THE HIGH COURT

JUDICIAL REVIEW

[2018 87 J.R.]

BETWEEN

PETER BARRY

APPLICANT

AND

THE GOVERNOR OF THE MIDLANDS PRISON AND THE IRISH PRISON SERVICE

RESPONDENTS

JUDGMENT of Mr. Justice Noonan delivered on the 7th day of December, 2018

1. On the 19th May, 2014, the applicant was sentenced to a term of imprisonment for a number of offences including rape and sexual assault. He is currently serving his sentence at the Midlands Prison in Portlaoise. The applicant suffers from the medical condition of Crohn's disease which makes him prone to a number of symptoms including an abnormal bowel habit leading at times to frequent and uncontrolled bowel movements.

2. He has been the subject of repeated medical reviews in relation to his health and the uncontroverted evidence is that since his incarceration, up to June 2018, he has had 464 medical contacts with medical staff at the prison. The within judicial review proceedings are the third such proceedings brought by the applicant within a twelve month period. The first proceedings related to complaints by the applicant about his mode of transport to appointments outside the prison, which transport the applicant alleged to be unsuitable for him having regard to his medical condition. These proceedings were compromised.

3. In the second proceedings, the applicant sought orders of *mandamus* requiring the respondent Governor to return to him certain duvets and towels that had been confiscated and to install a shower curtain in his cell. Judgment in that case was delivered by Faherty J. on the 11th May, 2018 dismissing the applicant's claim. In the current proceedings, the applicant seeks essentially an order that he should not be required to share a cell with any other prisoner as result of his condition and further an order that he should be provided with both food and medications appropriate to his illness.

4. In these proceedings, as in the proceedings before Faherty J., the applicant claims that the allegedly wrongful acts of the respondents in relation to accommodation of which he complains were motivated by an animus towards him arising out of the fact that he brought the first case. In the second case, he made the same allegation. In the course of her judgment, Faherty J. referred to the plaintiff's allegations concerning the first case and noted (at para. 56):

> "Whatever the circumstances regarding to these other proceedings, the applicant has not put anything before the Court in this regard which could conceivably be considered by the Court as retaliatory conduct by the respondents."

5. The application now before the court is one whereby the applicant seeks discovery of the following categories of documents:

> 1. All documents, including but not limited to, records, notes, correspondence, memoranda, of and concerning the prison menu, which said menu is created with the advice of any dietitian, as provided to the applicant by the respondents, from the date of the applicant's detention at the first named respondent prison, to the present time, possessed and/or capable of being possessed by the respondents;
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> 2. All documents, including but not limited to, records, communications, notes, assessment memoranda, notes or documents, investigation reports or memoranda, held electronically or otherwise, of and concerning, all prisoners detained at the first respondent prison, in single cell occupancy, and all particulars relating to the reasons or basis for such detention, whether on health or medical grounds or otherwise, in June 2016 to the present time, with redactions so far as necessary to ensure privacy and protection of such prisoner's identity, which said documents are possessed and/or capable of being possessed by the respondents;
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> 3. All documents, including but not limited to, all records, reports, notes, communications, whether held electronically or otherwise, of and concerning the dates of interference with the applicant's single cell occupancy, the numbers of such inmates on an individual basis, so far as redaction as to identities may be necessary, and all particulars in relation to such prisoners, between 13th August, 2017 and the 4th November, 2017, which said documents are possessed and/or capable of being possessed by the respondents;
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> 4. All documents, including but not limited to, records, reports, notes, communications, held electronically or otherwise, of and concerning all prisoners afforded single cell occupancy, whom had their single cell occupancy interrupted by the placement of other inmates in such cells, with redactions as may be necessary to protect identities, between the 13th August, 2017 and the 4th November, 2017, as possessed or capable of being possessed by the respondents.

6. The relevance of the dates between August and November 2017 above referred to is that during that period, for some 41 days the plaintiff, who occupies a double occupancy cell, had a cellmate placed with him. Apart from that period, the plaintiff has since 2016 and continuing up to the present time been the sole occupant of the cell that he currently occupies.

7. It should be noted that the applicant originally sought no less than twelve categories of discovery in his letter seeking voluntary discovery which was responded to by the respondents on the 17th September, 2018. In that letter, the respondents agreed to make discovery of all documents relating to the applicant's medical treatment and care in prison. That discovery has now been made. As in his second claim, the applicant in these proceedings claims that the fact that he was required to share his cell with another inmate for a period of 41 days over the past two years was motivated by discrimination against him as a result of his first case. This is denied by the respondents who say that the requirements of a fluctuating prison population may mean that from time to time, it is unavoidable that the applicant may have to share his cell but insofar as possible, they seek to avoid this happening.

8. In response to averments by the prison Governor as to what happens in the case of other prisoners, the applicant's solicitor in an affidavit sworn on the 23rd July, 2014 avers (at para. 26):

> "As regards the arrangements for other prisoners, as averred, this is not relevant to the within proceedings…"

9. Whatever about the reprisal allegation relating to the applicant's cell occupancy, no such allegation appears to arise in the context of his other complaints about food and medication because it would appear that even prior to the commencement of his first case, the applicant was making complaints about these matters to the prison authorities.

10. The legal principles to be applied to applications for discovery in judicial review proceedings are well settled. In *Sheehy v. Ireland* (High Court unreported 30th July, 2002) Kelly J. (as he then was) noted that the necessity for discovery in judicial review proceedings is rare and is the exception rather than the rule. Those principles have been summarised and applied in a number of recent cases – see McE*voy v. Garda Commissioner* [2015] IEHC 203, *Marques v. Minister for Justice and Equality* [2017] IEHC 597 and *Flynn v. Charities Regulatory Authority* [2018] IEHC 359. It is of course true to say that discovery will be ordered in judicial review proceedings where it is necessary for the fair disposal of the matter. A very useful discussion of the topic is to be found in the judgment of the Court of Appeal in England and Wales delivered by Sir Thomas Bingham MR in *R. v. Secretary of State for Health Ex parte Hackney London Borough* & Ors [1994] Lexis citation 1574. At p. 9 of the judgment, 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 lead 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.
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> In the ordinary inter partes civil action the plaintiff usually makes a series of factual averments which may well be challenged, but which are usually sufficiently plausible to raise issues calling for discovery. It is not open to a plaintiff in a civil action, or to an applicant for judicial review, to make a series of bare unsubstantiated assertions and then call for discovery of documents by the other side in the hope that there may exist documents which would give colour to the assertions of the applicant, or the plaintiff, which he is otherwise unable to begin to substantiate. This is the proscribed activity usually described as "fishing"; the lowering of a line into the other side's waters in the hope that the net may enclose a multitude of fishes, the existence or significance of which the applicant has no rational reason to suspect."

11. The court continued (at p.15):

> "It seems to me that it would be unjust and unfair to order discovery in judicial review proceedings simply on the basis of unsupported assertions by applicants of wrong doing on the part of respondents. To allow discovery in such circumstances would cast an onerous burden on respondents for what would ex hypothesi be no good reason, while unsupported assertions by their very nature do not demonstrate that justice for the applicant requires an order for discovery. Thus, in such circumstances, an order for discovery would be likely to do justice to neither party and injustice to one. It is for this reason that the courts are averse to granting orders of a "fishing" or "Micawber" kind. That is to say, orders designed to find out whether mere assertions have any basis in fact."

12. This appears to me to accurately summarise the law in this jurisdiction also. In the context of categories 2, 3 and 4, the applicant seeks from the respondents documents in relation to single cell and shared occupancy throughout the prison for the periods mentioned. The applicant submits that he requires these documents to establish whether the placing of another prisoner in his cell was done from an improper animus or motive. There is no evidence whatsoever underpinning this assertion, the same assertion in earlier proceedings having been found to be without any foundation. It seems to me therefore that the discovery sought in relation to these three categories falls squarely into the fishing category discussed by Bingham MR as based on unsupported assertions and no more.

13. To order such discovery would be quite unnecessary for the fair disposal of the matter and would patently be unjust to the defendants. It really amounts to little more than an attempt by the applicant to find out if there might be any document which is capable of supporting an otherwise entirely bare assertion. That is not the purpose of discovery and is impermissible. Moreover, the applicant's solicitor himself avers that arrangements for other prisoners are irrelevant and accordingly the request for discovery necessarily fails on relevance grounds also.

14. Finally, with regard to the first category sought, the plaintiff has already had the benefit of discovery of all his medical records which would include any medical advice about diet and copies of the relevant prison menus have already been exhibited in the Governor's replying affidavits in the substantive proceedings. I fail to see therefore how the documents sought in this category can advance the applicant's case one way or the other and such discovery is equally unnecessary for the fair disposal of the matter. In the course of submissions, counsel for the applicant indicated that he required to see these documents in order to decide whether to pursue this issue at trial. This is the very thing that the Rules do not permit.

15. Accordingly, for these reasons, I will refuse this application.