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Judgment: approved by the Court for handing down | *Delivered:* **19/02/2007**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

APPLICATION BY TERENCE McCAFFERTY
FOR JUDICIAL REVIEW

WEATHERUP J

[1] This is an application for judicial review of the decision of an adjudicating Governor at HMP Maghaberry on 19 September 2006 in relation to the award of 14 days cellular confinement, further to a finding that the applicant had assaulted another prisoner. Mr O'Rawe appeared for the applicant and Mr Coll for the respondent.

[2] The applicant is a sentenced prisoner at HMP Maghaberry. On Thursday 6 July 2006 he was charged with assaulting another prisoner under Rule 38(3) of the Prison and Young Offenders Centre Rules (NI) 1995. On the same date he was placed in the Punishment & Segregation Unit under Rule 35(4) pending an investigation into the alleged incident. Rule 35 is headed "Laying of Disciplinary Charges" and Rule 35(4) provides that:

> "A prisoner who is to be charged with an offence against discipline may be kept apart from other prisoners pending adjudication if the Governor considers that it is necessary, but may not be held separately for more than 48 hours."

The applicant received a notice under Rule 35(4) dated 7 July 2006 stating that he would be kept in separation "Pending an investigation into an incident that occurred in Rowe House exercise yard during the evening of 6/7/06."

[3] The period of 48 hours elapsed and the applicant was further detained in the Punishment & Segregation Unit under Rule 32. Rule 32 is headed "Restriction of Association" and Rule 32(1) provides that:

> "Where it is necessary for the maintenance of good order or discipline or in his own interests that the association permitted to a prisoner should be restricted either generally or for particular purposes the Governor may arrange for the restriction of his association."

The applicant received a notice under Rule 32 dated 9 July 2006 and the reason for his restriction of association was stated in the same terms as the earlier notice under Rule 35. The notice provided for restriction of association for a period of 48 hours with effect from 1508 hours on 9 July 2006.

[4] Thereafter, the applicant received a further notice of restriction of association under Rule 32 for a period of 28 days. Rule 32(2) and (3) provide that:

> "(2) A prisoner's association under this Rule may not be restricted under this Rule for a period of more than 48 hours without the agreement of the Secretary of State."
>
> (3) An extension of the period of restriction under paragraph (2) shall be for a period not exceeding one month, but may be reviewed for further periods each not exceeding one month."

The further notice under Rule 32 was signed on behalf of the Secretary of State by the Director of Operations. It stated the same grounds as had been stated in the earlier notices and provided for restriction of association for a period of 28 days with effect from 10 July 2006. The restriction of association continued until 21 July 2006.

[5] Accordingly, the applicant spent 14 days in the Punishment & Segregation Unit, being 2 days separation under Rule 35 and 12 days restricted association under Rule 32.

[6] The adjudication took place on 19 September 2006 before Governor Cromie. The evidence against the applicant was a video-recording of the alleged assault in the exercise yard. The Governor viewed the video and on the basis of the viewing was satisfied that the applicant had assaulted another prisoner. The applicant did not attend the adjudication and his reason is stated in his affidavit to have been that -

> "Due to my previous experience of these proceedings, the adjudicating Governor invariably finds a prisoner guilty of the alleged offence by accepting the evidence of prison officers and failing to take into account the evidence put forward by a prisoner."

[7] The applicant was awarded 14 days cellular confinement, which is the maximum period of cellular confinement permitted under Rule 39(f). There was also a loss of associated privileges, being 16 in total, which included loss of newspapers, books, notebooks, tobacco, telephone, earnings, television, gym and library. It is the loss of these privileges that distinguishes cellular confinement from separation pending adjudication or restriction of association because these privileges continue in the case of a prisoner who is subject to Rule 35 or Rule 32.

[8] The applicant's complaint in this judicial review is that the award of 14 days cellular confinement did not take into account the earlier 14 days that the applicant had served under Rule 35 and Rule 32. The application for leave to apply for judicial review resulted in interim relief being granted on 25 September 2006, at which time the applicant had completed 7 days cellular confinement. Accordingly, there are 7 days of the original award still outstanding.

[9] The respondent's approach appears from the affidavit of Governor Cromie. During the course of the adjudication the applicant did not co-operate and it is apparent from the record of proceedings that Governor Cromie was at pains to be fair to the applicant and to engage him in the process.

[10] Governor Cromie states that he was not aware that the applicant had served a period of restriction under Rule 32. He states that such a restriction would be of limited relevance because Rule 32 is not a punishment. Governor Cromie's approach is that as the applicant was not subject to a punishment and would have enjoyed the full range of the other privileges, the cellular confinement which was awarded to the applicant was quite different in nature and effect to the loss of association under Rule 32. Governor Cromie concludes by stating that " … I do not accept that I would have been obliged to reduce the award although, of course, I would have considered it had the applicant chosen to advise me that he had previously sustained a loss of association under Rule 32 in connection with this matter."

[11] The applicant's case is that the treatment of the applicant under Rule 35 and Rule 32 arose solely out of the incident of 6 July that gave rise to the adjudication and was, therefore, relevant to the award that would be made. The respondent's case is to accept the relevance of that treatment under Rule 35 and Rule 32, but to express certain qualifications, namely that it is of limited relevance because the restraints are of a different character, further that the Governor would not be obliged to reduce the award had he taken it into account and further that the Governor would have taken it into account if it had been made known to him by the applicant. On the other hand the applicant accepts these qualifications and the issue between the parties therefore reduces to whether this otherwise relevant consideration may be disregarded when not notified to the adjudicating Governor by the prisoner or whether prison staff should notify the adjudicating Governor of the matter at the appropriate time, namely if and when he comes to consider his award.

[12] The respondent's concession that the operation of Rule 35 and Rule 32 was a relevant consideration was unavoidable. The applicant's transfer to the Unit under Rule 35 and Rule 32 arose out of the events that gave rise to the charge and the transfer impacted on his residual liberty while in the prison. It was clearly connected to the matters that give rise to the charge and must properly be regarded as a relevant consideration, if and when the Governor comes to determine what award might be made in any adjudication. However, the respondent contends that this is a matter of mitigation and it is for the applicant to raise points in mitigation, as with criminal proceedings.

[13] The context is that of prison adjudication and usually the prisoner is not legally represented. It is common case that it is a matter relevant to any award that restrictions are imposed on a prisoner arising out of the events that lead to the adjudication. Of course adjudications are disciplinary matters and restrictions under Rule 35 and Rule 32 are not punishments, but that does not detract from their relevance to any award that might be made. The relevant details are not peculiarly within the knowledge of the prisoner. The relevant details are in the records of the Prison Service and could readily be produced along with any adjudication record if the Governor reached the point of considering the award to be made. However, administratively, the particulars could equally be produced by the prison authorities and indeed the details may be more accurate than a prisoner's recollection and would certainly have to be checked by the authorities in any event.

[14] The starting point must be that all relevant considerations should be taken into account. Accordingly, when a prisoner is held under Rule 35 and Rule 32 in connection with events that gives rise to adjudication and the prisoner is found to have committed an offence against discipline arising out of those events, the restrictions under Rule 35 and Rule 32 are relevant to the determination of the award and should be taking into account by the Governor. The matter to be taken into account is not peculiarly within the knowledge of the prisoner and the requirement to take into account such a relevant consideration should not be affected by the failure of the prisoner to bring the matter to the attention of the Governor. The prison authorities should provide the Governor with such details when considering any award. The extent to which the information bears on the award is, of course, a matter for the Governor.

[15] In the present case the respondent raises two supplementary matters that bear on the outcome of the judicial review. The first is that the applicant had an alternative remedy by way of Petition to the Secretary of State. The second is that the furnishing of the information to the Governor about Rule 35 and Rule 32 would have made no difference to the award.

[16] To deal first with the issue of alternative remedy, Rule 44 under the heading "Remission and mitigation of awards" provides that *t*he Secretary of State may remit any punishment or mitigate it and subject to any directions of the Secretary of State, the governor may remit or mitigate any punishment imposed by a governor. Rule 45

under the heading "Petition against awards" provides that a prisoner may petition the Secretary of State in respect of an award made by a governor on the ground that the governor misapplied the prison rules or failed to follow the principles of natural justice or the award was more severe than was merited by the findings.

[17] The applicant contends that to apply to the Secretary of State is not an effective alternative remedy because it is said that delay in the process would have resulted in the total period of cellular confinement having been served before the matter would be addressed. On the other hand judicial review permits an application for interim relief on an application for leave and the present case illustrates that the award of cellular confinement may be halted pending a determination of the applicant's grounds of complaint.

[18] To warrant a refusal of judicial review on this basis any alternative remedy should be an effective remedy. The Court of Appeal in DPP's Application [2000] NI 174 adopted a summary of the position in relation to alternative remedies that had been set out in an article by Beloff & Mountfield in [1999] JR 143 as follows -

> "(a) The existence of an alternative statutory machinery will mean that courts will look for 'special circumstances' before granting an alternative remedy;
>
> (b) There are, however, a number of factors which may amount to special circumstances and the courts should be astute not to abdicate its supervisory role;
>
> (c) What is the most efficient and convenient method of resolving a dispute should be determined having regard not only to the interests of the applicant and the respondent before the court, but also the wider public interest;
>
> (d) Whether the allegedly alternative remedy can in reality be equally efficacious to solve the problem before the court having regard both to the interests of the parties before the court, the public interest and the overall working of the legal system;
>
> (e) In determining the most efficacious procedure the scope of enquiries should be considered. It may be that fact-finding is better carried out by an alternative Tribunal. However, if an individual case challenges a general policy the relevant evidence may be more readily admissible if the

challenge is brought as judicial review. An allegation that a prosecution is unlawful because brought in pursuit of an over-ridged policy can scarcely be made out on the facts of one case; and

(f) Expense of the alternative remedy or delay may constitute special circumstances."

[19] Consideration must be given to the interests of the applicant, the respondent public authority and the public. This triangulation of interests indicates that, in the circumstances of the present case, the most efficacious route would be to proceed by way of judicial review. Petitions against awards may be brought to Prison Service headquarters, acting for the Secretary of State, but Mr Coll for the respondent was unable to confirm that the outcome would have been, as in the judicial review, the securing of some interim remedy before the period of the disputed award had elapsed. It would be in the interests of all concerned that Petitions to the Secretary of State in relation to awards be addressed before the award is completed. A process at Prison Service Headquarters might admit of a form of interim relief in the same way as may arise on the granting of leave for judicial review so that the award under challenge may be halted in cases where the authorities consider that to be appropriate. Thereafter consideration can be given to the substantive issues that arise and the award may be reinstated or altered as appropriate in the light of the outcome of the Petition.

[20] As it was not possible to establish that the proposed alternative remedy was equally effective in securing a halt to the award before the period had expired I am satisfied that the most efficacious remedy was to undertake the proceedings for judicial review.

[21] The second matter upon which the respondent relies is that in this case it would have made no difference if the Governor had been notified of the applicant being subject to Rule 35 and Rule 32. Were I to be so satisfied then I would not interfere. However I can not say that that would have been the position. The 14 days cellular confinement is the maximum that the Governor may award and the applicant had already served 14 days under Rule 35 and Rule 32, albeit that was not a punishment and was a lesser restriction on his residual liberty within the prison. It may be that the Governor would have discounted some days. I must leave it to the Governor to decide what effect Rule 35 and Rule 32 should have in this particular case.

[22] I refer the award back to Governor Cromie to take into account the applicant's 14 days under Rule 35 and Rule 32 in determining the award to be made further to his finding that the applicant had assaulted another prisoner. I am not quashing the award that was made. I am exercising the powers under Section 21 of the Judicature (Northern Ireland) Act 1978 to refer the matter back to the original decision maker. I take this course because the applicant was uncooperative and did not play any part

in the adjudication process and this judicial review may not have been necessary had he contributed to the adjudication and given his history to the Governor. The applicant has 7 days cellular confinement to complete, subject to such adjustment as the Governor may determine after taking into account the applicant's period under Rule 35 and Rule 32.