THE HIGH COURT

JUDICIAL REVIEW

[2017/1010 J.R.]

BETWEEN

GERALD DUNNE

APPLICANT

AND

THE GOVERNOR OF WHEATFIELD PRISON

AND

THE MINISTER FOR JUSTICE, IRELAND AND THE

ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Ms. Justice O'Regan delivered on the 20th day of June, 2019

Issues

1. Three issues arise for consideration by the court by reason of the within proceedings namely: -

> (1) In or about the disciplinary hearing which was undertaken by the first named respondent in respect of the applicant did the first named respondent breach fair procedure by reason of a failure to afford the applicant an entitlement to examine a particular knife and CCTV footage.
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> (2) Was the refusal of the second named respondent to refuse to consider the applicant's petition pursuant to s.14 of the Prison Act 2007 irrational, absurd, unfair and unlawful or, in the alternative did the first named respondent act unlawfully and in breach of the applicant's rights pursuant to s.14 of the Prisons Act 2007 by failure of the first named respondent to transmit the appeal of the applicant to the second named respondent, being the appeal dated 14th November, 2017; and
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> (3) did the first named respondent fail to act lawfully and breach fair procedures and natural justice in failing to respond to the reasonable requests of the applicant's solicitor for information to assist the applicant in prosecuting his petition in a meaningful and timely fashion.

Background

2. The applicant is and at all material times was a prisoner in Wheatfield Prison having been committed to prison on the 30th January, 1999 following a murder conviction and the imposition of a life sentence.

3. In these proceedings leave was afforded on 18th December, 2017 in respect of a statement of grounds of the same date. The statement of grounds was supported by a grounding affidavit of the applicant's solicitor, Matthew Kenny, on 20th December, 2017 which said affidavit was subsequently followed by a grounding affidavit of the Applicant dated 3rd January, 2018. Aside from a further affidavit to support an application to cross-examine Austin Stack, the first named respondent, the only other affidavit filed for or on behalf of the applicant was that of Mr. Kenny during the course of the hearing before the court to state that his letter of 7th November, 2017 was both faxed and emailed to the first named respondent. Accordingly, there is no replying affidavit disputing the averments in the affidavit of Austin Stack of 5th March, 2018, 13th November, 2018 or 29th May, 2019. In these circumstances the factual background upon which the applicant relies is to be gathered from the statement of grounds as the facts therein have been verified by the applicant's affidavit and that of his solicitor.

4. In the statement of opposition of 6th March, 2018 any wrongdoing on behalf of either of the respondents is denied.

5. It is common case that at approximately 2.10pm on 7th November, 2017 the applicant's cell was searched by a number of prison officers in the presence of the applicant when an improvised knife wrapped in tissue paper was found under the applicant's mattress and an almost full bag of razor blades was found on a shelf in the applicant's cell. In the proceedings the applicant does not deny that possession of either of the foregoing is contrary to prison rules.

6. Following the search, the applicant received a P.19 notice of a prison disciplinary hearing charging him with breaches of rules 17, 19 & 23 of the First Schedule of the Prison Rules 2007, namely damage or disfiguring prison property or the prison; has in his cell or room possession of a prohibited article; has in his possession a greater quantity of any article than he would be authorised to have.

7. The disciplinary hearing commenced on 8th November, 2007 but was adjourned on the basis that, by defence the applicant advised the respondent that the CCTV would show that others had access to his cell when he was not present (see para. 9 of the Statement of Grounds). It further appears from affidavit evidence that the applicant asserted to the prison officers who searched his cell as aforesaid that he did not lock his cell after him while he was at work and other persons would have had access to the cell. The applicant stated that he had no knowledge of the knife.

8. The hearing resumed on 14th November 2017 and there is a dispute between the parties as to whether or not the applicant was shown part of the CCTV footage for the day of 7th November, 2017 in respect of the period 8.09am to 14.23pm. Although the applicant asserts that the first named respondent failed to show CCTV footage in his presence (see para. 22 of the Statement of Grounds) the first named respondent asserts in his affidavits of 5th March, 2018 and 13th November, 2018 that the applicant did see the CCTV footage however in cross-examination the first named respondent states that the applicant saw the CCTV footage in respect of the segments which involved parties entering and leaving the applicant's cell during the period aforesaid. It is not disputed therefore that the applicant did not see the totality of the CCTV footage for the period aforesaid.

9. At para. 8 of the Statement of Grounds the applicant suggests that the bag of razor blades was found on a high shelf that he did not use and no other property of his was on that shelf. He suggests that he could not reach the shelf. In para. 8 of the affidavit of Governor Stack it is stated that there is no high shelves in prison cells and the only shelf in the applicant's cell (being a single occupancy cell) was a four-foot shelf and it is asserted that the applicant would have sight of the items as they were clearly visible on the lower portion of this shelf.

10. During the course of the hearing on 8th November, 2017 the form P.19 form was read to the applicant which *inter allia* recalls the finding of the knife wrapped in tissue paper and hidden under the prisoner's mattress together with the almost full bag of prison issue razors, the applicant was present at the search, the applicant was the only occupier of the single cell.

11. The P.19 record of 14th November, 2017 states: -

> *"I have viewed the saved CCTV footage from the morning in question. Every time your cell is open and when somebody enters your cell you were present. All these entering the cell are not carrying anything. Based on the evidence before me and the fact that you are responsible for the content of your own cell, I find the report proven. Have you anything to say before I pass sanction."*

12. The applicant indicated that it was not him and he inquired as to whether or not he could appeal. Insofar as the record records what occurred on 7th November, 2017 in respect of the CCTV the comment enclosed is *"I will adjourn the hearing to see if there is anything relevant to the hearing on the CCTV."* On 8th November, 2017 the hearing commenced at 11:11.

13. Insofar as the relevant correspondence from the applicant's solicitors is concerned it appears that the letter of the 7th November 2017 was faxed and emailed. It is not known when it was faxed however the email suggests it was emailed at 15.46. In the letter of 7th November, 2017 the applicant's solicitors asked that the first named respondent would preserve CCTV covering the entrance to the cell and surrounding areas for "*a reasonable period of time prior to today"* to ascertain whether another person(s) entered the applicant's cell while he was at work. The letter went on to ask the first named respondent to invite An Garda Síochána to investigate the matter and the knife be preserved in a tamper-proof evidence bag to allow it to be analysed. The letter asked that consideration be given to the use of fingerprint analyses "*and if it is not to be relied upon that our client be provided the opportunity to arrange his own fingerprint analysis*". The letter also stated that the applicant insists that some person or persons planted the knife in his cell.

14. In a subsequent email of 16th November, 2017 it was noted that the first named respondent found against the applicant at the P.19 hearing and imposed sanction. It is noted that the applicant "*had sought a review of same*." The email notes that the first named respondent did adjourn the P.19 hearing to review CCTV but declined to allow the prohibited article to be submitted for fingerprint analysis. It requested that the item and CCTV be preserved and the applicant will fund the analysis of the item if the IPS or An Garda Síochána will not examine it. A request to confirm the first named respondent's position within seven days was made together with a request to forward all documents relating to the P.19 prior to the determination by the Minister in order that the solicitors could assist the applicant in making representations.

15. In the event the form executed by the applicant on 14th November, 2017 was not an appeal to the Minister but rather an appeal which the Governor would deal with. Before the court is an affidavit of Francis Turrell who secured the relevant form on request from the applicant on 7th November, 2017. His affidavit is dated 12th November, 2018 and he states at para. 3 that the applicant was given the form he asked for – *"the applicant specifically requested from me an incentivised regime appeal form."*

16. The form executed by the applicant on 14th November, 2017 is headed Incentivised Regimes Policy – Appeal Form and states that the prisoner must lodge an appeal within five days of the prisoner being informed of the decision. There then follows a box within which the appellant is to incorporate the grounds of appeal and sign and date same. The document is a one-page document with what is called part 2 immediately under the applicant's signature which is to be completed by Governor grade and it states that the Governor must decide the appeal within five days of it being lodged. The decision was made on 17th November, 2017 by Assistant Governor Stack who rejected the appeal on the basis that the appeal was in relation to the prisoner's IR level, the prisoner has not stated any grounds in respect of the original decision to drop his regime level.

17. The applicant suggests that he executed this form and gave it to officer Turrell for transmission to the second named respondent, however, in the week following as he had heard nothing back from the respondent inquiries were made with Governor Stack and he was told he had signed the wrong form. He subsequently sought a new petition form, completed it, and gave it to the servants and agents of the respondents for delivery to the second named respondent. In this regard, it is common case that the second appeal form was executed on 23rd November, 2017, transmitted to the first named respondent with onward transmission to the second named respondent. The second named respondent on the same day determined that the appeal was out of time.

Relevant Prison Rules

Prisons Act 2007

18. The following sections of the 2007 Act are engaged in the within proceedings: -

> (a) Section 13(1) provides that sanctions may be imposed on a prisoner who is found by the Governor to have committed a breach of prison discipline including under s.13(1)(d) prohibition for a period not exceeding sixty days when engaging in specific and authorised structured activities or recreational activities, receiving visits, sending or receiving letters, using money or credit or any other facility including telephone facilities or possessing specific articles;
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> (b) section 14 provides that a prisoner who has been found by a Governor to have committed a breach of prison discipline and on who a sanction under s.13 has been imposed may within seven days of its imposition sent to the Governor for transmission to the Minister a petition concerning the findings or sanctions or both findings and sanctions;
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> (c) under s.66(2) if a prisoner is alleged to have committed a breach of discipline the Governor of the prisoner may decide to hold an inquiry into the alleged breach;
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> (d) section 67 provides where the Governor decides to hold an inquiry he shall inform the prisoner by notice in writing of the nature of the alleged breach and the inquiry shall commence not earlier than the next day and not later than the day falling seven days after the Governor has made his decision. Under sub.3 the prisoner is entitled to be present;
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> (e) under s.57(6) the prisoner shall be entitled to be told what is alleged against him and to hear or be given an opportunity to examine or to have explained to him any evidence given or submitted in support of the allegation that he

committed a breach of prison discipline.

Case Law

(1) In *Egan v. Governor of Wheatfield Prison* [2014] 1 I.R. 64 leave had been afforded on 12th August, 2013 and in advance thereof the applicant's solicitors by letter of 25th July, 2013 sought ten specific items as set out in that letter. The request from the solicitors was following a disciplinary hearing when restrictions were imposed. Mr. Justice McDermott held that solicitors have a duty to inform themselves in obtaining from those responsible for the decision clear and transparent information as to the offences set out in the P.19, the result of the determination, the nature of the petition and any other relevant information which would assist them in offering their client the advice to which he was entitled in respect of an application by way of judicial review. The court held that a solicitor is thereby inhibited from presenting the full evidence concerning a challenged decision appropriate to an application for leave to apply for judicial review to the court where there is a denial of basic documents to the applicant's solicitors. Mr. Justice McDermott also stated that it is of the utmost importance that the Governor be able to conduct prompt informal hearings and apply any appropriate sanctions as soon as is reasonably practicable in order to maintain good order and discipline in the prison. The disciplinary hearing is conducted under rules which embody fair procedure and the court went on to state: -

"However, an applicant's solicitor should be entitled to a copy of the P.19, a copy of the decision made and a copy of the petition submitted, together with the Minister's decision when made."

Mr. Egan was challenging the failure of the Minister to determine the petition expeditiously.

(2) In *Peter Kenny v. The Governor of Portlaoise Prison Anor*, Ms. Justice Ní Raifeartaigh delivered a judgment on 11th October, 2017. The court indicated that prisoner rules are required to be read and informed by principles of constitutional and fair procedure. In that matter the applicant was disciplined for receiving contraband which despite a search was not found however during the hearing the applicant was told by the Assistant Governor that CCTV footage clearly showed that he had the item in his hand which he then secreted in his person. The applicant disputed this and asked to see the CCTV footage - this request was refused. The court did not think that the situation required anything like the full panoply of an adversarial hearing, however, basic evidence, namely the CCTV, upon which the decision maker was proposing to base his decision should be shown to the prisoner notwithstanding that the CCTV footage may have been so clear that nothing the applicant could ever have said would have changed the Assistant Governor's mind on what he had seen. At para. 14 the court indicated that it appears to have been the only evidence relied upon by the Assistant Governor.

(3) In *Doolan v. Governor of Arbour Hill Prison Anors* [2019] I.E.H.C. Ms. Justice Murphy was dealing with an application for certiorari in respect of a disciplinary hearing in respect of conduct of the applicant prisoner. The applicant was relying on the Supreme Court decision in *Ezeani v. Minister for Justice Anors*. [2011] I.E.S.C. 23 where Fennelly J. stated that reasonable notice to the affected person of the substance of any matters raised is required to fulfil natural justice although it was not necessary that the entire and every detail of the case against him be notified. The test is whether he had a fair opportunity to prepare himself and to respond. In her decision, Ms. Justice Murphy concluded that to serve a P.19 notice at 5pm without furnishing copies of the documentary evidence on which it was proposed to rely for a hearing at 9.49am the following morning could potentially deprive a prison of a proper opportunity to prepare for a hearing. The court was persuaded that a failure to allow the applicant to examine the evidence against him alleged to constitute the bullying and harassment of his victim was sufficient to vitiate the Governor's decision. The court was satisfied that a prisoner was entitled to hear the evidence and where there is oral evidence relied upon the prisoner is entitled to examine it. In that case the Governor specifically relied on evidence on which he refused to allow the applicant to examine – the transcripts of the telephone conversations and the screenshots from the website were furnished to the applicant shortly after the hearing to allow him to prepare a petition to the Minister.

19. In the case *Gallagher v. Governor of Portlaoise Prison* [1977] Finlay P. was satisfied that the functions being performed by the Governor of a prison was partly of a judicial or decision making character and as such must be carried out in accordance with the dictates and requirements of natural justice (see in *Re. Haughey* [1971] 1 I.R. 217).

Decision

CCTV

20. The applicant is undoubtedly correct in indicating that there were conflicts present in respect of the evidence given by Assistant Governor Stack relative to the CCTV both as to the length of time he spent reviewing the CCTV and the production of the CCTV to the applicant. On the other hand, the applicant states he did not see the CCTV. The applicant also submits that it was the CCTV coverage of the previous day which was sought to be reviewed.

21. In the solicitor's letter of 7th November, 2016 the request was that the Governor preserve CCTV covering entrance to the cell and surrounding area for a reasonable period of time prior to today. The time period might well refer to the period prior to the search as there is no reference to the previous day although the letter does state that the preservation of the CCTV is to ascertain whether another person or persons entered the applicant's cell when he was at work. In the letter of 16th November, 2017 when it was noted that the hearing of the P.19 was adjourned to review CCTV the solicitors asked that the Governor preserve the CCTV. The CCTV was available to the court during the hearing and clearly therefore it has been preserved. At para. 9 of the Statement of Grounds it is stated that the applicant advised the Governor that the CCTV would show that others had assess to his cell when he was not present

22. The Assistant Governor does not assert that he showed the applicant the entirety of the CCTV and accordingly the discrepancy of the accounts of the CCTV in my view is not material. If the CCTV was part of the case of the Governor against the applicant, then the entirety of the CCTV should be shown rather than a portion thereof (see the judgment in *Kenny* aforesaid). If on the other hand the CCTV footage was reviewed to ascertain whether or not the Governor could see that others had access to the applicant's cell such a viewing was in furtherance of the applicant's defence as opposed to the particulars of the allegations being made against him.

23. Given the content of para. 9 and the correspondence of the applicant's solicitors together with the fact that the Governor was happy to continue with the inquiry without any reference to the CCTV and same did not appear on the P.19 form I am satisfied that the CCTV footage did not in fact form part of the evidence against the applicant and so was not captured by s.67(6) of the 2007 Act or the *Kenny* or *Doolan* judgments aforesaid.

24. The applicant's solicitors knew by 16th November that CCTV footage had been viewed by the Governor and that the outcome of the hearing was negative to the applicant. Assuming that the applicant is correct when he says he did not see the CCTV footage then presumably the applicant's solicitors by 16th November were also aware of this fact and yet did not make any complaint in the letter of 16th November.

25. Reference in my view to "*a reasonable period of time prior to today*" does admit of an understanding reference to today was reference to the search that took place at 14:10 (the letter of 7th November, 2017 having been emailed at 15:46) and accordingly given that the applicant choose to express the requisite period in general as opposed to specific terms the applicant has not demonstrated a factual basis sufficient to discharge the burden of proof on the applicant to establish any want of fair procedure by the first named respondent in respect of the CCTV footage.

The knife and razor blades
26. Insofar as the razor blades are concerned the applicant denies that he possessed the bag of razor blades (see para. 8 of the Statement of Grounds) and stated they were found on a high shelf that he did not use nor could he reach same and no other property of the applicant was on the shelf. This statement is countered at para. 8 of the affidavit of Assistant Governor Stack of 13th November, 2018 wherein he states there are no high shelves – there was a four-foot shelf present in the cell and the applicant would have had sight of the items as they were clearly visible on the low portion of the shelf. The deponent states that the applicant was not authorised to have them. This statement has not been countered since it was made.

27. Insofar as the applicant suggests that Assistant Governor Stack contradicts himself in relation to fingerprints on the knife I cannot agree. At para. 6 of his first affidavit of 5th March, 2018 and at para. 7 of his second affidavit of 13th November, 2018 Assistant Governor Stack stated that it was not routine to have contraband items fingerprinted and they were not warranted in the circumstances and, because of general use, it could have had any number of prints on it prior to improvisation in the manner and with the relevant wrapping, such wrapping could reasonably have been expected to wipe any or all such prints. Clearly Governor Stack was speaking of before and after improvisation and wrapping.

28. Legislation requires the hearing to be undertaken within one to seven days.

The complaint at para. 23 of the Statement of Grounds is to the effect that the first named respondent failed to preserve the knife and make it available to the applicant and his solicitors for forensic testing before the hearing/conclusion.

29. In the letter of 7th November the applicant's solicitors asked that An Garda Síochána be invited to investigate and the knife be preserved in tamper-proof evidence bags to allow it to be analysed and asked that consideration be given to the use of fingerprint analysis. It was indicated that the applicant insists that some other person planted the knife in his cell.

30. By the letter of 16th November, 2017 having noted that the hearing resulted in the imposition of a sanction and a review of the outcome sought by the applicant. The letter noted that the Governor had declined to allow the prohibited article to be submitted for fingerprint analysis.

> *"We must ask that you preserve the item and CCTV. Mr. Dunne will fund the analysis of the item in question if … please confirm your position within seven days.".*

31. No complaint is made that the Governor had made the decision he had or indeed is there any sense of urgency - the position of the Governor was actually sought to be clarified within seven days, i.e. on or before 23rd - the date upon which Mr. Kenny received an effective response from the Minister and the outcome of the appeal before the Governor was known since 17th November.

32. No evidence is before the court that the item has not been preserved to the extent of the updated request of 16th November in respect of the knife.

33. In all of the circumstances it appears to me that there is no evidential basis to suggest that preserving and making the knife available for forensic testing prior to the hearing/conclusion was otherwise than in accordance with s.67(6) of the 2009 Act.

34. In the event the court in *Egan* noted that it was of the utmost importance that the Governor be able to conduct prompt and in formal hearings and apply appropriate sanctions as soon as reasonably practicable. It held that an applicant's solicitor was entitled to a copy of the P.19, the decision, the petition to a decision of the Minister and this finding is made in the context of para. 27 where it is stated that a solicitor is thereby inhibited from presenting the full evidence concerning a challenged decision appropriate to an application for leave to apply for judicial review to this Court.

35. Clearly the entitlement to the items identified in *Egan* related to a stage in advance of applying for leave for judicial review – in other words that the decision and appeal process has already concluded by the date of entitlement to the documents.

Solicitor's correspondence
36. As aforesaid the letter of 7th November asked to preserve CCTV for an unspecified period of time and asked the Governor to invite An Garda Síochána to investigate the matter and so preserve the knife and give consideration to fingerprint analysis or the applicant be afforded an opportunity to arrange his own fingerprint analysis. In the letter of 16th November, 2017 the updated status was noted and preservation of the knife and CCTV was sought with the Governor's decision to be confirmed within seven days.

37. The last mentioned letter also requested that all documents relating to the P.19 prior to the determination by the Minister would be forwarded to assist the applicant in making representations.

38. It appears from *Egan* that the documents relating to the P.19 are to be made available to the applicant's solicitors in the context of the conclusion of the disciplinary process and in contemplation of or immediately prior to an application for judicial review rather than during the course of the process. Further it appears to this Court clear that the documents relied upon was the P.19 which was already in the possession of the applicant. It is noted that the specific documents requested were not enumerated.

39. The letter is suggestive that the review of the Governor's decision by the applicant was one to be dealt with by the Minister as opposed to the Governor. This aspect of the matter will be dealt with in the next paragraph hereunder.

40. In the factual circumstances of the within claim and bearing in mind the *jurisprudence* herein before set out, I am satisfied that it is regrettable that there was no communication from the first named respondent to the applicant's solicitor prior to the letter from the second named respondent of 23rd November, 2017, however, this in my view does not amount to a breach of fair procedure or natural

justice in particular having regard to the *Egan* judgment aforesaid and the fact that the P.19 document was already in the possession of the applicant.

41. At para. 31 of the Statement of Grounds the applicant complains that the second named respondent (presumably the first named respondent) violated fair procedure and natural justice in failure to comply with the principle of *audi alteram partem*, in failing to respond to the reasonable requests of the applicant's solicitor, in failing to facilitate the applicant's solicitor and effectively denying the applicant legal assistance.

42. By reason of the foregoing I am not satisfied that the applicant has on the facts of the matter and in accordance with the burden of proof on the applicant, demonstrated a violation of fair procedure and natural justice in the manner contended for in para. 31.

Appeal Form
43. The applicant contends at para. 12 of the Statement of Ground that he advised the servants or agents of the first named respondent that he wished to petition the second named respondent pursuant to s.14 of the Prison Act 2007 and he sought a form on which to do so. Having completed the form, he said he returned it to the prison officer for onward transmission to the Minister.

44. In the affidavit of Francis Turrell of 12th November, 2018 the aforesaid at para. 3 he says that the applicant specifically requested from him an incentivised regime appeal form and it was provided to him duly completed by the applicant.

45. There is a clear conflict of the factual background in respect of the form requested. The applicant has chosen not to respond further to the affidavit of officer Turrell by way of further affidavit.

46. Although the solicitor's letter of 16th November suggests that the applicant understood that he was signing a P.19 appeal to the Minister and it is argued that there has been no drop in his regime level to warrant an appeal to the Governor nevertheless on the other hand the applicant was at the time familiar with process and purpose of a P.19 appeal and an incentivised regime appeal which in fact is borne out by para. 12 of the Statement of Grounds when the applicant suggests he specifically asked for the form to petition the Minister and it appears he also advised his solicitor this was the nature of the appeal he had lodged. The document he signed is clearly identified as an incentivised regime policy appeal form, is of a different colour to the P.19 appeal form and the decision making process is clearly to be completed by the Governor as per the content of the one-page appeal form.

47. As a matter of fact the appeal of 23rd November, 2017 which was made to the Minister was out of time.

48. The Governor in cross-examination gave evidence that in dealing with the appeal of 14th November, 2017 he had not taken advantage of the applicant's misunderstanding as to the nature of the appeal he was then processing.

49. In the circumstances it does not appear to have been a situation where the first named respondent was preferring form over substance but rather by reason of the content of the form and the evidence of officer Turrell there is in my view ample scope for the first named respondent to believe that the appeal was to him as opposed to the Minister. Reference is made in the Governor's decision to the fact that the prisoner had not set out any grounds to appeal the original decision to drop his regime level.

50. In the circumstances therefore although there is clear confusion as to the appeal which the applicant wished to process nevertheless I am not satisfied that it is such that it warrants a finding of a breach of fair procedure on the part of the Governor accordingly the complaint made in paras. 25-30 inclusive of the Statement of Grounds are not made out.

Conclusion
51. In the circumstances I am not satisfied that the applicant has demonstrated a factual basis to secure an order for certiorari of the decision of the first named respondent of 7th November, 2017 or the decision of the second named respondent of 23rd November, 2017.