

THE HIGH COURT

JUDICIAL REVIEW

[2015 No. 292 J.R.]

BETWEEN

PETER KENNY

APPLICANT

AND

THE GOVERNOR OF PORTLAOISE PRISON

RESPONDENT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

NOTICE PARTY

JUDGMENT of Ms. Justice Ni Raifeartaigh delivered on the 11th day of October, 2017.**Nature of the case**

1. These proceedings involve a challenge by way of judicial review to the determination of a prison governor that the applicant had breached prison rules by receiving contraband during a visit from his spouse/partner, together with the sanctions imposed on foot of that finding. The applicant complains of alleged defects in the hearing which led to the determination and argues that there was a want of fair procedures. The central aspects of the complaint are that the applicant was not allowed to view CCTV footage of the incident at the hearing, and that a prison officer was not present as a witness at the hearing before the governor.

Facts

2. The applicant is a 35 year-old man who is currently serving sentence of life imprisonment. While he was receiving a visit on the 15th May, 2015 from his partner, the visit was stopped and he was then searched on suspicion that he had received a prohibited article moments earlier. The prison officers conducted a search which involved the removal of his clothes but did not involve a cavity search. The search yielded no prohibited article.

3. The applicant was shown a P19 Report in relation to the incident on the 15th May, 2015. A P19 report is filed by a prison officer when there has been a suspected breach of discipline. Having viewed the report, the assistant governor averred that he decided to hold a hearing to conduct an inquiry into the incident on the 16th of May, 2015. It is alleged that the P.19 was defective as it was unsigned with no date attached to a signature.

4. On the 16th May, 2015, the applicant was brought before the assistant governor David Conroy on foot of the P19 report form, which he averred was signed by prison officer Dunne. This report says as follows:

"On the above date at approximately 15.20 pm while supervising the visits [box I] observed the above-named prisoner [receive] a prohibited article from [his] visitor Rita [O' Toole]. He placed this prohibited article on the lower part of [his] body."

5. The assistant governor proceeded to conduct a short hearing then and there. The grounding affidavit exhibits the P19 form with the contemporaneous note of the exchanges between the assistant governor and the applicant during the hearing. It records that the prisoner was asked if the report was correct and said no. It records that he was informed that the CCTV "clearly shows that you had an item in your hand and that you secreted that item in your groin or anus area". It is recorded that he replied "I did not receive any item on the visit". He then asked if he could see the footage, to which the governor replied "I am not in a position to allow you to see the footage for security reasons". No other evidence was tendered at the hearing by any other person. officer Dunne was not present.

6. The governor then determined that the applicant had breached the prison rules and imposed the following sanctions: that for a period of 35 days the applicant was –

- (i) ordered to wear prison clothes
- (ii) prohibited from specific activities/evening recreation
- (iii) prohibited from specific activities/use of the gym
- (iv) prohibited from having personal visits
- (v) prohibited from having personal phone calls
- (vi) prohibited from possessing specific articles.

The applicant was informed that the decision could be appealed.

7. SI 11/2013 which amends the Prison Rules expressly provides that a governor shall not impose a prohibition on personal visits as a sanction unless he explains the reason for imposing such a sanction. The applicant also complains that the governor provided no reason at the time and recorded no reason on the record of hearing.

8. There followed an exchange of correspondence between solicitors on behalf of the applicant commencing on the 19th May, 2015 and culminating on the 29th May, 2015. In the course of this correspondence the respondent referred to the petition (or appeal) process and pointed out that the applicant had not invoked this process following the determination and imposition of sanctions. The

applicant then commenced these judicial review proceedings.

9. In an affidavit sworn in these proceedings, officer Dunne said that he was seated in the visiting box approximately five feet away from the applicant and his visitor. He says that he observed them hug each other and then observed Ms. O'Toole brush her left-hand side against the applicant's left-hand side, which led him to believe that she had passed him something. She then spoke to the officer, which he suspected was an attempt to distract him from the fact that she had passed an item to the applicant. In his affidavit, he says that he did not actually see anything being passed from one to the other nor did he see any objects. Emphasis was laid by counsel on behalf of the applicant that there was a significant variation in this regard as between his P19 report and his sworn affidavit insofar as the former suggested that he had actually observed an object being passed. He then describes that he communicated his suspicion to another officer and that the applicant was asked to leave the area. He describes the search taking place and clarifies that this did not involve a cavity search of the applicant's anus, which is where the officer now believes the contraband item was concealed.

10. In an affidavit sworn by assistant governor David Conroy, he referred to the fact that Ms. O'Toole had come to the adverse attention of the prison authorities in the past; she had been prohibited from visiting the applicant for a period in 2010 and was also placed on "screen visits" for another period in 2014 following indications from a sniffer dog on three previous occasions. Assistant governor David Conroy says that having received officer Dunne's P19 report, he himself reviewed the CCTV footage on the desktop computer in his office, before convening a hearing in order to conduct an inquiry. In his affidavit, he described what he says the CCTV footage shows as occurring during the incident, screen by screen. In the course of this description, he said that at a certain point an item is visible in the visitor's left hand and is a small white bullet shaped object approximately 30 millimetres in length and 20 millimetres in diameter. The visitor removed this from her sleeve before the applicant came into the visiting area. He then enters the visiting area and hugs her, and she brushes her left-hand side against his left-hand side, following which her left hand appears empty. He said the visitor then speaks to officer Dunne and at this time, the applicant can be seen to move his hand down the left-hand side of his tracksuit. He said the item can be seen in the applicant's hands and the applicant can then be seen to conceal the item in his groin/anus area.

11. With regard to the "security reasons" offered as the reason for declining the applicant's request to see the CCTV, he says as follows:

"For security and logistical reasons it was neither possible nor practical, without compromising prison security or causing major disruption to the prison routine for the footage to be shown to the applicant at the time of the hearing as to do so would have involved bringing the applicant to a less secure area of the prison, which would not have been appropriate and would, at that time, have brought him into contact with other prisoners to whom he could have passed the contraband.

Having viewed the footage I myself formed the firm view that the offence had clearly occurred and the footage constituted the evidence upon which I based my decision. Whether the applicant actually viewed the footage or not was not going to sway my belief that the offence had been committed."

Discussion and Conclusions

12. The Prison Rules 2007 provide as follows at r. 67:

"(3) An inquiry into an allegation of a breach of prison discipline shall be conducted by the Governor, and the prisoner to whom the allegation relates shall be entitled to be present during the conduct of the inquiry."

It continues at subs. 6:

"(6) The prisoner shall be entitled to be told what is alleged against him or her and to hear or be given an opportunity to examine or have explained to him or her any evidence given or submitted in support of an allegation that he or she committed a breach of prison discipline. (emphasis added)

(7) The prisoner shall be entitled to reply to any allegation that he or she has committed a breach of prison discipline and, with the consent of the Governor, to call a witness to give evidence. A prisoner shall give notice prior to the commencement of the inquiry of a witness he or she wishes to call to the inquiry.

(8) The Governor shall not withhold his or her consent under paragraph (7) unless he or she is satisfied, upon reasonable grounds that the evidence that the witness would propose to give would be of no assistance in furthering the inquiry.

(9) At an inquiry the prisoner may put questions, through the Governor, to any witness."

13. It may be that because of the disjunctive manner in which r. 67(6) is expressed (as emphasised above), that the Prison Rules do not, strictly speaking, require that a person be entitled to "examine" the evidence, provided the evidence is "explained" to him. However, it seems to me that the Prison Rules are required to be read and informed by principles of constitutional fair procedures. It is of course well established that the requirements for fair procedures in the course of hearings conducted in accordance with the Constitution vary according to the circumstances: *Mooney v. An Post* [1994] WJSC-HC 1443, *Kiely v. The Minister for Social Welfare* [1977] I.R. 267, and *McAuley v. Commissioner of An Garda Síochána* [1996] 3 I.R. 208. What is necessary in terms of fair procedures in one situation may not be necessary in another. I certainly do not think that the situation arising in the present case required anything like the full panoply of an adversarial hearing, but it does seem to me that the basic evidence, namely the CCTV, upon which the decision-maker was proposing to base his decision, should have been shown to the prisoner so that he could have an opportunity to comment upon it. Further, and with all due deference to the assistant governor's expertise regarding security within the prison, it is difficult to see how security considerations rendered the showing of the CCTV impractical or impossible. It was not suggested that there was anything connected with the content of the footage that raised security considerations; the only explanation advanced (as set out above) related to the location of the hearing. No reason is offered as to why the hearing had to take place at that particular time; or why it could not have been part-heard, and then adjourned to allow the CCTV to be viewed at some other time and place. Further, the suggestion that the prisoner might have passed the contraband to other prisoners if they had moved to a less secure area in the prison is somewhat odd in view of the fact that the hearing was taking place a day after the incident. It is also difficult to see why this could not have been prevented if he had been escorted to and from a less secure area, assuming a less secure area to be the only place containing a room in which the footage could be played to him as is implied by the governor's affidavit. I am not persuaded that it would have been impossible to create some situation whereby the CCTV could have been shown to the applicant at

some appropriate time and place within the prison without compromising security.

14. It may well be that the CCTV footage was so clear that nothing the applicant could ever have said would have changed the assistant governor's mind on what he had seen. However, I do not think the content of fair procedures should be dictated in a particular case or generally by a view as to whether it would have made any difference to the outcome. Cases are often heard in the courts where the prosecution case appears open and shut, but a defendant is not disentitled to the normal procedures by reason of this fact. It seems to me that the prisoner in this particular situation was entitled to see the CCTV, which appears to have been the only evidence relied upon by the assistant governor, and have the opportunity to comment upon it, with a view to trying to persuade the governor that nothing untoward was happening during the incident. It may well have made no difference whatsoever to the outcome, having regard to the contents of the governor's affidavit as described above, but in my view, the applicant was entitled to have the opportunity to see the CCTV footage and comment upon it as a simple and basic requirement of fair procedures. For this reason, I propose to quash the decision and remit it for a fresh decision.

15. As regards the absence of officer Dunne at the hearing, I do not think it was necessary to have him present at the hearing since it seems that his role in the matter was confined to reporting his suspicion to the assistant governor; thereafter, the only evidence actually relied upon was the CCTV evidence. Even if officer Dunne had been present and his account completely undermined in some form of cross-examination, this would not have made any difference; it was not upon his evidence but rather the CCTV evidence upon which the assistant governor appears to have based his decision. The position might well be different if the assistant governor Conroy had partly based his decision upon the report of officer Dunne, but this does not appear to be the situation in this particular case, given what was said by the assistant governor at the hearing and as recorded on the P19 form.

16. Nor do I think the decision of the assistant governor breaches natural justice by reason of a failure to give reasons. There is extensive authority on the variation in the level of detail required to be given by way of reasons which depends on the situation; in cases involving short and simple matters, an extensive explanation is not required and what is required is simply that the person affected know the basic reason for the decision reached. Having regard to the questions and answers at the hearing as set out above, it seems to me that the applicant must have been well aware that the reason for the decision was the content of the CCTV footage, since he was told that the CCTV "clearly shows that you had an item in your hand and that you secreted that item in your groin or anus area".

17. Finally, I should say that I do not think that it is an appropriate case in which the applicant should be shut out from judicial review simply because there was in existence a right of appeal which he did not exercise. In circumstances where a hearing is tainted by the absence of a basic fair procedure, judicial review seems to me to be an appropriate course of action to pursue.

18. Accordingly, I will grant the relief sought.