Neutral Citation: [2015] IEHC 273

THE HIGH COURT

[2013/843JR]

BETWEEN

JASON WHELAN

APPLICANT

AND

THE GOVERNOR OF MOUNTJOY PRISON MINISTER FOR JUSTICE AND EQUALITY

RESPONDENTS

JUDGMENT of Ms. Justice Murphy delivered the 1st day of May, 2015

1. At all times material to these proceedings the applicant was a prisoner in Mountjoy Prison. His sentence commenced on 17th October, 2012. Almost a year later on 10th October, 2013 the applicant committed two serious breaches of prison discipline. In the first incident, the applicant threw a bucket of slop over a Prison Officer. In the second incident, the applicant caused damage to his cell by pulling the sink from the wall. Following a hearing, the respondent, as he was entitled to do, invoked the provisions of rule 62 of the Prison Rules 2007 and directed that the applicant not be permitted to engage in general or particular authorised structured activities, or participate in communal recreation, or associate with other prisoners, for a period of 56 days. On foot of this decision the applicant was removed from the general prison population and was placed in a unit known as CBU, the Challenging Behaviour Unit. While there, on 7th November, 2013, he committed another breach of prison discipline when he threatened to assault a Prison Officer. He admitted the misconduct alleged and was given a further punishment of 28 days loss of privileges. This further punishment was to commence on the 8th December 2013, three days after the expiry of the punishment which he was then serving, which was due to expire on the 5th December, 2013.

2. On the 8th November, 2013, the day following the imposition of the second punishment, the applicant's solicitor wrote to the respondent complaining that he was not being provided with one hour of exercise in the open air each day as required by rule 32(1) of the Prison Rules. Rule 32(1) provides:

> *"Each prisoner not employed in outdoor work or activities shall be entitled to not less than one hour of exercise in the open air each day, provided that, having regard to the weather on the day concerned, that is practicable."*

3. On his client's instructions, his solicitor described the area in which the applicant was offered exercise to be a cage like structure which is not open to the sky. The applicant's solicitor also made complaint about other matters which are not relevant to this application. Having received no response to his initial letter, the applicant's solicitor wrote again on 12th November, 2013. By letter of the same date, the first respondent replied setting out the reasons why the applicant was on a restricted regime and asserting that the regime under which he was being detained was compliant with the Prison Rules, including the rule relating to exercise. Two days later, on 14th November, 2013, an application for leave to seek judicial review was brought before the President. A number of reliefs were sought but those relevant to the current application were the reliefs sought at 1 and 2, being :-

> *(i) an order of mandamus by way of application for judicial review, compelling the first named respondent to allow the applicant one hour of exercise in the open air every day, subject to the weather, pursuant to rule 32(1) of the Prison Rules 2007.*
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> *(ii) a declaration by way of application for judicial review that the offer of 1 hour of exercise in an enclosed yard which is not in the open air is not sufficient compliance with rule 32(1) of the Prison Rules 2007.*

4. The President directed that the application for leave be brought on notice to the respondents. The application came before Hedigan J. on 22nd November, 2013. On that date, the Court had before it the grounding affidavit of the applicant's solicitor and the replying affidavit of the first respondent in which *inter alia* he set out the dimensions of the exercise area in issue and exhibited photocopied photographs of its exterior. Hedigan J. gave leave to the applicant to apply by way of application for judicial review for:-

> *(1) an order of mandamus by way of application for judicial review, compelling the first named respondent to allow the applicant one hour of exercise in the open air every day, subject to the weather, pursuant to rule 32(1) of the Prison Rules 2007 and*
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> *(2) a declaration, by way of application for judicial review that the offer of one hour of exercise in an enclosed yard which is not in the open air is not sufficient compliance with rule 32(1) of the Prison Rules 2007.*

4. The grounds upon which leave was granted were as follows:-

> *(i) The instant case concerns the detention of the applicant. The applicant is currently serving a custodial sentence in Mountjoy Prison. In or about the 4th October, 2013, the applicant was sanctioned for a breach of prison discipline. The sanction imposed was 56 days loss of privileges.*
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> *(ii) Since the imposition of this punishment the applicant has been detained in a single occupancy cell which is locked for 23 hours of every day.*
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> *(iii) The applicant has been offered exercise every day. However, the area in which the applicant has been offered exercise is not outdoors. He describes it as a cage like structure with no natural light other than that which comes through vents. It is not open to the sky.*
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> *(iv) The applicant frequently refuses to go to this area for exercise as he views it as no different to his cell. Rule 32(1)*

of the Prison Rules 2007 provides: "each prisoner not employed in outdoor work or activities shall be entitled to not less than one hour of exercise in the open air each day provided that having regard to the weather and the day concerned that is practicable."

(v) The failure to afford the applicant exercise in the open air everyday is contrary to the Prison Rules 2007, the applicant's constitutional right to health and the ECHR.

5. On that date, the 22nd November 2013, the second respondent was discharged from further participation in the proceedings. The matter was remitted for hearing to the 4th December, 2013. The matter was not heard on that date. Two days later according to the supplemental affidavit of the respondent, on the 6th December 2013, the applicant was released from detention in the CBU and returned to the general prison population. The second period of 28 days punishment, imposed for the breach of prison discipline on 7th November, 2013, does not appear have been carried into effect.

6. A statement of opposition was filed by the first respondent on 14th July, 2014, accompanied by a supplemental affidavit. The respondent has essentially advanced two grounds of opposition to the applicant's claim, one procedural and one substantive. The procedural ground of opposition is mootness. The respondent contends that the application is moot in circumstances where the applicant is no longer in the Challenging Behaviour Unit but has been returned to the general prison population. The substantive ground of opposition is the contention that the exercise yard attached to the Challenging Behaviour Unit is in compliance with rule 32(1), being an exercise area appropriate to the type of prisoners detained in the Challenging Behaviour Unit who according to the respondent's supplemental affidavit are "*high risk*" or "*misbehaving inmates*". In this context, the respondent contends that the decision on what constitutes appropriate open air exercise is a matter for his discretion as provided for in rule 75 of the Prison Rules 2007 and in particular rule 75(3) which provides that:-

"The Governor shall develop and maintain a regime which endeavours to ensure the maintenance and good order, the safe and secure custody and personal well-being of the prisoners"

The Exercise Area

7. In his original replying affidavit the respondents sets out the dimensions of the exercise area at paragraph 12. He states:-

"I say that the applicant is permitted one hour exercise in the open air daily, in accordance with rule 32 of the Prison Rules. I say that this exercise takes place in an area which measures 6.88 metres (22.5 ft) by 5.32 metres (17.5 ft). I say that this yard has a height of 7.2 m (23.6 ft) sloping to 5.8 metres (19 ft) and is roofed for security reasons and so as to facilitate exercise notwithstanding inclement weather. I say that 180 sq ft of the yard perimeter is open to the air and the remainder is covered in sheet metal in order to allow privacy to those inmates using it for exercise."

8. These bare dimensions do not convey the nature of the area as vividly as the photographs provided by the respondent. These photographs show what is, in effect, a large lean-to shed, the back wall of which is brick and the remaining three walls of which are constructed of sheet metal. The top portion of the sheet metal walls consists of steel mesh which allows in some light and air. The meshed portion is well above head height and from the photographs supplied appears to cover the top quarter of the 19 ft outer wall. Thus it is well above the head height of individuals using the area. The meshed area on the side walls of the shed is less than that on the outer wall. The entire structure is covered by a steel sloping roof which extends from the brick wall out beyond the outer steel wall. There appear to be four lights on the central trusses supporting the steel roof, suggestive of the fact that the area needs illumination, at least part of the time. The Court is satisfied, as a matter of fact, that this exercise area is not in the open air. The entire area is enclosed, with some light and air admitted through the top meshed part of the structure. If this is open air, then a cell which has bars which admit light and air would similarly be in the open air. This structure in fact resembles a large holding cell.

9. A person is in the open air when he/she can look up and see the sky and have the sun in his eyes or feel the rain on her face. This exercise area meets none of those requirements. The Court therefore has no hesitation in holding that the exercise area attached to the Challenging Behaviour Unit is not in the open air in the commonly accepted sense of that term.

10. Being satisfied as a matter of fact that this is not an open air facility, the Court must next consider whether it should reject the application either on the procedural ground that it is moot or on the substantive ground that 'open air' is a relative concept within a prison context and that it is a matter of gubernatorial discretion whether an exercise facility satisfies open air requirements.

Mootness

11. Whether an application is moot falls to be determined at the date of hearing rather than the date of initiation of the proceedings. At the date of hearing of this case the applicant was no longer in the Challenging Behaviour Unit having been returned to the ordinary prison population. Accordingly, he was not then subject to exercise within this structure. In those circumstances, an order of *mandamus* compelling the first named respondent to allow the applicant one hour of exercise in the open air everyday, subject to the weather, pursuant to rule 32(1) of the Prison Rules was at the time of hearing moot and counsel for the applicant accepted that this was so.

12. Therefore, the only ground left standing, for which leave had been given, is the claim for a declaration that the offer of one hour of exercise in an enclosed yard which is not in the open air is not sufficient compliance with rule 32(1) of the Prison Rules 2007.

13. The respondent maintains that the applicant's claim in this respect is also moot because he was no longer subject to the particular exercise regime which applies in the Challenging Behaviour Unit and his application does not come with any of the established exceptions to the moot rule.

14. On the date of the hearing the applicant was still in prison and the exercise arrangement provided for inmates in the Challenging Behaviour Unit was still in place. It was contended on behalf of the applicant that he was therefore liable, in the event of further breaches of discipline, to be returned to the Challenging Behaviour Unit and to be subjected again to the exercise regime available in that unit. Given his history, that was a real rather than a remote possibility

15. On the facts of this particular case, where the applicant was still in custody in the respondent's prison at the time of the hearing and where the exercise arrangement complained of in the CBU remained in place, the Court is satisfied that the application is not moot. In the much quoted and approved statement of the Canadian Supreme Court in *Borowski v. Canada* [1989] 1 SCR 342:-

"An appeal is moot when a decision will not have the effect of resolving some controversy affecting or ***potentially*** *affecting the rights of the parties. Such a live controversy must be present not only when the action or proceeding is*

commenced but also when the court is called upon to reach a decision. The general policy is enforced in moot cases unless the court exercises its discretion to depart from it. (Emphasis added)."

16. On the day of the hearing of this case the applicant could potentially have found himself in the CBU being provided with an exercise regime which he contends is not in compliance with the Prison Rules. As Hardiman J. pointed out in *Goold v. Collins* [2004] 7 JIC 1201,

> *"In the United States an issue is not deemed moot if it is "capable of repetition, yet evading review" a phrase devised in 1911 and constantly used thereafter e.g. in Honig v. Doe 484 US 305 [1988]. This is said to be the case where:*
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> *"(1) The challenged action is in its duration too short to be fully litigated prior to its cessation or expiration and (2) There is a reasonable expectation that the same complaining party would be subjected to the same action again".*

17. In this particular case the applicant had spent from the 10th October, 2013 to the 6th December, 2013 in the CBU. He was due to serve a further 28 days in the CBU commencing on the 8th December 2013, though for some unexplained reason this sanction was not enforced. There was nothing before the Court to suggest that the applicant could not be subjected to further incarceration within the CBU during the remainder of his imprisonment. In these circumstances, on the basis of both the Canadian and American tests, as approved by Hardiman J in *Goold v. Collins*, the Court is satisfied that the application is not moot. For that reason, it is not necessary for the Court to go further and consider whether this is one of the exceptions to the mootness rule where the Court will determine an issue despite the fact that it is moot, such as arose to an extent in *O'Brien v PIAB* [2007] 1 IR 328 and very directly in *Okunade v. The Minister for Justice, Equality & Law Reform and Others* [2013] 1 ILRM. In so holding, the Court is nonetheless conscious that were it to find this application moot, as night follows day further applications on this issue would emerge, and so had the Court been compelled to consider whether this case came within the exceptions to the moot rule, it might well have concluded that it does.

Substantive Ground of Opposition

18. It was argued by counsel for the first respondent that *'open air'* in the context of a prison environment is different to the general understanding of *'open air'*. She contended that a free person in all likelihood would not consider any part of the prison to be *'open air'* given the presence or proximity of high walls and fences at all points therein. She contended that the fact that the expression is being considered within the context of the Prison Rules must to some extent inform its meaning. Unless the area is entirely enclosed, then the extent to which it is 'open air' is to some extent a matter of interpretation and a question of degree. She quoted three excerpts from European Court of Human Rights case law which she contended illustrated the point. Each of the three cases dealt with substandard prison conditions and in particular overcrowding in which context the physical characteristics of an outdoor exercise facility had been considered by the European Court of Human Rights. The Court was directed to the case of *Ananyev and Others v. Russia* nos. 42525/07 and 60800/08, 10 January 2012, a case in which, as the Court was informed, the European Court of Human Rights had said as follows;

> *"The requirement that prisoners be allowed at least one hour of exercise in the open air every day is widely accepted as a basic safeguard…it is also axiomatic that outdoor exercise facilities should be reasonable spacious and whenever possible offer shelter from inclement weather…"*

19. On checking the judgment, the Court notes that this is not in fact a statement of the European Court of Human Rights but is an extract from the Second General Report of the CPT, the European Committee for the Prevention of Torture and Inhumane or Degrading Treatment or Punishment CPT/Inf (92) 3 [EN]. The Court notes that what is recommended by the CPT is the provision of shelter in an outdoor exercise facility. The provision of shelter does not require the enclosure of the entire area so as to transform it in effect into an indoor area. Counsel for the respondent also referred to *Moiseyev v. Russia* no. 62936/00, 9 October 2008 in which the exercise area was only one of a number of complaints made by the applicant. In that case it was the limited physical space for exercise which was in issue. The exercise area had an opening to the sky which was protected with metal bars and a thick net but the major criticism of the Court was that the exercise yard was only two square metres larger than the cells which themselves provided inadequate space. Thirdly, the respondent's counsel relied on a statement of the European Court of Human Rights in *Mandiæ and Joviæ v. Slovenia*, nos. 5774/10 and 5985/10, 20 October 2011. This again was a case primarily about overcrowded prison conditions which the respondent State maintained were alleviated by the fact that the prisoners had access for two hours each day to an outdoor exercise in a yard of approximately 600 square metres and an additional two hours per week in a recreation room. The Court was referred to part of paragraph 78, the more extensive version of which is as follows:-

> *"The court finds that the applicants situation was further exacerbated by the fact that they were confined to their cell day and night, save for two hours of daily outdoor exercise, and an additional two hours per week in the recreation room. As there was no roof over the outdoor yard, it is hard to see how the prisoners could use the yard in bad weather conditions in any meaningful way. It is true that the applicants were allowed to watch TV, listen to radio and read books in the cell. This however, cannot make up for the lack of possibility to exercise or spend time outside of the overcrowded cell."*

20. Counsel for the respondent urged the Court to hold that the fact of a roof being in place on an outdoor facility could not of itself be said to be a breach of rule 32 of the Prison Rules 2007 in circumstances where the absence of such roof resulted in prisoners being unable to use the yard in any meaningful way. The Court is satisfied that the thrust of the ECHR decision is that the absence of shelter in the exercise yard meant that the yard could not be used in bad weather and thus was not an answer to the problem of overcrowding. Again the desirability of providing shelter within an open air exercise is qualitatively different to turning an open air yard into an indoor yard.

21. In furtherance of his contention that *'open air'* is a question of degree which must be assessed in the context of the prison and the Prison Rules, the respondent sets out at paragraphs 4, 5 and 6, of his supplemental affidavit filed on the 10th July 2014, the basis upon which he contends that the exercise unit attached to the CBU is compliant with rule 32(1). He avers as follows:-

> *"I say that one of the considerations which informs the construction of this particular exercise yard, which by definition is confined to high risk or misbehaving inmates, is that it needs to be covered to a significant extent so as to prevent drugs (and to a lesser extent other contraband) being passed by means of an aerial route. I say that this area is close to an external wall and that a number of contractors and other prisoners pass by it everyday. These factors are material considerations in determining how the area should be laid out.*
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> *I say that preventing the circulation of drugs is one of the biggest challenges for the administrators of Irish Prisons and that my concerns extend not only to the issue of rehabilitation, which drugs inevitably derail, but also to the health and safety of prisoners in my charge and the risk that an overdose of drugs could cause serious harm or death to such*

persons. Given that the persons who seek to smuggle contraband into prisons or to transfer it within the prison confines, are constantly finding new ways to overcome the restrictions which are put in place, it is necessary to be very thorough in any measures which are taken to combat their efforts. Accordingly I say that I believe that the restrictions which are evident in the exercise yard under review are appropriate to the security and operational needs which I have assessed as being necessary for this part of the prison.

For the avoidance of any doubt, I say that I have seen the exercise yard which is used by those who are being kept on the Challenging Behaviour Unit (sometimes referred to as the CBU). I have considered whether it is appropriate for its purpose and in view of the size and layout of the area and while it is necessarily restricted to a certain extent, I have taken the view that it is suitable for open air recreation."

22. Counsel for the first respondent argued that it is for the Governor to make an assessment as to what is *'open air'* and that his views in the matter are entitled to be upheld unless there is no basis for so doing. In that regard she relied on rule 75 of the Prison Rules which deals with the powers and duties of Governors. Particular reliance was placed on rule 75(3) which provides :-

"The Governor shall develop and maintain a regime which endeavours to ensure the maintenance and good order, the safe and secure custody and personal well being of the prisoners."

23. It is established law that a prison governor has a wide discretion in the area of prison management. Counsel relied on the case of *Derek Devoy v. The Governor of Portlaoise Prison, the Irish Prison Service and the Minister for Justice, Equality and Law Reform* [2009] IEHC 288 in which Edwards J. made the following observations:-

"The management and governance of the nation's prisons is a matter for the executive. It is provided for in the Prisons Acts 1826 to 2007, and in particular the Prisons Act 2007, and the rules made by the third named respondent under s. 35 of that Act, namely the Prison Rules 2007. Under this scheme of legislation, and in particular Rule 75 of the Prison Rules day to day governance of a prison is entrusted to the Governor of the prison who is responsible for its management subject to the directions of the third named respondent, and of the second named respondent through its Director General. The Governor of each prison has a broad discretion which is reflected in Rule 75(3) of the Prison Rules 2007, which states:

"The Governor shall develop and maintain a regime which endeavours to ensure the maintenance and good order, and safe and secure custody and personal well-being of the prisoners."

However, in applying the Prison Rules the Governor must apply them in a manner which is respectful of and intended to vindicate the constitutional rights of the prisoner to the extent that they are not abrogated or suspended by the very fact of his being sentenced to a term of imprisonment. Among the residual constitutional rights of a prisoner which are not abrogated or suspended is the right to be treated humanely and with human dignity. The Prison Rules recognise this and indeed Rule 75 (2) (iii) requires the Governor "to conduct himself or herself and perform his or her functions in such a manner as to respect the dignity and human rights of all prisoners."

24. Counsel also relied on a passage from the judgment of Barrington J. in the *State (Richardson) v. Governor of Mountjoy Prison* [1980] ILRM page 82 where he said:-

"It appears to me that the purpose of the prison rules is to reconcile the need for security and good order in the prison with the prisoners subsisting constitutional rights. Clearly the prison authorities must be allowed a wide area of discretion in the administration of the prison in the interest of security and good order."

25. The Court readily accepts that prison governors have a wide area of discretion in and about the management of prisons. Counsel for the first respondent went further and suggested that curial deference may attach to such a decision. As trenchantly stated by Hardiman J. in *Meadows v. Minister for Justice Equality and Law Reform* [2010] IESC 3, in a passage which was opened and relied on by the counsel for the respondent:-

*"…I believe that the decision of a member of the government answerable to Dail Eireann and who is himself a member of that body, **on a matter properly his to decide** is emphatically entitled to deference in a Democratic State. (Emphasis added)."*

That of course in this case, begs the question whether the decision that an exercise facility is *'open air'* is a matter properly the Governor's to decide. Having considered rule 32 of the Prison Rules, the Court has decided that it is not.

Decision of the Court

26. The arguments advanced on behalf of the first respondent are inventive but not persuasive. While the respondent undoubtedly has a very wide discretion as to the manner in which he fulfils his obligations to the prisoners in his custody while balancing his duty to maintain order and safety, that wide discretion is not an open ended one. The discretion must be exercised in accordance with the Prison Rules. Rule 32 is clear, it provides at 32(1):-

*"Each prisoner not employed in outdoor work or activities **shall be entitled** [emphasis added] to not less than one hour of exercise in the open air each day, provided that, having regard to the weather on the day concerned, that is practicable."*

27. Rule 32(1) applies to all prisoners and includes those who have been removed from the general prison population pursuant to rule 62. The only discretion conferred on the first respondent by rule 32(1) is the discretion to disallow open air exercise if the weather is unsuitable on the day concerned. It seems to the Court to follow that, if weather conditions can make the exercise yard unsuitable then the yard must be open to the elements. Given the Governor's discretion to disallow exercise when the weather is unsuitable it also seems clear that the Governor cannot be compelled to provide shelter within an open air exercise area. Other than this limited discretion afforded to the Governor by the latter half of rule 32(1) open air exercise is mandatory.

28. For the purposes of interpretation, rule 32(1) can be usefully contrasted with rule 32(2) which states as follows:

"In so far as is practicable each prisoner shall be permitted to have access to, and the use of, indoor space and equipment, suitable for physical recreation, exercise or training, and shall be provided with appropriate instruction where necessary".

29. In addition to open air exercise, rule 32(2) envisages the provision of indoor exercise. The requirement to provide such indoor exercise is expressly made subject to practicability. What is practicable in a given situation is precisely the type of decision in which gubernatorial discretion arises. The entitlement to open air exercise on the other hand is mandatory and is not subject to discretion other than as already stated above.

30. The question as to whether the exercise area provided for the Challenging Behaviour Unit is or is not in the open air is therefore a question of fact. The term *'open air'* in rule 32(1) is not qualified or limited by words such as *'as far as practicable'* or *'as the governor shall think fit'*. It therefore must be construed in accordance with its natural and ordinary meaning. It is not necessary for the Court to expound on the widely accepted view in civilised society of the need to afford prisoners access to open air exercise in order to assist in sustaining their mental and physical health. The Court is satisfied as a matter of fact that this exercise area is not in the open air in the natural and ordinary meaning of that term having regard to the fact that it is entirely roofed; that it is bounded on one side by a solid brick wall and on the other three sides by sheet metal; that less than 10% of its entire area consists of steel mesh which admits light and air; that the area of meshing is at a height double the size of an average individual; that a person utilising the facility would at best have an oblique view of the sky. As a minimum, a person who is in the open air should be able to look up and see the sky and feel the elements be it wind, rain or sun. In the Court's view those minimums are not provided by the exercise unit attached to the Challenging Behaviour Unit in Mountjoy Prison and therefore do not provide for open air exercise as required by rule 32(1) of the Prison Rules. While the Court acknowledges the understandable security concerns expressed by the first respondent in his supplemental affidavit of the 14th July 2014, the Court is quite satisfied that it is not beyond the wit of man to provide open air facilities which are capable of meeting the security requirements and concerns of the first respondent. The Court will hear the parties on the terms of the declaration to be made.