

**THE HIGH COURT**  
**JUDICIAL REVIEW**

**[2013 No. 636 J.R.]**

**BETWEEN**

**ROBERT EGAN**

**APPLICANT**

**AND**

**THE GOVERNOR OF WHEATFIELD PRISON**

**RESPONDENT**

**AND**

**THE MINISTER FOR JUSTICE, EQUALITY AND LAW DEFENCE**

**SECOND RESPONDENT**

**JUDGMENT of Mr. Justice McDermott delivered on the 2nd day of December, 2014**

1. This is an application for an order of *certiorari* by way of judicial review quashing the decision of the first named respondent (the Governor) made on 30th June, 2013, against the applicant in respect of a breach of the Prison Rules 2007-2013 and the Prisons Act 2007. The applicant also claims a declaration that the second named respondent (the Minister) has to date conducted the "petition" process, as provided by s. 14(1) of the Prisons Act 2007, under which he sought to have the decision reviewed or reversed in an unlawful manner which amounted to a breach of the applicant's constitutional rights to fair procedures and a breach of the Prisons Act and Rules.

2. The applicant is a convicted prisoner serving a sentence of nine years imprisonment at Wheatfield Prison which was imposed on 8th May, 2010. He regularly received visits from his partner and two children until 29th June, 2013, when the Prison Governor refused her permission to enter the prison for the purpose of visiting the applicant because she had been observed on CCTV bringing prohibited items into the prison to him on 15th and 22nd June. The applicant was advised of the refusal and the fact that future visits with his partner were now prohibited. He now receives a more restricted form of visit from his partner.

3. Arising out of these events, the applicant was given a P19 report form which issues when it is proposed to initiate disciplinary proceedings against a prisoner before the Prison Governor. The P19 alleged that the applicant had offended against prison discipline, in contravention of Schedule 1 of the Prison Rules 2007, in that, a prison officer had reviewed CCTV footage of the visiting area on 15th and 22nd June and observed the transfer of prohibited articles from his partner to him on each of the visiting dates. The P19 stated:-

"On both visits I observed the visitor, identifiable as (the applicant's partner) pass an article to the prisoner. On both occasions the visitor and the prisoner used the children on the visit to obscure the view of the supervising officer and of the cameras. I reported this matter to (an Assistant Chief Officer). Both visits are saved as Visits 15/6/13 Robert Egan, and Visits 26/6/13 Robert Egan in the 2013 OSG File."

**The P19 Hearing**

4. The following morning, Sunday 30th June, a hearing was heard in respect of these alleged breaches of prison discipline. The Prison Governor, a Chief Prison Officer and the applicant were present. The applicant states that the Governor read over the P19 to him and asked what he wished to say in response. He claims that he stated that he did not know what the Governor was talking about and that the Chief Officer present immediately stated that if he were to admit the breach of discipline, he would get a lenient sanction. He states that he immediately and emphatically denied both allegations contained in the P19 report and expressly requested that he be allowed to view the CCTV footage. He claims that he was then asked to wait outside the door, left the room and waited nearby. He was there for a number of minutes. When he returned to the office he noted that the Prison Governor was watching a monitor in the presence of the Chief Prison Officer and another prison officer. He claimed that the Governor stated that what he was watching looked "suspicious" and added that the Governor claimed that he could not see everything. The applicant stated that he responded to the effect that looking suspicious did not constitute guilt. The Prison Governor then said that this was a game of cat and mouse and that it was his job to catch the applicant, and the applicant's job to "get away" with it if he could. He claims that he expressly requested permission to view the CCTV footage which was refused. He said that the Governor stated that if he wished to view the footage, he would have to contact his solicitor.

5. The Prison Governor in an affidavit stated that on the morning of 29th June, he received a report from an Assistant Chief Officer that there was CCTV footage of the applicant's partner passing an article to him during visits on both 15th and 22nd June. Furthermore, she had admitted to passing drugs, phone numbers and notes that the applicant did not want the prison authorities to see to the applicant during previous visits. The Governor decided that she should be prohibited from visiting the prison. Any visitor who is prohibited can apply in writing to have the prohibition reviewed.

6. The Governor stated that the allegations recorded on the P19 were put to the applicant at the hearing on 30th June and when asked for a response, he denied any wrongdoing. The Governor said that he informed the applicant that he watched the CCTV footage of both visits and was satisfied that both recordings showed that he had received contraband from his partner while using the cover of their children. The applicant asked to view the footage. The Governor states that as the computer in the room was logged onto a wider computer system, he asked the applicant to leave the room while it was switched over to the more restricted

CCTV system. This was necessary for security reasons.

7. The Governor claims that when the CCTV was ready for viewing, he requested that the applicant return to the room and then showed the CCTV footage of both incidents to him. He stated that the handing over of the items had been carried out very well, and expressed his disappointment to the applicant that the couple had used their children in order to achieve this. The Governor denies that the applicant was not permitted to watch the footage or that he was informed that he would have to see a solicitor in order to obtain it. The Governor also avers that he informed the applicant that he was aware from intelligence that he was involved in the movement of contraband around the prison and that this was causing tension within the prison. The Governor states that the applicant replied that he could not prove that and he was not admitting to anything. The Governor states that he then informed the applicant that he was satisfied that the allegations as set out in the P19 were proven, and proceeded to sanction him in accordance with the Prison Rules.

8. The sanctions imposed upon the applicant were as follows:-

- (a) A forfeiture of 56 days evening recreation.
- (b) A forfeiture of 56 days of making and receiving telephone calls or letters.
- (c) A forfeiture of receiving any ordinary visits for 56 days.

The applicant was still entitled to receive one phone call and one screened visit per week during the period of the sanctions.

9. An affidavit was also submitted from Chief Officer Edwards who was present at the hearing. He confirmed the evidence of the Prison Governor and, in particular, that the CCTV footage of the incidents, the subject matter of the P19 report, was shown to the applicant in his presence during the hearing. He also denied that he told the applicant that he would get a lenient sanction if he admitted the disciplinary offences.

10. Insofar as there is a conflict of evidence in the affidavits between the Governor, members of his staff and the applicant, the court notes that no application was made to cross examine any of the deponents by the applicant and that the burden of proof lies upon the applicant to establish the facts relevant to the grounds advanced. The court is not satisfied on the balance of probabilities that the applicant's version of events is truthful and, therefore, is not satisfied that the applicant has established his challenge to the disciplinary decision of 30th June. The central feature of that challenge was that he was not shown the CCTV footage, and I am not satisfied on the balance of probabilities that that is so.

11. The applicant submitted a petition to the Minister in respect of the decision.

#### **The Petition**

12. Prison discipline is dealt with under Part 3 of the Prisons Act 2007. Section 12 of the Act provides that if a prisoner is alleged to have committed a breach of prison discipline, the Governor may decide to hold an inquiry into the alleged breach. The prisoner must be informed of the breach and the date and time of the inquiry. The procedure relating to an inquiry is specified in the Prison Rules. At the conclusion of the inquiry, the Governor is empowered to impose the sanctions set out in s. 13 of the Act if he finds that the prisoner committed a breach of prison discipline, and to record the finding and sanction imposed. The sanctions imposed in this case were permitted under section 13(1). Section 13(2) provides that:-

"2. The governor may suspend, subject to such conditions as he or she may specify, the operation of the whole or any part of a sanction so imposed (other than a sanction of forfeiture of remission) for a period not exceeding 3 months from the date of the conclusion of the inquiry concerned."

Section 13(3) provides that if any condition to which a suspension is subject is not complied with during the period of suspension, the governor may direct the sanction to take effect forthwith or from a specified date, or that it be "abated in a specified manner".

13. Section 14 of the Act provides that a prisoner who is found guilty of a breach of prison discipline and upon whom a sanction under s. 13 has been imposed:-

"may within seven 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."

Section 14(2) provides that:-

"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."

14. Section 15 of the Act provides that a prisoner upon whom a sanction of forfeiture of remission of a portion of his or her sentence has been imposed may bring an appeal against the finding or sanction or both to an Appeal Tribunal to be established under section 16. The Appeal Tribunal has never been established.

15. The Governor in his affidavit states that he informed the applicant of his right to petition the Minister.

16. The court is satisfied that following the Governor's decision the applicant was informed that he was entitled to petition the Minister for Justice, Equality and Defence in respect of the finding and sanction imposed. Insofar as there is any conflict in the evidence between the applicant and the Governor on this matter, I am not satisfied on the balance of probabilities that the applicant's denial that he was informed of his entitlement in this regard is truthful. The applicant accepts that he was furnished with a "half sheet" and submitted a petition in writing against the finding and sanction. He states that he presented the petition to senior prison officers the following morning, Monday 1st July.

17. The petition process under s. 14(2) was the only avenue open to the applicant whereby he might seek the revocation of the sanction based on a challenge to the finding or the nature of the sanction, or both.

18. The sanctions applied as a result of the Governor's decision took effect immediately, notwithstanding the submission of the petition under section 14(2). By the time an application was made to this Court to challenge the decision of the Minister and the procedures followed in respect of the disciplinary hearing and the petition on 12th August, 2013, the applicant had served 43 days of

the 56 day forfeitures imposed upon him. His petition at that stage had not been determined by the Minister.

19. The applicant's petition stated:-

"I wish to appeal the punishment and outcome of the P19 with (the) Governor. I believe suspicion alone does not constitute a crime or misconduct. And because I am innocent of the allegations made towards me and my visitor were unfounded and not true. And these are my reasons for this appeal. So I hope you consider this when you read my appeal sheet.

Yours sincerely

Robert Egan."

The petition is dated 30th June, 2013, and stamped as received on 4th July, 2013, by "Prisons Operations". The petition system does not require an oral hearing, nor is it envisaged that it would be subject to elaborate procedural formalities. It is, for the most part, a paper driven process in which the Minister exercises a wide discretion which must be exercised in a fair and reasonable manner and in accordance with constitutional fairness appropriate to the nature and scope of the remedy as defined by section 14. This may be contrasted with the more elaborate procedural formalities envisaged under the appeal system, yet to be established, under ss. 15 and 16 relating to the forfeiture of remission.

**Delay**

20. An Assistant Principal in the Operations Directorate of the Irish Prison Service received the petition from the applicant on 4th July, together with the P19 and the record of the result of the hearing and the sanctions imposed.

21. Following the Governor's decision, the applicant's solicitors wrote to the Director of the Irish Prison Service claiming that despite lodging an appeal against the finding, the sanctions imposed upon him had taken immediate effect and were not suspended. A request was made that they be suspended pending the outcome of the petition. His solicitors stated that they were informed by their client that he was told to seek the CCTV footage on which the authorities were relying in respect of the allegations through his solicitors and furnished his authority to that effect. A copy of the letter was forwarded to the Prison Governor. A reply was sought to this letter on 16th July and a note was received from the Assistant Governor of Wheatfield Prison noting receipt of the letter sent to the Prison Service on 16th July.

22. On 27th July, his solicitors again wrote to the Governor of Wheatfield Prison expressing dismay at the lack of a detailed and relevant reply to the letter of 11th July.

23. The solicitors sought a range of documentation relating to the disciplinary hearing, including a copy of the CCTV footage relied upon in respect of the offences, together with a copy of the written petition. It was alleged there had been multiple breaches of the Prisons Act 2007, and the Prison Rules 2007 – 2013, in the conduct of the hearing and the petition. A request was made that the sanctions imposed on the applicant be suspended pending the determination of the petition submitted and that the documents and items requested be furnished. It was indicated that if the petition submitted by the applicant were rejected and the adverse findings and sanctions upheld, the applicant intended to proceed to judicially review the entire process of the disciplinary hearing and the adverse findings and sanctions imposed. A copy of this letter was sent to the Director of the Irish Prison Service and the Office of the Chief State Solicitor.

24. An application for leave to apply for judicial review was made to the High Court on 12th August, 2013 (the President), and an order was made granting leave to seek judicial review of the decision and the petition process, and staying the continuing imposition of the sanctions ordered by the Governor on 30th June until further order. That stay continues until the determination of these proceedings.

25. The delay in replying to the solicitor's correspondence and in dealing with the petition was explained in an affidavit of Assistant Chief Officer Hickey, the officer designated in respect of the P19 petition, sworn on 19th January, 2014. He stated that he received the petition from the applicant on 4th July, together with accompanying documentation including the P19, and a record of the finding made. He was also aware of the letters received from the applicant's solicitor. He said he was unable to respond to this correspondence or adjudicate on the P19 petition because both the Governor and the Chief Officer who were present at the hearing were on leave for the month of July. He stated that he was unable to confirm at that time whether or not the applicant had been shown the footage of the incidents as a result. Further delay was caused by the fact that he was about to go on leave himself though his consideration of the petition was in train when the correspondence was received, and was ready to be completed when the information regarding the footage was to hand. I infer (although it is not explicitly stated in the affidavit) that this occurred after the deponent and the two senior officers returned from their holidays some time in August.

26. In his affidavit the Prison Governor stated that it was accepted that the applicant's solicitor sought ten specific items as set out in their letter dated 25th July, 2013. He states that:-

"Solicitors have been informed, by various Prison Governors on numerous occasions in the past, that the proper procedure for requesting documents pertaining to a prisoner is to make such an application through a Freedom of Information request to the Department of Justice, Equality and Defence. Such applications are dealt with in accordance with the provisions of the Freedom of Information Act 1997, as amended, which provides a timeframe within which such request must be dealt with and also provides an appeals process should the applicant be dissatisfied with the response. Fahy, Bambury & McGeever Solicitors persist in seeking documents directly from the prison. No Freedom of Information request has ever been received in respect of the items sought."

This correspondence was in relation to a matter upon which the solicitors had received their client's instructions concerning a deprivation of important access visits to his partner and children and loss of communication rights by letter and telephone for a period of 56 days. If this is thought to be an explanation for the failure to answer the correspondence, it is entirely inadequate. It suggests that the explanation offered by Assistant Chief Officer Hickey is only part of the story, and that it was believed that the solicitors correspondence did not warrant the courtesy of a reply because they were going to get the stock answer that the matter should be dealt with under the Freedom of Information Act. It is an entirely inappropriate response to solicitors who have been communicating with their client who was operating under the restriction described following a disciplinary hearing, in respect of which he was entitled to seek legal advice. The solicitors had a duty to inform themselves and obtain from those responsible for the decision, clear and transparent information as to the offences set out in the P19, 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 or in pursuing a petition.

27. A solicitor acting on behalf of a prisoner should not be denied access to the essential documents to which his client was privy, whether because they were served upon him such as the P19, or created by him such as the petition. The denial of these basic documents to the applicant's solicitors was calculated to inhibit or frustrate the applicant's right to seek and obtain legal advice concerning these matters. 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. The court accepts that there may be issues concerning prison order, discipline or security which preclude the furnishing of certain materials, such as the CCTV footage or other relevant material, or there may be an issue arising in respect of disclosing footage or documents identifying third parties, who may also have rights to be protected. The court is also mindful of the nature of the disciplinary and petition process. It is of the utmost importance that the Governor be able to conduct prompt, informal hearings and apply any appropriate sanctions as soon as reasonably practicable in order to maintain good order and discipline in the prison. The disciplinary hearing is conducted under rules which embody fair procedures appropriate and proportionate to the issues relevant to breaches of prison discipline. However, an applicant's solicitor should be entitled to a copy of the P19, a copy of the decision made and a copy of the petition submitted, together with the Minister's decision when made. The court is not satisfied that the solicitors were entitled to the elaborate list of documents set out in the correspondence or the motion for discovery brought in the course of these proceedings, absent special or exceptional circumstances.

28. The central issue in this case is the failure of the Minister to determine the petition expeditiously. The court is not satisfied with the explanation for the delay in dealing with this petition. The prisoner had a very short period within which to submit it, and did so immediately. The sanctions were also imposed immediately. It is quite unfair and oppressive to a prisoner that he should be obliged to serve virtually the full period of the forfeiture ordered before that petition is determined.

29. The applicant submits that the Governor had a power to suspend the operation of the forfeitures imposed pending the outcome of the petition, but did not do so. The court does not agree. Section 13(2) provides that the Governor may suspend the operation of the whole or any part of a sanction imposed for a period not exceeding three months from the date of the conclusion of the inquiry concerned. However, it is clear from subs. (3) and (4) that if the conditions are not complied with, the Governor may direct that the sanction shall take effect forthwith or from a specified date or that it be abated in a specified manner or if the conditions are complied with, that the sanction shall cease to have effect at the end of the period of suspension. The purpose of these provisions is to vest in the Governor the power to encourage good behaviour and discipline on the part of a prisoner who has been subjected to a sanction under section 13. It is not linked to the petition or appeal process provided under ss. 14 and 15. However, the Minister is empowered under s. 14(2) after consulting the Governor to affirm, modify or "suspend (subject to any specified terms or conditions)" or revoke the sanction and cause the petitioner to be notified accordingly. The delay in this case has effectively deprived the Minister of the capacity to exercise her power effectively by revoking the sanction in its entirety or suspending a significant portion of it.

30. The court is, therefore, satisfied that it is appropriate to grant a declaration that the delay by the Minister in determining the petition submitted under s. 14 of the Prisons Act 2007, is inordinate and inexcusable and amounted to a breach of the applicant's constitutional right to fair procedures pursuant to Article 40.3 of the Constitution and was, in all the circumstances, unreasonable having regard to the provisions of s. 14(2) and the necessity that such petitions be dealt with within a reasonable time. Since the court is not satisfied that the provisions concerning suspension set out in s. 13 apply to the petition process, it is incumbent upon the Minister to act promptly once a petition is made or otherwise, as in this case, a substantial part of the period of forfeiture may have elapsed by the time a decision is made. If this type of delay were to occur in other cases in which shorter periods of forfeiture or penalty were imposed, the entire disciplinary penalty may well be served by the time the Minister makes a decision. The Minister's obligation is to determine the petition as soon as reasonably practicable in the circumstances. This did not occur in the applicant's case.

## **Conclusion**

31. I am, therefore, satisfied to make the declaration in the terms set out above and to stay the further application of the sanctions imposed until the Minister makes a decision on the petition under section 14(2).