Neutral Citation No. [2013] NIQB 115 | *Ref:* **TRE9047**

Judgment: approved by the Court for handing down | *Delivered:* **13/11/2013**
*(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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GORDON BEATTIE FOR JUDICAL REVIEW

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TREACY J

Introduction

[1] The applicant in this case is a life sentence prisoner detained at Maghaberry Prison. In the present application he has challenged the decision of the Northern Ireland Prison Service which found him guilty on 23 July 2013 of an offence against prison discipline in consequence of which an award was imposed. The application for judicial review is advanced on three grounds.

[2] The first is a jurisdictional point to the effect that the relevant disciplinary charge had not been made within 48 hours of the mandatory requirement to do so in Rule 35(1) of the Prison and Young Offenders' Centre Rules (NI) 1995 ("the 1995 Rules"). Secondly, there was a complaint of procedural unfairness arising from the alleged insufficiency of time that the applicant was said to have had to prepare his defence. And thirdly, alleged failure to establish an essential proof in the case, namely the condition of the applicant's temporary release which it was said he had breached.

Background

[3] As I have already indicated the applicant is a sentenced prisoner. He was sentenced to life imprisonment following a conviction for murder and robbery on 20 June 1995 and in February 2003 his tariff was set at 15 years from 21 December 1993. He was released from custody on life licence on 20 May 2010 but was recalled on 20 January 2011. He was in breach of three conditions of his licence including a residency requirement at Thompson House, he had also misused alcohol and shown

aggression towards his partner. He was charged with assault occasioning actual bodily harm upon her. He was assessed by the Probation Board for Northern Ireland as being a risk of serious harm and a principle forensic psychologist concluded that his risk of future violent behaviour was in the moderate to high range but this was specific to his relationship with his partner.

[4] On 15 April 2013 he was again released from custody, this time on a pre-release scheme phase 3. He again had a residency requirement at Thompson House and an associated curfew from 22.00 hours to 07.00 hours. It was during this release that he was observed by a staff member at Thompson House, Hugh Gibson, breaching his curfew by climbing out of a window at 00.27 hours and returning at 06.35 hours on 30 June 2013.

Rule 35(1) – Mandatory 48 Hours Requirement

[5] Rule 35(1) of the 1995 Rules provides that:

> "Where a prisoner is to be charged with an offence against prison discipline the charge shall be laid in writing before the Governor within 48 hours of the discovery of the offence, save in exceptional circumstances."

[6] It is common case between the parties that this requirement is mandatory – see R v Board of Visitors of Dartmoor Prison [1986] 3 WLR 61 in respect of a comparable provision then applicable in England and Wales. Rule 35(1) uses the imperative "shall" and includes an express provision for exceptional circumstances which it was said precluded the implication of further qualifications. The mandatory nature of the requirement is expressly recognised in the Northern Ireland Prison Manual on the Conduct of Adjudications which at para2.1 states:

> "Under Prison Rule 35 a charge of an offence against prison discipline must be laid within 48 hours of the discovery of the offence. Failure to charge within 48 hours renders any subsequent hearing void unless there are very exceptional circumstances.

[7] Turning to the jurisdictional point - was the charge laid within 48 hours of the discovery of the offence? This begs a number of questions namely discovery of the offence by whom and what constitutes discovery of the offence for the purposes of Rule 35(1). Both parties agreed that the Rule is referring to discovery of the offence by the Prison Service. Mr Sayers, on behalf of the applicant, says that the discovery of the offence was not later than 5 July based on the contents of an email of the same date from Mr Gibson, timed at 13.51 hours to SO Craig Doherty in the following terms:

> "Hi Craig just giving you the details re GB leaving Thompson House on the morning of 30 June 2013. GB left Thompson House at 00.27 and returned at 06.35. He left the building by climbing out of a window from a move on flat belonging to another resident. I will be able to get you a copy of the CCTV footage early next week." (sic)

[8] Accordingly, it was submitted that the 48 hour period commenced, at the latest, on 5 July 2013. Knowledge of an allegation is not however the same as discovery of the offence. In the vast majority of cases, in the prison context, the application of the Rule will give rise to few problems because most alleged breaches of prison discipline will occur within the prison. Ordinarily, prison officers will have had first-hand knowledge of alleged breaches and charges must, as we have seen, be laid within 48 hours of the discovery of the alleged offence, save in exceptional circumstances. This might, for example, be a prisoner caught smuggling contraband or with unauthorised articles on his possession or in his cell or assaulting a prison officer or observed assaulting another inmate and so forth.

[9] On other occasions it might be that some suspicious activity has been observed but which will require the CCTV to be scrutinised. Thus, for example prison visits are subject to CCTV observation to ensure, amongst other things, that unauthorised articles are not brought into or out of the prison. Something might occur which arouses suspicion. Subsequent viewing of the CCTV might lead to discovery of an offence in the sense of elevating it from mere suspicion to sufficient evidence justifying preferring a charge at which point time would start to run.

[10] At this stage, that is to say by 5 July, the information relayed to the Prison Service was an allegation plainly from a credible source of a serious breach of the terms of the applicant's release. However, in deciding whether to exercise their discretion to press a charge the Prison Service properly enquired, by viewing the CCTV footage, whether there was sufficient evidence to justify preferring a charge. When that stage was reached after viewing the footage the applicant was then charged in accordance with Rule 35 and the statement of the reporting and identifying officer, SO Craig, underpinning the charge was then served in accordance with Rule 36 and the adjudication manual. It was on viewing the CCTV footage that the offence was discovered by the Prison Service in the sense that it was then discovered as a matter of fact by those reviewing that the applicant could be reliably identified as having committed an offence for the purpose of charging. Accordingly, I am satisfied that the charge was not out of time and Rule 35 was complied with. If I am wrong in that conclusion I also consider that the reasons for the delay in this case amounted to exceptional circumstances.

[11] Prior to the adjudication the applicant's solicitor faxed a letter on 17 July 2013 to the Life Governor requiring a copy of the CCTV footage to enable consultation and advice to their client, a copy of any witness statements and confirmation that no

adjudication would take place until the materials sought had been served and the applicant's solicitor had a chance to consult in relation to this material. The adjudication went ahead on 23 July without the letter being responded to and without the applicant having the material sought or the opportunity to consult in respect thereof. By letter dated 24 July Governor McKeown wrote to the applicant's solicitors in the following terms:

> "Thank you for your letter dated 17 July regarding your client Mr Beattie. In respect of the information sought:
>
> 1. Mr Beattie was temporarily suspended from the pre-release scheme on 4 July 2013 following a disclosure which raised concerns around public protection.
>
> 2. I can confirm on 12 July 2013 that I reviewed CCTV from Thompson House Hostel along with a senior officer of Wilson House after which I was satisfied Mr Beattie had a case to answer.
>
> 3. Mr Beattie was placed on report for breach the conditions of his temporary release under Rule 38(11) on 12 July 2013 when I had become aware of the alleged offence.
>
> 4. Your client may request for an adjournment to consult with his solicitor at his adjudication.
>
> In regards to the CCTV arrangements can be made for you to view same at Maghaberry by a legal visit. If you have any further queries on this matter they should be referred to Governor McBlain."

[12] That letter was sent after the adjudication had already taken place and accordingly the applicant's solicitors didn't receive the material which they had previously sought.

[13] The failure to respond to the applicant's requests either at all or within a relevant timescale has not been the subject of any or satisfactory explanation in this case. The suggestion at one time in the respondent's skeleton argument at para 22 was this:

> "Regarding the applicant's skeleton argument Governor McCall has stated that he has no

> recollection of seeing the faxed copy of the letter of the applicant's solicitor dated 17 July 2013. It is possible of course that the faxed copy was not sent/received and it is notable that the applicant has not produced evidence that the faxed transmission took place. He points to an NIPS administrative issue when in fact it could just as possibly be an administrative issue at his solicitor's office."

[14] That point was not pursued by the respondent because there had been a short further affidavit served by the applicant's solicitor, Mr Pearse McDermott, of McCann and McCann exhibiting a copy of the transmission verification report dated 17 July 2013 at 8.45 am and to the relevant fax number. So in light of that Mr Daly, on behalf of the respondent, understandably did not pursue that point.

[15] Therefore, there is, as I have already pointed out, simply no explanation for the failure to comply with the quite reasonable request made by the applicant's solicitors. It may be that had those requests been complied that it would not have made any difference whatsoever to the outcome but the applicant is entitled to a fair process and a full opportunity of presenting his case to use the language of Rule 36(4) of the 1995 Rules.

Conclusion

[16] On that ground, in my view, the adjudication must be quashed. In the light of that conclusion I do not consider it necessary to deal with the applicant's third point which was, in any event and perfectly understandably, not pressed with any degree of enthusiasm by the applicant. For these reasons the judicial review is allowed and the decision is quashed.