Neutral Citation No. [2009] NIQB 68 | *Ref:* **MOR7595**

Judgment: approved by the Court for handing down | *Delivered:* **03/08/09**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY DARREN HART FOR JUDICIAL REVIEW

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AND IN THE MATTER OF A DECISION OF AN ADJUDICATING GOVERNOR AT HMP MAGHABERRY ON 19 JUNE 2008

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MORGAN LCJ

[1] The applicant seeks an order of certiorari quashing the finding that he was guilty of failure to obey a lawful order pursuant to Rule 38 (22) of the Prison and Young Offenders Centre Rules (Northern Ireland) 1995 and the subsequent award of 7 days loss of tuck shop and 7 days loss of evening association, suspended for 3 months. The sole ground on which he was given leave to challenge the decision was that the hearing was unfair in that the adjudicating Governor failed to adequately explore a possible defence of duress and satisfy himself that the said defence had been sufficiently negatived.

The Background

[2] The applicant is a life sentence prisoner with a tariff period of 12 years. He was committed to Hydebank Wood Young Offenders Centre on 6 March 2002. He had a turbulent time there and was transferred to Maghaberry prison on 22 July 2004. For security and safety reasons concerning contact with two other prisoners his access to education, gym and workshops was limited. He complained about this and on 26 June 2006 wrote to the Prison Ombudsman asking him to carry out an investigation. It was noted that the applicant applied to be transferred to Maghaberry in the full knowledge that there were two prisoners in Maghaberry from whom he would have to be kept separate. The Ombudsman upheld the applicant's complaint and noted that a recent Case Conference had identified action points to enable the applicant to partake in the activities appropriate to his regime level.

[3] The applicant was moved to alternative accommodation within the prison and a memorandum was prepared to deal with possible contact between the applicant and David Conway, who was serving a life sentence for the murder of the applicant's sister. The memorandum noted that the applicant should be located and managed so as to ensure that there was no risk of him coming into contact with Conway. Prison staff were to check where each of these prisoners was located when either of them had to make a movement within the prison.

[4] On 12 May 2008 the applicant commenced work in the joinery workshop within the prison and attended there the following day. He says that he was threatened in the workshop but has not identified the person who did so. On 14 May he had a domestic visit and so did not have to report to work. On 15 May he again attended the workshop but on his return he came face-to-face with Conway who was returning from the education block to his accommodation. Both were accompanied by prison staff. He was angry that he had come so close to Conway and protested to prison staff that they were to be kept apart. On 16 and 19 May he was not asked to report for work. On 20 May the applicant was asked to go to the workshop but refused saying that he was under threat. He refused to give the prison officer the name of the person who was threatening him. The prison officer made inquiries to establish whether there was any possible threat to the applicant in the workshops and advised the applicant that there was no evidence of such a threat. The applicant was then instructed to go to work but refused. He was charged the following day. He issued a prisoner complaint form asking if his safety in the workshops could be guaranteed. He received a reply indicating that procedures had been put in place to limit the risk to him while out of his normal residential location.

[5] The adjudication came before the Governor on 22 May but was adjourned to enable the applicant to obtain legal advice. His solicitors contacted the prison to seek documentation. On 19 June the hearing reconvened before Governor Davies. The applicant indicated that he understood the charge, that he had sufficient time to prepare an answer and that he had consulted with his solicitor. He entered a plea of guilty. The prison officer who gave the order was called and the Governor asked if the applicant had given any reason why he refused to go. The prison officer said that apparently the applicant and Conway were not to meet under any circumstances but that they had met in transit a day or two before this.

[6] The adjudication transcript indicates that there was a lengthy discussion between the applicant and the Governor who had known the applicant since his time in the Young Offenders Centre. In an early part of the transcript there is a reference to a complaint form about the incident and "the attack on me" but there is no reference within the papers to any such attack.

The Governor recognised that there were issues between the applicant and Conway and the prisoner described these as keeping his safety and Conway's safety while in prison. There then followed a lengthy exchange about the applicant's attitude both in the Young Offenders Centre and Maghaberry. The Governor noted that the applicant had made a good decision not getting into Conway and that Conway had made a good decision not getting into him. The Governor asked if he had refused to go to work because he was scared in case Conway got to him or he got to Conway. The applicant replied "just in case something broke out". The applicant then continued "it is just as equal on his part as mine. If we bump into each other something kicks off." Shortly after this the applicant said "I am willing to go back to work I shouldn't not refuse. I will just have to do it." A short time later the applicant said "why is there such a big deal? Me and Conway have asked to meet each other on previous occasions.." To this suggestion the Governor said "the last piece of information I have Darren is that you were going to half kill each other". The applicant said "but that's from Hydebank". At the end of the adjudication the Governor imposed an award of 10 days loss of evening association suspended for three months and 7 days loss of tuck shop suspended for three months.

The Law

[7] The defence of duress is considered in Archbold at paragraph 17 -120 and is defined as a fear, which may have to be well grounded, produced by the threat of death or grievous bodily harm which overbears the will of the person thereby preventing him from performing the act and which is effective at the time of the event. In relation to prison cases the leading authority is Re Jameson and Green's Application (unreported 27 July 1993). That was a case in which a prisoner had refused to obey an order to wash and slop out in the morning on the ground that this would involve mixing with republican prisoners. Both pleaded guilty at the adjudication but Jamison raised the issue of threats to his family from paramilitaries in his written response to the charge and Green raised the same issue at the hearing. Carswell J summarised the law relating to duress as follows:

> "1. Where the issue of duress is raised in an adjudication, whether before its commencement in the prisoner's statement on form 1127 or at the hearing by the prisoner in his evidence or in questions asked of the witnesses, it is the duty of the Governor to take it into account and deal with it in his findings. This applies whether the prisoner has pleaded guilty or not guilty, because he may have insufficient appreciation of the relevance of the issue of duress. It may in some cases even arise only after the governor has

> determined the issue and asked the prisoner if he has anything to say in mitigation. If he then raises the issue of duress, the governor should inquire into it and review his decision on the prisoner's guilt on the charge.
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> 2. Once the issue of the making of the threat amounting to duress has been raised, the governor must be satisfied beyond reasonable doubt that it has been ruled out. This may be done in either of two ways:
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> (a) He may be satisfied beyond reasonable doubt that no such threat was really made. If so, he should spell this finding out in his decision.
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> (b) He may be satisfied – again, he must be so satisfied beyond reasonable doubt – that if any threat was made, a reasonable person in the position of the prisoner would not have given in to the threat but would have resisted it. If he so finds, he should specify that clearly in his decision, preferably with sufficient reasons for this Court to see why he came to that conclusion. Such a finding needs to be based upon sufficient evidence, and the governor should make sufficient inquiry into the circumstances during the adjudication to establish the facts necessary to find his conclusion. In some cases these may depend on his background knowledge of the running of the prison, and if so, he should preferably refer to them in the course of the hearing and give the prisoner an opportunity to deal with them."

[8] Weatherup J considered this issue in Re Neil White's Application [2004] NIQB 15. That was a case in which the applicant was charged with damaging the windows and furniture in his cell. The applicant accepted that he had damaged the cell but said that there had been a lot of shouting going on in the wing and he could hear a concerted shouting about wrecking. He felt he had to obey. If he had not damaged his cell other prisoners would have punished him although he was unable to say what sort of punishment would have been involved. The Governor concluded that the applicant had not made out any case before him of duress. Weatherup J concluded that where the issue of duress is raised by a prisoner at any time in the course of the adjudication whether it is raised in terms or by implication it should result

in the hearing being conducted on the basis of a plea of not guilty to the charge.

Conclusion

[9] It is clear that the Governor spent considerable time exploring the applicant's motivation for his refusal to obey the order. The applicant had not made any complaint of threat in the Form 1127 when he responded to the charge. He was specifically asked at the adjudication whether he had refused to go to work because he was scared in case Conway got into him. In reply the applicant referred to something breaking out but went on to say it was just as equal on Conway's part as his. Neither of them had made any comment to the other when they met and there was no suggestion that anything had been done by either to suggest any hostile intent. The Governor was aware that there had been some history between the applicant and Conway and independently explored this with the applicant. In none of these lengthy exchanges did the applicant indicate that his refusal to go to work was because of any threat he envisaged from Conway. I consider, therefore, that the applicant has not raised the issue of duress in any of the forms contemplated by Carswell J.

[10] In White Weatherup J raised a further circumstance whereby duress may be raised by a prisoner by implication. Although White is a case where the prisoner expressly raised the question of duress I accept that there may well be circumstances where the defence of duress is raised by implication rather than expressly. There may be many reasons why a prisoner is unable to articulate the circumstances which gave rise to a duress defence and it is important that governors are alert to the possibility that a duress defence is raised by implication. In this case, however, it is clear that the Governor engaged in a lengthy discussion with the applicant about his motivation. It is a fair reading of that exchange that the applicant's concern was with the administrative systems within the prison. The Governor has indicated in his affidavit that this exchange was with a view to examining the applicant's motivation so as to ensure that no issue of duress was being raised. The applicant had every opportunity to express any fear affecting him but did not do so. He did not raise any threat either expressly or impliedly. I consider that the Governor was right to conclude that no case on duress had been raised by implication.

[11] Accordingly I dismiss the judicial review application.