

Neutral Citation no. [2004] NIQB 58

Ref: **GIRC5078**

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

Delivered: **24/09/04**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN’S BENCH DIVISION (JUDICIAL REVIEW)

**IN THE MATTER OF AN APPLICATION BY CIARAN JAMES
CUNNINGHAM FOR LEAVE TO APPLY FOR JUDICIAL REVIEW**

GIRVAN J

[1] This is an application for leave to apply for judicial review of a prison governor’s adjudication of 25 June 2004. The adjudicating governor, Governor Wilson, found the prisoner guilty of being abusive to a senior prisoner officer on 16 June 2004. The governor’s award was 7 days loss of evening association, 7 days loss of television and 7 days loss of telephone.

[2] The adjudication hearing commenced on 14 June 2004 and was adjourned to enable the prisoner to see his solicitor. At the re-convened meeting on 25 June 2004 the governor decided to proceed upon the basis that the prisoner had had an opportunity to see a solicitor though the prisoner’s solicitor was on leave. It cannot be said that the governor’s approach was unfair or unreasonable in the circumstances. Senior Officer Shields gave evidence of abusive behaviour which the prisoner challenged and denied. The hearing was further adjourned to enable to application to call prisoner Tolan who gave evidence on 25 June 2004 supportive of the applicant’s case. The governor ultimately preferred the evidence of the prison officer.

[3] The application for leave is dismissed for the following reasons:

- (i) The transcript of the hearing, which I have considered, reveals no error of law in the approach adopted on the part of the adjudicating governor. The question for determination was essentially a question of credibility of the witnesses and there was material upon which the governor properly directing himself could conclude, as he did, that the prisoner was abusive.

This judicial review is in reality a disguised appeal on the merits.

- (ii) The applicant in the grounds set out in the Order 53 statement raises an issue as to the unavailability of the video recording. At the hearing of the adjudication the prisoner did not press the point as to the unavailability of the video footage saying that if there was a problem he accepted that. He did try to turn the absence of the video to his advantage to say that he would not have behaved in an abusive way in front of a video. However the matter was a procedural and evidential one for the governor.
- (iii) In paragraph 6 of his statement the prisoner complained that there was no transcript, note or reason for the decision. However the correspondence from the solicitor did not ask for any transcript note or reason but sought to make a generalised case of harassment which the Prison Service rejected in correspondence.

[4] I would also reject the leave application on the grounds that there has been delay in seeking to challenge the decision. There was correspondence making a wider allegation but not directed to the adjudication decision. No attempt was made to challenge the propriety of the actual adjudication decision in correspondence. More generalised points can be made which might assist parties and the Legal Services Commission in the future in relation to applications such as this. The Court would be slow to grant leave where the prisoner has failed in clear and open correspondence (properly exhibited to the grounding affidavit) :

- (a) To set out his case at an early stage;
- (b) To seek confirmation or clarification of the reasons for the decision if there is any doubt about the reasons for the decision, and
- (c) To give the Prison Service a reasonable opportunity to set out the Prison Service's response to the prisoner's complaint.

Practitioners will normally be expected to follow the type of reasonable, fair preliminary procedure set out in the English Pre-action Protocol for Judicial Review. Furthermore, in the nature of these cases the applicant should proceed promptly. The Legal Services Commission should be careful to differentiate the granting of legal aid (a) to investigate the prisoner's complaint and (b) to bring a leave application. It appears that in some instances legal aid is granted for both the investigatory step and the bringing of a leave application. Investigations properly carried out often reveal that there is no prospect of success in seeking leave for judicial review. Public funds should not be wasted on futile leave applications which themselves generate costs and expenses in the preparation of affidavits often involve the

Prison Service at the leave stage. The Legal Services Commission should review its procedures in these cases to ensure a proper use of the limited resources available. Counsel acting for applicants have an important role to play in ensuring that legal aided applications are not pursued if they have no prospect of success.

[5] Furthermore, the Prison Service will often avoid this type of application if in the correspondence addressed to them it sets out clearly the reasoning behind their decision. This need not be in a voluminous or complex form but the Prison Service could usefully set out the reasons, at least in skeleton form, to make clear the basis upon which a decision was reached. The Prison Service might usefully review its procedures in these matters in this context. In relation to the suggestion that in every first case a transcript of the hearing should be made available there is no justification or reason for this being a general practice. In an appropriate case a transcript may be desirable and on occasion the Prison Service may consider that in order to meet and answer a case the transcript should be made available to put an end at an early stage to an unjustifiable proposed application. One cannot be proscriptive about the circumstances when the making available of a transcript would be necessary or desirable.

[5] In the result I refuse the application.