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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND (JUDICIAL REVIEW)

Hart's Application [2009] NICA 15

AN APPLICATION FOR JUDICIAL REVIEW BY DARREN HART OF THE NORTHERN IRELAND PRISON SERVICE

Before: KERR LCJ, HIGGINS LJ and GIRVAN LJ

JUDGMENT

GIRVAN LJ

Introduction

[1] The appellant is a prisoner at HMP Magheraberry serving a life sentence for murder. He brought judicial review proceedings challenging various decisions made under the provisions of the Prison and Young Offenders Centre Rules (Northern Ireland) Order 1995 ("the Rules"). Before Gillen J at first instance he sought to challenge a decision detaining him in a special supervision unit ("the SSU") pursuant to Rule 35(4) on 6 November 2007; a decision on 7 November 2007 to apply the provisions of Rule 32 to him; the decision on an adjudication to subject him to 7 days' cellular confinement on 8 November 2007; and the alleged denial of access to legal advisors during the period of his cellular confinement. Gillen J dismissed his judicial review application.

[2] In this appeal Ms Quinlivan on behalf of the appellant challenged Gillen J's decision in relation to the appellant's detention in the SSU under Rule 35(4), the appellant's detention under Rule 32 and the alleged failure by

the Prison Service to tell the appellant about his right to telephone legal advisors during his period of cellular confinement following adjudication. The appellant however did not appeal against other aspects of Gillen J's judgment in which he upheld the adjudication decision by which the appellant was found guilty of assaulting a fellow prisoner Bell and given 7 days' cellular confinement.

The factual background

[3] On 4 November 2007 a prisoner Austin Bell was assaulted by the appellant. Video footage of the assault was viewed on 6 November 2007 and the appellant was observed to engage in the attack on Bell. Stephen Davis, a Governor Grade 2, was informed on 7 November 2007 and he obtained the video footage. He was satisfied that the appellant had been involved in the assault.

[4] On 5 November 2007 another prisoner Braund, a sexual offender, was seriously assaulted in the prison. David Kennedy, a Governor Grade 4 was informed of the incident and was told by security staff that they believed that the appellant was involved as a ringleader. The PSNI was contacted in view of the serious nature of the assault.

[5] Governor Kennedy in his affidavit stated that:

> "I believe this to be a serious incident and accordingly I decided to apply the provisions of Rule 35(4) of the Prison and Young Offenders Centre (Northern Ireland) Rules 1995 and placed the applicant in the Special Separation Unit ("SSU") to prevent any further disturbances taking place."

Other individuals who were believed to have been involved in the assault were also confined to the SSU. The appellant's confinement began at 20.25 on 5 November 2007.

[6] Detective Constable Corry interviewed the applicant on 6 November 2007. It was the appellant's case that he was interviewed as a potential witness only and not as a suspect. He was not interviewed under caution. The appellant's solicitor was told by the police that the appellant was not regarded as a suspect and clothes which had been taken for forensic examination were returned to him. The appellant remained in detention under Rule 35(4).

[7] On 7 November 2007 while the appellant remained detained under Rule 35(4) Governor Kennedy became aware of the appellant's involvement

on the assault on Bell. It was decided that he should be charged with an offence under Rule 38 and he was served with a Form 112 advisory notice of the charge at 17.50 on 7 November 2007.

[8] Governor Davis considered the circumstances of the appellant's alleged involvement in the assault on Braund and on Bell and viewed the video footage of the incident involving Bell. He concluded that further investigation of the circumstances of the assaults was necessary and on that basis decided it was appropriate to apply the provisions of Rule 32 to restrict the appellant's association for the maintenance of good order and discipline pending further investigation of the events. The Rule 32 restriction on association commenced at 19.31 on 7 November 2007.

[9] The adjudication in respect of the assault on Bell took place on 8 November 2007 before Governor Kennedy who was satisfied beyond reasonable doubt that the appellant had assaulted Bell. He imposed a penalty of 7 days' cellular confinement. Governor Kennedy did not consider it appropriate to take into account the time the applicant had spent in the SSU subject to Rule 35(4) because it related to a different matter namely the assault on prisoner Braund. He also decided that the applicant had only been subject to Rule 32 for one night and this should not be taken into account in relation to the length of the cellular confinement imposed.

Relevant Rules

[10] Rule 32 of the Rules provides:

> "(1) Where it is necessary for the maintenance of good order or discipline, 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.
>
> (2) A prisoner's association under this Rule may not be restricted under this Rule for a period of more than 48 hours without the agreement of the Secretary of State."

Rule 32(2A) to (2L) were added by an amendment order which took effect on 13 April 2005. These additions provide for the Governor to inform a member of the Independent Monitoring Board ("the Board") that he has restricted the association of the prisoner and of the date, time and location of the first review of the restriction. The governor shall inform a member of the Board of the matters referred to in paragraph 2A as soon as practicable and in any event no later than 24 hours after the prisoner's association is restricted.

Unless it is not reasonably practicable, a member of the Board shall be present at the reviews of the restriction of the association of the prisoner. The Board must satisfy itself that the procedures in Rule 32 for arranging and reviewing the restriction of association of the prisoner have been followed and that the decision of the Governor to restrict the association of the prisoner is reasonable in the circumstances. The Board is entitled to inspect the evidence on which the Governor's decision was based unless such evidence falls within paragraph 2H (for example the evidence would infringe national security or endanger the physical or mental health of any individual). If not satisfied that the appropriate procedure has been followed and the decision is reasonable the Board shall draw the matter to the attention of the Governor who must review his decision promptly and in any event within 7 days. Failing this the Board shall draw the matter to the attention of the Secretary of State who must consider the matter and take such steps as are reasonable in the circumstances.

[11] Rule 35 which falls under the heading "Laying of disciplinary charges" provides:

> "(1) 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 .
>
> (2) The prisoner shall be informed of the charge on the grounds on which it has been made within 24 hours of the charge being laid before the governor and, in any case, before the inquiry before the governor, to enable him to consider any defence he may wish to make.
>
> (3) Before any inquiry the prisoner who has been charged will be provided with information about the procedure and purpose of the inquiry and will be informed of the right to request legal representation at the inquiry.
>
> (4) 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."

The Rule 35(4) Decision

The arguments

[12] Ms Quinlivan on behalf of the appellant argued that the purported exercise by the governor of the powers under Rule 35(4) to order the appellant's confinement on 5 November 2007 in the SSU was bad in law. She argued that Rule 35(4) only comes into play pending adjudication when it has been decided that a prisoner is to be charged with an offence. There was no evidence to suggest that the appellant was ever going to be charged with an offence against prison discipline in respect of the assault involving Braund. The PSNI had made clear that the appellant was not regarded as a suspect and the video evidence in relation to the Braund assault did not provide support for the contention that the appellant was in some way a ringleader. Dr McGleenan on behalf of the respondent contended that Rule 35(4) did not require that an adjudication be pending against a prisoner prior to his separation from the general prison population. Rule 35(1) provides a time period within which the prison authorities can make a determination on the laying of a charge. He argued that Rule 35(4) plainly anticipated that where a disciplinary charge is in contemplation but has not been laid a prisoner might be kept separate. A fair reading of the Rule showed that the actions, inquiries and conclusions of the PSNI were not an essential ingredient requiring due consideration of the question of the application of Rule 35(4). The fact that a criminal charge against a prisoner by the prosecuting authorities is unlikely does not guarantee that the prisoner would not be subject to internal disciplinary action by the prison authorities. There was evidential material suggestive of the appellant's involvement in the events which led to the serious assault on Prisoner Braund.

The Judge's view

[13] Gillen J concluded that there was a basis for the relevant governor to conclude that the appellant was to be charged with an offence under Rule 38. He considered that this is the clear implication of the affidavits of Governors Davis and Kennedy although it could have been more clearly stated. He held that there was no basis on which the decision to invoke Rule 35(4) was Wednesbury unreasonable. The decision-making by the governor was a separate issue from the decision-making process by the PSNI.

Conclusions

[14] The Rules contain two separate and different powers namely (a) the power in Rule 32 where it appears desirable for the maintenance of good order and discipline or in the prisoner's own interest to remove a prisoner from normal association and (b) the power under Rule 35(4) to hold a prisoner separate for up to 48 hours where the prisoner is to be charged with

an offence. The power under Rule 32 (which finds its analogue in Rule 45 of the English Prison Rules) is a power aimed at the maintenance of good order and discipline and may not be imposed as a punishment (see Livingstone, Owen and MacDonald Prison Law 4th Edition at paragraph 10.025). The complaint that the Rule 32 power (and its English equivalent) was in practice being exercised for punitive purposes and in an excessive manner led to the amendment to Rule 32 which provides an oversight role for the Board. The power under Rule 35 (which has its English equivalent in Rule 53 of the English Prison Rules and which is found in the self-contained section of those Rules dealing with offences against discipline) is an incidental power exercisable in the context of the disciplinary jurisdiction of the prison authorities in respect of offences against discipline. While the power under Rule 35(4) is not in itself punitive it is a power exercisable in the context of the disciplinary procedures leading up to an adjudication of an alleged offence against discipline. Rule 35(4) is not subject to the oversight supervision of the Board. It is clear that the power under Rule 35(4) only becomes exercisable if the prisoner is to be charged with an offence against discipline. It presupposes the conclusion on the part of the prison authorities that a disciplinary charge will be laid against the prisoner.

[15] According to his affidavit Governor Kennedy decided to apply the provisions of Rule 35(4) and placed the appellant in the SSU "to prevent any further disturbance taking place". While Governor Kennedy was informed that security staff believed that the appellant had been involved in the assault on Braund no decision had been made to charge him in relation to that alleged offence against discipline. Governor Davis in his affidavit stated that by 7 November he wanted further investigation of the circumstances of the two assaults in order to decide what course of action was appropriate. Likewise he made no decision that a charge would be brought in relation to the Braund assault.

[16] Since no decision had been made to bring the disciplinary charge against the appellant, Rule 35(4) did not come into play and hence the purported exercise of the power was invalid. While it would have been open to Governor Kennedy to decide to exercise the power under Rule 32, there being a factual justification for such a decision, Rule 32 was not relied on. Had it been, the provisions of Rule 32(2A) to (2L) would have come into play and in particular the Board would have had a role to play in satisfying itself whether the proper procedures had been followed and whether the decision was in all the circumstances reasonable. It is, accordingly, not possible to simply treat the Governor's decision made invalidly under Rule 35(4) as one effectively and properly made under Rule 32. We must accordingly conclude that the decision to apply Rule 35(4) to the appellant was wrong in law. Although the Order 53 statement (amended on 15 April 2008) makes the case that the detention was unlawful once it became clear that the police did not regard the appellant as a suspect and that there was not going to be a charge

against him in relation to the allegation of assault on Braund, the decision to apply Rule 35(4) was bad in law ab initio since the power was exercised before a decision had been made to bring a disciplinary charge against the appellant.

The Rule 32 Decision

The arguments

[17] Ms Quinlivan argued that the decision made on 7 November was also bad in law. Rule 32 could only be invoked when it was necessary for the maintenance of good order and discipline. The assault on Bell was a minor one and did not justify restricting the appellant's association. She pointed out that Governor Davis relied on both the assault on prisoner Braund and the assault on Bell within Bush House as justifying the invocation of the provisions of Rule 32. She contrasted this with the affidavit that Governor McKeown made on 14 January 2008 where he averred that he had informed the appellant that he was being detained under Rule 32 for the purpose of good order and discipline because of the assault on 4 November on prisoner Bell. She argued that the appellant could not at that stage have been suspected of involvement in the assault on Braund in view of the police attitude. Dr McGleenan countered those arguments, pointing to the broad empowering discretion afforded to a prison governor by Rule 32(1) and contending that the exercise of the discretion falls to be determined by the yardstick of reasonableness. The decision was self-evidently within the range of reasonable possible decisions which a governor could make in the circumstances, having regard to the reports implicating the prisoner in the serious assault on Braund and the assault on Bell who had severe physical disabilities. The Governor's approach to Rule 32 disclosed no legal error accordingly.

The judge's view

[18] Gillen J held that the decision to apply Rule 32 to the appellant was not Wednesbury unreasonable. Discipline is the responsibility of the Governor and he had evidence indicating the appellant's involvement in the Braund assault. He had evidence of his involvement in the Bell assault and there was a complaint by Bell of bullying. It was entirely reasonable to invoke the general provisions of Rule 32 which is aimed at the maintenance of good order and discipline.

Conclusions

[19] We conclude that Gillen J was correct in his analysis and conclusion. The decision to apply Rule 32 to the appellant was not bad in law and fell within the range of legitimate decision-making on the part of a prison

governor faced with evidence of behaviour on the part of the appellant which justified the view that it was necessary and appropriate to apply Rule 32 to the appellant in the interests of good order and discipline. As noted at paragraph 13 above, Rule 32 is a power exercisable not for disciplinary purposes but for the maintenance of good order and discipline. This requires the Governor to exercise a discretion in the context of a power aimed at protecting good order and discipline in the prison. The exercise of that discretion necessarily involves considering inter alia the rights and interests of other prisoners who might be at risk from breaches of order and discipline committed by the prisoner concerned. The appellant has not shown that the relevant governor in any way trespassed beyond the relatively generous ambit of this discretionary power aimed at the protection of discipline and order.

Access to legal advice during cellular confinement

Arguments

[20] Ms Quinlivan argued that there was no system for providing the appellant with telephone contact with his solicitor or other contact via the Prison Service whilst the prisoner was subject to cellular confinement following adjudication. The appellant in his affidavit averred that he lost access to a telephone when placed in cellular confinement following adjudication and that he was unaware of any facility for contacting his solicitor. It was argued that if he had been able to contact his solicitor by telephone and advise him of his adjudication proceedings, steps could have been taken at an earlier stage which could have had the effect of reducing the time he spent in cellular confinement. In the circumstances he alleged he suffered a prejudice by virtue of the failure of the prison authorities to advise him of his entitlement to contact his solicitor by telephone whilst in cellular confinement. Dr McGleenan pointed out that the Governor's Order on Rule 32 and the SSU states that "prisoners may request a telephone call which will, as far as possible, be of 15 minutes duration." The Order on the SSU stated that a prisoner undergoing cellular confinement will only be deprived of those privileges specified in the adjudication award. In this case the adjudication award did not specify any restriction on access to the telephone. The Prisoner Routine for Rules 32 and 35(4) which the appellant saw but refused to sign, stated that if he had required to use the telephone the staff would try to accommodate him at the time of his request for of up to 15 minutes duration.

Conclusions

[21] We agree with Gillen J that there is no basis for the appellant's challenge in relation to this head of complaint. There was a clear policy in operation in the prison for contact with solicitors during cellular confinement.

The Prisoner Routine document to which Dr McGleenan referred and which the appellant refused to sign made it abundantly clear that the prison authorities would endeavour to accommodate him if he asked to use the telephone. The applicant did not request telephone access to his solicitor. As Gillen J pointed out there was no evidence that the appellant either sought or wished to have access to a solicitor.

Disposal of the appeal

[22] Where no decision had been made to charge the appellant with an offence there was no power to confine him separately from the other prisoners under Rule 35(4) and we so declare and we allow the appeal to that extent. The appellant was ordered to serve seven days' cellular confinement for the assault on prisoner Bell. At the leave hearing on 14th November 2007 the confinement was suspended pending the hearing of the judicial review application. In the light of the conclusion we have reached on Rule 35(4) the respondent will be bound to review the question whether the balance of the cellular confinement should be served.