[2020] IEHC 302

THE HIGH COURT
JUDICIAL REVIEW

[2018 No.844 JR]

BETWEEN

CAOLAN SMYTH

APPLICANT

THE GOVERNOR OF THE MIDLANDS PRISON
AND
THE IRISH PRISON SERVICE
AND
THE MINISTER FOR JUSTICE & EQUALITY

RESPONDENTS

JUDGMENT of Ms. Justice Mary Rose Gearty delivered on the 17th day of June, 2020

1. Introduction

1.1 This Applicant sought leave in respect of numerous reliefs, supporting his application with a bleak account of his incarceration in the Midlands Prison. The Respondents were put on notice of the application and a telescoped hearing took place after the exchange of pleadings and affidavits. An Assistant Governor in the Prison has refuted most of the assertions made in the originating affidavit so comprehensively that the Applicant has been compelled to confine his argument to one issue only: whether rule 62 procedures, which mandate the review and recording of certain decisions, should have been applied to him. As part of that process, he also argues that confidential information in the possession of the Respondents should be open to review; one cannot make meaningful objections to a decision if one does not know why it was made. This ground was not included in the original application for leave but is a new ground. Leave to argue this new ground was not strenuously contested by the Respondent in circumstances where it is a variation on one of the many reliefs which are no longer sought in the case, though the Respondents opposed the proposal that rule 62 applied or that confidential information should be open to review.

1.2 The Applicant has been identified by the Respondents as a vulnerable prisoner. The grounds for this decision are disputed. The Assistant Governor of the Prison has averred that he is in receipt of confidential information to the effect that there is a viable and continuing threat to the Applicant's life. The Applicant has averred that there is no threat to his life and argues that he should be permitted to test this information and refute it. He also points to rule 62 which gives procedural protection to prisoners who, in order to maintain good order in the prison, are held under very restricted regimes. The argument is that such restrictions ought only to be permitted in respect of prisoners who have the procedural rights which are set out in rule 62. He has not enjoyed these procedural protections and he should be, he argues, under the terms of rule 62, entitled to a regular review of the grounds for his being identified as vulnerable due to threats. The oral argument in the case included a discussion of provisions whereby confidential information is examined by a judge in the context of a court case or pre-trial criminal disclosure hearing.

1.3 The Applicant applied to the Court for leave to cross-examine the Assistant Governor, which leave was refused by Humphreys J. in a decision dated 9th June 2020, [2020] IEHC 242. The grounds on which this decision was made are no longer relevant insofar as most of the case made at that time has been abandoned but are material insofar as they concern the confidential information received by the Governor. The application was said to be one which would permit counsel to explore the information. In these circumstances, Humphreys J. commented that the Applicant was not in a position to say that the Governor was not in receipt of such information and the anticipated cross-examination was in relation to the weight or reliability of that information. In that respect, Humphreys J. ruled:

> *"Aside from truly exceptional categories (like political questions) that are not relevant here, no decision is beyond review; but in practice such review in the case of a decision based on information from confidential sources can only be based either on legal points or on some cogent evidence to the contrary from the applicant, because it would be entirely contrary to the public interest to engage in an exploration of confidential information received by public authorities."*

1.4 Finally, there is a grievance procedure under the Prison Rules which has not been invoked in this case. Instead, the Applicant went to the High Court on an *ex parte* basis, making the case set out in more detail below, which case has now been abandoned in favour of the single, more focused argument just described.

2. The Telescoped Hearing

2.1 The test in leave applications, whether on notice to the respondent or not, remains the test as set out in *G v DPP*, [1994] 1 I.R. 374, namely, whether or not the Applicant has an arguable case in law that he is entitled to the relief sought and that judicial review is the most appropriate remedy. In a telescoped hearing, which effectively means a hearing in which the parties have exchanged pleadings and legal submissions shortly after leave was requested, the application is treated as if it were the application for judicial review itself.

2.2 The question presented to this Court was whether the decision that the Applicant is a vulnerable prisoner is reviewable and, if so, whether he may successfully quash that decision, or obtain mandamus or declaratory relief as to the application of the procedural safeguards contained in rule 62 allowing him to challenge the grounds for the decision or to ensure that the grounds are examined by a third party such as the Director General or the Court itself.

2.3 One of the hazards of permitting an extension of the grounds of review, as was done here in order not to prolong the case given that the Applicant is a remand prisoner, is that there has been no preliminary leave application and therefore no formal process whereby the grounds were clear on both sides and confirmed by the Court at the leave stage. This has had three unfortunate effects in this case: firstly, the case made at the initial *ex parte* hearing bears little relation to the case made now and, as a result, secondly, most of the legal submissions have been abandoned by both sides. The third difficulty is that,

the new ground having been effectively added to the case in the telescoped hearing, there is no formal submission or pleading as to the order or orders actually sought. The general orders are so broadly drafted that it is possible to enlist one of them to serve as the order sought but it is clear that the case now being made was not contemplated in any detail by either side.

3. Daily Life in Prison: Reviewing the Decision of a Prison Governor

3.1 The rationale informing much of the case law in respect of prisoner applications for judicial review was addressed in the Canadian case of *R v Institutional Head of Beaver Creek Correctional Camp*, (1968) 2 D.L.R. 3d 545, and can be summarised as follows: if the governor is making an administrative decision, the courts have no function. If she is making a judicial or quasi-judicial decision, this can be reviewed by the Court. On a pragmatic note, the Canadian court suggested that if the decision affects the prisoner as an inmate, it is likely to be an administrative decision but if it affects her as a person, it is more likely to be a judicial decision. Hence the numerous cases in which the dignity of the prisoner as a human being has been upheld by reviewing decisions which are said to create onerous regimes of confinement or unsanitary conditions. This line of authorities also grew in tandem with the European Court of Justice jurisprudence on the rights of prisoners.

3.2 There are equally numerous pronouncements as to the importance of prison management being free to go about the demanding business of running a prison without judicial supervision of routine matters i.e. the kind of administrative decisions which affect every prisoner qua prisoner. Throughout the caselaw there is widespread recognition of the sensible proposition that, by definition, a prisoner has lost some of her constitutional rights, the most important and obvious being her liberty. This does not mean that disproportionate restrictions on her liberty are justified but a balance must be struck between the duty to vindicate human rights and the duty to ensure that the prison is a safe environment for all those in it, including the prisoners themselves. These issues are explored in *Foy v Governor of Cloverhill Prison*, [2010] IESC 529, [2012] 1 IR 37, where Charleton J. confirmed that every governor has a wide discretion as to how a prison is managed.

3.3 In order to get a sense of the difficulties that arise in a prison environment and the dangers of a court imposing mandatory orders without considering the consequences for those managing complicated environments, it is only necessary to read paragraphs 16 to 35 of the case of *McDonnell v Govenor of Wheatfield Prison,* [2015] IECA 216, considered below, where Ryan P. describes the oral evidence presented in that case. The problems outlined included aggression from other prisoners, threats which emanate from one person but can be carried out by another acting under duress, the fluid nature of the situation as prisoners enter and leave the system and the constant necessity to consider the effect on all other prisoners and on scarce resources of attempts to improve prisoner welfare. The difficulties in respect of vulnerable prisoners appear to be exacerbated by the refusal of others to associate with them. Many of the obstacles and pitfalls of other civil law proceedings emerge in this environment in that the cases revolve around people

trying to exercise their rights while living in very close proximity to others, sometimes for very lengthy periods. All of this must be managed by the prison governor, while also maintaining good order and security for her staff and for all the prisoners. But cases which involve the rights of prisoners carry the added complication that a prison, by its nature, must house some of the most aggressive people in society. It is a significant duty of the governor to protect all prisoners, including those who are themselves categorised as violent, from other prisoners within the system who pose a threat to them.

4. Candour

4.1 The applicant in judicial review proceedings is expected to show the utmost candour in the initial application for leave. This is because the application is made *ex parte* and the respondent is not, usually, in a position to correct any misstatement of fact. The extent to which this applies in a case where notice has been given is arguable, but it cannot be controversial to conclude that the applicant who makes a series of unsustainable claims at the *ex parte* stage, all of which are withdrawn when the respondent refutes them, has put any remaining claim at risk due to the discretionary nature of review proceedings. This must be the case when the refuted assertions are relevant to the relief claimed.

4.2 The extent of the duty on an applicant in *ex parte* proceedings (for a Mareva injunction in that case) was set out by Mr. Justice Clarke, as he then was, in *Bambrick v. Cobley,* [2005] IEHC 43, as follows:-

> *"Clearly the court should have regard to all of the circumstances of the case. However, the following factors appear to me to be the ones most likely to weigh heavily with the court in such circumstances:- 1. The materiality of the facts disclosed.*
>
> *2. The extent to which it may be said that the plaintiff is culpable in respect of a failure to disclose. A deliberate misleading of the court is likely to weigh more heavily in favour of the discretion being exercised against the [order sought] than an innocent omission....*
>
> *3. The overall circumstances of the case which lead to the application in the first place."*

4.3 In a judicial review, the same duty of candour applies, and the Court is entitled to consider the Applicant's lack of candour in its exercise of the discretion as to whether or not the remedies sought should be granted. The most striking fact omitted from this Applicant's affidavits was that it was his refusal to mingle with certain other prisoners which formed the basis for his claim that he was being actively prevented from associating with others.

4.4. It is also important and, again, uncontroversial, to add that even where the inconsistencies in an affidavit point to a lack of candour, if the case reveals a breach of the law by the respondent body, it is appropriate that the breach be identified and it may be appropriate to afford a remedy, even in the case of an otherwise undeserving

applicant, as it is important that the law be upheld generally and it may be significant for an applicant in a future case.

5. The Vulnerable Prisoner under Rule 63 and the Protection of Rule 62

5.1 The relevant Prison Rules are 62 and 63, the latter being the rule which provides for the prisoner who is deemed to be vulnerable. The former is the rule which applies to prisoners who are subject to restrictions and this may have an application in the case, depending on the facts. Under the Prison Rules of 2007, rule 63 states:

"(1) A prisoner may, either at his or her own request or when the governor considers itnecessary, in so far as is practicable and subject to the maintenance of good order and safeand secure custody, be kept separate from other prisoners who are reasonably likely tocause significant harm to him or her.

(2) A prisoner to whom paragraph (1) applies may participate with other prisoners of thesame category in authorised structured activity if the governor considers that suchparticipation in authorised structured activity is reasonably likely to be beneficial to thewelfare of the prisoner concerned, [such activity may be supervised].

(3) The governor shall make and keep in the manner prescribed by the Director General, arecord of any direction given under this Rule and in particular

(a) the names of each prisoner to whom this rule applies,

(b) the date and time of commencement of his or her separation,

(c) the grounds upon which each prisoner is deemed vulnerable,

(d) the views, if any, of the prisoner,

(e) the date and time when the separation ceases."

5.2 The relevant portions of Rule 62 state:

62.(1) Subject to Rule 32 (Exercise) a prisoner shall not, for such period as is specified in a direction under this paragraph, be permitted to (a)engage in authorised structured activities ...,

(b) participate in communal recreation,

(c) associate with other prisoners,

where the Governor so directs.

(2) The Governor shall not give a direction under paragraph (1) unless information has been supplied to the Governor, or the prisoner's behaviour has been such as to cause the Governor to believe, upon reasonable grounds, that to permit the

prisoner to so engage, participate or associate would result in there being a significant threat to the maintenance of good order or safe or secure custody.

(3) A period specified in a direction under paragraph (1) shall not continue for longer than is necessary to ensure the maintenance of good order or safe or secure custody.

(4) Where the direction under paragraph (1) is still in force, the Governor shall review not less than once in every seven days a direction under paragraph (1) for the purposes of determining whether, having regard to all the circumstances, the direction might be revoked.

(5) A prisoner in respect of whom a direction under this Rule is given shall be informed in writing of the reasons therefor either before the direction is given or immediately upon its being given, and shall further be informed of the outcome of any review as soon as may be after the Governor has made a decision in relation thereto.

(6) The Governor shall make and keep a record of -

(a) any direction given under this Rule,

(b) the period in respect of which the direction remains in force,

(c) the grounds upon which the direction is given,

(d) the views, if any, of the prisoner, and

(e) the decision made in relation to any review under paragraph (4).

(7) The Governor shall, as soon as may be after giving a direction under paragraph (1) (c), inform the prison doctor, and the prison doctor shall, as soon as may be, visit the prisoner and, thereafter, keep under regular review, and keep the Governor advised of, any medical condition of the prisoner relevant to the direction.

(8) The Governor shall, as soon as may be after giving a direction under paragraph (1) (c), inform a chaplain of the religious denomination, if any, to which the prisoner belongs of such a direction and a chaplain may, subject to any restrictions under a local order, visit the prisoner at any time.

(9) The Governor shall, as soon as may be, submit a report to the Director General including the views of the prisoner, if any, explaining the need for the continued removal of the prisoner from structured activity or association under this Rule on grounds of order where the period of such removal will exceed 21 days under paragraph (4). Thereafter, any continuation of the extension of the period of removal must be authorised, in writing, by the Director General." [Emphasis added.]

Rule 62, therefore, provides safeguards in the form of a weekly review of the status of the prisoner, the maintenance of records in respect of any such decision, including the views of the prisoner as to the decision, and the involvement of a religious advisor, a doctor and, after 21 days, the Director General of the Prison Service.

5.3 It seems clear from the wording of rule 62 that information provided to the Governor may form the basis for a decision to impose the restrictions described so that there may be considerable overlap between rules 62 and 63. The decision that a prisoner is a vulnerable one, in other words, does not exclude the operation of rule 62 in an appropriate case on the plain meaning of the rules. Such a decision under rule 63 must, almost by definition, be one based on information supplied to the Governor and must also be based on reasonable grounds that there is a significant threat to the maintenance of good order or safe or secure custody in the prison unless the restrictions described are imposed. It is axiomatic that this must be the case in the context of a rule 63 situation; the safe custody of the vulnerable prisoner, for one, is significantly threatened by a rule 63 threat. The Respondents are correct to note that the two rules have different objectives; one punitive, one protective. If the operation of rule 63 leads, in fact, to a regime such as that described in rule 62, however, the protections of rule 62 must be deployed as the protective objective has become, in its effect, punitive.

5.4 This is the logical consequence of the decisions of O'Malley J. in *Dundon v. Governor of Cloverhill Prison* [2013] IEHC 608, and O'Regan J. in *Dumbrell v Governor of the Midlands Prison* [2018] IEHC 462, in which Ms. Justice O'Regan expressly followed the rationale in *Dundon*. Mr. Dundon was permitted very limited association with others and no educational activity. At para. 83 of her judgment, O'Malley J. noted: -

> *"It seems to me that where a Governor maintains a high security unit of this nature, it is necessary to monitor the situation of prisoners in it. Where, as in this case, the numbers in the unit drop and a prisoner is not authorised to engage in education, work or training, it is incumbent on the Governor to consider either relaxing the regime to which the prisoner is subject or invoking Rule 62 if the conditions for such invocation exist. Assuming, from the way that this case ran, that the Governor was unwilling to do the former, I conclude that he should have made a formal decision in relation to the latter... This would have conferred upon the applicant the protection involved in regular review and notification and, if the situation continued for more than three weeks, the oversight of the Director of the Prison Service."*

5.5 Ms. Justice O'Malley's comments on the status of the Prison Rules go to the heart of the issue in this case and this Court agrees with them. She described the rules and how they should operate, at paragraphs 77 to 80 of *Dundon*:

> *"77. It is not necessary to set out at any length the authorities that support the proposition that the governor of a prison has a very wide discretion as to the manner in which he fulfils his obligations to the prisoners in his or her custody while complying with the duty to maintain order and safety... However, I also agree that*

the discretion, which is conferred by the Prison Rules, must be exercised in compliance with those Rules. I do not regard the Rules as a sort of weapon to be used by either prisoners or the lawful authorities in a "battle of wits" or otherwise- they are the rules made by the Minister, mandated by the primary legislation enacted by the Oireachtas. They confer authority on the Governor and protect him or her in the exercise of that authority. In short, they are the law as far as both prisoners and Governor are concerned.

78. The issue here is not whether the Governor may or may not establish differing levels of security in different areas of a prison, to deal with perceived differences in the security risks posed by different prisoners. There was no debate on this point but in my view it would be difficult to argue that he or she could not. The question is whether a Governor may restrict the normal life of a prisoner, as envisaged by the Rules, without recourse to the provisions of the Rules that specifically permit such restriction.

79. In Devoy, it was accepted by the respondent, and held by Edwards J. that there is a "presumption" arising out the combination of Rules 27 and 62 in favour of a prisoner being permitted to associate with other prisoners. On the authority of Devoy I conclude that where a restriction on such association reaches the point at which Rule 62 becomes applicable, it should be invoked so that the notification and oversight provisions take effect.

80. For the avoidance of doubt it should be made clear that the courts have no role in the micro-management of these issues. It is also accepted that a prison setting is fluid. Prisoners come and go, whether by way of release or transfer, movement to another part of the prison or travelling to court or hospital etc. The status of a prisoner remaining in the unit does not alter with each such development. However, it may be of assistance to recall that Rule 62 requires a weekly review. It seems to me that where a prisoner's situation is de facto akin to a Rule 62 regime for a period of days approaching that length of time, and does not appear likely to change within it, consideration must be given to formalising the regime."

5.6 The characterisation of the rule 62 protections as a formal regime which should be invoked if the prisoner's situation is akin to that described in the rule is clearly correct and, as O'Malley J. remarked, protects both prisoner and governor. In *Dumbrell v Governor of the Midlands Prison* [2018] IEHC 462, Ms. Justice O'Regan held that rule 62 should be invoked when rule 62(1)(a), (b) and (c) applied i.e. when a prisoner was not permitted to engage in authorised structural activities, or to engage in communal recreation, or to associate with other prisoners. Mr. Dumbrell had argued that when such a regime is being implemented, it should only be done under rule 62, and the Court agreed.

5.7 The restrictive regime described in (a), (b) and (c) is not that outlined on the facts in this case, however. The Applicant claimed in his initial *ex parte* application that he had been kept in segregation and was not permitted to associate with other prisoners. It now

appears that this is due to his refusal to associate with any of the other prisoners on his landing. He has requested to meet with two specific prisoners; these requests were refused. One refusal was a due to disciplinary proceedings involving the other prisoner and the second due to a threat to the Applicant emanating from associates of the second prisoner. He has made no other requests in this regard. It is incorrect to classify this Applicant as one who is not permitted to associate with other prisoners, nor is he a prisoner who is not permitted communal recreation. He chooses to remain apart from others in his unit.

5.8 In his statement grounding this application, the Applicant alleged that he had been subjected to a continuous regime of solitary confinement and that he was often locked into a cell for 23 hours of the day. It is now accepted that this is not so and that he is afforded at least two hours, daily, for recreation in the gym or yard.

5.9 The Applicant alleged that he did not have access to structured activities, work, vocational training, education or programmes. The Respondents have clarified that he has not applied for any such programme and, while this was challenged on affidavit, no supporting documentation was exhibited and this part of the claim is no longer relied upon. Thus, the Applicant has not shown that he is not permitted to engage in structured activities.

5.10 The Applicant made claims in respect of deficiencies as regards screened visits with family and problems in arranging professional visits from his solicitor. All claims for declarations or other relief in respect of visits have now been abandoned in the wake of averments to the contrary in the responding affidavit sworn by the first named Respondent.

5.11 Finally, and for completeness, the Applicant alleges that the decision to categorise him as a rule 63 prisoner is negatively impacting on his mental health, but he has produced no supporting evidence to this effect and has made no request to see medical staff in relation to medical or mental health issues arising from being placed on rule 63.

5.12 The true picture of conditions in this Applicant's case, therefore, is that the reason he has no structured activities is that he has failed to apply for any programmes and the lack of companionship arises from his refusal to associate with any prisoner on his wing or any other prisoner in the building, save two men in respect of whom the Respondents offer reasonable grounds for refusing to facilitate the specific, and only, requests. On its facts, therefore, this Applicant has not brought himself, to use the formulation of O'Malley J., into a situation which is *de facto* akin to a rule 62 regime, so as to attract the procedural requirements of rule 62. Furthermore, at least one of the safeguards to which he is not necessarily entitled, but which was afforded him nonetheless, is the weekly review of his position which was confirmed on affidavit and documented in minutes exhibited by the Respondents.

5.13 In *McDonnell v the Governor of Wheatfield Prison*, [2015] IECA 216, the prisoner was also designated a vulnerable prisoner under rule 63. He was held on 23-hour lock up and had been effectively segregated from other prisoners. He had no access to educational or

vocational facilities. In the High Court, he had obtained injunctive orders due to what were found to be disproportionate and excessive restrictions on his constitutional rights, despite the threat identified. The danger to his person was accepted in that case. Ryan P. delivered the decision of the Court of Appeal overturning the High Court decision. He pointed out that the Governor's task was a very difficult one and that the oral evidence in the case had established the numerous efforts made to vindicate this prisoner's rights. The association with other prisoners had been rendered impossible when he fell out with two of the only prisoners who were willing to associate with him. Notwithstanding this evidence, the trial judge had made various orders, including mandatory orders about association. The Court of Appeal confirmed that the decision under rule 63 was one that was subject to judicial review but that it is for prison authorities to decide what measures are necessary for the safety of prisoners. Only a high level of threat justifies severe restrictions on a prisoner, but that the level of threat in the case was extremely high. Again, while confirming that decisions as to restrictions were reviewable, the Court held that a large measure of discretion has to be afforded to the prison authorities in such cases. Finally, the Court noted that a prisoner is obliged to cooperate with prison management and cannot by "*wilful disruption or breach of discipline or refusal to obey rules or cooperate contrive to bring about a situation in which his conditions are unpleasant or worse and nevertheless obtain relief from the courts*." This comment, when applied to the factual position arising here, confirms the Court in its view that it is not appropriate for the Court to order that rule 62, or any part thereof, be applied in this case or to grant declaratory relief to that effect.

5.14 Finally, in this respect, the court notes the decision in *Devoy v. Governor of Portlaoise Prison* [2009] IEHC 288. There, Edwards J. considered the issue of a prisoner in substantial isolation, finding that this may, over time, amount to sensory deprivation comprising a breach of a prisoner's right to bodily integrity. The Court confirmed that no prisoner is entitled to confinement in a particular prison or wing of a prison. Edwards J. also referred to the wide discretion enjoyed by prison governors as to prisoners' placement within the system, including the question of association within a prison. On the facts in that case, rule 62 should have been applied and the Court granted a declaration that the decision to restrict the prisoner's association was unlawful but refused *certiorari* on the basis that quashing the decision to keep the applicant on a particular wing would be "wholly inappropriate" in such a case. There is insufficient evidence in this case to warrant a declaration that rule 62 should have been invoked.

6. Confidential Information and Rule 63

6.1 Having decided that rule 62 does not apply on the facts of this case, the Court will nonetheless consider a remaining issue in this case, insofar as the Applicant may choose to invoke one of the other avenues open to him in querying the decision to apply rule 63 in his case. While any comment in this regard must be *obiter*, given the decision already reached, arguments were addressed to the question of the confidential information in the case, and the Court offers the following observations in that regard.

6.2 The Assistant Governor avers that the decision to invoke rule 63 was made on the basis that there was a serious, continuing and viable threat to the Applicant's life. He states that a record was kept of the direction pursuant to rule 63(3) and that the decision is reviewed on a weekly basis. Supporting documentation was exhibited comprising notes of weekly meetings at which this Applicant's status appears as a regular item on the agenda. He states that the applicant was served with the sole form required by rule 63 on the 31st of January, 2020. Looking at the requirements of rule 63, there is no obligation to serve a new form each week, nor must the form be served on the solicitor for the Applicant . There is no obligation to identify a date on which the rule will cease to apply as, by definition, this date cannot be known in advance. This argument was rejected in *McDonnell* (see para 76) for exactly that reason. Rule 63, therefore, appears to have been followed by the Respondents.

6.3 The Assistant Governor claims he is in possession of confidential information that the Applicant was and continues to be at significant risk of being harmed or killed by other inmates. In his affidavit, he gives a broad outline as to the sources of the threats, but no detail. It is averred that the threats to the Applicant are assessed as credible and for operational and security reasons the nature and source of the information must be treated as highly confidential to protect the sources and to allow good order and security in the prison.

6.4 The Applicant contests the basis for the decision to invoke rule 63. He claims that he knows something of the origins of the information, naming particular sources. He accuses the Respondents of shifting their rationale in that he believes that the threats have been alleged to emanate from different sources at different times. The origin of this information is not clear. It may be informally from prison staff or from other prisoners but, in any event, the Applicant appears to know more of the content of the confidential information than the Court does. The submissions in this regard suggest that there is no issue as to the Assistant Governor being in receipt of information but that the reliability of the information is disputed, however it may be that the Applicant accuses the Respondents of fabricating the threats, although this has not been said expressly.

6.5 The Applicant served notice to cross-examine the deponent for the Respondents and this motion was heard by Mr. Justice Humphreys who refused leave to cross-examine. Humphreys J. held that the fact that the Assistant Governor was in receipt of such information was not a matter in dispute but the Applicant sought to explore and weigh the information. That decision was not appealed by the Applicant who proceeded with his application to this Court without leave to cross-examine the named deponent.

6.6 The grounds on which this decision was made are instructive insofar as they concern the confidential information received by the Governor. The application was made in order to permit counsel to "explore the information". In that respect, Humphreys J. ruled:

> "Aside from truly exceptional categories (like political questions) that are not relevant here, no decision is beyond review; but in practice such review in the case of a decision based on information from confidential sources can only be based

either on legal points or on some cogent evidence to the contrary from the applicant, because it would be entirely contrary to the public interest to engage in an exploration of confidential information received by public authorities."

6.7 That ruling applies to the specific facts of this case and one can see readily that the series of inconsistencies within this Applicant's affidavits informed the ruling generally. Turning to the confidential information issue, if such information is to be explored, the first difficulty is in the disclosure of the information. If the Applicant were entitled to receive and review such information himself, the management of a prison would be rendered more difficult and the danger to such informants exacerbated in a wholly disproportionate way. The potential sources of such information would be reluctant to continue to assist the prison service with potentially useful and occasionally life-saving information. Setting out the practical end result of an order giving leave to cross-examine on this point, serves to highlight the overwhelming policy reasons against granting that order. The decision to refuse the application to cross-examine on the contents of the confidential information was inevitable in these circumstances.

6.8 The Applicant avers that he is not aware of any threat to his life and furthermore believes the names put forward by the prison authorities, of persons who represent a threat, do not represent a threat to him, and have denied any animosity towards him. He asserts "this is a convenient mechanism for the Governor to keep me on 23 hour lock-up" and he states that the Governor has given conflicting rationale for using Rule 63. This "conflicting rationale" refers to the Applicant's averment that different names have been put forward as the authors of the threats described. Again, the Court notes that there is no source for the Applicant's averments in this respect and the averments do not in fact point to a shifting rationale, which remains the same, but to a changing basis for the same rationale, which may very well be an accurate and sound basis.

6.9 As a matter of first principles it is important to note that in the exceptional cases, such as this one, where a threat is identified but the prisoner does not accept that it is reliable, it is nonetheless an important duty of the governor to ensure that it is not carried out. This may perhaps go without saying but certain averments of this Applicant suggested that he was best placed to assess the gravity of any threat and there should be no question of it being a matter for a prisoner to make the decision as to whether and how he should be protected.

6.10 One can trace the line of authority as regards the treatment of confidential information in court for different purposes through various superior court decisions to recent cases such as *A.P. v the Minister for Justice and Equality*, [2019] IESC 47 and *Doody v Governor of Wheatfield Prison*, [2015] IEHC 137. In Doody, Noonan J. considered an application to review a remission decision. One of the grounds argued was that the decision not to grant a third remission to the applicant was because of a view formed by the Respondents which was based on confidential information which was not revealed to the prisoner applicant. In an affidavit, this evidence was described as a confidential report from the Gardaí, who indicated that they were not of the view that the applicant was unlikely to re-

offend and that their view was that he remained a potential threat to the safety and security of members of the public. The applicant argued that this report had not been revealed to him until referred to in the proceedings and that, as a confidential report in respect of which the basis for those views was not revealed, it was effectively insulated from review or challenge.

6.11 Mr. Justice Noonan discussed the tension between the argument that reasons should be given for any judicial or quasi-judicial decision involving the rights of an applicant and the public policy reasons that might restrict or even deny that right. It is worth quoting his comments in full:

"24. In the wake of the decision of the Supreme Court in Mallak v. Minister for Justice [2012] 3 I.R. 297, cases where decision makers are absolved from the duty to give reasons must be exceedingly rare...

25. Where reasons must be given, as in most cases, the nature and extent of the reasons will necessarily vary by reference to the circumstances of the case… there have been many cases where brief and succinct reasons have been held sufficient... cases may arise where the nature of the issue concerned imposes a duty on the decision maker to furnish detailed and elaborate reasons.

26. In the present case, it cannot be said that no reasons have been furnished by the Minister. Clearly two have been given. The first one is the nature and gravity of the offence and the second the potential threat to the safety and security of members of the public. On their face, these are clearly valid reasons ....

27. With regard to the second reason, the applicant complains that it has no basis in fact, or at least one of which he has been made aware. If such conclusion derives from the content of the Garda report, then the applicant says he is entitled to see it, even in redacted format, or at the very least to be given the gist of the complaint against him. Mr. Hickey says that this cannot be facilitated in the public interest and has explained why. For obvious reasons, the Minister has to be able to receive information from An Garda Síochána that is full, frank and uninhibited by reference to the need to protect sources who might otherwise be placed in danger or the need to maintain confidentiality in relation to criminal intelligence matters.

28. The inevitable tensions between these opposing points of view gives rise to a troubling dilemma. One can readily appreciate how the applicant may feel aggrieved by being deprived of the opportunity to address something which may be decisive but is unknown to him. On the other hand, it is easy to conceive of circumstances where disclosure of even the gist of the complaint would have the effect of revealing the source who might thereby be endangered.

29. In delivering the judgment of the Supreme Court in Mallak, Fennelly J., with considerable foresight, said: '79...it will be a matter for [the Minister] to decide what procedures to adopt in order to comply with the requirements of fairness. It is

not a matter for the court to prescribe whether he will give notice of his concerns to the applicant or disclose information on which they may be based or whether he will continue to refuse to disclose his reasons but to provide justification for doing so. Any question of the adequacy of reasons he may actually decide to provide or any justification provided for declining to disclose them can be considered only when they have been given.'"

6.12 This Court agrees with the reasoning set out above. Clearly, it could be dangerous to reveal the source, or even the contents, of information such as that in the present case. Equally, one can readily understand the frustration of an applicant who seeks to challenge the rationale for a decision that has such an impact on his detention. Noonan J. went on to consider the authorities on temporary release and remission insofar as they referred to confidential or sensitive information and he concluded at paragraph 47: *"All this, it seems to me, adds up to the fact that this is a case that falls into the 'sensitive intelligence information' category. In this type of case the duty of fairness requires no more than the decision maker acts honestly and without bias or caprice*."

6.13 In order to ensure that this is the case, however, and bearing in mind the words of Fennelly J., there should be a procedure whereby both the rights of the prisoner and the safety of the source are protected. There is a mechanism whereby the Applicant can seek to review this decision or test the basis for it, and it lies in the Grievance Procedures under the Prison Rules. The rules provide for a governor's meeting with prisoners (rule 55), and for a prisoner's meeting with the visiting committee or with an officer of the Minister (rules 56 and 57). Under rule 57. (1), if a request is made, in writing, to the Governor to meet with an officer of the Minister (other than the Governor, a prison officer or any other person working in the prison) "*the Governor shall, upon receipt of such request, forward the request without undue delay to the Director General*."

6.14 There are detailed provisions as to how such a meeting should take place and be recorded. Should such a meeting be requested, it appears to be a suitable mechanism whereby the contents of the confidential information could safely be revealed to one who could review the decision, knowing all of the facts on which the decision was based. This would be a proportionate response to the dilemma identified by Noonan J., above, between the importance of open and candid relationships (between prisoners, prison service personnel, and members of An Garda Siochana, if that arises in the case) and the right of a prisoner to know that a decision is a reasonable one, taken in his interests and reviewable by an independent party even if the nature of the information on which it is based cannot be revealed to him.

6.15 In *A.P.*, the Supreme Court considered the issue of challenging the basis for a decision when the applicant does not have access to the information on which the decision was based. Clarke C.J. acknowledged the difficulties in cases (such as this one) in which overriding State interests preclude disclosure and confirmed that the court remains the final arbiter in terms of the fairness of any procedure adopted. The processes described in *A.P.* at paragraphs 5.12 to 5.17 of the judgment, such as providing a synopsis of the

information or ensuring that an independent person assesses it, are the kind of processes envisaged by rule 62 and which might be invoked successfully by the Applicant by using the grievance procedures. It should be noted that in this case, to use the wording of the Chief Justice, it appears that the gist of the information has been given to this Applicant. A court can only become involved in the issue at a point when procedures provided have been exhausted or if the argument is made that these procedures are inadequate in a particular case.

7. Conclusion

7.1 The rule 62 regime may, in certain circumstances, apply to a rule 63 prisoner. Looking at the facts of this case, however, the circumstances in which it might apply do not arise here. This Applicant has not been made the subject of a regime as restrictive as those which applied in the cases on which he relies, despite his having averred initially that this was such a case.

7.2 As in *Doody*, the decision (to invoke rule 63) in this case was not arbitrary or irrational. It was based on confidential information and there is no basis on which to quash that decision. Instead, the complaint is that it cannot be challenged and that it was not subjected to any procedural safeguard such as those contained in rule 62. The Prison Rules cannot be rewritten by the courts and if the Applicant does not come within the restrictions of rule 62, he may not claim the right to the protection it affords. It does appear that the protection of rule 62(9) would be a reasonable protection for a prisoner in this situation but the same effect can be achieved through the grievance procedure under rule 57(1).

7.3 The reliefs sought are refused.