Neutral Citation No. [2010] NIQB 122 | **Ref: DEE7993**

*Ex Tempore Judgment: approved by the Court for handing down (subject to editorial corrections)** | **Delivered: 5/11/2010**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

Sloan's (Thomas) Application [2010] NIQB 122

IN THE MATTER OF THOMAS SLOAN FOR JUDICIAL REVIEW

DEENY J

[1] This is an application by Thomas Sloan for judicial review of a decision of a Governor of Her Majesty's Prison Magilligan. It has come before the court this morning on a basis of urgency, but the court has had the benefit of legal argument from Mr Desmond Hutton of counsel for the applicant and Dr Tony McGleenan of counsel for the respondent and the court is able to deal with the matter.

[2] The applicant has two complaints in effect which arise in this way. He is a serving prisoner at Magilligan serving a sentence of six years imprisonment for robbery which was imposed upon him at Belfast Crown Court on 20 February 2009. As he had been in custody for some time before that his earliest release date is 27 April 2011. In accordance with procedures in place in the prison the Prison Service considers it proper to allow prisoners approaching their release date the possibility of home leave. In his particular case his behaviour was such as to allow him to be admitted to the Foyle View Unit at HMP Magilligan earlier this year. As his counsel says he has increased privileges in that unit and it seems common case that it is a sought after unit by prisoners serving in Magilligan. One aspect of the privileges there is the ability to work outside the prison unit in the daytime as apparently this prisoner has been doing. In addition there is the opportunity, perhaps a greater opportunity than for the general prison population, to have home leave and this man has had home leave as recently as 27 to 29 October. However on his return, it would appear, on 29 October he was served with some summonses for the Magistrates' Court and he was brought before the Governor. The applicant's averments about that meeting are not fully accepted by the respondent. I should interject that the respondent of course has had a very short time to deal with these matters and is not to be taken as

accepting all the matters asserted by the applicant through his solicitor, but in any event the effect of it was that because of these summonses unless he could persuade otherwise he would have to return to, or the Governor would be minded to return him to, the general prison population and this subsequently happened.

[3] Mr Hutton on behalf of the applicant on this Order 53 statement says there are two decisions which are challenged. One, is that the prisoner was to have gone on a further home release weekend tomorrow 6 November until 9 November and he has lost this because he has left Foyle View. This particular home leave was linked to him being an occupant of the Foyle View Unit and he seeks interim relief by which the court would order the Governor to release him on this leave. Secondly, he, Mr Hutton says that he has been removed from the Foyle Unit and had a loss of privileges thereby. The matter could be put in the most favourable way to the applicant thus. The four summonses which were drawn to his attention on 29 October were in some way served or made known to the applicant in March of this year and I think I will have to return to that in a moment. But the summonses relate to four driving offences: driving without a policy of insurance being in force, driving without being the holder of a driving licence, failing to produce a driving licence to a constable and failing to produce a certificate of insurance and they all arose on 23 July 2007. The applicant had instructed Martin Madden of his solicitors in March of this year to enter a plea of guilty to those charges.

[4] Mr Hutton today draws to the court's attention that on consulting Mr Valentine's book on Criminal Practice and Procedure it transpires that these offences cannot attract a sentence of imprisonment but are only punishable by fine. I have to return to that in moment. He therefore says that the Governor was at fault in removing the man's home leave and in removing him from Foyle View because of these summons appearing when in fact he could not be sentenced to imprisonment on foot of them and therefore, Mr Hutton submits, they could not impact on his release date and therefore should not impact on his continued residence in Foyle View.

[5] These submissions in my view fail and they fail for a series of reasons. It may be helpful to look at the affidavit of Peter Madden, solicitor, filed in support of the Order 53 statement. The applicant having been warned by the Governor that the summonses were likely to lead to him being removed from Foyle View was permitted to ring his solicitors Messrs Madden and Finucane. He was then able to speak to Mr Michael Madden of that firm with whom he had had previous dealings. As the applicant's solicitor's affidavit says Mr Michael Madden "appears to have misunderstood the applicant to instruct that he had a weekend parole scheduled for 30 October 2010". As I have said of the weekend paroles, one was just finished and the other one was to commence on 6 November and Mr Madden therefore wrote a letter based on that misunderstanding but complaining of this decision of the Governor.

Among other things he said : "We understand that the first court date for the summons (sic) is mid-December 2010. We are instructed that this summons was previously served on Mr Sloan, however the summons was not served properly upon the court, and therefore it had to be served again on Mr Sloan and the court." He went on to allege that the refusal of the weekend release placed on this was irrational or unreasonable.

[6] Messrs Madden and Finucane then aver that they took further instructions from the applicant on Monday 2 November and it had become apparent to them by then that the cancelled parole was 6 to 9 November and there was a further letter which is important and I will not set it out, it is fully set out in the affidavit, but I will quote what seems to be the most relevant passage.

> "As stated in Mr Madden's letter [that is of 29 October] this summons is in respect of driving offences. Specifically we understand that these alleged offences are failing to produce a driver's licence and driving without insurance, offences which in almost all occasions would not attract custodial sentence."

So the position is that the solicitors having had a weekend to reflect on this matter and a second opportunity to speak to the client inform the prison governor that "in almost all occasions the summons would not attract a custodial sentence". Now of course that is wrong as Mr Hutton said, subject to one point I'll come to, because their contention now is that they could not attract such a sentence at all. A holding letter was written by the Governor in response on 2 November.

[7] Madden and Finucane wrote again on the same date but again did not take the point that Mr Hutton now takes about the nature of these offences. In accordance with the duty of candour to the court they do set out what had happened earlier in the year and I think I will turn to that in a moment but what is clear is that even in the Order 53 Statement, the draft of which was received from counsel on 4 November 2010, the point now made by Mr Hutton is not taken i.e. that the summons do not and the offences do not attract a sentence of imprisonment. I stop there and say it seems to me wholly untenable to argue that the court should find the decision of the prison governor unlawful for not taking into effect that fact when a leading firm of solicitors failed to detect it at all when acting on behalf of their client and in the course of writing not one but three letters and instructing counsel to prepare judicial review proceedings. They, of course, should have drawn it to counsel's attention. It is no criticism of counsel but he did not include it in his draft; he obviously continued his researches overnight and has properly drawn it to the court's attention now. To declare the Governor's

decision unlawful because he who is not a lawyer fails to take into account a factor that had been overlooked by an extremely prominent firm in this field seems to be a wholly untenable proposition.

[8] I then turn to another point which out of an abundance of caution I think it right to deal with too, and to assist in dealing with that point I quote from paragraph 15 of Mr Peter Madden's affidavit:

> "I have spoken to Michael Madden of our offices in relation to the issue of service of the summons. I am advised by Mr Madden and verily believe that he did not have a precise a recollection of events, but that such recollection that he had tallied with the applicant's instructions as set out at paragraph 5(xiv) above. He did say, that if he has any recollection of the summons then it must have been previously received by the applicant. He advised me that these charges are not charges for which legal aid would have been granted, and that given the likelihood that he would not receive a fee with dealing with a summons it is unlikely that he opened a file in respect of the summons. Our offices do not have a record of an opened file in respect of this summons."

It will be recalled that the applicant's contention which his solicitor accepts is that he had spoken on the telephone to Michael Madden of his solicitors and had instructed him to plead guilty to the summons. Mr Madden reported back to him a few days later that the summons had been listed as it was "not properly before the court" and that it would be reserved; the applicant heard no more about this summons until 29 October 2010.

[9] As I put to counsel for the applicant once Mr Michael Madden had accepted instructions to enter a plea one might reasonably have expected him to have taken steps to have the plea entered. The court does not know what is meant by the phrase "not properly before the court" and counsel were not able to assist in that regard but certainly counsel for the applicant does not dispute that it would be common for the solicitors to sort out such matters on behalf of their clients. In my view they ought to have done so once the applicant, in fairness to him, had instructed that a plea be entered.

[10] Whether one refers to these (euphemistically) as "administrative difficulties" on the part of the applicant's solicitors or as an error on their part certainly the Prison Service of Northern Ireland could not be blamed.

[11] The solicitors in preparing this matter for this application telephoned the case work support manager at the Belfast office of the Public Prosecution Service and they advised a solicitor in the applicant's solicitor's firm that if the summons was not before the court then it is likely that the court would have refused to deal with the matter but it would be marked incomplete in the computer system. The case work support manager further advised the applicant's solicitor "that their records showed six attempts to serve the summons but cannot explain why on each occasion service had failed. He advised that these attempts to serve the summons were to serve on the applicant at HMP Magilligan". The applicant's counsel here, very properly, then points out that the Magistrates' Courts Rules (Northern Ireland) 1964 at Rule 11(4) allow a summons of this nature to be served on an accused person "at his usual or last known place of abode" inter alia. It is therefore most surprising that as the man was a prisoner in Magilligan throughout the period that this summons could simply not have been left there for him and there seems to have been some failing either on the part of the PPS or on the part of the PSNI in serving the matter. One has therefore a degree of sympathy with the applicant in that regard. But how is that possibly on the papers before me an unlawful act on the part of the Northern Ireland Prison Service? If the applicant has a grievance it is against his solicitors or against whoever failed to properly serve the man but there is absolutely no evidence before me at the present time of fault on behalf of Magilligan. So again the applicant's case would fall under that heading and would fail.

[12] I think that leaves really only one matter. Mr McGleenan is able to draw to the court's attention, as indeed did Mr Hutton, a letter of 4 November, that is yesterday, from the relevant Governor to Madden and Finucane and some points are put there which I should take into account in fairness to all concerned.

[13] The letter recites some of the history briefly in its first two paragraphs and then goes on to quote:-

> "The selection criteria for Foyle View states (sic) that any further court appearances will result in their placement within Foyle View being reassessed, and that removal from the Unit is precautionary with the placement being reassessed after the conclusion of the proceedings. Your client falls within this category and his placement in Foyle View will be reassessed after the court date of 16 December 2010.
>
> Furthermore, prisoners are required to inform Foyle View staff when being interviewed of any outstanding charges they may have. If, as you claim, the charges date from 23 July 2007, and are

> indeed more than three years old, your client should have informed staff when asked at interview if he had further charges outstanding. As the summons had been previously served on him and not dealt with, he would have been aware that the matter had not been dealt with.
>
> I cannot comment on nor prejudge any sentence a court may impose on your client for the alleged offences. Foyle View weekend home leave is an enhanced home leave scheme for those within the Foyle View Unit. As your client is no longer in Foyle View, he is not permitted to avail of the scheme."

[14] On foot of that Mr McGleenan draws attention to a document which was referred to as the Foyle View Compact between determinate sentenced prisoners going into that Unit and the Unit. He draws attention to the second paragraph which says:-

> "You will be expected to be open and honest with staff and provide full information, which will assist staff, to help you with your resettlement."

He says the prisoner therefore should have told the staff about the summonses. I am not sure that is the strongest point on behalf of the Prison Service because the prisoner having told Mr Michael Madden to enter a plea on his behalf might well have thought the matter was disposed of though, of course, he had been told by Mr Madden that he had not been able to enter that plea so in any event either he is at fault in not drawing it to the attention of the Prison Service or certainly the Prison Service cannot be at fault because they were not informed about it.

[15] But the compact goes on at paragraph 14 of a section called 'My commitment to you' that is the prisoner's commitment to the Prison Service as follows:-

> "Any further PSNI investigations, warrants or court appearances, which arise during your term in Foyle View Resettlement Unit, will result in your placement being reassessed. You may be removed from the Unit until such proceedings have been concluded. Removal from the Unit at this stage is precautionary, it is not an implication of guilt, nor is it a de-selection. Your placement may be reassessed after the conclusion of the proceedings."

Mr McGleenan therefore submits that what the Governor is doing is entirely in accordance with the procedure laid down. There is a further court appearance that leads to reassessment and they are perfectly entitled to move him from the Unit on a precautionary basis while they are doing that. Furthermore he says the Governor is perfectly entitled to wait until the hearing of the summonses on 16 December, next month that is, before deciding whether to readmit him. Again these seem to me submissions of substance. Mr Hutton said that I should direct the Governor to reconsider the matter now that he had pointed out that the prisoner could not be sentenced to imprisonment. I am not minded to do that and shall not do that. I say that for two reasons. One, that it seems to me a matter within the discretion of the Prison Service, (albeit having only, of course, discussed the matter at fairly short notice and without counsel having had further opportunity to consider the issues) that it is within the Governor's discretion to take into account summonses even if they cannot lead to imprisonment. But secondly, on enquiry from the court Mr Hutton helpfully outlined what could be done, in his submission, to a serving prisoner who is before the court with offences punishable by the District Judge (Magistrates' Court) only by fines. He could be fined but given time to pay of up to six months which in this case would allow the prisoner some time after 27 April in which to pay some fines though not long. He could in theory be given an absolute discharge which counsel accepted was unlikely here given that the prisoner has some 96 previous convictions including 31 for road traffic offences. But more realistically perhaps he could be given a conditional discharge.

[16] If he was given as penalties on his plea of guilty to these four charges, one or more fines by the District Judge, the prisoner can ask, the prosecution cannot ask, but the prisoner can ask for an immediate warrant by reason of his non payment of the fines and at that point the court is empowered to impose a sentence of imprisonment for non payment of the fines. Normally that would be quite a short sentence counsel submits and I am willing to accept that for these purposes. The prisoner might well do that when he is already in custody but as is acknowledged it may be open to the District Judge to make a sentence of imprisonment in default of payment of a fine consecutive to a sentence which the prisoner is serving. I, as it clearly should be understood, have not had an opportunity to research that myself but it seems to me that that sounds correct and that therefore the Governor's instincts may well have been sound (to not prejudge the sentence of the court) and that a possible sentence of imprisonment here might arise from these summonses although it may not be likely.

[17] So for all these reasons it seems to me that I should not grant leave here let alone any relief. There is no arguable case in my view that the Governor of HMP Magilligan has behaved unlawfully by the decisions he has taken to date and I refuse the application.