THE COURT OF APPEAL

Unapproved **No Redactions Needed**

Record Number: 2023/10

High Court Record Number: 2021/797 JR

Neutral Citation Number [2024] IECA 42

Ní Raifeartaigh J.

Binchy J.

Butler J.

MICHAEL MURRAY

APPELLANT

-AND-

GOVERNOR OF MIDLANDS PRISON, IRISH PRISON SERVICE, MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Ms. Justice Ní Raifeartaigh delivered on the 22nd day of February 2023

Nature of the appeal

1. This is an appeal in respect of an order of the High Court refusing relief sought by the appellant in judicial review proceedings (see judgment of Meenan J., [2022] IEHC 672). The question raised is whether a convicted person is liable to the disciplinary offences and sanctions in the Prison Rules 2007 (S.I. 252/2007) in respect of his misconduct in a courtroom during his

sentence hearing. The appellant submits that, contrary to what was found by the High Court judge, the Prison Rules do not apply in that situation at all and that it is solely for the sentencing judge to decide whether or not to deal with the matter by way of the contempt of court jurisdiction.

Background

2. The appellant was tried and convicted in respect of certain offences. He was sentenced to a term of 15 years and on appeal his sentence was increased to one of 19 years. On the 5th July 2021, while serving that lengthy prison sentence, the appellant was convicted of separate offences by a jury before the Circuit Court. On the date of his conviction, the judge adjourned the case for sentencing on 29th July 2021 and remanded him in custody. On the adjourned date, and during the sentencing hearing, the appellant became agitated and threw a bible at the sentencing judge. He was removed from the courtroom and participated in the remainder of the sentencing hearing via video link. The judge decided not to impose any sanction under the law of contempt in respect of this behaviour and proceeded to impose sentence. The appellant was subsequently the subject of a disciplinary hearing in prison in respect of his behaviour in court and a sanction of 40 days' loss of privileges was imposed. The process was started by service of a P19 which alleged that he had offended against discipline in contravention of Schedule 1 of the Prison Rules 2007 which included misconduct 3 (threatening behaviour), misconduct 7 (intentionally or recklessly endangering any person), misconduct 8 (assaulting any person) and misconduct 32 (offending against good order and discipline).

3. He challenged the decision by way of petition under s.14 of the Prison Act 2007, and the decision to sanction was affirmed. He then brought judicial review proceedings and sought *certiorari* to quash both the original decision and the decision affirming it; a declaration that the discipline of a prisoner for conduct while in the custody of a court is not provided for by

the Prison Rules 2007 or Prison Act 2007; and if necessary an order of *mandamus* compelling the Prison Service to provide him with ordinary privileges.

The relevant Prison Rules and statutory provisions

The Prisons Act 2007 as amended

4. Section 2 of the 2007 Act provides that "prisoner " means "*a person who is ordered by a court to be detained in a prison and includes a prisoner who is in lawful custody outside a prison*".

5. S.35(1) of the Act provides that the Minister may make rules for the regulation and good government of prisons. The Prison Rules were made pursuant that provision.

6. S.35(2) provides that without prejudice to the generality of the first subsection, the Rules may provide for various matters which are then set out at (a) to (j). Here the relevant sub-paragraph is (e) which provides for *" acts which constitute breaches of prison discipline committed by prisoners while inside a prison or outside it in the custody of a prison officer or prisoner custody officer".*

7. S. 39 provides for absence from prison on compassionate grounds, or for the purpose of assessing a prisoner's suitability for early release, or for facilitating his or her re-integration into society, or to enable a prisoner to assist in the investigation of an offence. It provides that the prisoner is to be returned forthwith to prison if he is not of good behaviour, or if a breach of the peace involving the prisoner occurs, or if they attempt to escape (or assist another in so attempting).

8. S.40(1) of the Act provides that a prisoner who (a) is absent from a prison pursuant to an order under section 39 or another enactment or an order of a court, or (b) is being brought to or from a prison or court, may be placed in the custody of a prison officer, a prisoner custody

officer or a member of the Garda Síochána. S.40(2) provides that a prisoner in such custody is deemed to be in lawful custody.

The Prison Rules 2007 (S.I. No. 252/2007) as amended

9. Rule 2(2) provides that the phrase "breach of prison discipline" shall be construed in accordance with Rule 66 ("Breach of prison discipline").

10. The same Rule also provides that "prisoner" means a person who is lawfully detained in a prison and proceeds to enumerate certain types of detainee, including those detained on foot of a sentence of imprisonment or a sentence of detention, those on committal by a court on remand or awaiting trial, those detained on foot of an order of the Special Criminal Court made pursuant to section 43 (1)(c) of the Offences Against the State Act 1939 (No. 13 of 1939), those detained in relation to certain immigration and asylum matters, those detained under extradition legislation, those detained under transfer of sentenced persons legislation, debt defaulters and those imprisoned for contempt of court. It then provides a final general provision as follows: "*and includes such a person when temporarily outside the prison in the custody of a prison officer, a prison custody officer or other person authorised by the Governor*." Rule 66(1) provides that An act or omission described in Schedule 1 of the Rules shall for the purposes of Part 3 of the Prisons Act, 2007, be a breach of prison discipline and "a breach of prison discipline" shall be construed accordingly. (Part 3 of the Act sets out the procedures in respect of inquiries into alleged breaches of prison discipline, sanctions and appeals).

11. Schedule 1 provides:

> "A prisoner shall be guilty of a breach of prison discipline if he or she -
>
> (1) disobeys or fails to comply with any lawful order of the Governor or of any prison officer,
>
> (2) contravenes or fails to comply with any provision of these Rules or any local order,

(3) treats with disrespect, through the use of any abusive, insolent, racist or threatening behaviour or language, the Governor, any prison officer, any prisoner, any visitor to the prison or any other person,

(4) without lawful authority -(a)prepares, manufactures, (b)consumes, inhales, or administers to himself or herself or any other prisoner, (c) consents to the administration to himself or herself of, or (d) has in his or her possession or buys, sells or supplies, any intoxicating liquor or substance, controlled drug or medicinal product,

(5) is intoxicated as a consequence of knowingly consuming any intoxicating liquor or substance, controlled drug or medicinal product,

(6) pierces himself or herself or another prisoner with a needle or other implement, or consents to another prisoner piercing him or her with a needle or other implement, whether for the purpose of tattooing or otherwise,

(7) intentionally or recklessly endangers the health or personal safety of any person or persons,

(8) assaults any person,

(9) engages in any form of bullying or harassment,

(10) intentionally obstructs a prison officer in the execution of his or her duty or any other person going about his or her authorised duties,

(11) attempts, by use of any inducement or threat, to influence any prison officer, any prisoner, or other person in the performance of his or her duties in a prison,

(12) makes false allegations against the Governor, any prison officer, any prisoner, any visitor to the prison or any other person,

(13) gives false evidence to, frustrates or fails to cooperate with an investigation or inquiry under Section 12 of the Prisons Act, 2007 (Inquiry into alleged breach of prison discipline) or Section 15 of the Prisons Act, 2007 (Appeal against forfeiture of remission of portion of sentence) or Rule 57B (Preparation of internal reports on complaints)

(14) fails to comply with a direction of a prison officer in relation to the conduct of a search under paragraph (3) of Rule 6 (Searching), including failure to open his or her mouth for the purpose of enabling a visual examination to be carried out,

(15) absents himself or herself from any place where he or she is required to be, or is present at any place where he or she is not authorised to be,

(16) intentionally or recklessly sets fire to any part of a prison or any other property, whether or not that property belongs to him or her,

(17) damages or disfigures any part of the prison, prison property, or the property of any other person,

(18) fails to comply with a requirement to work or intentionally fails to work properly or to engage properly in authorised structured activity,

(19) has in his or her cell or room or has in his or her possession any prohibited article,

(20) has in his or her possession an article in a part of the prison where he or she is not permitted to be in such possession,

(21) sells or supplies to or receives from any person any prohibited article,

(22) sells or supplies to any person any article which he or she is allowed to have only for his or her own use,

(23) has in his or her possession a greater quantity of any article than he or she is authorised to have,

(24) refuses to undergo an examination or refuses or fails to provide a sample when requested to do so, under paragraph (5) of Rule 26 (Tobacco, intoxicating liquor and drugs), for the purpose of detecting the presence or recent use of intoxicating liquor, a controlled drug or any medicinal product (other than a controlled drug or medicinal product for which a prescription has been issued by a prison doctor, registered dentist, psychiatrist or other healthcare professional) or other illicit substance,

(25) takes any article belonging to another person without the consent of that person,

(26) detains any person against his or her will,

(27) mutinies or commits any act of collective indiscipline,

(28) escapes, or absconds from prison or lawful custody, or aids or abets another prisoner to escape or abscond therefrom, or has in his or her possession any article, or information, intended for use in an escape or absconsion,

(29) attempts to commit, incites another prisoner to commit, or assists another prisoner to commit or attempt to commit any of the foregoing breaches of prison discipline,

(30) is indecent in language, act or gesture,

(31) displays, attaches, or draws on any part of a prison, or on any other property, threatening, abusive or insulting racist words, drawings, symbols or other material,

(32) in any other way offends against good order and discipline."

The High Court judgment

12. The High Court (Meenan J.) found that the appellant was in the lawful custody of the prison authorities outside a prison at the relevant time and therefore came within the definition of a prisoner in the 2007 Act. Meenan J. thought that s.40 was "not exhaustive of the circumstances in which a prisoner is in lawful custody" and that even though the prisoner was not absent from prison under s.39 of the Act or being brought to or from a prison or court, he

was still in lawful custody when he threw the book at the judge. He said that the Rules passed pursuant to s.35 of the Act applied to the appellant as set out in s.35(2)(e) of the Act and therefore the first respondent (the prison governor, hereinafter "the Governor") was lawfully entitled to discipline the appellant. He also held that although the appellant was liable for sanction for contempt of court, this did not preclude the application of the 2007 Act or Rules to him.

The appellant's submissions

13. The appellant submits that having regard to the purpose of the 2007 Act as a whole, the statutory provisions dealing with disciplinary matters upon their proper construction do not apply to the conduct of a prisoner while he is in court in respect of criminal proceedings. He submits that an accused participating in criminal proceedings in a courtroom is for that period of time "*in the custody of the court*" and that the appropriate method for dealing with any misconduct during that period is by way of contempt of court (exclusively). He submits that the decision and sanction imposed by the Governor did not fall within the scope of his authority and amounted to an executive interference with the administration of justice. The appellant submits that, in line with the principle of strict construction of penal provisions, any doubts in respect of the interpretation and application of legislation governing prison discipline must be resolved in favour of the prisoner.

14. He submits that the overarching requirement of the s.2 statutory definition of "*prisoner*" is that a person to be regarded as a 'prisoner' must be a person who *at that point in time* is subject to an order of a court that they be detained in a prison. The latter part of the definition merely makes clear that such a person does not lose their status as a prisoner merely by virtue of their being outside a prison.

15. He submits that on the 29th July 2021 (the date to which the sentence had been adjourned and on which the book-throwing incident took place) the appellant was a person who

had been previously the subject of an order for his detention in prison and equally clearly he was a person who was shortly to be once again made subject to a further such order, but the earlier order which had remanded the appellant in custody was "spent" in light of the requirement that he be produced back before the Circuit Criminal Court on the day in question. He only became a "prisoner" again once a fresh order was made on the 29th July 2021 committing him to prison.

16. He submits that the appellant was therefore neither a "*prisoner"* nor in the "*lawful custody"* of the first respondent for the purposes of the Act or the Rules at the relevant time.

17. He submits that s.40 does not cover the appellant's situation as the circumstances of being in the custody of the court is not referenced in it and he was not any event a "*prisoner"* within the meaning of s.2.

18. The appellant points to *dicta* in certain cases such as *State (Gallagher) v the Governor of Mountjoy Prison* (unreported, High Court, 18 May 1977), where the High Court observed that "…*these Rules are made for the protection prisoners, but they are also made for the proper administration and running* ***of a prison***…"; and *State Richardson v Governor of Mountjoy Prison* [1980] ILRM 82, where Barrington J. said:

> "*It appears to me that the purpose of the Prison Rules is to reconcile the need for security and good order in the prison with the prisoners' subsisting constitutional rights. Clearly, the prison authorities must be allowed a wide area of discretion in the administration of the prisons in the interests of security and good order*."

19. He points to the observation of Professor Rogan in ***Prison Law*** (2014, Bloomsbury Professional) at §1.17 that:

> "*The Rules govern almost all aspects of prison life, from the procedures on reception, to conditions in prisons, to visits, to correspondence. They must be*

the first port of call for the prison administrator and/or practitioner dealing with a prison matter."

20. The appellant submits that while the Rules do envisage disciplinary measures to be taken against prisoners in respect of acts which take place outside prisons in certain limited contexts, the legislative intent of the Oireachtas in the introduction of the Prison Rules was solely to ensure the good management and governance of prisons. If an act of ill-discipline by a prisoner has no bearing on the governance of prison life, then it would be surprising if it were ever intended to be captured by the Prison Rules.

21. He submits further that the question of double jeopardy might arise if the judge had found the appellant to have been in contempt and sentenced him to a period of imprisonment in respect of it. This further underlines, he says, that the 2007 Act and Prison Rules were never intended to apply to a person while in the custody of the court because it would create overlapping jurisdictions as between the court and the prison governor.

22. He submits that an extraordinary circumstance would arise if a prison governor were required, in a hypothetical case, to form a view as to whether the presiding judge in the Circuit Criminal Court had been "put in fear" during an incident, or even as to whether an excuse for a given behaviour existed, having regard to all the surrounding circumstances. He poses the hypothetical question as to whether this would involve having to call a Registrar or perhaps a Judge as a witness before the governor, a scenario which he describes as "constitutionally dubious" and which can be avoided by an application of the double construction rule.

23. Counsel during the oral hearing of the appeal gave the example of an accused person who makes defamatory allegations against people including prison officers while giving evidence at his own trial and submitted that it was clear that he could not be disciplined for these utterances this in view of the absolute privilege which governs court proceedings. He submits that it is wrong to think of the immunity in s.17 of the Defamation Act 2009 as merely

something which would provide a defence to a potential prison disciplinary charge in respect of utterances; rather, he submits, it provides assistance more generally to interpreting the scope of the Rules, namely that they simply do not apply to the conduct of accused or convicted persons while they are in the custody of the court.

The submissions on behalf of the respondents

24. The respondents submit that because the appellant was serving a sentence at the relevant time, he clearly and unambiguously fell within the first part of the definition of "prisoner" in s.2 of the Act ("a person who is ordered by a court to be detained in prison…") and therefore that it is not necessary to consider the second part ("….includes a prisoner who is in lawful custody outside a prison"). He did not cease to be a prisoner serving a 19-year sentence when he entered the courtroom. Further, the second part is not in any event exhaustive because of its use of the word "includes".

25. Insofar as the appellant had submitted that misconduct outside a prison has no bearing on the governance of prison life, the respondents submit that this is obviously not the case, citing examples of prisoners being escorted not only to courts but also to hospitals and places of rehabilitation. Counsel on their behalf submits that behaviour of a prisoner outside a prison may have a direct consequence on the management and governance of prisons "at the very least because presumably dangerous and violent prisoners will require a greater degree of staff than will compliant prisoners".

26. The respondents point out that misconduct in court can be prosecuted on indictment as an alternative to the judge dealing with it as a contempt, and submits that this shows definitively that there can be overlapping jurisdictions as between the court and the executive. The contempt jurisdiction is not, he submits, an exclusive jurisdiction.

27. As to the appellant's hypothetical example concerning defamatory allegations made by an accused person (for example against a prison officer) during criminal proceedings, the respondents submit that s.17 of the Defamation Act, which provides for absolute privilege in respect of statements made by a party in the course of proceedings presided over by a judge, specifically carves out an immunity in respect of statements only and therefore does not speak at all to misconduct which involves a physical act such as an assault.

Analysis and Decision

28. I am in agreement with the conclusion reached by the High Court judge for the following reasons.

29. First, the appellant was at all material times serving a 19-year sentence in respect of the sexual offences of which he had been previously convicted and sentenced. Even leaving aside the question of his status at the time of the incident *vis a vis* the judicial and executive arms of the State respectively, I am in no doubt that the appellant was at all times in the custody of the Governor on foot of the 19-year sentence and that he did not cease to be in that custody while he was in the courtroom for the purpose of the second set of criminal proceedings. Therefore he clearly fell within the definition of "prisoner" in s.2 of the Act and Rule 2(2) of the Prison Rules even when he was produced in court for further criminal proceedings. I do not accept that each time he was in court for the purpose of the second set of criminal proceedings he ceased, for the duration of those proceedings, to be in the custody of the prison governor on foot of the ongoing 19-year sentence, and counsel has cited no authority for the proposition that an accused person serving a sentence moves back and forth between the custody of a prison governor and the court in the manner suggested.

30. Further, I believe that the position would have been the same in any event even if the appellant had not been serving the 19-year sentence. While it may be that the phrase "custody

of the court" has been occasionally used in some situations (although I must confess that I have not come across this phrase in my own experience), no authority setting forth the basis for any such a legal concept was put before us nor did my own (limited) researches uncover any material supporting the existence of such a concept. A criminal judge decides on whether a person is remanded in custody or on bail before a trial, and during a trial, and in the event of conviction or guilty plea, makes an order for imprisonment or detention or one of a non-custodial nature. But the fact that the court has the power to order detention does not appear to me to involve the court itself taking custody of the person. The judicial arm of the State has no resources for doing so and is entirely dependent on the executive branch of the State for taking and maintaining custody of and over individual persons. It seems to me that there is an important distinction between the judicial function in making decisions and orders with respect to liberty and detention, on the one hand, and the concept of taking a person into custody, on the other. The latter forms no part of the judicial function in this jurisdiction and that is precisely why the judicial arm has no resources of any kind for taking persons into custody. There is no such thing as judicial custody, or at least none has been demonstrated to this Court to exist with reference to any authority.

31. My understanding of the legal position is that where a person's criminal case is adjourned and he has been remanded in custody until that adjourned date (whether pending trial or pending sentence, and whether or not he is already serving a sentence), he remains in the custody of the prison governor until further order of the court (whether it be for his release or continued custody). I do not agree that the legal custody of the prison governor ceases immediately upon the accused person being physically produced in court on the adjourned date, with custody somehow notionally transferring to the court itself when he is produced in court, and then transferring back to the prison governor if and when a further remand in custody is ordered. Prison officers invariably escort the prisoner to and from court, and maintain close

supervision over them while in the courtroom. In my view, the prisoner continues to be detained by the prison governor pursuant to the order on foot of which he has been produced until a fresh order is made by the court. The fact that he is physically present in the courtroom for the purpose of the court proceedings does not alter this status. The practical reality is that the judge in a criminal court has no responsibility for or involvement in the security arrangements in the courtroom, or the conditions in the prison cells attached to the court, or any related matters. I accept of course sometimes the concepts of legal custody and physical custody are not identical, but the arrangements which are visible in Irish courtrooms seem to me accurately to demonstrate an underlying conceptual reality, which is that under our system of administration of criminal justice, the executive branch is given responsibility for the custody of persons (whether pre-trial or on foot of a sentence) and the judicial branch the responsibility for making decisions about custody without ever taking people into custody itself. Simply because an accused person is physically in the courtroom and the court can exercise *certain* powers in respect of him, including that of making a decision that he should be further remanded in custody or sentenced to a term of imprisonment, does not in and of itself necessarily mean that the court itself is his legal custodian.

32. Therefore I am entirely unpersuaded of the most important keystone of the appellant's argument, namely that he was in the "custody of the court" at the time of the book-throwing incident.

33. Secondly, while I accept that the primary purpose of the discipline-related aspects of the Prisons Act 2007 and the Prison Rules is probably to deal with alleged misconduct within the *physical* prison setting, it cannot be said that this is the sole purpose of those provisions. It is clear from the inclusion, in s.2 of the Act, of a person "*who is in lawful custody outside a prison*" within the definition of prisoner that its scope is directed towards people who are in the *custody* of the prison governor and not physically *on the premises* in a prison. The same

point can be made with regard to s.35(2) which refers to breaches "*committed by prisoners while inside a prison or outside it in the custody of a prison officer or prisoner custody officer".* The key question therefore is, again, whether or not the appellant was in the custody of the prison governor at the material time. Having decided above that the appellant was within the custody of the prison governor even while in court, it seems to me that the reading of the Act and Rules as contended for by the respondents is straightforward and correct. Moreover, it accords with common sense that misconduct outside the physical prison setting may well have an impact on the running of the prison itself (the example given by the Respondent of the staffing implications for escorting a dangerous prisoner to a hospital being very apt). There is no inconsistency in an interpretation which focusses on the prisoner being in the custody of a prison officer rather than the one which was contended for by the appellant, namely one which conceptualises it as primarily location-based (the prison building) with limited exceptions.

34. Thirdly, I am not persuaded that the wording of s.40(2) of the 2007 Act is of assistance to the appellant. Indeed, although it was not argued, it seems to me that the appellant's status was encompassed within s.40(1) in any event: "*absent from prison pursuant to…an order of a court*". The order made by the court on the 5th July 2021 committed the appellant to the custody of the prison governor and adjourned the case to the 29th July 2021. This is a standard type of such an order which, by both adjourning and remanding in custody, thereby incorporates an implicit but very definite command to the prison governor to produce him on the adjourned date. (Further production orders are not required in such cases). That being so, the appellant was brought to court on the 29th July 2021 on foot that of the order of 5th July 2021 and was therefore "*absent from prison pursuant to an order of a court*" within the meaning of s.40(1).

35. Even if I am wrong about that, I certainly do not think that the fact that s.40(2) does not explicitly mention prisoners who are in the courtroom as being in lawful custody somehow

confirms or provides support for the very large and novel proposition that there is a concept of judicial custody into which a prisoner passes while physically present in the courtroom.

36. Fourthly, the appellant advanced the proposition that the Circuit Criminal Court judge had exclusive jurisdiction to deal with any misconduct which took place in the courtroom itself. However, this proposition is undermined by the fact that cases of contempt may be dealt with, and sometimes should be dealt with, by the prosecution authorities, who are of course part of the executive branch. This is so in cases where, for example, the judge is the direct victim of the alleged contempt (as discussed in the Grand Chamber decision of *Kyprianou v. Cyprus*, App. No. 73797/01, 15 December 2005)**.** This undermines the proposition that the presiding judge is the only person with power to deal with the misconduct of an accused person in court or that the matter falls within the exclusive competence of the judicial branch.

37. Fifthly, insofar as it is suggested that the co-existence of both the judge's contempt jurisdiction and the power of the prison governor to investigate and sanction under the Prison Rules may involve the principle of double jeopardy, there are many situations in which the same behaviour may amount to infractions of a disciplinary code as well as the criminal law. There is no general principle precluding both sets of proceedings as discussed in caselaw such as *McGrath v. The Commissioner of An Garda Síochána* [1991] 1 I.R. 69; *Garvey v. The Minister for Justice, Equality and Law Reform* [2006] 1 I.R. 548; and *Walsh v Commissioner of An Garda Siochana* [2010] IEHC 257. Whether the sequencing of proceedings or other matters may give rise to an unfairness in any individual case must be examined on a case-by-case basis: as Geoghegan J said in *Garvey*, even in the case of an acquittal in criminal proceedings,

> *"it may, in any given circumstances, be unfair and oppressive to conduct a disciplinary inquiry into the same issues in respect of which there has been an acquittal on the merits at a criminal trial but this will depend on the particular*

surrounding circumstances and in particular their cumulative effect. There is no necessary preclusion per se of such a double process."

There can be no objection in principle to the co-existence of the two jurisdictions (the contempt power of the judge and the disciplinary power of the prison governor) provided they are being exercised appropriately in their different contexts and there is no unfairness or oppression in a particular case. No such unfairness or oppression arose in the present case not least because the judge (wisely, in view of *Kyprianou*) chose not to deal with the matter by way of her contempt jurisdiction.

38. Sixthly, insofar as the appellant relies on the defence of absolute privilege under s.17 of the Defamation Act 2009 in his argument, I do not accept that this necessarily means that the Rules should be interpreted to exclude all other forms of misconduct by an accused person while he or she is being dealt with in the courtroom. (Indeed, the statutory privilege in s.17 of the 2009 Act applies only to *defamatory* utterances and applies only in defamation actions and it may be that one has to turn back to the common law on absolute privilege rather than the statutory defence if one were seeking to rely on absolute privilege in the context of prison (or other) disciplinary contexts. For other kinds of utterances, such as incitement to hatred, one must turn to the specific legislation, such as s.5 of the Prohibition of Incitement to Hatred Act 1989). One can readily see how a broad protection of utterances in court proceedings is necessary in order to enable the administration of justice to take place. Witnesses and accused persons need to be given a full opportunity to provide their narratives without fear of reprisals in subsequent proceedings. The same logic does not apply, for example, to physical violence or disruptive behaviour in the courtroom.

39. Accordingly, despite the ingenious arguments put forward on behalf of the appellant by his counsel Mr. McDonagh, I am of the view that the first respondent was within jurisdiction when he acted as he did pursuant to the Prison Rules, that the High Court judge was correct in

so finding, and that the appeal should be dismissed (subject to what is said below concerning the refusal of the recommendation for the Legal Aid (Custody Issues) Scheme.

Costs and the Legal Aid (Custody Issues) Scheme

40. With regard to costs, the appellant also appealed in respect of the High Court judge's refusal to recommend payment under the Legal Aid (Custody Issues) Scheme. He submits that the trial judge erred in his approach to the costs issue and that the ordinary rules on 'costs following the event' do not apply to proceedings such as these as the appellant had indicated his intention to apply for a recommendation pursuant to the Scheme. He points out that the Scheme encompasses judicial reviews which "consist of or include Certiorari, Mandamus or Prohibition and concerning criminal matters or matters where the liberty of the applicant is at issue". To obtain the benefit of the Scheme, an applicant must apply for the Scheme at the commencement of the proceedings and receive, by convention, a recommendation from the High Court at the end of the proceedings that the Scheme be applied to the applicant. An applicant must also demonstrate that he does not have the financial means to obtain representation, which is not in issue in this case. The appellant cites O'Malley J. at §314 of her judgment in *AC & Ors v CUH & Ors* [2019] IESC 73:

> "The Custody Issues scheme is a relatively informal means for ensuring that legal representation can be procured in Article 40.4 applications (amongst other categories of case). Parties may choose their own lawyers, and all that is required is an application to the court, at the outset, for a recommendation. The recommendation will rarely be refused provided the grounds argued are stateable."

41. He also relies on the judgment of Barr J. in *H v DPP & Ors* [2021] IEHC 308, cited by this Court in *M v Director of Oberstown Children Detention Centre & Ors* [2021] IECA 260. The appellant submits that the appellant, a prisoner, was advised by senior and junior counsel

and a solicitor that he had some prospect of success. He was successful at the *ex parte* stage in obtaining an order granting him leave to seek judicial review of the first respondent's decision which suggests that his case was at least stateable. He submits that for recommendation in respect of the Scheme to be made, it does not matter that an applicant is ultimately unsuccessful.

42. The respondents have adopted a position of neutrality on this aspect of the appeal but accept that the winning or losing of the case is not relevant to a recommendation being made under the Scheme once the court is satisfied that the case is caught by the scope of the Scheme.

43. In all of the circumstances, and having regard to the terms of the Scheme as well as the *dicta* to which the Court was referred, we will allow the appeal on this point and accede to a recommendation that the matter be dealt with under the Scheme.

44. As this judgment is being delivered electronically I wish to record the agreement of my colleagues Binchy J. and Butler J.