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*(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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McClean's (Dennis) Application [2014] NIQB 124

IN THE MATTER OF AN APPLICATION BY DENNIS McCLEAN FOR JUDICIAL REVIEW

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Before: Morgan LCJ, Girvan LJ and Weir J

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MORGAN LCJ (giving the judgment of the court)

[1] This is an application by a serving prisoner at HMP Maghaberry seeking judicial review of decisions by the Police Service of Northern Ireland ("PSNI") and the Public Prosecution Service of Northern Ireland ("PPS") to investigate and prosecute the applicant for an assault for which the applicant has already been punished by the Prison Governor under the Prison and Young Offender Centre Rules (Northern Ireland) 1995 ("the 1995 Rules"). Mr Macdonald QC and Ms Askin appeared for the applicant, Mr Henry for the PSNI and Mr Philip McAteer for the PPS. We are grateful to all counsel for their helpful written and oral submissions.

Background

[2] On 13 October 2013, at approximately 15:20 hours, the applicant was involved in an incident during a family visit session. It is alleged that when Prison Officer McCormick attempted to terminate the session the applicant became aggressive and struggled with the Prison Officer. This caused both men to fall to the ground whereupon, it is alleged, the applicant punched the Prison Officer three times on the left side of his face and nose. Later that day, at approximately 18:53 hours, Prison Officer McCormick reported the matter to police by contacting the police call handling department. Mr Macdonald pointed out that Constable Close was the police liaison officer in the prison who was responsible for investigating any

complaints of assaults or serious offences reported to police by either prisoners or prison officers. Constable Irvine recorded a statement of complaint from Prison Officer McCormick on 14 October 2013 and on the same day Constable Close wrote to the security department at HMP Maghaberry requesting copies of any CCTV footage. A second prison officer also reported to police that during the incident he had been assaulted by one of the males visiting the applicant.

[3] In the meantime prison disciplinary proceedings were initiated by the Prison Governor against the applicant for breaches of Rule 38 of the 1995 Rules, namely assaulting a prison officer and being in possession of a prohibited article. The Prison Governor was at all material times unaware of the police complaint and Constable Close only discovered that the applicant had been subject to the adjudication process when he was so advised by the applicant's solicitor on 28 March 2014 as a result of a request to interview the applicant. An adjudication hearing opened on 15 October 2013 but was adjourned in order to facilitate the applicant obtaining legal advice.

[4] At the reconvened adjudication hearing on 23 October 2013 the applicant stated that he accepted the prohibited article complaint but wished to contest the assault. He said that the Prisoner Governor then indicated that the prison officers did not wish to go through the process and that if he pleaded guilty to the assault any punishment would be rolled up with the prohibited article punishment. He claimed that he agreed to plead guilty on this basis and on his understanding that if the matter was dealt with by adjudication then it would not be referred to the police for investigation and formal prosecution. He further stated that if he had been aware of the possibility that the matter could be referred to the PSNI then he would not have pleaded guilty to the assault.

[5] The Prison Governor said that at the adjudication hearing on 23 October 2013 the applicant did not plead guilty to possession of a prohibited article but rather was found guilty of that charge following consideration of the CCTV evidence. That was confirmed by the transcript. The Governor then claimed that, following the penalty for that charge being imposed, the recording equipment was switched off and a short conversation ensued in which, in response to a question from the applicant as to the effect the assault charge would have on the penalty imposed, he told the applicant that the punishments would be concurrent as both charges arose out of the same incident. The Governor stated that the recording equipment was then switched back on and the applicant pleaded guilty to the assault charge. He said that he never mentioned anything about Prison Officer McCormick not wishing to go through the process. Although Prison Officer McCormick was present at the adjudication and gave evidence he did not mention either that he had sustained injuries or that he had reported the matter to police.

[6] Paragraph 1.4 of the Northern Ireland Prison Service ("NIPS") Manual on the Conduct of Adjudications ("the Manual") provides that where an offence against prison discipline may constitute an offence in criminal law, the Governor must

decide whether to invite the police to investigate the charges or continue to deal with the matter by way of disciplinary proceedings. In making that determination, the Governor may draw on the Memorandum of Understanding on the Investigation and Prosecution of Offences Committed in Prison ("the MOU") agreed between the NIPS, PSNI and PPS in 2002. Where a decision is taken to refer charges to the police, paragraph 1.5 of the Manual requires that the adjudicator open and adjourn the adjudication pending the outcome of the police investigation.

[7] Paragraph 1.7 of the Manual deals with the referral of serious offences. The relevant offences are set out at A-G in the MOU. The offences at A refer to assault. They are set out as follows:

> "1. Alleged offences and attempted offences of murder, manslaughter, non-consensual buggery or rape or threats to kill where there appears to be genuine intent.
>
> 2. Other alleged assaults if (sic) any kind of (sic) the following elements are present:
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> **A.** The use of a weapon likely to cause, or causing, serious injury;
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> **B.** The occasioning of serious injury by any means;
>
> **C.** The use of serious violence against any person (providing that more than minor injury was the intended or likely outcome of such assault);
>
> **D.** Personal sexual violation other than rape;
>
> **E.** Any alleged assault that amounts to unlawful imprisonment (hostage taking)."

[8] Where the alleged offence falls within the offences listed in paragraphs A to G of the MOU, paragraph 1.7 of the Manual provides that the Governor should, following initial consideration of the individual circumstances of the alleged offence, refer the matter to the PSNI for formal investigation. In such cases the adjudication must not be reconvened until the outcome of the police investigation is known, as the police may, depending on the outcome of their investigation, lay charges against the prisoner.

[9] The MOU also deals with the decision to invite police to investigate. Paragraph 7 provides that the decision whether to invite the police to investigate an

alleged offence lies with the Governor of the prison. It is for him to decide whether an alleged offence can be best dealt with by way of disciplinary proceedings or whether a police investigation is required. However, paragraph 7 goes on to note that the DPP would expect that cases falling within the definition of serious cases in paragraph 1.7 of the Manual would be investigated by police and reported to him.

[10] Paragraphs 14 and 15 of the MOU provide as follows:

> "14. The great majority of offences against the Prison Rules will continue to be dealt with by the governor or, following referral to the Secretary of State, by the Board of Visitors. However, even if the police are asked to investigate, a disciplinary charge should be laid within 48 hours of the discovery of the alleged offence. The adjudication should be opened and the governor should satisfy himself or herself that there is a case to answer. If so, the hearing should be adjourned pending the outcome of the police investigation (provided the governor is satisfied that there is a case to answer).
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> 15. If a police investigation results in no prosecution the governor should consider whether to proceed with the disciplinary charge. However, if the resumption of the internal proceedings is likely to create an appearance of unfairness which is out of proportion to the seriousness of the alleged disciplinary offence governors should consider whether the charge should be dismissed. As a general principle governors should wherever possible avoid lengthy adjournments and should look to the police and the PPS for early decisions as to the likelihood of a criminal prosecution."

[11] The Governor said that he had concluded on viewing the CCTV and reading Prison Officer McCormick's statement that this matter did not require referral by NIPS to PSNI. In his 29 years in the prison service and 8 years as a Governor, to the best of his knowledge and belief there was an established practice, but no written policy, that an officer who made a complaint to police as a result of an incident in the prison reported doing so to the Security Department of the prison. Upon receipt of a report the Security Department then advised the Care and Supervision Unit, who administered the adjudication function, and a note was placed on the adjudication file for the information of the adjudicating officer. No notification was received from either of the prison officers who made the complaints to police in this case.

[12] The Governor believed and understood that any member of staff could choose to pursue a complaint with police regarding an incident in the course of their employment. Had Prison Officer McCormick either notified Security that he had made a complaint or advised the Governor prior to or during the adjudication hearing that the police were investigating a complaint he would have adjourned the adjudication pending the outcome of the police investigation. Equally a complaint to police could be made by a member of staff after adjudication had taken place. While the actions of a Governor in considering a matter for referral to police and the action to be taken if it was decided that a referral should be made was governed by policy, there was no policy that he was aware of governing complaints to police by individual prison officers and the Governor had no control in respect of such complaints. The Governor said that after becoming aware, as a result of these proceedings, that there had been a police complaint he made a request to the Director of Policy and Operations in the Department of Justice for the adjudication on the alleged assault to be quashed pursuant to Rule 44(1) of the 1995 Rules. That request was refused.

The submissions of the parties

[13] The applicant submitted that the purpose of the MOU was to provide a protocol for dealing with alleged offences occurring in prisons. That was reflected in the title, introduction and body of the policy. The full title was "Memorandum of Understanding of the Investigation and Prosecution of Offences Committed in Prison Service Establishments between the Northern Ireland Prison Service, the Police Service of Northern Ireland and the Department of the Director Of Public Prosecutions for Northern Ireland". The introduction to the MOU stated as follows:
"The objective of this document is to provide guidance on the respective roles of the Northern Ireland Prison Service, the Police Service of Northern Ireland and the Department of the Director of Public Prosecutions for Northern Ireland in relation to the investigation and prosecution of offences committed in Prison Service Establishments."

The applicant also relied on paragraphs 7 of the MOU referred to at paragraph 9 above which indicated that the decision to invite police to investigate an alleged offence committed in a prison establishment lay with the Governor of the prison although it was also provided that if the victim of any alleged criminal act requested a reference to the police the Governor should accede to that request.

[14] The applicant submitted that the alleged victim could not complain about the matter being dealt with internally since he had failed to request that the matter be referred to the police and had also failed to inform the NIPS that he had referred it to PSNI himself. It was argued that the established practice referred to by the Governor gave rise to a rule that prison officers should inform management if they had reported such a matter to police.

[15] As a result of the matter being dealt with internally the applicant was now prejudiced. Even if the PPS undertook not to adduce any evidence of his plea of guilty it would be necessary to cross examine Prison Officer McCormick on his failure to make a complaint directly to Constable Close, his failure to record alleged injuries in a statement to the NIPS and his failure to tell the Governor during the adjudication that he had reported the matter to the PSNI. Such cross examination was likely to lead to disclosure of the adjudication. We consider that this is the type of issue which a trial court often has to manage and we do not consider that it materially affects the outcome of this application.

[16] Finally, it was contended that the PPS decision to prosecute was contrary to its own policy as contained in the MOU. The continuation of the proceedings amounted to double jeopardy and a breach of Article 4 Protocol 7 of the ECHR. The prosecution of the applicant also constituted a breach of Rule 62 of the European Prison Rules which prohibited punishing a prisoner twice for the same matter. In any event the PPS Directing Officer failed to have regard to the MOU, failed to take into account that the Prison Officer had failed to disclose that he had reported the matter to police for investigation and that he was allegedly in breach of internal prison service policy.

[17] For the PPS Mr Henry submitted that the MOU dealt with referrals by the NIPS to the PSNI of possible criminal acts within the prison. No referral was made by NIPS as a result of the incident on 13 October 2013 and consequently he maintained that the policy document did not apply. In any event the MOU provided at paragraph 9 that if the victim of any alleged criminal act requested that the matter be referred to the police the Governor should accede to that request. In this case the victim obviously wanted the police to deal with the matter so a failure by the NIPS to refer would have been contrary to the MOU. The importance of the views of the victim in the MOU is consistent with the same approach in the PPS's Victims and Witnesses Policy.

[18] The matters raised by the applicant could in any event be pursued by way of an abuse of process application in the Magistrate's Court. The applicant is not prejudiced by virtue of the admission in the disciplinary process because the prosecution have undertaken not to adduce that evidence in the criminal trial. There was no deliberate manipulation of the rule of law in this case since NIPS did not know of the criminal investigation and similarly the PSNI did not know of the prison service disciplinary process.

[19] The starting point for the public interest decision to be made by the prosecutor is that where there is sufficient evidence available to put the accused on trial a prosecution should ensue unless there are other sufficiently weighty factors. The prosecutor took into account that the applicant had been subject to the earlier adjudication process but was entitled to give weight to the fact that this was an alleged assault on a public servant in the course of his employment. The MOU

expressly indicated at paragraphs 5 and 6 that the document contained guidelines only, that they were not comprehensive and that they did not cover every eventuality. The guidelines could not give rise to any legitimate expectation that the applicant would not be prosecuted. It was further submitted that the decision in R v Hogan (1960) 3 WLR 426 supported the view that there was a distinction between criminal proceedings and prison disciplinary proceedings as a result of which no double jeopardy issue arose.

[20] Mr McAteer adopted many of the points made by Mr Henry. He relied on the decision in R (ex parte Napier) v Secretary Of State for the Home Department [2005] 3 All ER 76 as authority for the distinction between disciplinary proceedings to which Article 6 rights did not apply and criminal proceedings. He submitted that the NIPS could not bind the conduct of an investigation by the PSNI. Once PSNI received the complaint they were bound to continue the investigation and submit a report to the PPS for direction irrespective of the outcome of the adjudication.

Consideration

[21] The judicial review proceedings in this case were issued on 27 March 2014. The respondents were the NIPS and the PSNI who were carrying out an investigation and had by that stage indicated an intention to interview the applicant. On 10 April 2014 the PPS indicated an intention to prosecute. The PPS were added as a respondent on 10 May 2014. On 27 May 2014 the NIPS were released from the proceedings as at all material times the Governor was unaware of the complaint to police. On 17 June 2014 the applicant again amended the Order 53 Statement to contend that the PPS Directing Officer acted under a misapprehension of material facts because he was unaware of the MOU or the internal prison service policy in respect of the reporting of complaints to police. It was broadly accepted that if we remitted this matter to the Magistrate's Court it was likely that there would be increased delay in the proceedings and in the circumstances we considered that we should deal with this as a rolled up hearing.

[22] There were four broad heads to the challenge made by the appellant: –

(a) It was contended that the MOU was a policy to which the PPS subscribed which prevented the prosecution proceeding in circumstances where the prisoner had been subject to adjudication particularly where the prison officer had failed to report his complaint to police to the Security Department of the prison;

(b) In any event the MOU give rise to a legitimate expectation that the applicant would not be prosecuted where he had been subject to adjudication;

(c) It was contrary to public policy, the European Prison Rules, the UN Standard Minimum Rules for the Treatment of Prisoners and Article 4 Protocol 7 of the ECHR to submit the applicant to a prosecution in the Magistrate's Court when he had already been subject to adjudication in the prison; and

(d) The PPS Directing Officer failed to take the MOU or the failure by the prison officer to report the matter to the Security Department of the prison when considering the public interest in pursuing the prosecution.

[23] The status of the MOU is set out in paragraphs 5 and 6 of the document. First, paragraph 5 identifies the MOU as containing guidelines. Secondly, the guidelines are designed to assist governors in determining whether to request the police to investigate alleged criminal offences committed in prison service establishments. The aim of the guidelines is to promote a shared understanding amongst all the agencies as to the relative seriousness of the offences committed in prison. That understanding is shared between NIPS, PPS and PSNI.

[24] Thirdly, paragraph 6 emphasises that these are guidelines only. That emphasis is then followed by the assertion that they are not comprehensive and do not cover every eventuality. The guidelines recognise that there will be circumstances which are not covered and that the particular facts of individual cases may justify taking a different approach. The guidelines are, however, intended to cover the great majority of behaviour by prisoners which may warrant involving the police.

[25] The guidelines indicate that the Governor should refer the matter to police where the victim of any alleged criminal acts so requests. In this instance there was no such request but there had been a prior complaint to police. The guidelines do not address this eventuality. They are designed to assist Governors and do not provide for what should happen in circumstances where the Governor is unaware of the fact that a complaint has been made.

[26] The Governor accepted in his affidavit that a prison officer could make a complaint about an assault of this kind after the adjudication. It was submitted on behalf of the applicant that it was a breach of policy for a prison officer to make such a complaint prior to the adjudication without notification to the Security Department. We are unable to accept that submission. There is no oral or written advice or instruction to prison officers that their entitlement to make such a complaint is so limited. The Prison Officers' Association is not a party to the MOU. The height of the appellant's case was that the Governor believed it to be an established practice that a prison officer would make such a report after making a complaint to police. That was insufficient to establish the existence of a policy in these circumstances.

[27] It is common case that if a prison officer reports the matter to police and at the same time notifies the Security Department of the prison the matter will be referred for investigation by police. We consider that there is no basis within the MOU for the conclusion that the right of the victim to have the matter investigated by police is extinguished by reason of the failure to notify the Security Department.

[28] It follows, therefore, that once the matter has been investigated the PPS have to consider whether to prosecute. We accept that the PPS should take into account the fact that an alleged offender has been subject to a finding at a prison adjudication and they did so. We do not accept, however, that there was anything in the MOU which was material to the public interest issue in proceeding with the prosecution and for the reasons given we do not consider that there was any policy inhibiting the right of the prison officer to make a complaint.

[29] This court reviewed the elements giving rise to a legitimate expectation in Loreto Grammar School's Application [2012] NICA 1 at paragraph 42:

> "[42] Whatever undesirable uncertainties may exist in the law of substantive legitimate expectation, it is clear from the authorities that a legitimate expectation can only arise where there has been, in Bingham LJ's succinct terminology, a "clear and unambiguous representation devoid of relevant qualifications" as to the decision maker's future conduct (see for example Attorney General for Hong Kong v. Nvunyen Shieu [1983] 2 WLR 735, Bancoult [2009] 1 AC, Coughlan and Association of British Internees v. Secretary of State for Defence [2002] EWHC (Admin) 2119.) A legitimate expectation may arise from an express promise given by or on behalf of a public authority or it may arise from the existence of a clear and regular practice which a claimant can reasonably expect to continue (see for example Lord Fraser in Council for Civil Service Unions v. Minister for the Civil Service [1985] AC 374 at 401). It has been stated, for example, in R v. Falmouth and Truro Port Health Authority (ex party South West Water Limited) [2001] QB 445 that "only the clearest of assurances can give rise to a legitimate expectation" (per Simon Brown LJ and Pill LJ). The promise or representation must come close to the character of a contract (see Lord Wolff MR in R v. North and East Devon Health Authority (ex parte Coughlan) [2001] QB 21. In R (Niazi) SoS v. The Home Secretary Laws

> LJ held that the court must be able to find that the public authority has "distinctly promised" before such a legitimate expectation to arise. "

[30] In this case reliance is placed upon guidelines which are said not to be comprehensive and which do not cover the circumstances of this case. The guidelines are designed to assist Prison Governors in the carrying out of their duties in respect of prison discipline. They do not impose any express restriction on the entitlement of the PPS to initiate a prosecution. Any such restriction would be in contradiction of the PPS Victim and Witnesses Policy which provides that the PPS will take into account the views of victims in deciding whether to prosecute. We consider that these guidelines fall far short of what is required to give rise to a legitimate expectation.

[31] The final issue is the double jeopardy point which arises under the international instruments including the ECHR and as a matter of domestic law. In order to sustain a claim of double jeopardy as a matter of domestic law it is necessary to demonstrate that the party has been subject to prior criminal proceedings before a court of competent jurisdiction (R v K, B and A [2007] 2 Cr App R 15). In R v Hogan [1960] 2 QB 513 the Court of Criminal Appeal concluded that where prison escapees had been subject to adjudication under the Prison Rules that did not prevent subsequent criminal proceedings in respect of the escape. There was no prior conviction by a court of competent jurisdiction. We consider that the same principle applies in this case.

[32] Article 4 Protocol 7 ECHR provides that no one shall be liable to be tried and punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted. This Protocol is not one of those made directly applicable in domestic law by the Human Rights Act 1998. It requires an analysis of whether the adjudication proceedings were criminal proceedings for the purpose of the Convention. This was addressed in R (Napier) v Secretary Of State for the Home Department [2005] 3 All ER 76 where it was concluded that prison adjudications which did not give rise to the risk of additional days did not constitute criminal proceedings. We agree with that analysis and do not consider, therefore, that Article 4 Protocol 7 ECHR assists the appellant.

[33] The last point concerns the prohibition in the UN Standard Minimum Rules for the Treatment of Prisoners and the European Prison Rules on punishing a prisoner twice for the same act or conduct. Leaving aside any issue as to the nature of the proceedings or the extent to which the appellant sustained a punishment as a result of the concurrent sentence it is accepted that in any criminal proceedings if the appellant is found guilty allowance must be made for the fact that he has been subject to the adjudication. He will not, therefore, in our view be punished twice in relation to the same conduct.

Conclusion

[34] For the reasons given we do not accept that the applicant has made out his ground of challenge in relation to either the PSNI or the PPS. The application is dismissed.