Neutral Citation no [2004] NIQB 15 | *Ref:* **WEAC4119**

Judgment: approved by the Court for handing down | *Delivered:* **12/03/2004**

(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 NEIL WHITE FOR JUDICIAL REVIEW

WEATHERUP J

[1] The applicant is a prisoner at HMP Maghaberry. This is an application for judicial review of a decision of a Governor at HMP Maghaberry upon the adjudication of the applicant for an offence against discipline under Rule 38(14) of the Prison and Young Offenders Centre Rules (Northern Ireland) 1995 of intentionally or recklessly setting fire to or destroying or damaging any part of a prison or other property.

[2] The events giving rise to the disciplinary charge occurred at 10.00am on Thursday 6 November 2003 at Foyle 2 Cell 17 when the applicant damaged the windows and furniture in his cell. The adjudication took place on 17 November 2003 and the applicant pleaded guilty and was awarded three days cellular confinement and the loss of a number of privileges.

[3] The applicant's grounds for judicial review are first that he raised the issue of duress at the adjudication and the issue was not dealt with properly by the Governor. Secondly he applied for legal consultation and legal representation at the adjudication and this was refused. Thirdly that a prison adjudication involves a determination of the applicant's civil rights and obligations or alternatively involves the determination of a criminal charge so as to attract the fair trial requirements of Article 6 of the European Convention on Human Rights.

[4] There were no tape recording facilities available during the adjudication and the Governor made a note of the proceedings. In his affidavit the Governor states that he followed the normal prison adjudication procedure. He asked the applicant whether he had had an opportunity to

prepare his defence and the applicant agreed that he had. The Governor asked the applicant whether he wished to have a legal consultation or legal representation and the applicant replied that he did. The Governor considered the request for legal consultation and legal representation and applied the "Tarrant principles", being a reference to R v Home Secretary, ex parte Tarrant [1985] QB 251. He considered the seriousness of the charge, the capacity of the applicant to present his own case, the prospect of legal or procedural difficulties in the hearing and the need for reasonable speed and fairness. The Governor concluded that it was not necessary for the applicant to have legal consultation or legal representation.

[5] The hearing then moved on to deal with the charge and the Governor's affidavit states that the applicant was asked whether he pleaded guilty or not guilty and he replied that he was pleading guilty. The reporting officer's evidence was to the effect that a cell check disclosed the damage to the applicant's cell windows and furniture. The applicant accepted that he had deliberately damaged the contents of his cell. The applicant gave evidence that he had been forced to damage his cell although he had difficulty in explaining what he meant. The applicant agreed that no particular prisoner had made a verbal threat towards him nor had he been personally identified by any other prisoners and ordered and threatened to damage his cell. The applicant stated that there had been a lot of shouting going on in the wing and he could hear a concerted shouting about wrecking and he felt that 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 be involved.

[6] The applicant's affidavit sets out further threats that he claims were made to him to compel him to damage his cell although he does not state in the affidavit that he told the Governor about these matters at the time of the adjudication. The Governor's affidavit confirms that the applicant did not relate those matters at the time of adjudication.

[7] The issue of duress is a difficult matter for prison governors conducting adjudications. The issue was dealt with by Carswell J in Jameson and Green's Application (Unreported 27 July 1993). The prisoners had pleaded guilty but raised the issue of duress during the adjudications. Carswell J quashed the adjudications as he was unable to hold in any of the cases that the Governors had addressed the issues with sufficient clarity or resolved them by reference to the correct legal requirements, in particular to the burden and standard of proof. These requirements Carswell J set out 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] In his affidavit in the present case the Governor states that he did not consider that the applicant had made out before him any case of duress and the applicant did not tell the Governor that he was under significant physical threat and the applicant did not tell the Governor that he initially refused to

take part in the protest or that certain prisoners had threatened him if he did not comply. However I am not satisfied that the Governor addressed the issues in the appropriate manner. To proceed on the basis of a plea of guilty after the issue of duress has been raised by the prisoner is to risk an incorrect approach to the issue. The Governor states on affidavit that in the light of the evidence produced he considered beyond reasonable doubt that the applicant was guilty of the disciplinary offence charged. However I am not satisfied that the Governor proceeded on the basis that he had to be satisfied beyond reasonable doubt that the applicant was not subject to duress. In the circumstances I propose to quash the adjudication.

[9] Where the issue of duress is raised by a prisoner, at any time in the course of an adjudication, and 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 – and if considered necessary the adjudication should start again on that basis. Duress, unless it is disproved, is a complete defence. Whether the prisoner should be found guilty or not guilty in a particular case should be determined in accordance with the approach of Carswell J set out above.

[10] On the applicant's second ground I am satisfied that the Governor applied the proper principles to the consideration of the application for legal representation and was entitled to reach the conclusion that he did. If a proper approach to the issue of duress is applied in adjudications and the Tarrant principles are applied on an application for legal representation I would not accept that raising the issue of duress in itself warrants legal representation, although as in all cases the position should be kept under review.

[11] Further the Governor applied the Tarrant principles to the application for legal consultation. Rule 35(3) provides that before any inquiry the prisoner will be informed of the right to request legal representation at the inquiry. Requests for legal representation are dealt with at the commencement of the adjudication. The prison rules do not express any right to legal consultation, but it is inherent in cases of the grant of legal representation that in such cases there would be a right to legal consultation. It is also inherent in the right to request legal representation that there will be cases where legal consultation would be required in order that the prisoner might assess whether to request legal representation and otherwise to obtain legal advice to assist in the conduct of an adjudication without legal representation. It is appropriate for the Governor to apply the Tarrant principles to any application for legal consultation, as the Governor did in the present case. Again I would not accept that raising the issue of duress in itself warrants legal consultation, although that must be assessed by the Governor on a case by case basis.

[12] The applicant's third ground concerns the application of Article 6 of the European Convention on Human Rights on the basis that a prison adjudication is the determination of a criminal charge or alternatively involves the determination of civil rights and obligations. This ground raises larger issues that it is not necessary to determine in the light of the finding on the applicant's first ground.

[13] For the reasons appearing above the adjudication of 17 November 2003 will be quashed.