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Judgment: approved by the Court for handing down | *Delivered:* **20/05/2008**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEENS BENCH DIVISION (JUDICIAL REVIEW)

AN APPLICATION BY JOSEPH CONNOR FOR JUDICIAL REVIEW

WEATHERUP J

[1] This is an application for judicial review of the decisions of a Governor at HMP Maghaberry on 22 January 2008 on the adjudication of the applicant on a charge of failing to obey a lawful order. The issue concerns the circumstances in which, on the adjournment of an adjudication hearing, an interim transcript may be required to be produced for the prisoner in order to facilitate legal advice on the further conduct of the resumed hearing. Ms Quinlivan appeared for the applicant and Dr McGleenan for the respondent.

[2] The applicant is serving a sentence of twelve years' imprisonment at HMP Maghaberry. On 27 October 2007 he was scheduled to receive a domestic visit but the visit did not proceed. On 31 October 2007 the applicant asked a prison officer if he could have the visit re-arranged. An exchange then took place between the applicant and the prisoner officer which resulted in the applicant being charged with the offence against discipline of disobeying a lawful order. The officer was PO Hutchinson and in his statement reporting the incident he described how he was unlocking the prisoners for breakfast on Roe 3 where the applicant was housed. The applicant enquired about the re-instatement of his visit and PO Hutchinson informed him that he would not be getting his visit reimbursed "as by all accounts it was his visitor's behaviour that caused him to lose the visit". The applicant was then abusive to the prison officer and when he started to make his way up the landing PO Hutchinson ordered him to lock up on two occasions. When the applicant ignored both orders PO Hutchinson instructed PO Weise to activate the alarm. PO Hutchinson's account was supported by the statements of PO Stewart and PO Weise.

[3] In his affidavit grounding the application for judicial review the applicant disagreed with the contents of the statements made by the prison officers. He stated his understanding that the 25 October 2007 visits had been cancelled for all prisoners because an alarm had been set off and not because of the actions of the applicant's visitors. He stated that when he had the exchange with PO Hutchinson he went from his cell towards the laundry and did not hear any order being given and was not aware that there was any issue until he was returned to his cell after the alarm had been activated.

[4] The adjudication opened before Governor Cromie on Friday 2 November 2007. The adjudication was adjourned for the applicant to receive legal advice and for the production of CCTV evidence of the events at Roe 3. The adjudication reconvened on Friday 23 November 2007 when evidence was heard from PO Hutchinson and PO Stewart and they were questioned by the applicant. The hearing was again adjourned as PO Weise was unavailable.

[5] After the hearing was adjourned on 23 November 2007 the applicant's solicitor wrote to the Governor at HMP Maghaberry on 30 November 2007 requesting copies of the charge sheet and statements and also requesting a transcript of the questioning of the prison officers on 2 November 2007 (which should have been a reference to 23 November 2007). The letter was forwarded to the General Office HMP Maghaberry where Governor Kennedy arranged for the copy charge sheet and statements to be forwarded to the applicant's solicitor. In relation to the request for a transcript Governor Kennedy went to the office to obtain information about the status of the adjudication. He was not aware of any details relating to the adjudication but was informed by staff that the adjudication had not been concluded. He did not require a transcript to be produced for the applicant's solicitor. The applicant's solicitor's letter was placed on the adjudication file for the consideration of the adjudicating Governor.

[6] By letter to Governor Kennedy dated 18 December 2007 the applicant's solicitor made a further request for the transcript of the questioning of the prison officers. Governor Kennedy returned to the office to determine the state of the adjudication and again found that the adjudication had not been completed. Governor Kennedy directed that the applicant's solicitor's letter be placed on the adjudication file for Governor Cromie to deal with the issue when the adjudication resumed. By a further letter to Governor Kennedy dated 15 January 2008 the applicant's solicitors again requested a transcript of the questioning of the prison officers. Governor Kennedy had no recollection of having received the letter of 15 January 2008.

[7] The hearing reconvened on Tuesday 22 January 2008 when the applicant refused to attend. Governor Cromie viewed the CCTV and heard the evidence PO Weise in the absence of the applicant. During the course of

the hearing on that day Governor Cromie adjourned on four occasions to speak to the applicant. On the first occasion he adjourned to advise the applicant to attend the hearing, but the applicant refused. On the second occasion he adjourned for the applicant's comments after Governor Cromie had viewed the CCTV. On the third occasion he adjourned for the applicant's comments after he had heard the evidence of PO Weise. Having then found the applicant guilty of the disciplinary offence Governor Cromie adjourned on a fourth occasion to ask the applicant if he had anything to say in mitigation. On reconvening the hearing Governor Cromie made an award that included eight days cellular confinement.

[8] The applicant's grounds for judicial review were as follows:

(i) That the conduct of the adjudication was unfair, in that it was conducted in circumstances where the applicant's solicitors had sought access to documentation relevant to the adjudication for the purpose of advising the applicant and the respondent failed to provide the documentation to the applicant or his solicitors.

(ii) That the refusal to provide the documents to the solicitors meant that the applicant was denied access to legal advice in a manner which was practical or effective.

(iii) The punishment imposed upon the applicant was unfair and unjust in all the circumstances.

(iv) That, in failing to address the question of whether or not on the facts of the instant case the applicant's solicitor should be provided with the transcript of the adjudication as they had requested, the respondent behaved irrationally.

(v) That the decision to refuse to provide the applicant with access to the transcript of the adjudication and to the facts of the instant case was Wednesbury unreasonable.

(vi) That the respondent's approach to the determination of whether an interim transcript should be disclosed during the course of an adjudication is unduly rigid and amounts in effect to an unlawful fettering of discretion to determine whether or not an interim transcript should be provided on the facts of the instant case.

[9] The applicant's solicitor's reason for requesting the transcript was to assist the applicant in his contention that the prison officers were untruthful in stating that the applicant had refused to obey a lawful order. The applicant wished to challenge the suggestion that the reason for the cancellation of visits on 25 October 2007 related to the conduct of the applicant's visitors.

The applicant was aware that another prisoner made a complaint about the cancellation of visits and the complaint form was returned on 5 November 2007 advising the prisoner that visits had been cancelled because there had been a breakdown of the electronic systems and a decision was taken on health and safety grounds that visits be cancelled and rescheduled. The applicant exhibited a copy of the complaint form to confirm the explanation offered to the other prisoner for the cancellation of visits on 25 October 2007. Accordingly, in the light of the transcript, the applicant wished to obtain legal advice from his solicitor on the development of this point at the resumed hearing of the adjudication.

[10] In relation to the production of transcripts of adjudications Governor Cromie stated that they were generally not provided. He referred to the very significant administrative burden that would be imposed on staff if transcripts were required for many hundreds of adjudications conducted each year. He pointed out that a prisoner may ask for the tape recording of an adjudication to be played back during the hearing. Governor Kennedy stated the transcripts were usually only produced when judicial review proceedings had been lodged by an applicant or where there were other exceptional circumstances. He had not sent a transcript to the applicant's solicitor because there was no transcript in existence and the adjudication remained incomplete. He referred to the applicant's solicitor's letter and stated that there was nothing exceptional about the applicant's case that would warrant production of the transcript.

[11] Governor Cromie noted that at the resumed hearing on 22 January 2008 the applicant refused to attend the adjudication, but did not raise any complaint about the absence of a transcript when Governor Cromie spoke to him. In his grounding affidavit the applicant stated that he declined to attend the adjudication on 22 January 2008 because he had not received legal advice from his solicitor because the prison authorities had not provided the transcript of the adjourned adjudication hearing. The applicant did not inform Governor Cromie that this was his reason for refusing to attend the adjudication.

[12] The transcript of an adjourned adjudication hearing has been described in these proceedings as an interim transcript. A request for an interim transcript should, where possible, be a matter for the adjudicating Governor, who would have knowledge of all the relevant circumstances. In the event the applicant's solicitor's letter was sent to the General Office and the letter was placed on the adjudication file. The second solicitor's letter was sent to Governor Kennedy, as he had responded to the first solicitor's letter, and again the letter was placed on the adjudication file. Governor Kennedy had no knowledge of the adjudication and was not in a position to assess whether there were circumstances that would have warranted the production of an interim transcript.

[13] It is not apparent that Governor Cromie made any decision in respect of the production of an interim transcript. Governor Cromie referred to the administrative difficulties that would arise if there were to be wholesale production of transcripts. However the production of interim transcripts is likely to be a limited exercise because it will arise where there has been an adjournment of the adjudication and an interim transcript is sought for the resumed hearing. Governor Cromie also referred to the facility for the tape recording of an adjudication hearing to be played back to a prisoner. That is a facility that may be necessary in the interests of fairness in the course of an adjudication or when an adjourned hearing has been reconvened, to assist in the recollection of the earlier proceedings. It is not a facility that would have assisted in the present case where the applicant required the interim transcript in order to consult with legal advisors prior to the reconvened hearing.

[14] Prison adjudications are intended to deal with disciplinary charges in a speedy and reasonably informal manner, consistent with the overall requirement for fairness to all concerned. A decision on the production of an interim transcript prior to the resumed hearing of an adjourned adjudication should, where possible, be an issue for the adjudicating Governor. The approach of the prison authorities is that such interim transcripts would only be produced in exceptional circumstances. That is an approach that the applicant challenges as being unduly rigid and amounting to a fettering of discretion. However I am satisfied that the approach is entirely appropriate and reflects the reality of the context in which such requests would be made.

[15] In the context of prison adjudications it is to be expected that, consistent with expedition, informality and fairness, interim transcripts would only be required in exceptional circumstances. The necessity for the production of an interim transcript may arise because of the complexity of the proceedings or of the need to address legal issues or of the limited capacity of the applicant to deal with the proceedings or other exceptional circumstances. It would not be appropriate to attempt any exhaustive statement of the circumstances in which interim transcripts may be provided as it would be a matter for the discretion of the adjudicating Governor in the circumstances of each case.

[16] However there is no evidence that Governor Cromie addressed the issue in the present case. The request in the solicitor's letter was on the adjudication file. It was not necessary for the applicant to raise the issue with the Governor as the matter was already the subject of correspondence. However the applicant's solicitor's letter did not explain the reason that the transcript was required and the Governor might have rejected the request on that basis or he might have asked the applicant's solicitor for the reason for the request.

[17] In the judicial review proceedings the applicant advances the reason for the production of an interim transcript on the basis of a challenge to the credibility of the prison officers' account of events at the applicant's cell in the light of the different explanations for the cancellation of visits on 25 October 2007. This was an issue taken up by the applicant in cross-examination of PO Hutchinson on 23 November 2007. PO Hutchinson agreed that he had told the applicant that he would not be getting his visits reimbursed because his visitors had been responsible for the cancellation of the visits on that day. PO Hutchinson described himself as the messenger but he could not remember who it was who had told him about the applicant's visitors. The applicant stated that an investigation was being conducted into the visits on the date of the exchanges on 31 October 2007. The complaints form exhibited by the applicant confirms a complaint received on 29 October 2007 and a response on 5 November 2007 confirming an alarm breakdown as the cause of visit cancellation.

[18] I do not accept that a copy of the interim transcript for the examination and cross-examination of the prison officers on 23 November 2007 would have assisted the applicant to receive any legal advice in challenging the credibility of the prison officers. The prison officers had already been cross-examined and the issue of credibility had been raised and the dispute about the cause of the cancellation of the visits had been raised. The applicant had the prison officers' statements and had received legal advice before the hearing of 23 November 2007. Although the issue of production of the interim transcript was not considered by the adjudicating Governor I am satisfied that in the circumstances of the present case there was no requirement for the production of an interim transcript. There was no unfairness to the applicant in not receiving legal advice on the transcript of the evidence given on 23 November 2007.

[19] The applicant contends that the award of eights days cellular confinement was an unfair punishment in the circumstances. The Governor noted that the applicant had two previous disciplinary matters, one of which concerned refusal to obey an order. The Governor also took into account that the applicant had refused to co-operate with the process on 22 January 2008. By affidavit Governor Cromie expands on the punishment issue by indicating that the applicant was a prisoner in the separated Republican wing where issues of order and obedience are particularly important. He states that because of previous difficulties with segregated prisoners a charge of disobeying an order is considered a serious matter. The applicant refers to another prisoner in separated conditions whose punishment was less severe. The details of the other prisoner's circumstances were not known to Governor Cromie or to the Court. There is no basis for concluding that the disciplinary award was unfair or disproportionate.