Neutral Citation No: [2018] NIQB 77	*Ref:*	KEE10749
*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:*	04/10/2018

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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IN THE MATTER OF AN APPLICATION BY KENNETH DOUGLAS FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION BY THE NORTHERN IRELAND PRISON SERVICE

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KEEGAN J

Introduction

[1] The applicant is a life sentence prisoner, presently detained at Her Majesty's Prison Maghaberry. By this judicial review the applicant challenges a decision of the Northern Ireland Prison Service ("NIPS") by which he was found guilty on adjudication of an offence against prison discipline, contrary to Rule 38(24) of the Prison and Young Offenders' Centre Rules (Northern Ireland) 1995 ("the 1995 Rules"). Leave was granted on 21 June 2018.

[2] By way of Amended Order 53 Statement the applicant seeks:

(a) An order of certiorari to remove into this Honourable Court and quash a decision of NIPS by which the applicant was found guilty on adjudication and an award was made.

(b) A declaration that the said decision is unlawful, ultra vires and of no force or effect.

(c) An order that the matter be reconsidered and determined in accordance with law.

(d) Such further or other relief shall seem just.

(e) Costs.

(f) All necessary and consequential directions.

[3] The applicant was charged under Rule 38(24). The details of the alleged offence are set out in the papers, the particulars of which are that the applicant was alleged to have:

> "…. committed an offence against discipline in that you were unfit to carry out your duties in the kitchen and appeared to be under the influence".

The applicant did not dispute having been unfit to work but contended that he had suffered a fall in his cell the night before, which he believed had resulted in concussion. The alternative case was that he was under the influence of a substance. That was the core of the case made against the applicant and the issue for determination before the adjudicating governor. The standard of proof is beyond a reasonable doubt. The adjudication began on 23 December 2017 and adjourned to allow the applicant to have legal advice. The adjudication concluded on 31 January 2018 when a finding of guilt was made by the adjudicator. The penalty was an imposition of 14 days loss of privilege (suspended for 3 months).

[4] There were three grounds put forth as the foundation for this application which I characterise as follows:

(a) A procedural challenge, which was particularised as follows:

(i) That the adjudicating governor failed to afford the applicant a procedurally fair hearing by failing to allow the applicant to call relevant witnesses (for example the prisoner in the neighbouring cell, the night duty prison officer, the nurse in reception) to give evidence at the adjudication hearing.

(ii) Failing to exercise her discretion to call relevant witnesses of her own motion to give evidence at the adjudication hearing (as envisaged by the NIPS Manual on the Conduct of Adjudications at paragraph 5.1 para 17).

(iii) Failing to allow the applicant adequately to challenge evidence at the adjudication hearing, by taking evidence from the House Nurse in Braid House in the absence of the applicant (contrary to Rule 36(4) of the 1995 Rules), as considered in the NIPS Manual on the Conduct of Adjudications at para 5.2.

(b) A rationality challenge expressed as follows:

(i) The conclusion that the applicant was guilty of a disciplinary offence contrary to the 1995 Rules was not rationally available on the evidence to an adjudicating governor properly directing herself in law; in particular, the key issue was the cause of the unfitness to work of the applicant, who had (i) raised as an issue the medical consequences of a fall, and (ii) undertaken a drugs screening (following a passive drugs dog indication) which had returned a negative result.

(c) A legality challenge which engages a consideration of the relevant rules as follows:

(i) The NIPS erred in concluding that a charge of in any other way offending against good order and discipline could properly be laid (and that the applicant could properly be found guilty) under Rule 38(24) of the 1995 Rules when a charge appropriate to the complaint disclosed by the reporting officer's statement – the essence of which was the influence on the applicant of an unknown substance – was available under the suite of offences set out at Rule 38(19) to (19B) relating to any intoxicating substance or drug.

(ii) Further, or in the alternative, in laying a charge (and making a finding of guilt) under Rule 38(24) the NIPS acted unfairly and unlawfully, by alleging the influence on the applicant of an unknown substance, but avoiding the necessity of proving the elements of such an offence prescribed by relevant provisions of the 1995 Rules.

The Rules

[5] The Northern Ireland Prison Service Rules are comprised in a consolidated document which came into force on 3 May 2005. This case centres on Rule 38 in particular Rule 38(24). Rule 38 reads:

> "38. A prisoner shall be guilty of an offence against prison discipline, if he –
>
> …
>
> (24) in any other way offends against good order and discipline."

[6] A number of other rules were referred to during the course of the hearing, namely Rule 38(19) which states that a prisoner shall be guilty of an offence against prison discipline, if he –

> "(19) prepares, manufactures, consumes, inhales or administers to himself or any other prisoner, with

or without consent, any intoxicating substance or drug, or buys, sells, passes or possesses any such item;

(19A) is found with any substance in a sample taken under rule 48B which demonstrates that he has alcohol in his body (but subject to rule 39A);

(19B) is found with any substance in a sample taken under rule 48C which demonstrates that a drug has, whether in prison or while on temporary release under rule 27, been administered to him by himself or by another person (but subject to rule 39B);

(19C) refuses to provide a sample under either rule 48B or rule 48C."

[7] The focus was understandably on Rule 38(19) however I also consider that Rule 38(21) is potentially relevant in that a prisoner may be guilty of an offence against prison discipline by:

> "(21) being required to work refuses to do so, or intentionally fails to work properly."

The Manual

[8] I was also referred to some provisions of the Manual on the Conduct of Adjudications in its current form which is dated March 2007. I refer in particular to the following extracts:

> "**General**
>
> 5.1. It is for the adjudicator to assess the truth of each statement given in evidence and where there is any doubt, to try to obtain further information to allow an assessment to be made.
>
> 5.2. The prisoner or his/her legal representative must have the opportunity to hear and challenge all the evidence in the case. In making his/her decision, the adjudicator may not take into account any information not presented as evidence (although s/he may take into account his/her general knowledge of the prisoner).

5.3. The prisoner may question witnesses directly, but if s/he abuses that opportunity the adjudicator may direct that questions be put through him/her. The adjudicator may need to help an unrepresented prisoner who has difficulty in framing questions. S/he may ask questions to get the information the prisoner seeks.

Calling of Witnesses

5.10. The prisoner should be asked before the hearing to name any witnesses s/he would like to call, so that arrangements may be made to make them available. The names of these witnesses should be indicated on the back of the Notice of Report Form 1127 by the prisoner. The accused may request further witnesses during the hearing.

5.14. The adjudicator may refuse to call a witness named by the prisoner or the Reporting Officer, if s/he is satisfied that the witness has no material information to offer or if the adjudicator has already heard the evidence that the witness will give and, that the proposed witness will simply repeat it. However, a witness should not be refused on the grounds of administrative convenience or because the adjudicator considers the case against the prisoner is already proved. If the adjudicator refuses to call a witness, s/he should give reasons for the record."

[9] The manual also refers to the opening procedure which should include asking the accused if s/he wishes to call evidence. It also points out that the adjudicator may himself/herself call further witnesses and ask questions to discover the truth of the matter.

[10] Annex D provides guidance in assessing that evidence that establishes guilt and specifically as regards rule 39(19) this states as follows:

"This charge is specifically designed to deal with the prisoner who receives a controlled drug from a visitor during visits, or from another prisoner or any other person not authorised to provide such a drug. A prisoner found preparing, ingesting or preparing to ingest an authorised controlled drug to himself or another prisoner, or passes or is preparing to pass such an unauthorised control drug to another prisoner, may also be charged under this paragraph. Prisoners who are seen to discard an article, that when laboratory tested proves

> to be a controlled drug and that drug is unauthorised, (for instance during a search when leaving visits, may also be charged under this paragraph)."

There is no guidance given about the additional paragraphs 19(A), (B) and (C) as they were inserted into the scheme by amendment after the manual was issued.

[11] The guidance pertaining to rule 38(21) is as follows:

> "This charge covers two distinct offences under the one paragraph. Firstly that a prisoner who is required to work, refuses to do so and, a prisoner who is required to work, intentionally failed to work properly. The evidence required for each offence differs.
>
> In the second instance:
>
> - The accused was lawfully required to work at the time and in the circumstances specified (for example, that s/he was an un-convicted prisoner who could not be required to work in the first instance).
>
> - The accused failed to work properly. In other words the alleged failure should be measured against a standard.
>
> - A genuine belief that the accused felt that the work was adequate would be a defence however, this belief should be measured against the standard normally expected.
>
> If the prisoner claims to have been medically certified unfit to carry out the work s/he is required to do, care must be taken to investigate fully such a defence. If the prisoner claims to have been unfit to carry out such work, but has not been medically certified as unfit, the adjudicator may wish to seek evidence on the point."

[12] As regards Rule 38(24) which is the rule under which this applicant was charged, the following guide is given:

> "This is a catch all charge that can be applied in circumstances where the alleged offence fails to correctly 'fit' any of the listed categories."

The Applicant's Evidence

[13] The evidence of the applicant is comprised in his affidavit which is dated 19 April 2018. In this the applicant states at paragraph 5 that he does not take any issue with the concern raised about his fitness to work on the morning. He does however dispute the allegation that his presentation was caused by an unknown substance as he believes that concussion as a result of a fall affected his presentation at work. The applicant states in his affidavit that he entered a not guilty plea to the charge. He states that the prison officer who was responsible for him confirmed that he had not previously been under the influence of drugs at work in the 15 months he had been employed in the kitchen. The applicant also makes the following averment:

> "The governor asked me whether I would like to call witnesses. I indicated to her that I had a whole story to tell, involving a number of people. The governor indicated that she would hear what I had to say before making a decision as to the calling of witnesses. I explained the events before and after the incident on 21 December 2017. I referred to the prisoner who had heard a bang on the night that I fell, the prisoner officer who had been unable to rouse me. I referred to the senior officer and a woman from the PDU having witnessed my behaviour shortly before work. I referred to my reporting of my suspected concussion to the nurse in reception."

[14] The applicant then complains that having heard his account the governor did not return to the question of whether the witnesses he had referred to should be called to give evidence, none of these witnesses gave evidence. He further states that the governor did adjourn the hearing for a number of minutes. The applicant explains that on her return she advised him that she had spoken with the house nurse in Braid House who had said there was no record of him reporting concussion until 2 days after the incident. The applicant then states that the governor found him guilty of the offence and he understood that this finding was based on the passive drugs dog indication and the house nurse's evidence that he had not reported his concussion for 2 days. The applicant continues that in the period before 21 December 2017 he had availed of 3 periods of unaccompanied temporary release each lasting 8 hours and as a consequence of the adjudication finding it was concluded that he would not be considered for temporary release for a period of 3 months. He also states that he lost his job working in the kitchen at Braid House and in due course was moved from Braid House.

[15] In this affidavit the applicant sets out the pre-action correspondence and in particular the reply from the governor which is dated 16 February 2018 in response

to the pre-action letter of 2 February 2018. The response is summarised as follows and particular note is made of the following points that were made by the governor:

> "(c) There is no record to show that your client saw a nurse at reception.
>
> (d) The documentation states that your client did not wish to call any witnesses. I would have allowed witnesses to be called if during the adjudication it became apparent they were relevant to the case.
>
> (e) I adjourned the adjudication to contact a member of the South Eastern Health and Social Care Trust to access your client's medical records. A member of the health team could find no report of clinical diagnosis of concussion on or around the dates in question; they did however show that your client had suggested he had concussion two days after the alleged incident.
>
> (f) I found your client guilty on the evidence provided from two members of discipline staff and the fact that the PDD indicated."

[16] In addition to this affidavit a transcript of the hearing on 31 January 2018 was provided to the court.

Evidence of the Respondent

[17] A number of affidavits were filed by the respondent which I have considered. Firstly, a custody prison officer has averred as to the drugs testing of the applicant following the incident on 21 December 2017. In relation to the outcome of the testing this deponent states that the test was completed on 4 January 2018 and recorded as a pass on the prison system as there were no drugs detected within the urine.

[18] The unit manager also has filed an affidavit which contains the following averments:

> "5. Based upon the papers and what I heard of the adjudication on 21 December 2017 the applicant attended for work in the kitchen and was reported by the catering officer to be under the influence of an unknown substance, further, she did not believe the applicant to be fit for work. The senior officer spoke to the applicant and formed the view that the applicant seemed to be under the influence of an unknown substance. At that point the

> applicant was ordered to go and sit in the prisoners' rest room. After that he was taken by security to a holding room in reception where he could be seen by a nurse and then back to Braid House. The applicant underwent a detection process by a passive drug dog (PDD) – this is previously incorrectly described as a preliminary drug detection – which a preliminary process used to indicate whether or not certain substances are present. The dog indicated that the applicant showed signs of having a substance present. Following on from the indication the applicant provided a urine sample to be tested for drugs. The sample was provided the following day on 22 December 2017 and tested."

[19] This affidavit goes on to explain that the applicant was issued with a Notice of Report against discipline and an information sheet. It explains that he was asked a number of questions including how he was pleading which he stated not guilty and asked was he calling any witnesses which he stated no. The affidavit confirms that this was on 23 December 2017 and the applicant then asked for an adjournment of the hearing to contact his legal team which was granted and the applicant met with his legal team on 8 January 2018.

[20] This deponent states that she heard the adjudication on 31 January 2018. She explains the procedure and states in this affidavit the applicant could not name any witnesses but that she explained to him that if during the process he could identify a witness that she would consider calling them. This witness says the reason she did not call the neighbour was firstly the applicant could not name the neighbour and this would have led to a further adjournment, more importantly the neighbour did not have sight of the applicant in the cell so he could not verify what the applicant allegedly said happened that evening. She further states that the night custody officer was not available as they do not work days and the applicant had not made a request to have them present as a witness at the adjudication at the previous hearing. In relation to the nurse who spoke to the applicant on the morning this witness states that she adjourned to contact the house nurse (although not the nurse in reception) for her to look at the medical notes for that day. The affidavit also states as follows:

> "The house nurse informed me that there was no mention of a fall or concussion noted in the medical notes, the only note was that the applicant had an unsteady gait and that he stated that it was normal behaviour, there was no note of a black eye or a cut to the applicant's face which would be noted had it been observed and which would have suggested a fall or incident of some kind. … The medical records did not contain any note relating to an incident the night before and no note that the

> applicant claimed to have fallen when he had spoken to the nurse on 21 December 2017.
>
> I was content that the lack of evidence including the medical notes meant that I could dismiss the claim by the applicant that an incident occurred on the night before attending for work on 21 December 2017. I decided that this lack of evidence regarding the alleged incident the night before meant that I was not required to make further enquiries on the claim."

[21] This affidavit then confirms that the applicant did not appeal the adjudication through the channels open to him. This witness takes issue with the applicant's assertions that he was removed from his employment and his residential location as a result of this incident. She states that this occurred prior to the adjudication hearing and these changes to the applicant's regime are not as a result of the adjudication.

[22] A further affidavit was filed by a senior officer in relation to the application of the rules. This affidavit was admitted by consent at the hearing. At paragraph 2 it states as follows:

> "This charge was completed under Rule 38(24) Good Order and Discipline, it could not be completed under Rule 38(19) as there was insufficient evidence of any of preparing, manufacturing, consuming, inhaling or administering any substance nor under Rule 38(19A) as there was insufficient evidence of any alcohol having been taken. Rule 38(19B) was also not applicable as a charge as the inmate was not found in possession of any illicit substances. Rule 19C was not applicable as he was drug tested the next day and passed."

[23] The affidavit concludes that:

> "I did review the charge at the time it was laid and I am of the view that charge was appropriate and correct in the circumstances in that turning up to work in the prison kitchen whilst unfit and appearing to be under the influence of a substance of some sort, would offend good order and discipline within the prison establishment."

Consideration

[24] I am grateful to Mr Sayers BL on behalf of the applicant and Mr Joseph Kennedy BL on behalf of the respondent for their written and oral

arguments. At the outset I bear in mind the context of this case. The prison adjudication system is onerous in that it has to deal with many applications. It is not to be examined with the rigors that would be applied to a court process - see *Re Joseph Connor's Application* [2008] NIQB 53. However, the basics of procedural fairness must be observed as set out in a line of cases referred to in the arguments in particular *Re Rowntree's Application* [1991] 11 NIJB 67. I bear all of this in mind and am careful not to apply too exacting a standard to the actions of the adjudicator. The outcome also depends on the particular facts of a case.

[25] Accordingly, having considered the particular circumstances of this case, my conclusions on the three arguments that were raised are as follows:

(i) *The procedural challenge*

I am not convinced that Mr Sayers' arguments succeed in relation to the calling of witnesses by either the applicant or the governor. It was clear from the outset that this applicant did not indicate that he was going to call witnesses. Reference has been made to the transcript but again that is very unclear as to what witnesses would be called.

I accept that the adjudicator has a broad level of discretion in relation to the calling of witnesses and so her approach cannot be characterised as irrational as regards that particular issue.

However, the issue I have is with the procedure adopted by the governor after she decided to take evidence from a witness. To the credit of the governor, she took some steps to verify the applicant's case. The problem with the approach that was taken is that core evidence was heard by the governor in the absence of the applicant. That seems to me to be contrary to the requirements of the NIPS Manual on the Conduct of Adjudications at paragraph 5.2 which states that the prisoner or his/her legal representative must have the opportunity to hear and challenge all of the evidence in the case. In making his/her decision, the adjudicator may not take into account any information not presented as evidence (although she may take into account his or her general knowledge of the prisoner).

I appreciate that the manual is a guide however this was important evidence about both the medical condition of the applicant and whether or not he was under the influence of drugs. The governor describes the latter category of information as more important. This evidence clearly influenced the decision-making process.

The applicant disputed the accuracy of the information that was obtained from the nurse in Braid House however the governor relied on it as the transcript states:

> "And what she was able to tell me is that you were seen on the 21st and you made no mention of a banged head or any concussion and that you came back 2 days later that you may have been concussed OK."
>
> "But more importantly she was able to tell me from the notes that a drug dog actually signalled on you when you were removed from the kitchen in the reception area ok. So, I don't accept what you are saying Kenny and to be honest with you I think you should have just pleaded guilty from the outset and saved a lot of hassle here. So I find you guilty beyond reasonable doubt of the charge. Is there anything you want to say in mitigation? Do you want to talk to us now about exactly what happened?"

Mr Kennedy properly accepted that the issue of the negative drug test was only raised after this discussion and after the governor had made her decision and relied on the passive drugs dog evaluation. It is clear from the transcript that this evidence heavily influenced the governor's decision. However that was only part of the picture as the negative drug test should also have been taken into account. So in relation to the procedural challenge I find in favour of the argument made by the applicant in relation to how the evidence was dealt with.

(ii) *The legality challenge*

Mr Sayers has also convinced me with his able arguments on this ground for the following reasons:

The rules provide a comprehensive code contained within Rule 38. In my view Mr Sayers is correct in his submission that there should only be recourse to Rule 38(24) when no other rule applies. He states at paragraph 9 of his skeleton argument that "it is plain from the first four words of Rule 38(24) - *in any other way* - that the offence which the paragraph creates is directed at situations in which good order and discipline is offended in a manner *not addressed by another offence in the code.* "

I see the strength of Mr Sayers' argument that if the evidence is not such to prove the core ingredient of the alleged offence it is unfair to proceed under the "catch all" rule. In this case the clear focus was on whether or not the applicant was under the influence of a substance. The charge is actually framed as a breach of discipline without reference to good order. The governor effectively found that the applicant was in breach of discipline because he was under the influence at work and was unfit to carry out his duties. There is nothing else alleged in the particulars of offence in relation to the applicant's behaviour.

I agree with the proposition advanced by Mr Sayers that the charging body should not be allowed to circumvent the obligation to prove the ingredients of a disciplinary offence contained with Rule 38. In this case applying Rule 38(19) would require proving that the applicant was under the influence of drugs and applying Rule 39(21) would require proving that he was intentionally failing to work properly without a medical cause.

I stress that there may be circumstances where resort to Rule 38(24) may be appropriate but I do not consider this was one of them on the particular facts.

There was also some discussion about the applicability of Rule 38(19) to this type of situation given the guidance offered in the manual. An issue may have arisen inadvertently because the manual has not been updated since the insertion of rules 38 (19A), (19B) and (19C). There would be an easy way to correct this if Rule 38(19) was taken to have a more general reach and if that was explained in the manual.

(iii) *The irrationality challenge*

I will not elucidate on this to any great extent as the findings I have made above inevitably leads me to a conclusion that this challenge also succeeds on this ground because of how the decision was reached.

[26] There is clearly some factual dispute as to the exact effect on the applicant of this adjudication and in particular whether the loss of privileges was caused by other events. I form no view upon this given the limitations of this type of hearing. In any event this issue does not influence my findings outlined above.

Disposal

[27] As part of his submissions Mr Kennedy made the case that even if the court was against the respondent that the decision should not be quashed. In this regard he relied upon a decision of the Lord Chief Justice of *Samuel Henry's Application* [2010] NIQB 26. In that case Morgan LCJ did not consider that he should refer the matter back to the adjudicator or that he should quash the determination. That was on the basis that he concluded that the governor was correct to find the breach of the rules established. The issue was whether or not the facts in mitigation were properly taken into account. So there is a difference with the case at hand given that the issue in this case is a finding of guilt. It follows that I must agree with Mr Sayers that the only effective remedy here is a quashing order. I accept his argument that the alternative review mechanisms or recourse to the Prisoner Ombudsman would not achieve the desired result.

[28] In the light of the above I consider that the applicant has succeeded on all of the grounds put before the court and that the decision should be quashed. I will hear from counsel as to any other matters that arise.