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*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **19/06/2007**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

AN APPLICATION BY GORDON BEATTIE
FOR JUDICIAL REVIEW

WEATHERUP J

[1] This is an application for judicial review of a decision of a Governor at Her Majesty's Prison, Maghaberry of the 3rd March 2007 whereby he found the applicant guilty of an offence against prison discipline and awarded him fourteen days cellular confinement. Mr Scoffield appeared for the applicant and Mr Coll for the respondent.

[2] The applicant is a sentenced prisoner serving life imprisonment imposed on the 19th June 1995 with a specified minimum term of fifteen years. He has now entered the three year pre-tariff period and has become entitled to home leave. The applicant had two accompanied home leaves in December 2006 and one unaccompanied home leave on the 29th December 2006. When the applicant returned to prison from his unaccompanied home leave he was stopped in the prison after the prison drugs dog responded to his return, presumably by sitting down in the manner in which these dogs are trained. The applicant was strip searched and nothing was found and he was transferred to the segregation unit for 48 hours under Rule 32 of the Prison and Young Offenders Centre Rules (Northern Ireland) 1995 .

[3] Rule 32 is used in circumstances such as prevailed in the present case as a means of monitoring prisoners who might be concealing prohibited items. The applicant was searched again at 7.00 pm that evening and nothing was found in the course of the search. However, as a result of a cell search that was undertaken at that time an item was found concealed around the sink in the cell. The item was a bag that contained 100 yellow diazepam tables and 4 grams of cannabis. The applicant was charged "that on Friday the 29th December 2006 at 1900 hours at Maghaberry SSU landing 2 cell 3 you committed an offence against discipline in that you had in your possession a package which contained 100 yellow tablets that were identified as 5 milligram diazepam and 0.4 grams of a brown substance that tested positive for cannabis".

[4] The adjudication hearing was convened on the 1st January 2007 and the 3rd January and was adjourned for the applicant to obtain legal advice. The applicant consulted by telephone with his solicitor and this resulted in a solicitor's letter to the Governor in which a series of requests were made in relation to the proposed adjudication. The requests were as follows -

(1) Please confirm that you will allow our client legal representation at this hearing given the serious criminal nature of the charge;

(2) We require copies of the written statements of the officers who found the items as to where and when they found them;

(3) We require details of the last time the cell in question was searched prior to the find and the detail of that search;

(4) We require the cleaning record for that cell;

(5) We require details of all the persons, prisoners and staff that would have had access to this cell for the last three weeks;

(6) We require details of all persons who actually had access to this cell;

(7) We require sight of the forensic report indicating what the contents of the package is; and

(8) We require details of any fingerprints taken from the package so that we may obtain our own expert if necessary.

[5] There was no reply to the letter from the applicant's solicitor and the adjudication proceeded on the 3rd March 2007. Governor Kennedy who conducted the adjudication considered a copy of the letter which was produced to him by the applicant during the hearing. The Governor found the applicant guilty of the charge.

[6] In essence the applicant relies on two grounds for judicial review. The first, procedural unfairness, relates to the absence of any information being furnished to the applicant or the applicant's solicitor as requested in the applicant's solicitor's letter. The second, Wednesbury, relates to the decision being irrational on the basis of insufficient evidence.

[7] A transcript of the hearing before the Governor indicates that he asked whether or not the applicant had had time to prepare an answer to the charge to which he replied "yes" and as to whether he had had time for legal consultation to which he replied "yes" and as to whether he had pleaded guilty or not guilty to which he pleaded "not guilty". Prison Officer McClean then read his evidence which was to the effect that on Friday the 29th December 2006 he had been a class

officer in the unit and that at approximately 1900 hours Officers Dickson and McIlwrath carried out a full body search on the applicant. During the follow up cell search Officer McClean found a package hidden above the overflow pipe underneath the sink. The package appeared to contain tablets wrapped in tinfoil and then sealed in cling film and the package was given to a member of the search team.

[8] The applicant asked no questions but the Governor dealt with the issue of access to the cell as he asked Officer McClean to clarify whether prior to the applicant going into the cell it had been thoroughly checked. The officer replied that the routine was that a cell would be checked as a prisoner leaves and it is checked before a prisoner goes in. Officer McClean was not able to say who had actually completed the cell search before the applicant had gone in but he said that it would automatically be done and then he expressed his satisfaction that the package had not been there when the applicant was put in the cell.

[9] Officer Dickson confirmed that he had been with Officer McClean and was tasked to search the cell. During the search he observed Officer McClean finding the package containing the tables wrapped in tinfoil and sealed in cling film under the cell sink. Again the applicant did not ask the officer any questions and again the Governor asked about the checking of the cell prior to it being occupied by the applicant. Officer Dickson stated that such a cell search was a standard operation and the Governor and the officer confirmed between each other that the applicant had been removed from the cell and the cell had been checked. Officer Dickson stated that the reason for the search was that he had heard the toilet flushing and he had said to the Senior Officer that they should do a full body search of the applicant in that cell and he described how they went in to the cell and the search resulted in the finding of the contraband.

[10] The prisoner produced to the Governor the solicitor's letter and the Governor read the letter. The Governor found that it was not necessary for him to take up any of the matters outlined in the letter. The concluding remarks referred to the officers being very clear in their evidence as to how the cell was checked and to Officer Dickson's evidence that they had gone back into the cell because of the toilet flushing and the Governor's understanding that items might be secreted in a place where they would not be discovered on a normal full search.

[11] The solicitor's letter was not received by the prison authorities. This is very unfortunate and there is no explanation. The records provide a log of items received in the life sentence unit where the Governor was based but the letter is not recorded in the log and was not received by the Governor. It may be that the letter was lost in the post or it may be that the letter was lost in the prison. The respondent says that the applicant's solicitor should have followed up on the absence of any reply to the letter. It is not clear that the solicitor received any notice that the hearing was going to resume on 3 March and no doubt had he received such notice he would have

followed up the matter before the hearing. In any event the letter was available to Governor Kennedy at the adjudication on the 3rd March 2007.

[12] The first point in the letter concerns legal representation and Mr Scoffield for the applicant stated that he was not pressing that matter. The Governor in his replying affidavit refers to the Tarrant principles being applied and he had considered the issue of legal representation and did not believe that legal representation was warranted. The second matter refers to the written statements of evidence. The written statements were available to the applicant and he could have made them available to the applicant's solicitors. The eighth point concerns fingerprints. There is no indication that fingerprints were actually taken. As there were no police involved in this investigation, as far as I am aware, it is assumed that the prison authorities were not equipped to undertake fingerprint examination and that there were no fingerprints and no fingerprint report. Point seven refers to a forensic report. Governor Kennedy states at paragraph 10 of his affidavit that during the adjudication the package containing the drugs was present and when the officers were giving evidence the package was shown to the applicant. The evidence relating to the testing of the drugs was also available at the adjudication. The contents of the test report were not read into the record but it is apparent that the Governor was satisfied that the contents were confirmed as being diazepam tablets and cannabis. At no stage did the applicant challenge the identification of the contents nor did he challenge the suggestion that the contents were what they were alleged to be. The issue was whether the applicant knew anything about the package and the contents. The applicant raised no issue about the contents and on the information available I have no reason to doubt the Governors conclusion that the test report established that the items were as the charge specified.

[13] The core of the case relates to points three to six which are concerned with search, cleaning and access to the cell and the request for information and disclosure of records in relation to those matters. The respondent noted that the applicant did not ask any questions at the adjudication, but the applicant pleaded "not guilty" and thus issue was joined in relation to proof of his possession. Whether or not the applicant asked questions, proof of possession was obviously required. The Governor was alert to this issue of linking the items that had been recovered to the applicant. The Governor asked questions relevant to establishing a link between the applicant and the items recovered. From the transcript the evidence of Officer McClean was that the routine on the landing was to check the cell on a prisoner leaving and on a prisoner going into the cell and therefore the routine would have been that before the applicant was put in that cell the cell would have been searched. The form given to prisoners placed on Rule 32 after an indication by the PDD, which I take to be a reference to the Prison Drugs Dog, states that "Your cell has been checked and any existing damage has been recorded, any further damage to the cell is your responsibly and you will be placed on report for this". It is apparent that there is a check on the cell at least for the purpose of establishing whether the cell is damaged and so as to make the prisoner responsible for any damage and I assume

that there is also a record of any search that is conducted in the cell before the admission of a prisoner to the cell.

[14] On the issue of proof of possession of an unauthorised article Mr Scoffield referred to Creighton, King, Arnott on Prisoners and the Law at paragraph 9.47 which specifies the three elements of the charge that have to be made out:

> "(a) Presence - that the article exists, that it is what it is alleged to be and that it was found where alleged;
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> (b) Knowledge - that the prisoner knows what the article is and knew that it was present;
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> (c) Control – that the accused had either sole or joint control over the article
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> (citing R (King) v The Board of Visitors of Camp Hill [1984] 3 All ER 897). To like effect in this jurisdiction is Morrison's Application [1991] 2 NIJB 10.

[15] The first element is presence. There is not any doubt that this item was present. The two prison officers confirm it being found and a test report was available to confirm the contents. Knowledge and control by the applicant are the issues. It is of course the essence of the case against the applicant that he brought the item into the cell. In order to establish that he did so it is necessary to exclude the possibility that the item was brought in by another before the applicant arrived. That possibility was the unspoken defence of the applicant and one to which the Governor was alert.

[16] The evidence to address that issue narrows down to the "routine" of checking the cell before a new prisoner would be put into the cell. I proceed on the assumption that there would be a record of that search. It is the record sought in point three of the letter from the applicant's solicitor. It would not be necessary to check the cleaning records or to check three weeks traffic of prisoners and staff through the cell in order to address knowledge and control, assuming that there was a cell search carried out before the prisoner went in and before anyone else could have put anything in the cell.

[17] I must be mindful, as the Governor obviously was, of all the circumstances of the case. There are a number of such circumstances which he would have considered relevant. First of all the applicant had tested positive for a drugs connection. He explains the positive reaction by having been in a hostel where there were drug users. That may well be the explanation or on the other hand it may be that there was a positive reaction because the applicant had drugs concealed in his person. Secondly, the applicant was searched and nothing was found. Thirdly, prisoners secrete drugs in their persons and the 48 hour Rule 32 regime is adopted to ascertain

if the drugs might emerge while the prisoner is in the segregation unit. That process is not under challenge in this application for judicial review and has been addressed in other applications. Fourthly, the prison officers heard the flush of the toilet and believed that to have been a signal that it was time to conduct a search. Fifthly, while it may be coincidence, the result of the cell search at that stage was that the drugs were found.

[18] A number of more general considerations I take into account as well. Adjudications are intended to be a speedy and a summary process. However, serious charges may be preferred that occasion loss of privileges and which impact on home leave entitlements. Further, Governors must be satisfied of all the elements of any disciplinary charge beyond reasonable doubt. All the evidential rigour of a criminal trial may not be demanded in such proceedings, for example, the test report may be tabled, as in effect happened here, and with no issue joined the evidence can be accepted. However the evidence relating to knowledge and control was that of a "routine" rather than a record of actual events and to accept such evidence rather than the available record of events was inadequate. On that basis there are grounds for quashing this finding because the evidence that was produced before the Governor did not confirm the absence of the item on a search of the cell before the applicant entered the cell.

[19] Section 21 of the Judicature (Northern Ireland) Act 1978 provides that "…. where on an application for judicial review …. the relief sought is an order of certiorari and the High Court is satisfied that there are grounds for quashing the decision in issue, the court may, instead of quashing the decision, remit the matter to the lower deciding authority concerned, with a direction to reconsider it and reach a decision in accordance with the ruling of the court….". There are a numbers of indicators that the applicant brought the item to the cell. Rather than quashing the finding at the adjudication I propose to remit the matter to the Governor to reconvene the hearing and determine the issue as follows. The Governor should establish if there is evidence of an actual search of the cell before the applicant's arrival in the cell so as to satisfy the Governor beyond reasonable doubt that the applicant brought the item into the cell and if there is such evidence then the Governor may confirm the finding. If on the other hand the Governor can not be so satisfied on the evidence then he will find the applicant "not guilty" and the records will be amended accordingly. As the matter is being remitted to the Governor to address further the issues of the applicant's knowledge and control of the item recovered, the Prison Service should furnish to the applicant in advance of the resumed hearing, statements of the evidence to be offered and copies of any supporting documents to be relied on at the hearing. In the circumstances this should be furnished to the applicant at such time in advance of the hearing as will afford the applicant an opportunity to copy the same to his solicitor and to obtain legal advice and to prepare his defence to the charge.

[20] The respondent claimed that there was an alternative remedy by way of Petition to the Secretary of State. Leave was granted in this case on the papers. The

issue of alternative remedy was not raised at the leave stage by a respondent's application to set aside the grant of leave. In such circumstances it is not appropriate to refuse relief on that ground. The matter is remitted to the Governor to determine, in accordance with the terms of this judgment, whether the applicant's guilt has been established.