NO REDACTION NEEDED
APPROVED JUDGMENT

THE COURT OF APPEAL
CIVIL

Record Number: 2023/284
High Court Record Number: 2022/753 JR
Neutral Citation Number [2024] IECA 111

Power J.

Meenan J.

O'Moore J.

BETWEEN

CAROLINE EGAN

RESPONDENT

-AND-

THE GOVERNOR OF CLOVERHILL PRISON

APPELLANT

JUDGMENT of Mr. Justice Brian O'Moore delivered on the 7th day of May, 2024

1. The respondent, Ms. Egan, is a solicitor. She is a sole practitioner with offices in Dublin. She has been in practice since the early 1990s. Her clients include persons who are in custody in Cloverhill prison. The appellant is the Governor of that prison. On the 27th of June 2022, the Governor barred Ms. Egan from visiting Cloverhill. In these proceedings, Ms. Egan challenged the validity of this decision. She succeeded before the High Court (Owens J.). The Governor has appealed that judgment to this Court. I will begin with an

account of the relevant facts which, viewed in the context of the submissions made to the Court, is sufficient to decide this appeal.

2. On the 27th April, 2022, the Governor received an email from a clerical officer in Cloverhill prison. The email read: -

> "I received a phone call yesterday evening from Caroline Egan. I found her very hard to deal with. From the minute I answered the phone she just started ranting to me about not being able to get through to the Visitors Centre. I tried to explain to her that we have nothing to do with the Visitors Centre but she was not giving me a chance to even speak, kept cutting me off and continuing on her rant. She said that it is ridiculous that we don't have any access to the Visitors Centre and that she is being discriminated against because no one is getting back to her. Also that it is not on and that enough is enough. She also asked for the Director General's email as she said she wanted to take things further again as she felt she was ignored. I told her to (sic) she would find it on the Irish Prisons website and she wasn't happy again saying it's ridiculous that I don't have it on hand to provide it to her. I was just very taken aback from the whole phone call and didn't appreciate the way I was spoken to on the call."

3. In her evidence to the High Court, Ms. Egan put this call in context. She said that for some time she had been experiencing difficulty in booking physical prison visits to Cloverhill. She used the required email address extensively in order to obtain visits. She said (at para. 7 of her grounding affidavit) that: -

> "In or around April 2022 I was using with (sic) the above email address extensively in order to obtain visits with clients. These clients all had urgent court business and required consultations with both myself and Counsel. Having received little to no

response to these emails, I phoned the General Office to make certain enquiries. My partner was with me as I made the call and heard the entirety of its contents. I wish to state that I did not act intemperately in any way during this phone call or any of the preceding emails."

4. Later on the 27th April, the Governor (through his secretary) wrote to Ms. Egan in the following terms: -

> "I am writing to inform you that after your phone call last night to our General Office a complaint has been submitted to the Governor's Office. The Governor advises that staff here are not here to be verbally abused and that he takes the complaint very seriously.
>
> The booked visit system is in high demand here and staff will deal with your request in due course, as they do with every other solicitor in the State. Every effort is made to accommodate all requests. [If] there is a repetition of this unwarranted and upsetting behaviour and should it continue the Governor will consider prohibiting entry into Cloverhill Prison under section 36(9)(c) of the Prison Rules and you will have to engage another practitioner to visit your clients here. Furthermore, the Governor will forward any complaint to the Law Society."

5. It will immediately be seen that this letter did not seek a response from Ms. Egan. Despite this, it would certainly have been wise for her to engage with the Governor in respect of this correspondence, particularly given her own position that she had not verbally abused anyone. However, while Ms. Egan did not reply to this correspondence, equally the Governor did not pursue her for a response.

6. On the 28th May, 2022, an email was sent by a prison officer to the Governor. That email read: -

> "I was [in charge of] professional visits yesterday evening, Caroline had a visit booked with -- who has been in Mountjoy since two weeks ago.
>
> The visits system deletes any booking once the prisoner leaves Cloverhill so her visit was non-existent, she emailed at 4:10pm requesting to change the name of the visit to --. There is no name changes allowed inside a 24 hour period and she is well aware of this. ACO Farrelly went to the gate and spoke to Caroline to verify if she was looking to swear an affidavit for -- and she informed him that she wanted to see a different prisoner. This is an ongoing issue and her attitude towards us visit staff is completely unprofessional, rude and degrading, we endeavour to facilitate as many affidavits as possible as well as our book consultations and Caroline seems to be the only petitioner who constantly has issues. There are always exceptions to the rule but he constantly has complaints, claims which she has bookings and bombards us with emails which are regularly of an aggressive nature."

7. Appended to this email was an email (of the previous evening) from Ms. Egan. It read: -

> "I booked a professional visit for this evening.
>
> I also wish to have -- swear urgent documents for the High Court. --'s solicitor is present and confirmed he would assist.
>
> I have been refused a walk in to consult with my client (for the purpose of swearing) in relation to a High Court application, by an ACO --.

> This is contrary to all agreements made with my Profession and the Department of Justice and Equality.
>
> Please now confirm in writing that I am being refused access to -- this evening for this purpose."

8. As counsel for the Governor correctly accepted during the course of the hearing of the appeal, there is nothing whatsoever unprofessional, rude or degrading about the email from Ms. Egan. In fact, no email from Ms. Egan of that type was deployed by the Governor at any time.

9. On the 30th May, 2022, the Governor was sent an email by an official of the Prison Officers Association. It read: -

> "I wish to bring to your attention a matter of utmost concern regarding the unprofessional treatment of a number of staff by members of the legal profession. A number of staff have recently complained that they are increasingly subjected to rude, unprofessional and at times abusive behaviour when dealing with solicitors. Our members at all time were working within the guidelines and rules as laid out by the Governor and the agreed regime management policy.
>
> It is not always possible to accommodate all professional visits in these circumstances or in the time frame available. In this regard I would expect our staff not to be subjected to unnecessary ire and passive aggressive behaviour by those either visiting clients in the prison or booking same over the phone.
>
> I would be grateful if you could give this matter your urgent attention and await your response."

10. Despite the reference in this email to *"members"* of the legal profession behaving rudely or aggressively towards prison officers, counsel for the Governor at the hearing of the appeal acknowledged that there was no evidence that any solicitor (apart from Ms. Egan) had been banned from visiting their clients at Cloverhill. Indeed, there is no evidence whatsoever of any other solicitor (anonymised or otherwise) having been written to by the Governor in the way in which Ms. Egan was contacted by him or by his office.

11. On the 3rd June, 2022, the Governor's private secretary wrote to Ms. Egan notifying her that she was invited to attend a meting with the Governor in Cloverhill to discuss complaints submitted by prison staff regarding Ms. Egan's *"interactions with them and your demeanour towards them via emails…"*. As noted earlier, no offensive emails were ever disclosed to the court or, apparently, to Ms. Egan at any stage up to and including the hearing of this appeal.

12. The email went on: -

> "The meeting is to discuss this matter and to address future interactions."

13. Having asked Ms. Egan to nominate a date *"within a reasonable time frame"* for this meeting, the letter concluded: -

> "Following this meeting, consideration will be given as to what direction this matter will take and all measures are open to the Governor up to and including being excluded from entering the prison under Rule 36.9(c). Please note that we have informed the Legal Services Regulatory Authority of our invitation to you to this meeting."

Importantly, this email does not inform Ms. Egan that, if she does not attend the meeting she would or could be barred from entering Cloverhill prison.

14. A reminder was sent on the 10th June. This email read: -

> "Following up on our communication from the 3rd June, we note that we have no record of response on file.
>
> Can you please outline a date as to when you can attend Cloverhill prison for a meeting with a Governor to discuss the matters outlined previously?
>
> We'd appreciate a prompt response on the matter."

15. No response was received from Ms. Egan. On the 27th June, 2022, the Governor's secretary emailed Ms. Egan. The heading of the email was: -

> "Subject: A decision regarding prison visits"

The body of the email read: -

> "Following on from our two communications sent to you on the 3rd and 10th June we note that we do not have any response on record.
>
> Having provided you with an opportunity to respond to our communications, the Governor has reviewed same following complaints submitted by staff regarding your interactions with them. Following this review and a lack of engagement on your part, please be advised that you are now excluded from entering the prison under Rule36(9)(c) from Monday 4th July.
>
> In order to appropriate fairness (sic) in this matter, please be advised that you are now been (sic) provided with time to make alternative arrangements with colleagues from your Office to see your clients in Cloverhill prison after Monday July 4th.

Please note, we have made the Legal Service Regulatory Authority aware of the Governor's decision in this matter."

16. It is worth considering the state of play at this point. The Governor had notified Ms. Egan of complaints as of the 27th April. Neither in that correspondence, nor the later correspondence, were any meaningful details given in respect of these complaints. The emails which informed the Governor of Ms. Egan's alleged conduct were not sent on to her. In fact, the contents of the emails of the 28th and 30th May were not even summarised for Ms. Egan in order to enable her to respond to them.

17. At no time was Ms. Egan told that, should she not engage with the process, she would be excluded from the prison under Rule 36(9)(c) or, indeed, that there was a risk that this would happen should she not reply to correspondence or attend the proposed meeting. Instead, she was consistently told that there was a possibility of such exclusion - pursuant to the specific sub rule - for this depended entirely on what happened at her meeting with the Governor.

18. On the basis of these facts alone, Ms. Egan was not afforded due process prior to the decision of the Governor to exclude her.

19. Counsel for the Governor made the forthright submission that rights to natural justice and due process did not arise unless Ms. Egan's constitutional or legal entitlements were engaged, and that this did not occur here. This submission required the Court to decide whether, in this case, Ms. Egan's constitutional or legal rights were infringed. The debate at the hearing centred on the possible infringement of Ms. Egan's right to earn a living. It was this submission on behalf of the Governor that necessitated this question to be addressed. At no time did either side suggest that either this issue or the broader question of fair procedures should not be considered by the Court on the grounds that they fell outside the original

pleadings or, indeed, outside the Notice of Appeal or the Respondent's Notice. Neither of the latter documents refer to fair procedures at all, let alone breach of Ms. Egan's constitutional rights. In addition, neither set of written submissions agitated the fair procedure question in any way. Notwithstanding this, the parties fully argued the fair procedures question and the associated topic of any infringement of Ms. Egan's rights.

20. Leaving aside entirely the general proposition advanced by counsel for the Governor, the specifics of this case make it plain that Ms. Egan's ability to carry out her practice as a solicitor was impeded by any decision to exclude her from direct access to her clients in Cloverhill Prison. In her grounding affidavit, Ms. Egan stated (at para. 12) that: -

> "… I endeavoured as best I could to meet with my clients via videolink, but my physical ban from the prison proved to be quite disruptive. I continued to request physical visits with my clients."

21. At paragraph 20 of the same affidavit, Ms. Egan swore: -

> "I am a sole Practitioner and it is simply not practical for another solicitor to visit my clients in custody. While I have been partially able to obtain videolink consultations with some of my clients, I have a strong preference for in person consultations, particularly with some of my more vulnerable clients. In person consultations are best case to build and sustain a practice."

She went on (at para. 21): -

> "21. I wish to add that my physical exclusion from Cloverhill prison is having a significant impact on my relationship with my clients. Certain of my clients have indicated their desire to instruct a different solicitor in light of their perceived view

> that I will not meet them in person. Further, I have not been in a position to meet clients to swear affidavits for High Court Bail proceedings."

22. None of this evidence is contradicted in any meaningful way. The evidence available to the High Court (and to this court) establishes indisputably that Ms. Egan's ability to earn a living as a solicitor was significantly disrupted by the decision to bar her from visiting her clients in Cloverhill prison. Even accepting the proposition of law advanced by counsel for the Governor, therefore, Ms. Egan's entitlement to due process was fully engaged. It was not respected, for the reasons I have already set out.

23. However, the failings in due process do not end with the communication by the Governor's secretary of its decision to exclude Ms. Egan from Cloverhill, sent on the 27th June. On the 28th June, Ms. Egan belatedly replied to the Governor by an email enclosing a letter strangely dated the 24th June, 2022. That letter was, in my view, ill advised both in its content and in its tone. It began by a reference to the communications of the 27th April, 3rd June and 10th June, with a rider that in these *"inter alia you demonstrate your disregard for the norms of Natural Justice…"*. The response to communication number one, which Ms. Egan stated included an *"outrageous assertion"* that prison staff were verbally abused, rationally seeks *"all details of the complaint alleged."*

24. With regard to the second email, of the 3rd June, 2022, Ms. Egan declined to attend any meeting with the Governor and went on: -

> "Again, I now invite you to resile from and apologise for the outrageous suggestion that I have behaved unprofessionally towards your staff."

Ms. Egan also asks for all details of the alleged complaints together with a copy of the Governor's notification to the LSRA.

25. With regard to the third communication - the reminder of the 10th June, 2022 - Ms. Egan wrote: -

> "I refuse to provide a date on which to meet with somebody who has written to me as you have.
>
> This is my response.
>
> No one has ever written to me in such terms in 31 years in practice nor has my Professional body criticised me in all that time. If I have delayed a little in replying that is because it took some time to comprehend your hubris.
>
> Finally, I note that inherent in your communications lies the not too thinly veiled threat that blameless as I am even were I to present to a meeting you might reserve unto yourself the unfettered right to ban me in my Professional Capacity from your Prison. I now call upon you to apologise unreservedly for your defamatory utterances and to furthermore confirm to me that I will enjoy all reasonable access to my clients."

The letter concludes: -

> "I place the matter in the hands of my Solicitors and I feel sure that it could rest there provided you resile from and apologise for the awful assertions that you have published and that you furthermore confirm my right of access to clients because rest assured that is a right and not a privilege within your gift. Failing my requests you will leave me with no alternative but to vindicate my rights (by extension my Clients) by seeking all reliefs (Declaratory and otherwise) of the High Court of Ireland and naturally I will fix you with the Costs of same. I will allow you 14 working days within which to consider your response to this invitation."

26. Ms. Egan was quite entitled to seek details of the complaints made against her. In addition, she was quite entitled to refuse to attend a meeting with the Governor. The nature of this meeting, which is important, is something to which I will shortly return. However, it would have been more helpful for Ms. Egan to engage with the Governor, even through correspondence, rather than reply in the way in which she did. The response might be more understandable were it written after the notification to her by the Governor that he had barred her from the prison, but of course the letter of the 24th June, 2022 (at least on its face) is one which was composed before the Governor's decision was communicated to Ms. Egan. In any event, the reason given for the failure to reply earlier is unconvincing, and the tone of the letter unhelpful.

27. On the 6th July, the Governor's secretary acknowledged receipt of Ms. Egan's letter. On the 12th July, she wrote to Ms. Egan in these terms: -

> "As previously outlined, the Governor has received complaints from staff regarding behaviours (sic) that you display when dealing with staff. The Governor invited you into the prison to discuss the matters complained of, as he is not prepared to allow staff be subjected to any displays of aggression from anybody visiting the prison.
>
> You have refused to engage and the Governor has prohibited you from entering the prison pursuant to Rule 36(9)(c) of the Prison Rules. As previously advised, the Governor allowed you a period of time to arrange for another solicitor to attend Cloverhill to consult with your clients on behalf of your company.
>
> The prohibition from the prison is immediate, but is subject to review should you wish to attend a meeting to discuss a resolution to the complaints that have been made regarding your behaviour."

Contrary to Ms. Egan's reasonable request, no details of the complaints made against her were forwarded to her. No copy of the relevant emails were provided to Ms. Egan.

28. In addition, it is plain from the email of the 12th July that the exclusion from Cloverhill which had come into effect against Ms. Egan was an open ended and potentially perpetual one. The only way in which it could be reviewed would be were Ms. Egan to attend the meeting proposed by the Governor.

29. On the 15th August, Ms. Egan wrote to the Governor: -

> "Recent correspondence refer and in particular my request, on 11th August last, to visit with my clients; (inter alia) or indeed very vulnerable.
>
> Silence is not an assent in this case and accordingly I conclude that your previous refusal to allow me (on terms and conditions!) visit with my clients subsists - de facto, nor can I, as previously explained agree to attend a meeting which would apparently decide whether or not to allow me the required access on it would appear - wholly spurious prejudged and arbitrary reasoning.
>
> Regrettably, in all of this you would appear to have forgotten (mine I can attend to) the Constitutional Rights of my clients in your custody and I point out that I am without physical access to them since 4th July, 2022 so that they must conclude (what are they being told?) that I will not visit them."

30. The following day, a report was sent to the Governor by a clerical officer in Cloverhill about a call which that officer had made to Ms. Egan to request next of kin details for a client of Ms. Egans. The call was one which arose from a tragic episode in the prison. Given the timing of the email, counsel for the Governor correctly volunteered that this was not of relevance in justifying any decision by the Governor adverse to Ms. Egan, and it is therefore

not necessary to go into the detail of the communication. Of more importance is the fact that, again on the 16th August, 2022, Ms. Egan's communication of the 15th August was subject to the following reply: -

> "The Governor has invited you to a meeting, on many occasions, to discuss the worrying complaints he has received from staff regarding allegations of your behaviour while interacting verbally, and when writing to staff. The Governor has a duty of care to his staff and will not tolerate verbal abuse or indeed any other kind of abuse directed at staff. As previously advised the Governor has excluded you from physically visiting the prison under Rule 36(9)(c) of the prison rules. Additionally, as previously advised the prohibition may be reviewed following a meeting to discuss the matters of concern, if the meeting is successful in resolving outstanding issues.
>
> In terms of visits, the Governor has continued to allow videolink visits with your clients, but any physical visits to the prison are not possible until the serious matters complained of are discussed. In the interim you may appoint or deploy another solicitor to visit your clients in the prison, if you wish."

31. On the 22nd August, 2022, Blake Horrigan Solicitors (for Ms. Egan) wrote to the Governor setting out why (in their view) the actions of the Governor were unlawful and calling upon Ms. Egan's exclusion from Cloverhill to be lifted. The letter included the statement that Ms. Egan would not attend any meeting with the Governor *"until she is at the very least appraised of the nature and details of the complaints made against her. Such is a basic tenet of fair procedures."*

32. On the 23rd August, 2022 the Governor's office replied to Blake Horrigan, attaching letters of complaint *"from various dates with the names of the complaining staff redacted."*

However, the Governor's position remained unchanged, as is seen from concluding paragraph of the letter: -

> "Therefore, unless Ms. Egan wishes to reflect on her position I will not be allowing her to physically enter Cloverhill prison. Ms. Egan is welcome to appoint a colleague to take instructions from her clients. The invitation to Ms. Egan to attend and discuss any impasse is open."

33. This brings me back to the question of exactly what the Governor intended by inviting Ms. Egan to meetings. That cannot have been a meeting to confront her accusers; counsel for the Governor submitted forcefully that natural justice did not require this. Leaving aside the submissions of counsel made some considerable time after the event, exactly what the Governor had in mind can be seen from an email sent by his secretary (in response to further correspondence with Blake Horrigan) on the 30th of August 2022. The email on behalf of the Governor read: -

> "The Governor reasserts his mandate of the powers available to him under the rule [36] (9) see Prison Rules to exclude Ms. Egan from the prison in the interests of Good Order and Governance and indeed to protect the staff from unwarranted and unacceptable behaviour.
>
> As your client is denying the allegations, despite three complaints from different staff, on different dates, the Governor does not see the point of a meeting. The point of any proposed meeting was to allow Ms. Egan the opportunity, should she regret previous interactions, to give undertakings that there would be no repetition of unacceptable and unprofessional behaviours and allow the Governor to review the exclusion"

The Governor went on to reject the proposal by Blake Horrigan that there would be a meeting, at a neutral venue, at which Ms. Egan would be accompanied by her solicitor and in respect of which there would be a written record.

34. It would appear, therefore, that the purpose of the meetings contemplated by the Governor was, at all times, simply to allow Ms. Egan to recant in respect of her previous behaviour and undertake not to repeat it. In respect of the meetings which was proposed after the 27th June, 2022, the Governor on foot of these meetings would decide whether or not to revoke the exclusion of Ms. Egan from the prison. In respect of any meetings which were to take place before that exclusion was imposed, the purpose of the meeting was to enable the Governor to decide whether or not to exclude Ms. Egan from Cloverhill notwithstanding any expression of penitence and giving of undertakings by her. At no time were the meetings for the purpose of hearing Ms. Egan's side of the story, her reasoned rebuttal of the complaints against her, or what sanction (if any) might be appropriate should the Governor reject Ms. Egan's account of events or any arguments which she might advance. To the earlier failings in due process (summarised at paras. 16 to 18 of this judgment) must therefore be added the refusal by the Governor to provide Ms. Egan with even the most basic opportunity to address the allegations made against her.

35. It would be possible to decide the appeal, against the Governor, on the basis solely of this view of the facts. Strikingly, the failure on the part of the Governor to provide the basics of natural justice to Ms. Egan is so severe that it has not been necessary to refer to any authority in carrying out this analysis. However, there is a freestanding issue as to whether or not (even if the requirements of natural justice had been observed by the Governor) there is any entitlement on the part of the Governor to exclude Ms. Egan under Rule 36(9)(c).

This is the primary basis on which the trial judge decided in Ms. Egan's favour, and it is to this issue that I now turn.

36. Before one approaches the prison rules, or enabling legislation, it is important to consider two related submissions made by counsel for the Governor. The first of these was directed towards the construction of legislation. Counsel relied upon the judgment of Murray J. in *A. B. & C. v Minister for Foreign Affairs* [2023] IESC 10, at para. 73. This reads: -

> "In answering these questions, it is to be remembered that the cases - considered most recently in the decision of this court in *Heather Hill Management Company v An Bord Pleanála* [2022] IESC 43 … - have put beyond doubt that language, context and purpose are potentially in play in *every* exercise and statutory interpretation, none ever operating to the complete exclusion of the other. The starting point of the construction a Statute is the language used in the provision under consideration, but the words used in that section must still be construed having regard to the relationship of the provision in question to the Statute as a whole, the location of the Statute and the legal context in which it was enacted, and the connection between those words, the whole Act, that context, and the discernible objective of the Statute. The court must thus ascertain the meaning of the section by reference to its language, place, function and context, the plain and ordinary meaning of the language being the predominant factor in identifying the effect of the provision but the others always being potentially relevant to elucidating, expanding, contracting or contextualising the apparent meaning of those words."

37. This approach towards the construction of legislation is now the firmly established one, and is the way in which the rules and the legislation will be interpreted in this case.

38. The second proposition advanced on the Governor's behalf is to be found in *Foy v Governor of Cloverhill Prison* [2012] 1 IR 37. In his judgment, Charleton J. set out the approach that the courts might take towards the decisions of a prison governor. He emphasised, at para. 13 of his judgment, the fact that the legislation: -

> "Gives him or her an entitlement to decide on general matters of prison governance which are not already pre-decided by being made subject to specific prison rules."

39. Counsel for the Governor also relied upon para. 25 of the judgment of Charleton J., which begins: -

> "Some appropriate measure of deference by the court should also be afforded to a prison governor. The decisions which are made by a governor result from many years of experience of practical work within a context that demands expertise through experience. The Court should never shirk its responsibility to make a decision where unreasonableness leading to the unlawful depravation of a constitutional right has been shown. The analysis which the Court can bring to bear on the problem is, however, limited to the facts of particular cases. Decisions, within the context of prison governance and discipline, are required, under the spirit within which the Prison Rules 2007 operate, to be taken even-handedly. Few factors would seem to undermine prison security more surely than either the victimising of prisoners or the establishment of favourites through arbitrary decisions. Any such policy would fall within the terms of unreasonableness as it is circumscribed by administrative law. On the other hand, the review by courts on the basis of substituting the court's own view for decisions with which a court is not fully in accord, also carries a significant danger."

40. Having referred to the judgment of O'Connor J. in *Turner v Safley* [1987] 482 US 78 at 89, Charleton J. went on: -

> "26. It seems to me that once a decision is made in curtailment of such rights as continued notwithstanding the fact of imprisonment by way of remand or conviction, and which reasonably relate to the management of a prison and which are not arbitrary, discriminatory or wholly unreasonable, judicial review is not possible."

41. Of course, Ms. Egan has not been subject to any curtailment of rights arising from her imprisonment, as she is not in custody. Equally, counsel for the Governor did not contend that the current dispute is not one which is amenable to judicial review. Instead, he argued that the court should only intervene if it was satisfied the case is a very clear one. As I have already indicated, having regard to the principles of natural justice, the current case is indeed one which does not lack clarity.

42. I would respectfully agree with the approach set out by Charleton J., in particular at para. 13 of his judgment. However, that section of the judgment deals with situations which are not covered by the prison rules. In such situations, it may well be open to the Governor of a prison to act in a way which is rationally, appropriately and proportionally designed to deal with a difficulty which may arise in running the prison. For example, had the Prison Officers Association been so discomforted by the behaviour of visiting solicitors that they recommended that officers work to rule, or withdraw their services in some other way, then this may well have justified the Governor in taking appropriate steps to deal with the situation. However, the factual premise for him taking such action in the circumstances of this case was simply not made out, and in any event this is not what the Governor did. Instead, he identified a specific power which he then purported to exercise. In construing whether or not that power was in fact available to him in the circumstances of this case,

neither the High Court nor this court is required to show deference to the Governor's construction of the prison rules.

43. The prison rules are made pursuant to the Prisons Act, 2007. While counsel for the Governor stressed the provisions of s. 35(2) of the 2007 Act (providing that rules may be made providing for *"the duties and conduct of the Governor and officers of a prison…"*) nothing material turns on this.

44. With regard to the rules, the section of these dealing with *"Contact with Outside Community"* begins with Rule 35. Rule 35, in my view, does not govern visits to the prison by solicitors meeting clients. I say this for two reasons. Firstly, rule 38 clearly governs such visits. That rule is headed: -

> "Visit by Legal Advisor or Relating to Court Appearance"

The substance of the rule, leaving aside the heading, clearly governs specific rules applicable to solicitors as opposed to other visitors.

45. Secondly, rule 36(4) provides: -

> "Visits to which rules 35 (ordinary visit), 37 (visit for prisoner committed in default of payment of money or imprisoned in default of bail) or 39 (visit to foreign national) apply shall take place within the view and hearing of a prison officer, unless the Governor otherwise directs."

In other words, save for special direction by the Governor, rule 35 visits are to take place within the hearing of a prison officer. Such a provision would be quite unsuitable for visits by the solicitors of prisoners, given that the discussions between a solicitor and client are privileged ones. It would be entirely inappropriate for such communications (as a matter of

course) to be heard by a prison officer. That is, in fact, recognised in rule 38(2)(b) which specifies that a visit between a legal advisor and a prisoner shall be *"out of the hearing of a prison officer"* unless either the visitor or the prisoner request otherwise.

46. Rule 36, dealing with *"Regulation of Visits"* is not confined to any particular form of visit and therefore applies to visits by legal advisors to clients in custody.

47. The relevant rule, sub rule (9), reads as follows: -

> "(9) The Governor, where he or she believes it to be necessary in order to,
>
> (a) prevent the entry into the prison of controlled drugs or other prohibited articles or substances,
>
> (b) prevent a conspiracy to commit a criminal offence, or
>
> (c) otherwise maintain good order and safe and secure custody,
>
> may refuse to permit a visit to a prisoner by a person or persons."

48. Applying the well-established rules of interpretation to which I have already referred, I do not believe it is open to a Governor under these rules to exclude a solicitor from visiting any of their clients simply because he or she has been rude to prison officers. The purpose of the rule is clearly to deal with much more significant matters. The sub rule, obviously, deals with controlled drugs, the commission of criminal offences, the safe and secure custody of prisoners, and the good order of the prison or part of it. The good order of the prison is not, in my view, imperilled by rudeness or passive aggression on the part of a solicitor. In this regard, the analysis of the trial judge is highly persuasive. At page 4 of the Transcript of his ruling, he said: -

> "It would be open to a Governor to refuse a visit, for instance, to a disruptive relative to a prisoner who presents for a visit to a prisoner in a drunk and disorderly condition because this would interfere with good order, even though that particular carry on might not have a bearing on safe and secure custody of prisoners. The rule relates to prisoners and how the right of a prisoner to receive a personal visit may be curtailed. I agree with the applicant that it has nothing to do with interpersonal issues between prison staff and solicitors. The dispute here does not relate to 'good order'… within the meaning of that term as used in the prison regulations. A Prison Governor cannot impose a blanket ban on personal visits of a solicitor to all prisoner clients in order to ensure good manners by solicitors in dealing with staff and prevent further discourtesy, just as officials in other public offices cannot refuse on a blanket basis to deal with bad mannered members of the public who they encounter in the course of their duties. 'Good order' relates to order and discipline within the prison and is listed along with 'secure custody'."

49. I would add two glosses to this part of the judgment. While the trial judge refers to the right *of a prisoner* to receive a personal visit being curtailed, the exclusion of a visitor may of course happen as a result of the behaviour of the visitor as opposed to the prisoner. That is clear from the example that the trial judge himself gives. Secondly, the sub rule does not entitle the Governor to bar a legal advisor from even one visit on the basis of the activities alleged against Ms. Egan, let alone to bar the legal advisor indefinitely. Having said that, the perpetual nature of the ban in itself illustrates a further infirmity in what the Governor purported to do.

50. An essential part of the exercise in any discretionary power is that it be proportionate. Even if a power to exclude Ms. Egan existed pursuant to Rule 35(9), and even if that power

was exercised in accordance with the principles of natural justice, the indefinite exclusion of Ms. Egan from the prison was not justified by the aggressive acts (passive or otherwise) alleged against her (even taking them at their height). A proportionate response should have taken into account both the period of time for which Ms. Egan was to have been excluded, and the prisoners who she should have been prevented from visiting. Imposing a blanket prohibition on visiting *any* prisoner for an *indefinite* period does not respect the principles of proportionality. While the requirement that the Governor act proportionately is one which can hardly be disputed, it is of particular importance in circumstances where there was no appeal against his decision and no form of review available to Ms. Egan apart, of course, from having recourse to this court. Where there is no such right of appeal, and where the position of the Governor is that some element of deference should be accorded to him in the way in which he runs the prison, it is all the more essential that any exercise by him of a discretionary power is proportionate.

51. In that regard, I would also uphold the findings of the trial judge (in the passage of the judgment which I have already quoted) referring to *"a blanket ban"* on visits *"to all prisoner clients"*. These criticisms of the disproportionate nature of the ban are well founded, and in themselves would justify the granting of relief to Ms. Egan. The fact that the ban was for an unlimited period would also tend to the conclusion that it was a disproportionate one. In that regard, it is not enough to say that Ms. Egan had it within her own power to bring the ban to an end, were she to express regret for *"previous interactions"* and go on *"to give undertakings that there would be no repetition of unacceptable and unprofessional behaviours…"*; see the letter sent on behalf of the Governor on the 30th August 2022. There was no guarantee that, even if Ms. Egan did these things , the exclusion would be lifted. The position adopted by the Governor was that he would *"review the exclusion"* were Ms.

Egan to recant and to give these undertakings, but there was no guarantee that her exclusion would in fact be ended , even were she to take these steps.

52. The order of the trial judge appealed against by the Governor is as follows: -

> "THE COURT DOTH DECLARE that the respondent has acted in excess of jurisdiction in purporting to exclude the applicant from Cloverhill prison pursuant to Rule 36(9)(c) of the Prison Rules 2007 (as Amended)."

53. The Governor also appeals against the decision of the trial judge to award the costs of the proceedings to Ms. Egan.

54. For the reasons which I have set out , I would dismiss the appeal. Were it necessary to do so, I would also decide that the decision to exclude Ms. Egan was vitiated because of the numerous failures to comply with the requirements of natural justice and the principles of proportionality as described in this judgment.

55. On the question of costs, and any other outstanding issues, the Court has decided to list this matter for a brief hearing on the 10th of May 2024 at 9.30 am.

56. Meenan J. agrees with this judgment, and the orders which I propose.