Neutral Citation No. [2010] NIQB 26 | *Ref:* **MOR7755**

Judgment: approved by the Court for handing down | *Delivered:* **16/02/10**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEENS BENCH DIVISION (JUDICIAL REVIEW)

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Henry's (Samuel) Application [2010] NIQB 26

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW BY SAMUEL HENRY

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AND IN THE MATTER OF A PRISON ADJUDICATION HELD AT HMP MAGHABERRY ON 20 MARCH 2008

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MORGAN LCJ

[1] The applicant is a life sentence prisoner at HMP Maghaberry whose tariff has now expired. He has not been recommended for release by the Life Sentence Review Commissioners. On the morning of 18 February 2008 the applicant returned to HMP Maghaberry from a period of weekend home leave. He was inspected by the drug dog. Although the applicant considered that he had passed the inspection prison staff were of the view that he had failed. He was placed in a cell and approximately 20 minutes later he was accompanied by a number of prison officers into the reception area. It is common case that the applicant's hands were in his pocket. Officer Hazley says that he asked the applicant to remove as hands from his pockets and when he refused to do so he ordered him to remove his hands from his pockets. When he again refused Officer Hazley says that he put his hand on the applicant's right arm. The applicant subsequently made a statement of complaint to police in which he says that one of the prisoner officers shouted "get your fucking hands out of your pockets". The applicant said that he did not answer this and a few steps later his right arm was grabbed and he says that he was then assaulted. The assault allegation was the subject of a police investigation and CCTV footage was made available in relation to that.

[2] Subsequent to this incident the applicant was placed on segregation under Rule 35 (4) of the Prison and Young Offenders Centre Rules (NI) 1995

on the basis that the applicant attempted to assault staff following an indication by the Passive Drugs Dog. The following morning, however, the applicant was charged with disobeying a lawful order contrary to Rule 38 (22) in that he refused to obey an order from Officer Hazley to remove his hands from his pockets. The adjudication came on before Governor Cromie on 20 February 2008. The applicant indicated that he wanted it put back because he wanted legal representation and because there was a police investigation going on. The Governor adjourned the hearing to enable the applicant to obtain legal advice and noted that whoever heard the adjudication on the next occasion would have to consider whether a police investigation actually impinged on the evidence to be given. The hearing then reconvened before Governor McNally on 29 February 2008. The applicant indicated that his solicitors had been in correspondence with the prison and the Governor adjourned the hearing so that the correspondence could be checked.

[3] During this period correspondence was passing between the applicant's solicitors and Prison Service. On 20 February 2008 the applicant was informed that in light of the risk issues arising from the charge his programme of temporary release was being suspended as a precautionary measure. The applicant's solicitors made representations in respect of that and in a reply dated 28 February 2008 Prison Service confirmed that the adjudication had been adjourned pending PSNI investigation. In a further letter dated 14 March 2008 Governor Cromie stated that the charge had been adjourned at the applicant's request pending the outcome of PSNI investigations. The adjudication then reconvened before Governor Kennedy on 20 March 2008. He indicated to the applicant that the only charge with which he was concerned was that of refusing an order to remove his hands from his pockets. The applicant pointed out that he had been segregated within the prison under Rule 35 of the Prison and Young Offenders Centre Rules (NI) 1995 because of an allegation he had had attempted an assault. The Governor noted that there was a police investigation going on in relation to assault or the unnecessary use of force. He invited the applicant to accept that this was a separate matter and the applicant accepted that and indicated that he did not intend to call any witnesses. The adjudication accordingly proceeded.

[4] Officer Hazley gave his evidence in accordance with his report. The applicant indicated that he had a couple of questions. In his second question he suggested to the officer that everything in his statement was perfect. The Governor indicated in his affidavit that the demeanour and attitude of the applicant suggested that he was likely to question the Officer in an intimidating way so he intervened and directed that any questions to be put to the Officer should be put through him. At that stage there remained an outstanding allegation of assault against the Officer by the applicant which the PSNI were investigating. The PPS subsequently directed that there should be no prosecution. The applicant questioned the timing of the

statement and noted that there had been an amendment to the written report which the Officer accepted. When the applicant sought to question the Officer about how the physical confrontation between the applicant and prison officers occurred the Governor intervened to establish the relevance of the question. The applicant indicated that he was trying to clarify that he had not engaged in an attempted assault so that there was no justification for the use of restraint on him. The Governor indicated that that was a police matter and was not relevant to the issue with which he was concerned. The Governor then asked the applicant whether he had removed his hands from his pocket when asked and the applicant said that he had never been asked. The applicant said that there was nothing further he wished to put to the witness. The second Officer was not available and the Governor asked the applicant whether he wished to adjourn or whether he wished to proceed by reading that Officer's statement. The applicant was content to continue. The statement related in part to the allegation that the applicant refused to take his hand out of his pocket and in part to the subsequent confrontation. The Governor indicated that he was only concerned with the first part of the Officer's statement. At that stage the applicant indicated that he was not content. He indicated that he had lost six weekends over this. This appears to be a reference to his suspension of home leave. The Governor said that if the adjudication was dealt with that day he understood that the applicant would probably be returning very shortly to the PAU and his paroles would be reinstated. The applicant indicated that he wanted it dealt with that day. On the basis of the evidence of Officer Hazley the Governor found the applicant guilty of the charge and imposed an award of three days cellular confinement suspended for 3 months after establishing that there was no previous record. The Governor did not invite the applicant to make any points in mitigation.

[5] Mr Hutton BL appeared for the appellant and Mr McGleenan BL appeared for the respondent. I am grateful to both counsel for their helpful oral and written submissions. The applicant essentially advanced three arguments in the oral presentation of this case. The first was that the Governor wrongly excluded relevant evidence concerning the alleged assault on the applicant by prison officers. The second ground advanced was that the hearing of the disciplinary charge offended elements of the Manual on the Conduct of Adjudications and the third ground was related in that it was contended that the decision was unlawful by reason of the failure to invite the applicant to make any points in mitigation.

[6] The issue of the admissibility of evidence concerning the alleged assault of the applicant turns on the question of relevance, which must in any case be highly fact specific. The issue at this disciplinary hearing was whether the prison officer had given an order to the prisoner which he had failed to obey. That required proof that the order was given and that it was heard. In the transcript it is clear that the applicant's case was that he did not hear any

such order being given. The events which the applicant wanted to explore in cross examination of the prison officer occurred after it was alleged the order had been given. The issue which the applicant wanted to explore was the extent of force used on him by prison officers. Although that was highly material to any assault allegation made by the applicant it is difficult to see any basis upon which it was material to the issue of fact in this hearing which was whether or not an order to remove his hands from his pockets was given and heard.

[7] In support of his submission on this point Mr Hutton relies on the opinion of Lord Bridge in Attorney-General of Hong Kong v Wong Muk Ping [1987] AC 501.

> "It is commonplace of judicial experience that a witness who makes a poor impression in the witness box may be found at the end of the day, when his evidence is considered in the light of all the other evidence bearing upon the issue, to have been both truthful and accurate. Conversely, the evidence of a witness who at first seemed impressive and reliable may at the end of the day have to be rejected. Such experience suggests that it is dangerous to assess the credibility of the evidence given by any witness in isolation from other evidence in the case which is capable of throwing light on its reliability; . . ."

The important element to note in this passage is the reference to "evidence bearing on the issue". For the reasons set out above I do not consider that the assault matters which the applicant wished to explore were matters bearing on the issue. In those circumstances I consider that no criticism can be made of the Governor's decision to limit the evidence to be considered, a course he took with the initial agreement of the applicant. I do not consider that the applicant has established any breach of Rule 36(4) of the Prison and Young Offenders Centre Rules (NI) 1995 which requires that the prisoner be given a full opportunity of hearing what was alleged against him and of presenting his own case.

[8] The second matter advanced on behalf of the applicant is related to the first but arises in a slightly different context. In March 2007 the Northern Ireland Prison Service published a Manual on the Conduct of Adjudications. At paragraph 1.3 it is stated that the manual provides guidance, and is not stipulative except where an action is indicated as mandatory. The manual in this paragraph advises adjudicators that departure from the guidance may compromise fairness and justice and risk their decisions being overturned. Paragraph 5.18 deals with allegations made against staff before or at an

adjudication. Where such a situation arises the adjudicator is advised to consider whether it is alleged that a criminal action may have occurred or is an offence which may be referred to the PSNI for investigation. If it is determined that this is the case the adjudication should be adjourned until the findings of the PSNI investigation are known.

[9] In this case a PSNI investigation was ongoing in relation to the allegation of assault on the applicant by prison officers. In those circumstances if issues arising in relation to the assault had been relevant to the issue before the adjudicator I accept that the Manual indicates that the adjudicator should have adjourned the adjudication. In this case, however, the issues relating to the PSNI investigation were not material to the determination of the charge at issue and in those circumstances no criticism can be advanced in relation to the decision to proceed. In coming to this conclusion I have not had to consider what if any legal force should be given to the Manual.

[10] The third ground advanced on behalf of the applicant is also concerned in part with the Manual. Paragraph 6.2 of the Manual provides that if an adjudicator finds the prisoner guilty he should ask him if there is anything that he wishes to stay in mitigation or to explain his actions before punishment is awarded. The adjudicator is also advised that the prisoner may call witnesses in support of the mitigation. This is repeated at paragraph 23 of the Model Procedure for the Conduct of the an Adjudication and in paragraph 25 the adjudicator is advised to consider the appropriate punishment taking into account time spent under the restrictions of Rule 32 and/or Rule 35 (4). The latter advice is based on the decision of Weatherup J in Re Terence McCafferty's application [2007] NIQB 17.

[11] In this case the applicant was confined pursuant to Rule 35(4) but unlike McCafferty's application it is clear from the transcript that the Governor was aware of that fact. It remains the case, however, that the Governor did not invite the applicant to make any representation in relation to mitigation which is both a breach of the requirements of the Manual and goes to the fairness of the adjudication. I consider that on the latter ground at least the applicant is correct in criticising the determination as procedurally unfair. The question, however, remains as to whether this is a determination with which I should interfere. This was a suspended period of confinement imposed in circumstances where the adjudicator was in fact aware of relevant mitigating circumstances. The period of the suspension was modest and has now expired without adverse effect on the applicant. In all circumstances I do not consider that I should refer this back to the adjudicator nor do I consider that I should quash the determination having regard to the fact that I have concluded that the Governor was correct to find the breach of the Rules established.

[12] In all the circumstances I dismiss the application.