THE HIGH COURT

JUDICIAL REVIEW

Record No. 2017/1007JR

Between:

BRIAN DOOLAN

Applicant

AND

THE GOVERNOR OF ARBOUR HILL PRISON

AND

THE IRISH PRISON SERVICE

AND

THE MINISTER FOR JUSTICE & EQUALITY

AND

IRELAND AND THE ATTORNEY GENERAL

Respondents

JUDGMENT of Ms. Justice Murphy delivered on the 9th day of April, 2019

1. The applicant, Mr Brian Doolan, is currently incarcerated in Arbour Hill Prison where he is serving a sentence of 12 years on foot of his conviction of 42 sexual offences committed against a single complainant. The final two years of his sentence were suspended.

2. The applicant seeks an order of *certiorari* together with various declaratory orders, arising from a disciplinary hearing held on 27th September, 2017 at Arbour Hill Prison. At that hearing, the applicant was found to be in breach of prison discipline under Schedule 1 of the Prison Rules 2007.

3. While the applicant in his statement of grounds sought in addition to *certiorari*, six declaratory orders, the thrust of his complaint falls to be considered under three headings:

> 1) that Governor Dowling did not have jurisdiction to conduct the disciplinary hearing;
>
> 2) that there was a want of fair procedures in the manner in which the disciplinary hearing was conducted; and
>
> 3) the petition procedure in respect of disciplinary sanctions imposed, is ineffective and breaches basic principles of natural justice.

The facts set out below are in the main, uncontroverted.

General background

4. In his affidavit sworn on 4th April, 2018, Governor Dowling avers the following:-

In or around September, 2017, confidential information was received by the Irish Prison Service to the effect that a website had been created a number of months earlier by the son of the applicant, Mr. Christian Doolan. The website entitled 'www.briandoolan.com', contained a large amount of material which Governor Dowling avers, attacked the credibility and character of the applicant's victim. The website also contained a photograph of the victim which had been taken by the applicant when the victim was a child. The court notes that while prisoners do not have access to the internet, there appears to be no prohibition under the Prison Rules on maintaining a website.

Governor Dowling avers that there was reason to believe that some, if not all, of the material posted to the website, came from the applicant and that the applicant had been instructing his son to upload specific content on the website. He avers that an investigation conducted by the Irish Prison Service, revealed that the applicant had been using the prisoners' phone privileges in Arbour Hill Prison to give instructions to his son, Christian, on the material to be placed on the website, including material directed at the victim of his crimes. The investigation disclosed that the applicant had made a phone call to his son on 11th September, 2017, in which the applicant had directed that material be placed on the website relating to the victim's support group, 'One in Four'. Governor Dowling avers that further calls were made by the applicant on 13th September, 2017, in which he allegedly instructed his son to remove part of a paragraph and to replace it with other information. Reference was again made to the 'One in Four' website and allegedly a comment was made that their motto is now "*money before transparency*".

Governor Hughes prepared a report outlining the results of his investigation, which was submitted to Governor Dowling on 26th September, 2017.

5. As a consequence of that report, a P19 notice was served on the prisoner. This was served at 5 p. m. on 26th September, 2017 and a hearing was convened according to the records, at 9:49 a.m. on 27th September, 2017, approximately seventeen hours later.

P19 notice

6. There are spelling and grammatical errors in the P19 notice but the court proposes to set it and the hearing reports out *verbatim*, as delivered to the applicant. The P19 notice gave the date and time of the alleged misconduct as 13th September, 2017 at 6:33 p.m. Under the heading 'Misconduct Summary' the notice states "*Using Prisoners phone system to target the victim of a crime. The above-named prisoner has offended against discipline in contravention of Schedule 1 of the Prison Rules, 2007…".* The notice

specifies the misconduct description and the relevant breaches of the Prison Rules alleged. The particular breaches alleged were as follows:-

> *"(3) Treats with disrespect, through the use of any abusive, insolent, racist or threatening behaviour or language, the Governor, any prison officer, any prisoner, any visitor to the prison or any other person;*
>
> *(9) Engages in any form of bullying or harassment;*
>
> *(32) In any other way offends against good order and discipline."*

Having set out the three alleged breaches of discipline the P19 notice then states:-

> *"and/or in any other way against good order and discipline by: Acting contrary to the good order, security and government of Arbour Hill Prison."*

The P19 report to Governor Dowling continues:-

> *"I wish to report that Prisoner Brian Doolan is using the Prisoners phone system to instruct Christian Doolan in placing information on a website that is targeting the victim of the offence of which Brian Doolin is presently in custody. The name of this website is www.briandoolan.com. Phone call was made by Brian Doolan on the 11th September 2017 referring to the 1 in 4 website and instructing information to be placed on the www.briandoolan.com website.*
>
> *Further call were made on the 13th September 2017 instructing that part of a paragraph be removed and replaced with further information. Reference was made in regard the 1 in 4 website and the comment was made is the motto of 1 in 4 now money before transparency.*
>
> *It is clear from the phone calls and the information being relayed that the victim of Brian Doolans offence is being targeted on the website. "*

The hearing

7. On 27th September, 2017 a disciplinary hearing was convened by the Governor of Arbour Hill, William Dowling, commencing at approximately 9:49 a.m. At the hearing, the applicant was formally charged with having breached prison discipline as defined in Schedule 1 of the Prison Rules 2007, as set out above. In attendance were the Governor William Dowling, Chief Officer Roche, and the applicant. There are three queries listed and answered at the top of the report. The first is "*Prisoner understands the Discipline Process: Yes."* The second is "*Prisoner accepts the report as correct: No*". The third is "Prisoner wishes to call a witness: No." The next section of the report of the hearing is headed 'Prisoner Remarks' and states as follows:-

> *"Report read over to Offender - who stated that he wished to have part 3 of the prison act 2007 (this portion of the Act deals with treatment of prisoners in custody) – wished to see transcript of the phone calls – denied – transcript of calls read over to him, Indicated that these were exactly as transcribed in bold onto website. Q Are you aware of the website and have you giving any instructions to have material uploaded onto it. A. – I have not seen the website, I need to see the transcript of the phone call I can not recall. In response to question arounds his concerns: A – Not only do I now have an issue with SK, 1 and 4 the guards I will also be challenging the Prison service over the infringement of my rights and freedom of expression. Q requested to see the website, denied by stills to be provided. Stated – I am engaged in a campaign to clear and vindicate my name against the false allegations made by SK – I said niothing about this man until he went public against me – 1 in 4 were asked to answer question in the meantime – they refused. This got on the radio and stated certain things about me which were false – he has stated lies. I want to challenge thse lies. (A longer conversation took place around his appeal process and the avenues open to him to address any perchieved wrong – Q Is this report triggered by an outside person or group? A. Based on the ongoing intelligence received these facts have come to my attention I am obliged to investigate and follow up where the good order of Arbour Hill is concerned and where there is a perchieved abuse of the privileges available to all offenders –. At end when informed of the sanctions he indicated that he would not be using either the phone system or the computer system for the remainder of his stay in Arbour Hill. Sought copy of disciplne report, stills from the website and transcrip of the phone call conversation used against him for his appeal. A. To be issued. Informed that he will be closely monitored going forward)."*

Under the heading 'Governor Remarks' the hearing report states:-

> *"This was a lengthy hearing by our usual standards – Mr Doolan challenged every aspect of the hearing and did not accept the facts as presented – it is obvious from our conversation that Mr Doolan while denying this fact is well aware of the Website and has contributed to some or all of the material contained their in which targets his victim | Gardai and other personnel associated with this this case. . I am satisfied that he has used both the phone system and the frequent visits by his son to direct him in his campaign to 'clear his name' I have advised him that the only way in which this can or should be done is use the legal system with which he is very familiar. I find against Mr Doolan on count 9 and 32 in particular . The sanctions imposed are to reflect the seriousness of the potential damage that this type of actions can cause . Sanctions to take effect from tomorrow Thursday 28th September."*

8. The court notes from this report, that the evidence on which the governor relied were the transcripts of the aforementioned phone calls and screenshots of various posts taken from the applicant's website, which had been posted in June, July and August, 2017. Based on this evidence, Governor Dowling made a finding that the applicant had breached prison discipline by engaging in bullying and harassment contrary to Rule (9) of Schedule 1, and also found that he had offended against good order and discipline contrary to Rule (32) of the same schedule. The governor imposed a sanction on the applicant, denying him visits and phone call privileges for a period of 30 days. The applicant informed Governor Dowling that he disagreed with the finding. The applicant was notified of the process by which a petition against the finding could be lodged with the Minister for Justice & Equality pursuant to s. 14(1) of the Prisons Act 2007.

9. Section 14 provides that:

> *(1) A prisoner –*

(a) who is found by a governor to have committed a breach of prison discipline, and

(b) on whom a sanction under section 13 has been imposed,

may within 7 days of its imposition, send to the governor, for transmission to the Minister, a petition concerning the finding or sanction or both finding and sanction.

(2) On such a petition the Minister may, after consulting the governor, affirm, modify, suspend (subject to any specified terms or conditions) or revoke the sanction and cause the petitioner to be notified accordingly.

10. The applicant was informed that the petition would have to be filed within seven days of the imposition of a sanction, and that it could relate to both the finding of the governor and the sanction imposed by him. When the applicant made known his intention to petition, he was informed that copies of the evidence would be issued to him in due course.

11. On 28th September, 2017, the day after the hearing, the applicant was provided, for the first time, with copies of the phone transcripts and of the screenshots relied on by the governor during the hearing. These were provided for the purpose of his petition to the Minister, pursuant to s. 14(1).

12. On 2nd October, 2017 the applicant filed his petition to the Minister for Justice & Equality. The petition complains that while s. 14(2) grants the Minister the power to affirm, modify, suspend or revoke the sanction, it does not allow for a finding to be set aside and therefore, offers no relief to a prisoner in the event that an unlawful sanction has been imposed by the governor. On the same date the applicant attended the governor's parade, where he was told that the sanction would be altered. The governor claimed to have recently come across documentation which provided that as a matter of law, the applicant was entitled to one visit and one phone call per week.

13. On 3rd October, 2017 the applicant's petition was received by the Minister, however at the time of hearing of this application in November, 2018, more than thirteen months later, no decision had been delivered and the sanction had long since been served.

Justiciability of the complaint
14. The applicant submits that his conduct did not fall within the scope of Schedule 1 of the Prison Rules 2007, and therefore was not a justiciable matter in respect of which Governor Dowling could hold a hearing, make a finding of guilt, and subsequently impose sanctions upon him. The applicant submits that the Prison Rules were created under s. 35 of the Prisons Act 2007, which grants to the Minister the power to "*make rules for the regulation and good government of prisons*" and that pursuant to Rule 75(3), the governor shall "*develop and maintain a regime which endeavours to ensure the maintenance of good order and safe and secure custody and personal well being of prisoners*." The applicant submits that such rules cannot extend to the behaviour that was the subject of the complaints made against him, and that none of the alleged breaches constitute a threat to the "*good order*" and "*good government*" of the prison.

15. The respondents submit that the misuse of phone privileges by prisoners is manifestly a matter relating to the "*good government*" of prisons. They submit that it is axiomatic that the misuse of phone calls to parties outside of the prison by prisoners, many of whom have been convicted of very serious offences, has the potential to have a catastrophic effect not just on "*good government*" but on victims, witnesses and other members of the general public. The breach alleged here is that the applicant was misusing his phone privileges to attack the credibility and character of the victim of his crimes.

Decision
16. The court is quite satisfied that the use of prison phone call privileges for nefarious purposes is a matter that falls squarely within the Prison Rules 2007. The use of such phone privileges for the purpose of bullying or harassing a victim is a misuse of phone privileges.

Article 6 rights
17. The applicant next submits that if the matters are justiciable and within the competence of Governor Dowling, that his Article 6 rights were engaged, because the nature of the offence alleged was criminal and the potential penalty for a breach was a loss of remission. The respondents submit that this was a purely disciplinary matter, that the applicant's behaviour was not criminal in nature, and was therefore incapable of giving rise to criminal prosecution. The respondents submit that the disciplinary hearing did not result in the imposition of a longer custodial sentence, or a loss of remission, and for this reason, submit that the behaviour alleged does not come within the scope of Article 6.

18. Article 6 rights are engaged only where the result of a breach of discipline is punished by way of loss of remission or by the imposition of additional days' imprisonment. Where any such penalty is imposed, ss. 15 and 16 of the Prisons Act 2007 afford full Article 6 protections to any prisoner affected. The factors to be taken into account in determining whether a prison matter is of a criminal or disciplinary nature, as provided for in *Engel v The Netherlands* (1976) 1 EHRR 647, are: (a) the domestic classification; (b) the nature of the offence; and (c) the severity of the potential penalty which the defendant risks incurring.

19. The respondents submit that the misuse of phone privileges to bully and harass the victim of a crime, by placing material about him on a website, is not an offence known to Irish law. On this point the respondents rely on the decision of *R v Debnath* [2005] EWCA Crim. 3472, as referred to in the Law Reform Commission's 2013 report on '*Aspects of Domestic Violence*'. In that case, the accused registered the injured party on a homosexual dating website for people with HIV and sent emails to the injured party's fiancée purporting to be one of his friends, informing her of alleged sexual indiscretions by the injured party. In its report of the case contained in chapter 2 at para. 2.16, the Law Reform Commission concluded that such behaviour would not amount to an offence under s. 10 of the Non-Fatal Offences Against the Person Act 1997 in this jurisdiction, as it would not fall within the parameters of any of the provisions contained in the section. The respondents also submit a passage from the 2016 Law Reform Commission report on 'Harmful Communications and Digital Safety', where it is stated at para. 2.35 of Chapter 2 that "*it is unlikely that section 10 could be interpreted as applying to all forms of indirect activity*" so that "*where the offending communication is sent not to the victim but to others there may be no communication with the victim*." The report went on to say that where harmful messages are posted to private social media pages they may not be covered by s. 10, as there has been no direct communication with the subject of those messages.

20. In relation to penalty the respondents submit that the Irish Prison Service operates a dual system. Following the hearing of an alleged breach, most cases result in sanctions which are non-custodial in effect. In the event that a loss of remission or additional days' imprisonment is deemed the appropriate sanction, then a system with full Article 6 protections is invoked, pursuant to ss. 15

and 16 of the Act.

Decision
21. The court is satisfied that the misconduct alleged is not criminal in nature and that the applicant's Article 6 rights were not engaged. The fact that the Prison Rules 2007 provide for a dual system of discipline, one in which sanctions such as loss of privileges are imposed, and another in which a potential loss of liberty may be involved, does not in the court's view render the system unlawful. It is sensible and of benefit both to the prison system and to the prisoners that a graded disciplinary regime be available. While not perfect, an analogy could be drawn with the summary procedure in the District Court for minor offences and the indictable procedure in the Circuit Court for more serious offences. Relatively minor breaches of discipline can be dealt with in effect, in a summary manner, while more serious breaches which might lead to loss of liberty, would attract full Article 6 rights. It must be remembered that the misconduct alleged here is misusing telephone privileges to abuse somebody. The court is quite satisfied that in the circumstances of this case, the applicant's Article 6 rights were not engaged.

Want of fair procedures
22. The applicant's claim for *certiorari* arises from a claimed want of fair procedures in relation to the manner in which the disciplinary hearing was conducted. His complaints are as follows:

> 1) He was not provided with any evidence in advance of the hearing and he was not given sufficient time to prepare for the hearing;
>
> 2) He was not permitted to examine the evidence against him, being the transcripts of the phone calls and screenshots of the website, either before or during the hearing;
>
> 3) He was not provided with reasons for the decision reached at the hearing;
>
> 4) The absence of opportunity for him to be heard in mitigation;
>
> 5) That the hearing was not conducted by an impartial tribunal; and
>
> 6) The informality of the process.

All of the arguments made by both parties on this aspect of the application relate to one or other part of Rule 67 of the Prison Rules 2007. Rule 67 provides as follows:-

> *(1) Where the Governor decides to hold an inquiry into an allegation of a breach of prison discipline, he or she shall inform the prisoner by notice in writing of the nature of the alleged breach.*
>
> *(2) Where the Governor decides to hold an inquiry, it shall commence –*
>
> > *(a) not earlier than the next day after the prisoner has been given a notice under paragraph (1) unless the Governor has reasonable grounds for believing that delaying the holding of an inquiry would threaten the maintenance of good order or safe or secure custody, and*
> >
> > *(b) not later than the day falling seven days after the Governor has made his or her decision, unless the Governor upon reasonable grounds is of opinion that more time is required to enable the inquiry to be conducted effectively.*
>
> *(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.*
>
> *(4) As far as is reasonably practicable, a prisoner to whom an allegation relates shall not be escorted to or from an inquiry to which this Rule relates by the prison officer who made the allegation.*
>
> *(5) The prisoner shall be entitled to sit or stand as he or she wishes.*
>
> *(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.*
>
> *(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.*
>
> *(10) The Governor may adjourn an inquiry to which this Rule applies where the interests of justice so require and he or she shall inform the persons present during the conduct of the inquiry of his or her reasons for so doing.*
>
> *(11) A prisoner shall be entitled to make a plea in mitigation to the Governor before the Governor imposes any penalty.*
>
> *(12) The Governor shall, where necessary and in so far as is practicable, arrange for the provision of the services of an interpreter to a prisoner during the conduct of an inquiry into a breach of prison discipline.*
>
> *(13) (a) Pursuant to Part 3 of the Prisons Act, 2007, the Governor shall inform a prisoner of his decision to impose a penalty, suspend the operation of a penalty or restore lost remission, as soon as may be after he or she has made a decision to do so.*

(b) The Governor shall not include a prohibition on receiving visits as a penalty without specifying why that prohibition has been decided upon.

(c) A decision to impose 'loss of all privileges' for a specified period shall not be interpreted as including a prohibition on receiving visits unless it is specifically included in accordance with subparagraph (b).

Opportunity to prepare for hearing

23. The applicant submits that he was not given sufficient prior notice of the hearing or sufficient time to prepare for same, a right which he contends, is well-recognised. He cites the case of *O'Ceallaigh v An Bord Altranais* [2000] 4 IR 54 in support of his submission. In that case it was held by a majority of the Supreme Court that the nurse/applicant should have been informed of the allegations of misconduct that had been made against her, prior to any steps being taken to establish a formal inquiry. This, the applicant submits, highlights that the requirement of notification extends beyond the substantive hearing and is also applicable to the commencement of the inquiry. The applicant also cited the judgment of Fennelly J. in *Ezeani v Minister for Justice, Equality and Law Reform* [2011] IESC 23 where he stated:-

> *"45. The rules of natural justice require the decision maker to give reasonable notice to the affected person of the substance of any matters being raised which are adverse to his interest. It is not necessary that the entire of every detail of the case against him be notified. The test is whether he has a fair opportunity to prepare himself and to respond."*

24. The respondents submit that this is an entirely new argument that was not advanced in his statement of grounds, or in the applicant's grounding affidavit, and therefore, does not form part of the grounds for which leave for judicial review was granted. In any event, the respondents submit that the applicant was provided with details of the misconduct, having been furnished with a P19 notice on the day before the hearing, in compliance with Rule 67(2) of the Prison Rules 2007, as set out above. The respondent further submits that Rule 67(2)(a) does not require that a prisoner be given 24 hours' notice of a hearing, but rather provides that the inquiry be heard not earlier than the following day, which is what in fact, occurred in this case.

Decision

25. Prisoners should be given proper opportunity to prepare for a disciplinary hearing. What amounts to "proper opportunity" will of course, depend on the circumstances of each case. In circumstances where it is proposed to rely on documentary evidence, it is not unreasonable to expect that the documents would be provided to the prisoner together with the P19 notice, particularly when the Prison Service intends to conduct the hearing on the following day. As to the respondents' submission that Rule 67(2) does not require a delay of 24 hours before the hearing can be held, the court accepts that this is so. However, to serve a P19 notice at 5 p.m. without furnishing copies of the documentary evidence on which it was proposed to rely, for a hearing at 9:49 a.m. the following morning, could potentially, deprive a prisoner of a proper opportunity to prepare for a hearing.

26. That said, the court is not persuaded that in this particular case, the applicant was denied a proper opportunity to prepare for the hearing of the complaint against him. He was told of the nature of the misconduct alleged, namely, misuse of phone privileges. He was also told of the substance of the case against him, namely, that he was using his phone privileges to target the victim of his crime, by having his son, Christian Doolan, upload derogatory material about the victim, to a named website. In the words of Fennelly J. quoted above, *"It is not necessary that the entire of every detail of the case against him be notified. The test is whether he has a fair opportunity to prepare himself and to respond."* It appears to the court that the contents of the P19 notice were sufficient for that limited purpose. While in the court's view it would have been preferable to have had the documentary evidence served with the P19 notice, the court holds that the failure to do so did not in the circumstances of this case, render the disciplinary process unfair.

Denial of an opportunity to examine evidence

27. The applicant complains that he was denied access, both prior to and during the disciplinary hearing, to the evidence relied on by Governor Dowling, in concluding that the applicant had been guilty of a breach of prison discipline. The applicant complains that he was denied the opportunity to examine and/or to challenge the evidence relied on by Governor Dowling, contrary to Rule 67(6) of the Prison Rules 2007. The applicant submits that the failure to provide him with access to relevant evidence either prior to or during the hearing rendered the hearing fundamentally flawed. On this basis, he submits that the finding of Governor Dowling should be quashed.

28. In support of this argument the applicant relies on the judgment of Ní Raifeartaigh J. in *Peter Kenny v Governor of Portlaoise Prison* [2017] IEHC 581 in which a prisoner was denied the opportunity to view CCTV relating to his alleged breach of prison discipline. At para. 13 she held 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."*

The applicant attaches particular weight to the court's finding in that case, that the applicant's right to view the footage was unaffected by the content of the footage, and that he was possessed of the right to do so "*as a simple and basic requirement of fair procedures*."

29. The applicant also submits that the importance of the advance provision of materials was emphasised in *Sangar Nasiri v The Governor of Cloverhill Prison* [2005] IEHC 471 where McMenamin J. stated as follows:-

> *"Fair Procedures*
>
> *It is a remarkable fact that the proceedings in the District Court took place in circumstances where relevant material was made available to the District Court judge and was placed before him in circumstances which were not known to the applicant until the hearing of this enquiry under Article 40. It has been conceded on behalf of the respondent that the documentation before the District Court judge was both relevant and material to the application. I accept the submission, that such material contained evidence which might have been both detrimental and beneficial for the applicant and/or his legal advisors. Similar considerations apply to the memorandum of interview.*
>
> *It is impossible on the evidence to escape the conclusion that the 'information' and the memorandum of interview were likely to have formed part of the learned District Court judge's considerations. In my view the fact that they were so available would in itself render the proceedings before the District Court judge constitutionally and procedurally flawed*

even on the basis of justice being seen to be done."

30. The respondents submit that the contents of a transcript were capable of being read out word for word to the applicant, which is what the respondents submit, took place at the disciplinary hearing. The respondents submit that the *Kenny* decision was made within the specific context of that case, and that the court's decision was influenced by the fact that it would have been "*practically impossible*" to explain the CCTV footage to the prisoner. The respondents rely on the following passage of Ní Raifeartaigh J. at the beginning of para. 13 of her judgment, as authorising the approach adopted by Governor Dowling at the hearing, of explaining to the applicant the contents of the evidence, rather than allowing him to examine it:-

> *"It may be that because of the disjunctive manner in which r. 67(6) is expressed 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."*

31. The applicant contests that construction of Rule 67(6). In his submission, the rule does not provide a suite of choices to the Governor as to how to deal with evidence at a hearing. In his view, the rule directs the manner in which evidence is to be dealt with, and further sets out the entitlement of a prisoner at a disciplinary hearing. If the allegation of a breach of prison rules is made orally, then the prisoner is entitled to *hear* the evidence. If there is real evidence which supports the allegation, then the prisoner is entitled to *be given an opportunity to examine* the evidence. The alternative to examination provided in the rule, of having the evidence *explained* to the prisoner, is in the applicant's submission, designed to cover a situation where a prisoner is unable to examine the evidence, perhaps by reason of illiteracy or other disability. In such circumstances, providing a copy of the evidence to the prisoner would not be appropriate and therefore the burden of ensuring that he understands the evidence against him, can be discharged by sufficiently explaining to him the evidence upon which the allegation is based.

Decision

32. The court first notes that the comments made by Ní Raifeartaigh J. in *Kenny*, on the operation of Rule 67(6), appear to have been made obiter, prefaced as they are, by the phrase "*It may be that…*" The facts of this case bring the terms of the rule into sharper focus. While the applicant makes numerous complaints as to deficiencies and want of fair procedures in and about the entire disciplinary hearing process, the court is persuaded that the failure to allow him to examine the evidence against him, being both the transcripts of the phone calls and screenshots of the website content, alleged to constitute bullying and harassment of his victim, is of itself, sufficient to vitiate the lawfulness of the governor's finding. The court considers the applicant's arguments as to the proper construction of Rule 67(6) to be persuasive. A prisoner is entitled to hear the evidence and where there is real evidence relied upon, the prisoner is entitled to examine it. The disjunctive provision of the rule "*or have it explained to him*" does not detract from or lessen a prisoner's right to examine evidence. That provision is, in the court's view, designed to cover those situations in which a prisoner is for any reason, be it language, literacy, or other disability, unable to examine the evidence. In such cases, it is permissible to explain the content of the evidence.

33. In this case the prisoner asked to see the transcripts of his telephone calls and to see the website content. Both requests were denied. In coming to his conclusion that the applicant had breached prison rules, the governor specifically relied on evidence which he refused to allow the applicant to examine. The transcripts and relevant screenshots from the website were readily available and indeed were furnished to the applicant shortly after the hearing, to allow him prepare a petition to the Minister. There is no good reason why they could not have been produced for examination and comment by him, at the disciplinary hearing. The respondents simply rely on what the court finds to be, a misconstruction of the provisions of Rule 67(6), to attempt to justify their behaviour.

34. The court is satisfied in the circumstances of this case, that there was a clear breach of fair procedures in the governor's failure to produce to the applicant, the evidence on which the governor relied to convict him, and in addition, there was a failure to comply with the requirements of Rule 67(6) of the Prison Rules 2007, which entitles a prisoner to the opportunity to examine the evidence against him. These failures, without more, warrant the quashing of the governor's decision. The court therefore proposes to grant an order of *certiorari* quashing the decision of Governor Dowling made on 27th September, 2017. Having regard to the fact that the sanction imposed has already been served, the court does not propose to remit the matter for re-hearing.

35. As to the balance of the applicant's complaints as to a want of fair procedures, set out at items 3 to 6 at paragraph 21 of this judgment, the court is not persuaded by the applicant's arguments. The court considers that he was given sufficient reasons for the decision reached at the hearing. The court is quite satisfied that as he left that hearing, the applicant was fully aware of the reasons why he had been convicted of breaches of prison discipline, and why sanctions had been imposed on him. The proof of that lies in the fact that within a week, he was able to submit a petition to the Minister seeking relief from the decision. In a disciplinary hearing of this nature the governor is not required to give discursive reasoning for his decision. It is sufficient that the prisoner know, of what he has been convicted, and the basis for that conviction.

36. Nor is the court persuaded that the applicant was denied an opportunity to be heard in mitigation. It seems to the court from the report of the hearing, that a significant amount of time was given to the applicant's assertion that he was merely attempting to counteract what he perceived to be a wrong done to him. That is certainly capable of being construed as both a defence of justification and a plea in mitigation.

37. Finally, his complaint that the hearing was not conducted by an impartial tribunal and was impermissibly informal, is in the court's view unstateable. The Prison Rules 2007 specifically provide that an inquiry into an allegation of a breach of prison discipline be conducted by the governor. As he is the person responsible for the good government of the prison, it is entirely appropriate and proportionate that at least in the first instance, the inquiry should be made by him. His decisions are subject to review, judicial and ministerial. Depending on the sanction proposed, the prisoner may be entitled to a hearing with full Article 6 rights. The notion that every alleged breach of discipline should attract the full panoply of legal protections including a hearing by an impartial tribunal, is frankly preposterous and grossly disproportionate to the risk faced by an accused prisoner in a disciplinary hearing. The court therefore rejects the applicant's submissions on these issues.

Petition procedure

38. The applicant raised a number of issues challenging the petition procedure open to him; namely, that it is not carried out by a fair and impartial tribunal; and that the only power given to the Minister is to "*affirm, modify, suspend (subject to any specified terms or conditions) or revoke"* the sanction imposed. The implication of this limited power according to the applicant, is that the initial finding of guilt cannot be overturned. The applicant submits that the more serious the allegation, the greater the requirement for an independent re-hearing of the matter, and that the more the allegation approximates to one of criminal wrongdoing, the greater the right of appeal. The applicant additionally submits that it is difficult to see why greater procedural rights of appeal apply only to those

prisoners who have lost remission under s. 15 of the Act, as opposed to those charged with a breach of discipline, and that such an approach allows a governor to avoid independent scrutiny by selecting the form of sanction which precludes this.

39. In light of this court's determination that the finding of Governor Dowling should be quashed, it does not consider it necessary or appropriate to explore these arguments, or reach a conclusion as to whether or not the petition procedure is lawful. The court considers that the applicant's challenges are best left to an appropriate case in which they can be fully explored and any issue carefully determined. However, the court observes that any system, in which a sanction is spent before the petition in relation to the finding and sanction is heard, may well be liable to challenge. It is indeed remarkable that at the time of the hearing of this application, the petition by the applicant to the Minister, was still pending some thirteen months after it was delivered. The sanction imposed on the applicant had long since expired. Even more remarkable is the fact that the respondents sought to use their unexplained delay in processing the applicant's petition, to argue that this application for judicial review was premature, pending the outcome of the petition before the Minister. It would indeed be perverse were the respondents permitted to rely on their own default to prevent an applicant obtaining access to judicial review. The court agrees with the final conclusion of Ní Raifeartaigh J. in Kenny, that:-

> *"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."*