availed of the alternative remedy of petitioning the Minister, not a party to these proceedings, and I have no evidence as to how this remedy has been pursued by the applicant or whether sufficient remedy of the matters raised by him in that petition has been afforded.

69. Furthermore it is not clear to me how much of the sanction had been imposed when the stay on execution was granted at the leave stage. I do not consider that the failure to offer an opportunity to the applicant to make a submission in mitigation is such as to render the finding or the sanction unlawful, and until further information is available as to the status of the petition to the Minister, it is not possible for me to make any further finding in this regard. I consider that the applicant was not offered an opportunity to plead in mitigation, but any further relief in regard to this frailty will depend on further submissions.

Conclusion and summary

70. This case is made on a very narrow basis: that there was a breach of procedure in the course of a disciplinary hearing, and on a single assertion of fact, namely that the applicant gave evidence that consent had been given to him to receive the item in question. I am satisfied that the hearing did not progress on that basis, but that the applicant engaged with the disciplinary hearing by challenging the nature of the item he was alleged to have received and not whether he received an item without consent. He was facing a more serious charge of receiving an item concealed within a paper, he admitted to receiving a paper, and he was successful in defending the more serious charge in being found guilty of breach in regard to the less serious.

71. Because the factual basis of the claim is not borne out on my view of the evidence, I consider that the applicant has not made out a case that there was a breach of fair procedure in failing to call or afford the applicant an opportunity to call the witness from whom it is alleged that he had obtained consent. The claim, whether it be for breach of procedural fairness, or breach of the European Convention on Human Rights must fail on the facts.

72. The failure to give the applicant an opportunity to plead in mitigation is a breach of the Rules governing the process of the disciplinary inquiry and I make a declaration that the Rules were breached. The applicant did petition the Minister regarding the sanction, but as the course of that petition has not been clarified, I am unable to rule on the consequence of the breach of process. I will hear counsel on whether any consequential declaration is justified.