Neutral Citation No. [2015] NIQB 64

Ref:	**TRE9724**
Delivered:	**10/07/2015**

Judgment: approved by the Court for handing down
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

Gorski's (Sebastian) Application [2015] NIQB 64

IN THE MATTER OF AN APPLICATION BY SEBASTIAN GORSKI FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

and

IN THE MATTER OF A DECISION OF THE SOUTH EASTERN & SOCIAL CARE TRUST MADE ON OR AROUND 9 MAY 2014

and

IN THE MATTER OF THE NORTHERN IRELAND PRISON SERVICE

TREACY J

Introduction & Background

[1] The applicant, Sebastian Gorski, a prisoner at Maghaberry Prison was granted leave to apply for judicial review of a decision of the South Eastern & Social Care Trust ("the Trust") on 9 May 2014 by way of an emergency application.

[2] The Trust seeks to set aside this decision. The NIPS have already been dismissed from this application following the hearing. I have however set out below for completeness the relief sought and the grounds relied upon as against both the Trust and the NIPS.

Order 53 Statement

[3] The applicant sought the following relief:

As against the Trust:

(a) By way of interim relief, an Order of *Mandamus* compelling the South Eastern Health and Social Care Trust ('the Trust') to ensure that the Applicant has access to an appropriate medical consultation with a General Practitioner and/or a psychiatrist with a Polish speaking interpreter present;
(b) By way of further interim relief, an Order of *Mandamus* compelling the Trust to provide the Applicant with any and all medication prescribed to him on or around 7th May 2014;
(c) An Order of *Certiorari* to bring up and quash the decision of the Trust to hold and conclude a medical consultation with the Applicant in the absence of an appropriately qualified interpreter;
(d) A Declaration that the decision of the Trust was unlawful, *ultra vires* and of no force or effect;
(e) A declaration that the Trust has acted in a manner which is in breach of Prison Rules on provision of healthcare;
(f) A declaration that the Applicant's rights pursuant to Article 3 has been breached;
(g) A declaration that the Applicant's rights pursuant to Articles 8 and 14 have been breached;
...

As against the Prison Service:

(h) An order of Certiorari to bring up and quash the decision of the Prison Service not to provide any interpreting services to facilitate communication between the Applicant and its staff;
(i) An order of Mandamus compelling the Prison Service to provide adequate interpreting facilities;
(j) A declaration that the Applicant's rights pursuant to Articles 8 and 14 have been breached;
..."

[6] The grounds on which this relief was sought included:

With respect to the Trust:

(a) At all stages and since the Applicant's initial committal into custody, the Trust has failed to put in place interpreting facilities during the course of any and all medical assessments and it has thereby acted outwith the Prison Rules;

(b) In failing to provide an interpreter for a medical consultation on 7th May 2014, the Trust has acted unlawfully;
(c) The Trust has failed to provide the Applicant with any medication prescribed by a Doctor on 7th May 2014 and it has thereby acted unlawfully;
(d) The Trust has failed to properly assess the Applicant's state of health, in particular, his mental health. The trust has thereby acted unlawfully;
(e) By reason of the failures referred to at 3(a), (b), (c) & (d) above, the level of healthcare provided by the Trust has fallen far below that required by the Prison Rules. The Trust has acted in breach of section 6(1) of the Human Rights Act 1998 by failing to have any or any adequate regard to the Applicant's rights under Articles 3 and 8 of the Convention;
(f) Furthermore, by reason of the foregoing and by reason of his status as a prisoner, the Applicant's Article 14 right not to be discriminated against has been breached;
(g) The Trust has acted contrary to the spirit and intent of Part IX of the Prison Rules;
(h) The impugned decisions are irrational and unreasonable in the *Wednesbury* sense in that no reasonable decision maker would have made such a decision.

With respect to the Prison Service:

(i) By failing to provide facilities which would permit the Applicant the same level of communication with prison staff, the Prison Service has acted unlawfully;
(j) By failing to communicate with the Applicant in an effective manner, the Prison Service has denied the Applicant the opportunity to achieve enhanced prisoner status and employment within prison and has thereby acted unlawfully;
(k) The Prison Service's failure to provide any or any adequate translation and communication facilities has resulted in a breach of the Applicant's Article 8 rights;
(l) The Prison service has breached the Applicant's Article 14 rights when read in conjunction with Article 8;

(m) In the overall, the Prison Service has acted in an unreasonable manner and in a manner that no reasonable Prison Service would act.

Submissions

[7] The respondent submitted that the circumstances of how this leave application came to be heard and the lack of opportunity to provide all the required information to the court are relevant factors in a reconsideration of the issue of leave, in particular, the fact that the case was listed as an emergency before the Court at very short notice.

[8] The Applicant's pre-action letter (incorrectly dated 6 May but now confirmed as dated Thursday 8 May) was faxed to the Assistant Director for Prison Health at Lagan valley Hospital on Thursday 8 May at 17.24. As this was outside office hours, the fax was not registered and processed until some point in the morning of Friday 9 May. The respondent's Solicitors were not provided with a copy of the Pre-Action letter by the Applicant's Solicitors. This was despite the Solicitor with carriage being aware, from other proceedings, that the Directorate of Legal Services (DLS) act as legal advisors to the South Eastern Trust.

[5] The DLS first became aware of the Leave Application and the instant case at approximately 14.30 on 9 May, when a member of administrative staff received a phone call from Ms Ferguson of Higgins Hollywood and Deazley advising that the leave application was listed at 15.30 that afternoon. No details were given as to the substance of the case. Despite three telephone calls to the office of Messers Higgins Hollywood and Deazley papers were not obtained until an email was received at 15.31 on 9 May 2014. The respondent contended it was impossible to obtain adequate instructions prior to the leave hearing.

[6] Counsel and Solicitor for the respondent attended QB1 to deal with the matter in or around 15.30 without having had a copy of the pleadings. The respondent referred to the fact that on Friday 9 May there were significant travel restrictions in and out of Belfast City Centre that day due to the scheduled Giro d'Italia race event. The court informed the parties that the Judge would only be available to deal with the case until shortly after 16.00 when access into and out of the court and city would thereafter be restricted. This was a common issue across all of the sitting courts in Belfast that day. The respondent emphasised that this was not in any way a criticism of the court hearing, but rather the context in which the respondent sought to convey instructions in this case and the time in which the matters could all be ventilated before the court in what were relatively unusual circumstances.

[7] The Respondent had been making arrangements contemporaneously upon processing of the pre-action letter for the Applicant to be seen by a doctor and at the time of the hearing on 9 May, a doctor was en route to the wing to assess the

Applicant given the expressed urgency of the issue. He was seen at 16.27 by a Dr Lusty at Maghaberry. When the leave application was called into court, counsel for the respondent was attempting to speak directly with Dr Palmer, who was at that time in one of the Prison Houses on duty. Dr Palmer had undertaken the impugned consultation on 7 May with the Applicant central to the hearing. That phone call had to be terminated to deal with the application. It was not possible at that time to access records regarding the Applicant's previous medical appointments or his prescribed medications.

[8] The extent of the Respondent's instructions to the court at the leave hearing were that there had been a medical consultation on 7 May with Dr Palmer, that the Big Word telephone interpretation facility was available for that consultation but that it was not, in fact used, and a third party who attended the consultation with the Applicant assisted the doctor in interpretation. Due to the pressures of time and the information available at that time, a significant number of evidential issues were not capable of being confirmed to the court. The Respondent was not at that time able to inform the court as to the nature of the medication or whether it had been dispensed. The court did not have the benefit of an affidavit from the Applicant himself at that stage. The Applicant's solicitor averred in his affidavit that the Applicant had not been seen by any members of the health care team before 7 May despite a direct request by his solicitors to the Respondent on 1 May, a contention that may concern the court if the Applicant's health cares were being ignored. This was clarified after the leave hearing and established that the Applicant was in fact seen by a nurse on 1 May who made an appointment for him with the GP on 7 May and that the Applicant was content with this plan. Counsel were not in a position at that time to clarify to the court that the pre-action letter was not in fact dated 6 May nor that it had been received after working hours the night before ie 8 May.

[9] Leave was granted on the basis of concerns regarding the (accepted) use by Dr Palmer of a third party to assist at the 7 May consultation. A fuller exploration of the circumstances of this was not possible at the leave stage for the reasons as set out above. No interim relief was granted as the court was informed that a doctor's consultation was in train as the court was sitting using the Big Word service. The case was listed for review on 15 May.

[10] The respondent contended that upon having time to properly consider the evidence that was before the court on 9 May and upon taking full instructions, it was apparent that an arguable case was not made out and that the issue of leave having been granted should be revisited. The Respondent submitted that leave was granted on the basis of instructions by the applicant to his solicitors that failed to correctly reflect the situation as at the date of the leaving hearing. This was highlighted to the court at the subsequent review on the 15 May and the court at that time invited the Respondent to address these issues by way of an application to set aside leave if appropriate.

The test for leave

[11] The respondent submitted that the heart of the complaint by the Applicant, and the clear concern of the court at the leave hearing on 9 May, was how it came to pass that no formal interpretation service was used at the 7 May consultation (with the consequent effect on his privacy and potential health assessment) and also whether the Applicant had not been given his proper medication as at the leave hearing.

[12] Dr Palmer has filed an affidavit in this case dated 25 June 2014 and exhibited extracts from the Applicant's prison medical notes at the relevant time. As averred, the thrust of the Applicant's case at leave was that he was forced into using a cellmate to interpret for him in circumstances where he had no knowledge, awareness or access to proper interpretation services and such services were deliberately bypassed by the Respondent. The respondent accepted that it would be wholly inappropriate if this were the case.

[13] No medical service, based in prison or the community, can offer immediately accessible personal face-to-face interpretive services for all non-English speaking service users. The "Big Word" telephone service is used across the UK for medical interpretation as well as throughout the criminal justice system and elsewhere. The respondent contended that no issue was pleaded in this case by the Applicant as to this telephone service's lawfulness in such a role. Dr Palmer's affidavit sets out the circumstances where a face-to-face interpreter can be used or requested, but by its very nature this will involve time and delay to make such arrangements. The respondent noted that no criticism was made by the Applicant at the leave hearing of the fact that the 9 May consultation taking place in the prison to address their concerns was intending to use the Big Word Service and this case has not been pleaded or mounted on the basis that the use of such an interpretation service amounts to a "failure to provide an interpreter" or a "failure to properly assess the Applicant's health". The respondent pointed out that the Applicant's own legal representatives appeared to advocate the use of the telephone interpretation service in their letter to the prison healthcare department of 1 May requesting a medical consultation.

[14] Dr Palmer's affidavit sets out the circumstances of the 7 May consultation and the immediate access to the telephone consultation service that was to hand in the room throughout. The respondent contended that how the consultation developed was a simple misunderstanding between the Applicant and his GP regarding the purpose of the attendance of the third party who presented himself with the Applicant. The Applicant averred that the consultation itself was a surprise, "indeed nothing about this consultation was discussed with me". The applicant's records show that at the (interpreted) 1 May consultation, "Appointment made to GP 7 May for night sedation and not eating. Patient happy with same". No query was made by the Applicant on 7 May as to why the telephone service that he had used 6 days previously in a medical assessment before could not be availed of.

[15] The respondent submitted that on his own case, the Applicant made no issue regarding concerns about privacy or confidentiality at any time in the 7 May consultation with Dr Palmer. The Respondent commented that as with GP consultations outside of the prison environment, any patient is entitled to have a third party present if they so wish. The consultation was in no way made quicker or more convenient from the respondent's position by the presence and involvement of the third party in the room, and there can be no logical basis for a contention that this was some form of pejorative treatment of the Applicant, either as a prisoner, as a non-English speaker or on any other basis. The Respondent submitted that to elevate this clinical consultation into an act said to be ultra vires, irrational and Wednesbury unreasonable is an absurdity on the actual facts of this case.

[16] Regarding medication, the respondent contended that the Applicant's evidence before the court at the leave application was incorrect and incomplete. The applicant's solicitor's affidavit that grounded the leave stated that as at the leave hearing (4pm 9 May) the Applicant was still not in receipt of his (unspecified) medication. The respondent submitted that this was not correct as records exhibited by Dr Palmer showed that the Applicant confirmed to Dr Lusty at 16.27 on 9 May that he received his Zopliclone medication the day before (8 May). This medication was prescribed specifically to assist with the Applicant's sleep and to be taken 1x per night. The timescale of the script being processed, sent out, dispensed and distributed were reasonable and proportionate to the clinical issue at hand. Despite the case made on the papers on this point on 9 May, the Applicant's affidavit of 6 June filed after the leave hearing is entirely silent on this issue. The respondent contended it did not act unlawfully.

[17] The Respondent submitted that the 7 May consultation was wholly appropriate and lawful, and any issue regarding the presence and assistance of the third party was, at its very height, a fact-specific human misunderstanding between the parties involved. No case has ever been pleaded in relation to the clinical issues arising from the 7 May consultation nor has any case been made challenging the reasonableness or rationality of the respondent's clinical assessment of the Applicant in that consultation. The Applicant's subsequent evidence post-leave appears to widen out into other issues not referenced in the Order 53 or in argument.

Conclusion

[18] The approach of the court in applications to set aside leave is helpfully summarised at para 3.26 of Judicial Review In Northern Ireland, 2nd Ed, by Gordon Anthony. Had the true facts been known to the court at the time of the leave application the applicant could not have established an arguable case and leave would have been refused on 9th May. Furthermore, any such issues that were in play between the parties as at 9 May are no longer live rendering this application and relief sought academic.