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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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2014 No. 028597

Stewart's (Albert) Application [2014] NIQB 120

IN THE MATTER OF AN APPLICATION BY ALBERT STEWART FOR JUDICIAL REVIEW

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O'HARA J

[1] This application for judicial review arises from an incident in Maghaberry Prison on 15 December 2013, the actions of the applicant and the response of various senior officers in the Prison Service. Ms Caoimhe Tierney appeared for the applicant with Mr Peter Coll for the respondent. I am grateful to them both for their helpful and concise submissions.

Background

[2] The applicant is a sentenced prisoner who started his term of imprisonment in October 2013. It is the first time that he has received a prison sentence. By December 2013 he was held on the "Families Matter" landing in Quoile 3. I accept the description of this area of the prison which was given by Governor Treacy in his affidavit:

> "It is the only prison regime of its type in the UK. Prisoners apply to be placed there. They engage in a full-time positive parenting programme delivered in conjunction with Barnardos and enjoy enhanced family visits. The prisoners are expected to act with maturity and responsibility."

[3] On 14 December another prisoner, Mr Aluya, is suggested to have behaved in an aggressive and verbally abusive manner towards other inmates though not the

applicant. Mr Aluya was on Quoile 4, one floor below Quoile 3 with prisoners being relatively free to move between the floors.

[4] On 15 December at about 11.50 am a large of group of prisoners moved en masse from Quoile 3 to Quoile 4 and went to Mr Aluya's cell. When this movement started the applicant was not part of the group. Rather he was talking to prison officers in a recreation room. As word spread about what was happening both the applicant and those officers followed those who had already gone to Quoile 4. What happened next, or at least most of what happened next, was recorded on close circuit television. I was invited to watch the video recording as part of the hearing. Unfortunately the recording is silent so it is not possible to hear what was said between Mr Aluya and any members of the group. However the recording shows the applicant arriving after the other prisoners. Two prison officers were already present. The applicant is seen to make his way towards the front of the group. At one point Mr Aluya is seen to be holding a cup in his hand. There was no physical altercation. After a short time the group dispersed with prisoners returning to their floor and to their cells. It is common case that the prisoners moved away when an emergency button was pressed which signalled lock-down. The applicant was slow to leave Quoile 4 and make his way back up to Quoile 3.

[5] On the following day, 16 December, the applicant was moved from Quoile 3 pending adjudication under Rule 35(4) of the Prison and Young Offenders Centre Rules (Northern Ireland) 1995. That Rule provides:

> "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."

[6] On 17 December he was charged under Rule 38(24) which provides:

> "A prisoner shall be guilty of an offence against prison discipline … if he in any other way offends against good order and discipline."

This is obviously a very broadly defined offence. It is therefore important to note exactly what the details of the charge were. These are found in the "brief outline of alleged offence" which state "you went from Q3 to Q4 to confront … Aluya".

[7] On 18 December the applicant was detained under Rule 32 in the Care and Supervision Unit, a detention which had some adverse impact on his freedom within the prison. (The extent of that impact was proved not to be as significant as the applicant alleged in his affidavits, especially in terms of the number of phone calls he could make to his extended family but the regime on which he was placed

was undoubtedly more restrictive than it had been in Quoile 3). Rule 32, entitled "Restriction of Association" provides:

> "Where it is necessary for the maintenance of good order or discipline, or to ensure the safety of officers, prisoners or any other person 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."

That restriction was extended on 20 December and again 27 December because the adjudication which opened on 18 December was adjourned and did not conclude until 31 December due to the intervening holiday period.

[8] On 18 December the hearing was adjourned due to staff availability and to allow the applicant to consult with his solicitor which he then did. When it resumed before Governor McKeown on 31 December the applicant rather confusingly responded as follows when asked whether he pleaded guilty:

> "Governor McKeown – Are you pleading guilty or not guilty?
>
> Mr Stewart – Guilty, a hundred million per cent sir on the grounds of going from upstairs to downstairs but it wasn't for a confrontation. …
>
> Governor – You went from Quoile 3 to Quoile 4 to confront … Aluya. Are you pleading guilty or not guilty?
>
> Mr Stewart – Guilty."

[9] Quite properly Governor McKeown appears to have taken from this that the applicant was pleading not guilty. The hearing was made up primarily of the governor hearing from the applicant, watching the video and hearing from Officer Bell who had been in Quoile 3 with the applicant and who had then gone to Quoile 4 as the applicant did. Officer Bell's evidence confirmed in emphatic terms the gist of what the applicant said which was that the applicant did not threaten Mr Aluya, that he asked him to put the cup down rather than throw a hot drink over anyone and that he was in no way aggressive. Officer Bell added:

> "… In my view he actually was helping us to deescalate a situation. Yes, he maybe shouldn't have been there but while he was there he was actually

> helping us to deescalate because Albert was talking to him …."

The transcript of the hearing continues with Governor Bell asking:

> "But what you are telling me is that Mr Stewart at no time was aggressive or trying to escalate a situation or backing prisoners towards a situation.
>
> Officer Bell – No, no."

[10] The conclusion reached by Governor McKeown was as follows:

> "I have proved beyond reasonable doubt that you were on the landing. I have proved that you were there and you were present. You didn't respond to the alarm when asked to lock. You didn't respond, you took it upon yourself to stay there even though I appreciate you think it was for the good of Mr Aluya but you should not have been there, all right. Mr Bell has spoken up for you and Mr Bell has said to me that you were not aggressive in any shape or form or were you trying to, if you like, infuriate the situation …. Rather you were trying to calm the situation …. I still find you guilty **of the others**." (emphasis added)

[11] The sanction imposed by Governor McKeown was limited. It was set out by him as follows:

> "I am going to award you 14 days loss of evening of association, 14 days loss of newspapers and periodicals, 14 days loss of earnings, 14 days loss of tuck shop and 14 days loss of TV and 14 days loss and gym and sports and the reason you have not probably got the same award as others is because Mr Bell has spoken up for you and said that you took no active part in an aggressive manner. However when asked to lock you did not lock, you should have locked at the time."

The grounds of challenge and submissions

[12] Ms Tierney made the following main challenges on the applicant's behalf:

(i) That there was no basis for segregating the applicant on the day after the relevant events and that using Rule 35(4) to do so was unlawful

because the governor could not have considered segregation necessary, especially in light of the fact that earlier on 16 December the applicant had passed Mr Aluya's cell without incident.

(ii) That there was no basis for restricting his association from 18, 20 or 27 December under Rule 32 because that too was unnecessary in the circumstances which prevailed.

(iii) That these decisions breached his rights under Articles 3 and 8 of the European Convention on Human Rights because of the condition of a cell in which he was held and because he lost prison employment and family contact in a manner which was disproportionate.

(iv) That the finding of guilt on the disciplinary charge was entirely unreasonable and irrational because it was in effect an acquittal for confronting Mr Aluya and a conviction for not responding promptly to the lockdown, a charge which had not been made against him.

(v) That the procedures followed during the adjudication were unfair and prejudicial in that not all relevant video evidence was shown and that the applicant was not allowed to call Mr Aluya as a witness.

[13] In her submissions Ms Tierney rightly acknowledged that the courts have shown a margin of appreciation or a degree of deference to prison governors who have a knowledge and expertise on how to manage and control prisoners which is not to be lightly interfered with. This is evident from many decisions but is not, she submitted, to be extended to an unquestioning acceptance of the decisions which were made under the statutory rules. She particularly relied on the decision of Weatherup J in Re Corden's Application for Judicial Review (2004) NIQB 44 in which he stated at paragraph [9] that the invocation of Rule 32 is "on the basis of necessity and is a measure of last resort".

[14] Mr Coll's submission placed emphasis on the accepted fact that in assessing risks prison governors are ideally placed to make the appropriate judgement and that the court should be slow to intervene and countermand the conclusions reached.

Conclusions

[15] On the five main areas identified at paragraph [12] above I have reached the conclusions which are set out below. Before turning to them I have to say that the applicant's explanation and justification for following others to Mr Aluya's cell is simply ridiculous. He said this in his affidavit:

> "I am a trained professional fighter and feel that I am role model amongst the prisoners. I felt that I could

> give a leadership role in the situation in order to calm tensions and encourage the other prisoners to go back to Quoile 3 without any violence occurring. I also felt protective towards the prison officer I had been speaking with and wanted to ensure the officers would not get hurt dealing with Mr Aluya who was very unpredictable and erratic."

The applicant's concept of his own importance and his role is grossly inflated and distorted.

[16] On the first issue, the use of Rule 35(4), I dismiss the applicant's claim. I accept what Governor Treacy has said about the movement of trusted prisoners to Mr Aluya's cell being a significant breach of trust. This special enlightened regime could reasonably be seen to have been threatened by what happened. On any viewing of the video the applicant had arrived late but had then placed himself prominently in the event. The initial analysis of what happened appears to have led to only three prisoners, including the applicant, being separated. I accept that this was a legitimate, limited and reasoned response within 24 hours of the event and is not undermined by the fact that it took some time to distinguish between the roles played by the various individuals who went from Quoile 3 to Quoile 4.

[17] On the second issue of the use of Rule 32 I similarly accept that it could be seen as necessary to invoke the rule so as to restrict the applicant's association on 18 December and then on 20 December. It is not hard to understand why that response was necessary and proportionate in the immediate aftermath of the incident on 15 December. However I have much more difficulty with the extension of the use of Rule 32 on 27 December. By that time 12 days had passed since the incident. A group of four people within the prison made a referral for consideration of the extension of Rule 32 to the applicant. Their decision, written by Governor Malloy was as follows:

> "We viewed the CCTV footage which showed Mr Stewart being involved in the incident. However no violence was used and the incident was on Sunday 15 December 2013. I recommend an extension to the Rule 32 restriction for up to seven days. During this period his placement in the CSU should be reviewed."

[18] That recommendation went to Governor McCready at Prison Service Headquarters. In his affidavit he has averred:

> "I decided to grant the seven day extension. As appears from the decision document I was satisfied that this was necessary for the maintenance of good

> order and discipline, to ensure the safety of officers and prisoners and in the applicant's own interests. It was my view that this was necessary in the context of the serious incident and the applicant's pending adjudication process arising from it, in order to allow local management to assess the risks involved in his potential return to Quoile and to engage the current dynamic in that house among the prisoners and to allow for any tensions there to reduce."

None of that reasoning is apparent in the original documentation signed by Governor McCready. I am satisfied that the extension remained in place because the adjudication was incomplete, having been adjourned to 31 December. By 27 December it should have been possible to gauge whether there were any on-going tensions and what the current dynamic was in Quoile 3 and Quoile 4. The recommendation made by Governor Molloy specifically refers to the incident having happened some time previously. That put an onus on Governor Molloy and his colleagues and then on Governor McCready to consider what the effect was of time having passed. There is no evidence that this was done. Accordingly there is no evidence that it was necessary to continue the restriction of association or that it was the unavoidable last resort as per Weatherup J in Re Corden.

[19] On the third issue about the engagement of Article 3 and Article 8, I find first of all that there is no evidence whatever to support the complaint that the cell conditions were so bad as to engage Article 3. So far as Article 8 is concerned I find that the applicant had extensive telephone contact with his family throughout the period. The restrictions on this were limited and not disproportionate even after, as I have found, Rule 32 was wrongly invoked for the third time from 27 to 31 December. Specifically the applicant was not prevented from having contact with his child by an earlier partner – rather he chose not to make that contact. That is not the fault of the Prison Service and there is no disproportionate interference with his rights under Article 8.

[20] Finally I take the fourth and fifth issues together. Governor McKeown's fairness in his conduct of the adjudication has been challenged on grounds which I reject. I am satisfied that he did not need to see any more video evidence than he did. I am also satisfied that it was entirely appropriate for him not to hear from Mr Aluya. Any governor should be reticent to agree to a witness in the position of Mr Aluya having to give evidence and I agree entirely with the governor that it was not necessary for him to do so in the present case.

[21] However the reason why it was not necessary to hear from Mr Aluya is the reason why the finding of guilty on the disciplinary charge cannot stand. The charge is one of breaching good order and discipline by confronting Mr Aluya. The applicant's evidence and Officer Bell's evidence quoted at paragraphs [8] and [9] above was that the applicant acted in a pacifying role. The video evidence does not

contradict that. Governor McKeown accepted as much by saying that the applicant was trying to calm the situation. Having done so, he could not in my view have properly concluded that "I still find you guilty of the others" – there were no others to find him guilty of. The only hint as to what "the others" might be is in the final remark on sentencing that the applicant should have gone to lockdown when asked. That is correct but since that was not what the applicant was charged with it could not provide the basis for a guilty finding on the specific charge which the applicant faced.

[22] The respondent contended in correspondence dated 10 October 2014 that the very limited penalty imposed by Governor McKeown had in reality made little appreciable difference to the way in which the applicant has been dealt with during his last ten months in prison. I accept the gist of that analysis in broad terms but I do not accept that the finding should be allowed to stand even if its effect has been limited. It is not appropriate in the circumstances of this case to make any award of damages. It is however appropriate to make the following declarations:

(i) That it was unlawful to restrict the association of the applicant under Rule 32 of the Prison Rules after 27 December 2013.

(ii) That the decision that the applicant was guilty of the disciplinary offence with which he was charged was unlawful and ultra vires as was the punishment imposed on foot of it.