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Judgment: approved by the Court for handing down | *Delivered:* **02/04/2004**

(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY JOSEPH GRAHAM FOR JUDICIAL REVIEW

WEATHERUP J

The application

[1] This is an application for judicial review of an adjudication of the applicant at HMP Maghaberry on 1 August 2002. The applicant was charged with a disciplinary offence contrary to Rule 38(25) of the Prison and Young Offenders Centre Rules (Northern Ireland) 1995 in that he attempted to assault Prison Officer Caughey on Thursday 11 July 2002 at 11.05 at Cell 18 Erne 2. The applicant was found guilty of the disciplinary offence and awarded three days cellular confinement and 14 days loss of associated work.

[2] PO Wilson and PO Caughey made statements and gave evidence against the applicant. The case against the applicant was that the two officers entered the applicant's cell on Thursday 11 July 2002 to carry out a search. They described a lack of cooperation from the applicant and the throwing of various items of clothing at the prison officers. The applicant was described as having "lunged" at PO Caughey, and this allegation was the basis of the charge against the applicant. A struggle ensued resulting in other staff assisting to restrain the applicant. PO Wilson described being pushed over the edge of the bed in the struggle and his right shoulder striking the metal bed end and on leaving the cell he discovered a number of cuts on his forearm, which he reported to the prison hospital and entered in the accident book. PO Caughey stated that he had also been injured.

The applicant's grounds

[3] At the hearing the applicant relied on four grounds as follows –

(i) Breach of the '48 hour' requirement contrary to Rule 35(1);

(ii) Breach of the 'next day' requirement contrary to Rule 36(2);

(iii) Breach of the requirement that the applicant should have a full opportunity to present his own case contrary to Rule 36(4);

(iv) Breach of the fair hearing requirement under Article 6 of the European Convention in that a prison adjudication involves a determination of "civil" rights.

The 48 hour requirement

[4] The applicant's first ground is that there was a breach of Rule 35(1) which requires that –

> "Where a prisoner is to be charged with an offence against prison discipline the charge shall be laid in writing before the Governor within 48 hours of the discovery of the offence save in exceptional circumstances."

[5] This ground does not appear in the applicant's Order 53 statement and was not addressed in the respondent's replying affidavit. It first appeared in the applicant's skeleton argument. Adjudication form 1126 (details of alleged offence against the prison discipline) records that the details of the disciplinary charges were checked by a Governor on 13 July 2002 but no time is specified. Adjudication form 1127 (notice of report against prison discipline) states the date and time of issue of the form to the applicant as 13 July 2002 at 17.50. While the charge would have been laid before the Governor before notice was issued to the prisoner it can not be established by reference to the adjudication forms that the charge was laid before the Governor within 48 hours.

[6] The applicant contends that as the point goes to the jurisdiction of the Governor to conduct the adjudication the Court must be satisfied that there was compliance with Rule 35(1). The applicant relies on *Price v Humphreys* [1958] 2 QB 353 where the prosecution case had closed without proof that a requisite consent had been obtained. It was held that once the issue of the requisite consent had been raised the burden was on the prosecution to prove that the prosecution had been duly authorised. Accordingly the applicant contends that it was for the respondent to prove compliance with the 48 hour requirement now that the issue has been raised by the applicant.

[7] However I do not propose to allow the applicant to proceed on this ground as it was not a matter in respect of which leave was granted nor was leave sought to introduce the point by way of amendment in sufficient time to permit a response from the respondent on affidavit. If I were required to address the point in the present state of the evidence I would adopt the approach taken in *Quinn & Ors Application* (Unreported, 14 March 1988) where, on being unable to reach a conclusion on the available evidence as to compliance with Rule 29(5) of the 1982 prison rules (the requirement for a hearing the next day after a charge was laid) Carswell J, in the exercise of his discretion, declined to make an order of certiorari on the ground of breach of Rule 29. I would exercise my discretion in that manner by reason of the circumstances in which this issue was raised in these proceedings, as outlined above.

The next day requirement

[8] The applicant's second ground is that there was no inquiry into the charge as required by Rule 36(2) which provides as follows –

> "The Governor shall first inquire into any charge not later, save in exceptional circumstances, than the next day after the laying of the charge unless that day is a Saturday, Sunday or Public Holiday, or is a day of religious observance for the prisoner in accordance with his religious denomination as recorded under Rule 57."

[9] The charge was laid before the Governor on Saturday 13 July 2002 and the hearing commenced on Tuesday 16 July 2002. The Governor was not required to inquire into the charge on Sunday 14 July 2002 but would have been required to inquire into the charge on Monday 15 July 2002, unless it was a "Public Holiday" for the purposes of Rule 36(2). Rule 4(1) provides that-

> "Public Holiday means any holiday which is published by means of a Circular Instruction made by the Secretary of State and includes bank and privilege holidays."

The definition of public holiday in Rule 4(2) is disjunctive and extends to any holiday published by Circular Instruction and any bank and privilege holiday.

[10] By an instruction to Governors issued by the Director of Operations at the Northern Ireland Prison Service on behalf of the Secretary of State, "Bank, public and privilege holidays 2002" were specified for the purposes of the

discharge of prisoners under Rule 30(6)(a) and (b). The notice provided that Monday 15 July 2002 was designated an official holiday. It has not been established that the instruction to governors of 6 March 2002 is a "Circular Instruction" for the purposes of Rule 4(1). If it were a Circular Instruction I would be satisfied that Monday 15 July 2002, having been specified as a holiday, would be a "Public Holiday", even though the instruction was issued for the purposes of the discharge of prisoners.

[11] In any event, by notice dated 28 February 2002 to all departments from the Central Personnel Group of the Northern Ireland Civil Service it was specified in accordance with the leave and attendance part of the NICS staff handbook that public and privilege holidays included Monday 15 July 2002. While I am satisfied that the notice of 28 February 2002 is not a "Circular Instruction" it does make clear, as does the instruction to Governors, that Monday 15 July 2002 fell within the second limb of the definition of "Public Holiday" in Rule 4(1) under bank and privilege holidays. Accordingly the adjudication was not required to commence on Monday 15 July 2002 and the commencement of the adjudication on Tuesday 16 July 2002 was in accordance with Rule 36(2).

A full opportunity of presenting his own case

[12] The applicant's third ground is that the conduct of the adjudication was not in accordance with Rule 36(4) which provides –

> "At any inquiry into a charge against a prisoner the governor shall satisfy himself that the prisoner has had sufficient time to prepare his defence; the prisoner shall be given a full opportunity of hearing what is alleged against him and of presenting his own case."

[13] The applicant contends that the Governor conducted the adjudication in such a manner that he prevented the applicant from presenting his own case. In his affidavit the applicant makes the case that prison officers came into his cell to harass him so as to provoke an incident and he was then assaulted. Accordingly it was the applicant's case that the prison officers had concocted the evidence against him. The applicant was invited to cross-examine PO Wilson and he wished to do so in a manner that would compare and contrast PO Wilson's version of events with those appearing in the statement of PO Caughey. The Governor required the applicant to ask questions about PO Wilson's evidence and not about PO Caughey's statement, on the basis that PO McCaughey could be asked about his own evidence. Further the applicant wished to challenge PO Wilson about his alleged injuries by requesting sight of the entry in the accident book, but the Governor refused to consider that matter as the charge related to attempted

assault of PO Caughey. In his own evidence the applicant contended that the prison officers had fabricated their evidence and that a team of prison officers had attacked the applicant because of an exchange of words the applicant had had with another prison officer some days earlier.

[14] The applicant disputed the case against him. It is a legitimate means of advancing such a dispute for a witness to be questioned about his version of events and any conflict with another witness's version of events. This the applicant sought to do but he was prevented from doing so by the Governor. While prison adjudications are not to be conducted as the equivalent of criminal trials the proceedings must be such as to secure a fair hearing. I have considered the statements of the prison officers and the overall conduct of the adjudication. There does not appear to be any material in the statements of the prison officers that would indicate a conflict in their respective accounts, such as to undermine their version of events.

[15] Equally a dispute about a witness's evidence might be challenged by demonstrating that it is incorrect, even if that point does not relate to the essence of the charge. This the prisoner sought to do by asking to check the accident book, but the Governor refused to permit him to do so. The Governor conducting the adjudication has a discretion as to the extent of any inquiry into collateral matters when the credibility of a witness is an issue. There was no conflict in the statements or the evidence of the prison officers or any other factor present that ought to have required the Governor to undertake such a collateral inquiry. The denial of the facts alleged by a witness against a prisoner does not of itself oblige the Governor conducting the adjudication to undertake the investigation of collateral issues raised by the prisoner in relation to that witness. In the present case the Governor was entitled to conclude that it was not appropriate to consult the accident book.

[16] I am of the opinion that although the Governor imposed limitations on the manner in which the applicant proposed to present his case at the adjudication, the Governor was in a position to assess whether to accept the prison officers' version of events or the applicant's version of events and the limitations imposed did not inhibit the applicant's opportunity of presenting his case and there was no unfairness in the proceedings.

The determination of civil rights

[17] Finally the applicant contends that prison adjudications are subject to the requirements of Article 6 of the European Convention. Article 6 provides that –

> "1. In the determination of his civil rights and obligations or of any criminal charge against him everyone is entitled to a fair and public hearing

> within a reasonable time by an independent and impartial tribunal established by law."

[18] The applicant contends that an adjudication involves a determination of his "civil rights" for the purposes of Article 6. The award of loss of privileges such as associated work and consequential loss of earnings and the loss of visits are said by the applicant to fall within the ambit of the Article 8 right to respect for private and family life and are "civil rights" for the purposes of Article 6. The contention that Article 6 applied to prison adjudications because they involved a "criminal charge" was upheld in *Ezeh and Connors v United Kingdom* (Grand Chamber, 9 October 2003). The Grand Chamber found that adjudications resulting in the award of additional days in custody involved the determination of a "criminal charge" for the purposes of Article 6. As a result the Secretary of State suspended loss of remission as a penalty for disciplinary offences and the Prison and Young Offenders Centre (Amendment) Rules (Northern Ireland) 2004 came into operation on 1 February 2004 and have amended the 1995 Rules to provide that governors may not award loss of remission. The Rules now provide for the appointment of a Commissioner to inquire into charges referred by a governor and the Commissioner has power to award loss of remission.

[19] The applicant seeks to apply Article 6 to prison adjudications that no longer involve any risk of loss of remission, by reliance on the "civil" character of the determination. This is said to arise from the effect of disciplinary awards on the applicant's private life and loss of prison earnings. The respondent questions whether *Ezeh and Connors* could have proceeded to the Grand Chamber without consideration of the applicant's "civil rights" for the purposes of Article 6 if, as the applicant contends, the civil limb of Article 6 was capable of applying to the adjudication. In *Ezeh and Connors* the applicants were also awarded cellular confinement and exclusion from associated work and forfeiture of privileges (paragraphs 21 and 28).

[20] The civil limb of Article 6 has been considered by the European Commission on Human Rights in the context of prison adjudications. In McFeeley v United Kingdom [1980] 3 EHRR 161 the ECommHR considered alleged violations of Article 8 in relation to prisoners, including removal from association for disciplinary reasons, and found that such interferences were justified under Article 8(2) as necessary in a democratic society for the prevention of disorder or crime. In relation to alleged violations of Article 6, on the basis that restrictions on Article 8 rights amounted to a determination of civil rights and obligations within the meaning of Article 6, it was concluded at paragraph 103 that –

> "The Commission observes that the awards of punishments against the applicants were occasioned by the abovementioned offences against prison

> discipline and made after disciplinary adjudications against the applicant. These proceedings accordingly did not involve the determination of `civil rights' as that concept is understood in Article 6."

[21] Some disciplinary proceedings may involve the civil limb of Article 6. In *Albert and La Compte v Belgium* [1983] 5 EHRR 533 the ECtHR considered disciplinary proceedings against doctors for professional misconduct and held that Article 6 applied, as the right to practice medicine was a civil right. At paragraph 25 it was stated that disciplinary proceedings "did not ordinarily" lead to a contestation over civil rights and obligations; however, the position may be otherwise in certain circumstances. Article 6 was engaged because there was a direct relationship between the dispute and the right to practice medicine and further the right to practice medicine was a private right and thus a civil right.

[22] The applicant contends that the position in relation to the civil limb of Article 6 has been transformed by Re *S* and *Re W (Children – Care Plan)* [2002] 2 All ER 192 where the House of Lords considered a "starring" system of dealing with local authority care plans for children and held that it was a cardinal principle of the Children Act 1989 that courts were not empowered to intervene in the way local authorities discharged their parental responsibilities under final care orders. It was held that the decision whether a care order should be continued or discharged accorded with the requirements of Article 6 of the Convention. In particular the applicant relied on Lord Nicholls' –

> "[71] Although a right guaranteed by art 8 is not *in itself* a civil right within the meaning of art 6(1), the [Human Rights Act 1998] has now transformed the position in this country. By virtue of the 1998 Act art 8 rights are now part of the civil rights of parents and children for the purposes of art 6(1). This is because now under s 6 of the 1998 Act it is unlawful for a public authority to act inconsistently with art 8.
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> "[72] I have already noted that, apart from the difficulty concerning young children, the court remedies provided by ss 7 and 8 should ordinarily provide effective relief for an infringement of art 8 rights. I need therefore say nothing further on this aspect of the application of art 6(1). I can confine my attention to the application of art 6(1) to *other* civil rights and obligations of parents and children."

[23] The applicant sought further support from *S v Principal Reporter and Lord Advocate* [2001] Scot CS 82 (30 March 2001) a decision of the First Division Inner House Court of Session. Counsel for the Lord Advocate conceded that Article 6 applied as the hearing was determining the child's civil rights and obligations. The Lord President, in considering the concession, stated at paragraph [8] -

> "This was on either of two possible bases. First, children's hearing proceedings, such as the present, concerned matters relating to the child's family life in terms of Article 8 of the Convention and the child's Article 8 rights constituted a "civil right" for the purposes of Article 6. See McMichael v United Kingdom Series A No. 307 (1995), pp.51 – 42, paragraph 75, where the Court saw no reason to differ from the Commission's conclusion to that effect in a case involving a parent in a children's hearing. The Government conceded the point, indeed, before the Court. Secondly, the right to liberty is a civil right: Aerts v Belgium Reports of Judgments and Decisions 1998 – V 1939, p. 1964, paragraph 59. Therefore proceedings before a children's hearing in which the hearing could make a supervision requirement specifying secure accommodation are proceedings for the determination of the child's rights."

[24] The applicant interprets the approach in the two authorities referred to above as being that the engagement of any Convention right, and for present purposes Article 8 in particular, will involve a determination of civil rights for the purposes of Article 6(1). The respondent refers to examples of Convention rights being engaged which do not thereby attract Article 6 of the Convention. In *Golder v United Kingdom* [1975] 1 EHRR 524 the ECtHR considered the interaction of Article 6(1), 5(4) and 13 at paragraph 33 as follows –

> "What is more, the three provisions do not operate in the same field. The concept of `civil rights and obligations' is not co-extensive with the `rights and freedoms as set forth in this Convention', even if there may be some overlapping. As to the `right to liberty', its `civil' character is at any rate open to argument. Besides, the requirements of Article 5(4) in certain respects appears stricter that those of Article 6(1) particularly as regards the element of 'time' ".

[25] In *Maaouia v France* [2001] 33 EHRR 42 there was reliance on Article 6 of the Convention in a complaint about the length of deportation proceedings. At paragraph 35 it was stated –

> "The Court has not previously examined the issue of the applicability of Article 6(1) to procedures for the expulsion of aliens. The Commission has been called upon to do so however and has consistently expressed the opinion that the decision whether or not to authorise an alien to stay in a country of which he is not a national does not entail any determination of his civil rights or obligations or of any criminal charge against him within the meaning of Article 6(1) of the Convention."

At paragraph 38 the ECtHR added –

> "The fact that the exclusion order incidentally had major repercussions on the applicant's private and family life or on his prospects of employment cannot suffice to bring those proceedings within the scope of civil rights protected by Article 6(1) of the Convention."

Accordingly the proceedings for the rescission of the exclusion order did not concern the determination of a "civil right" for the purposes of Article 6(1).

[26] *Yazar and Ors v Turkey* [2003] 36 EHRR 6 concerned the dissolution of a political party, which was held to be a violation of Article 11 of the Convention but Article 6 did not apply. The ECtHR held that a dispute as to the right to pursue political activities as a political party was a right of a political nature not within Article 6. Similarly in *Ferrazzini v Italy* [2002] 34 EHRR 45 in a complaint about the time taken to resolve a tax dispute the ECtHR held that the pecuniary interests involved did not involve civil rights and Article 6 did not apply. The Court referred to Article 6 being engaged in relation to "private law", but that "public law" did not engage Article 6 unless the issue is decisive of private rights, so that exclusively public law matters are not covered by "civil rights and obligations." Private law rights are an elusive touchstone for the identification of civil rights.

[27] There are certain areas of activity that are not within the reach of Article 6. Examples in the areas of immigration, political and taxation disputes are referred to above. Where the area of activity engages certain Convention rights it is not every such engagement that attracts the operation of Article 6. Prior to the 1998 Act the European jurisprudence made it clear

that not every engagement of Article 8 rights attracted the operation of Article 6. Since the 1998 Act it is unlawful for a public authority to act inconsistently with Article 8. However I do not understand *Re S and Re W* and *S v Principal Reporter and the Lord Advocate* to mean that every engagement of Article 8 requires the application of procedures compliant with Article 6. Certainly the rights of children and parents at children's hearings where children are taken into care will involve Article 8 rights that require compliance with Article 6, as appears from *Re S and Re W* and *S v Principal Reporter and the Lord Advocate*.

[28] On the other hand the loss of association or loss of privileges as a consequence of a prison adjudication do not constitute a breach of Article 8. First of all there must be a "right" which has a basis in domestic law. In the prison disciplinary context the matters to which the applicant refers are not rights but privileges that are removed for disciplinary reasons. Secondly the right must be "civil" in nature as determined "by reference to the substantive contents and effects of the right" (Konig v Germany [1980] 2EHRR 170 at paragraph 89). Again the matters to which the applicant refers are privileges. Thirdly there must be a "determination" of the civil right in the proceedings. This requires a direct relationship between the dispute and the right. In prison adjudications the impact on privileges is indirectly engaged by the contest. In professional disciplinary proceedings the civil right to practice a profession is directly engaged in the dispute. That the loss of prison privileges may have repercussions on private life or family life would not involve a dispute as to civil rights for the purposes of Article 6. Nor would loss of earnings involve a dispute as to civil rights for the purposes of Article 6.

[29] There will be other decisions affecting prisoners that would concern "civil rights" that would involve Article 6 of the Convention. Recently, in *R (on the application of Justin West) v The Parole Board* [2002] EWCA Civ 1641 the potential for development in one aspect of this area was suggested by Hale LJ. The case concerned a parole board decision whether to recommend release on licence of determinate sentence prisoners recalled to prison upon the revocation of their licences. The Court of Appeal considered whether that was the determination of a "criminal charge" within the meaning of Article 6 and found that there was not. Hale LJ expressed regret that the matter was not also being considered under the civil limb of Article 6, as the common law always regarded the right to freedom from physical coercion, with which imprisonment was a serious interference, as the most important of civil rights. Hale LJ stated at paragraph 49 that –

> "At first blush, therefore, and without the benefit of hearing a full argument on the subject, I would expect to conclude that this was at least the determination of his civil rights and obligations and that Article 6(1) was thus engaged. The requirements of a fair hearing may differ

> according to the subject matter but they would include the right to be heard and to be represented by counsel albeit not necessarily at public expense."

The present case is not concerned with entitlement to the right to liberty as release from custody is not the issue.

[30] The applicant has not established any of the grounds of Judicial Review on which reliance was placed. The application is dismissed.