

THE HIGH COURT

[2024] IEHC 34

[Record No. 2023/3JRP]

BETWEEN

STEVEN PENROSE

APPLICANT

AND

**THE GOVERNOR OF MOUNTJOY PRISON, THE IRISH PRISON SERVICE AND THE
DEPARTMENT OF JUSTICE**

RESPONDENTS

JUDGMENT of Ms Justice Bolger delivered on the 26th day of January 2024

1. This is the applicant's application for discovery pursuant to his judicial review proceedings against the respondents arising from what he says were unlawful periods of detention in solitary confinement for extended periods of time from December 2021 to date.

Background

2. The applicant was sentenced to imprisonment for life on 13 December 2021, having been in custody in respect of the same charge since 17 May 2017. Most of his detention to date has been in Mountjoy Prison, but he has spent some periods of time in other prisons. The respondents have pleaded that the applicant's restricted regime in solitary confinement (the official term for which is the Challenging Behaviour Unit) was due to threats he made against staff and disciplinary sanctions imposed on him as a result of his conduct.

3. By decision dated 25 July 2023, Barr J. granted the applicant leave to seek *certiorari* of the Prison Governor's decision to place the applicant in solitary confinement. The applicant's statement of grounds was dated 5 November 2022, but was not received by the Central Office until 6 March 2023. The applicant had brought a motion to extend the time to seek judicial review as part of his application for leave. Barr J. did not refer to that application in his decision and did not specify the timeframe of the solitary confinement over which he was granting leave, although it is clear that it is the Prison Governor's decision to place the applicant in solitary confinement that the applicant has leave to challenge. A decision to

place the applicant in solitary confinement was first made in December 2021 and, since that time, the applicant has spent various, separate periods of time in solitary confinement.

4. The respondents accept that they filmed the applicant whenever he was outside of his cell from October 2021 to November 2022. The applicant seeks discovery of all of that footage. The respondents have agreed to give him three days of footage only (for reasons which will be explained further below) and say any more is irrelevant, not necessary, constitutes fishing and would be unduly onerous.

Conflicting claims

5. The applicant says he was placed in solitary confinement and his frequent requests to be moved were refused. The Prison Governor has averred on affidavit that he repeatedly offered the applicant a move out of solitary confinement. The applicant accepted during his submissions to this court that he did refuse to move from solitary confinement on a few occasions due to pending court applications, but otherwise he says the many references made by the Governor to him refusing to move from solitary confinement are untrue. The Governor exhibited his log which refers to a number of occasions when the applicant refused an offer to leave solitary confinement. In the course of his oral submissions to the court, the applicant said he was asking virtually every day he was in solitary confinement to be moved. The Governor's log does not refer to any of those requests.

6. There is, therefore, a distinct conflict on the evidence between the applicant and the respondent as to the applicant's claim of having made frequent requests to be moved from solitary confinement and the respondent's claim that the applicant was offered to leave solitary confinement on a number of occasions, which he refused.

The applicant's case

7. The applicant confirmed in correspondence of 6 December 2023 that he seeks discovery of the footage as he believes it will prove that he was unlawfully detained in solitary confinement and that the Governor's affidavit is untrue. He told the court that he has a large amount of documentation that will prove his case and that the footage is "extra" to what he already has but that he was not going to "reveal my hand" at this stage. He said he had very detailed and accurate notes of every conversation he had had with prison staff while he was in solitary confinement, including with the Governor, as he had little else to do. Nevertheless, he did not utilise those notes to narrow down the days or times of the day for which he wanted to see the footage.

8. During his submissions to the court the applicant said that he made requests to move from solitary confinement every Monday, and later suggested it might have been Monday or Tuesday or both. However, he was more definitive in saying that he requested a move from solitary confinement every day throughout all of January 2022. He also referred to 25 July 2022 as a day on which significant events occurred, three days after he was moved from the C-base to solitary confinement. He said the footage for that date would show that the entries in the Governor's log were "*complete lies*". He said he was told on that day that he would be moved, but that he had heard nothing further until 14 September 2022. The entry in the Governor's log for 25 July 2022 says that there were no requests. There is an entry for 14 August 2023 referring to an offer made to the applicant to move out which the log says he refused.

The respondents' position

9. By letter dated 15 November 2023, the respondents agreed to make discovery of the footage in respect of 14 September 2022, 17 October 2022 and 15 November 2022, as they say they were the dates on which the applicant was offered a move from solitary confinement which they say he refused and that the footage for those days could potentially be of relevance to the proceedings. The applicant claims that those dates are selective and that the respondents are trying to mislead the court.

10. The respondents contend that the remainder of the footage is irrelevant and unnecessary to the applicant's case and that making discovery of the hours and hours of footage that exists would be excessive and unduly onerous. They submitted that the trial judge will only have jurisdiction over what happened going back three months from the date on which the applicant's statement of grounds was filed in the Central Office on 6 March 2023, or at the earliest going back three months from 5 November 2022 which is the date on the statement of grounds and that no discovery outside of that timeframe should be given.

Decision

11. The time limit issue does not disentitle the applicant, in principle, to the discovery he seeks, given that Barr J. did not limit his leave to any specific period of time even though an application to extend time was before him and the first occasion on which the applicant was put in solitary confinement was December 2021, well before the three-month time limit, whether that is calculated from the date on the statement of grounds or the date on which

it was received in the Central Office. It will be a matter for the trial judge to determine the time of the applicant's solitary confinement over which the court may have jurisdiction (on which I make no decision). It would not, therefore, be safe or appropriate to pre-empt that decision by limiting the temporal scope of the discovery to be made, if any.

12. I move now to consider the merits of the application for discovery. The applicant cited nothing, apart from his own assertions of truth and lies, to supplement his claim that he was entitled to discovery of the footage in order to challenge the truth of the respondents' affidavits (or, as he put it, to prove that they were all lies). Such bare averments are insufficient, particularly from an applicant who seems to claim to be sitting on some of the evidence that he says he has. I follow the decision of the Court of Appeal in *BAM v. NTMA* [2015] IECA 246 where Ryan P. held that "[d]iscovery cannot be used merely to test averments" (at para. 37) in the absence of evidence to support the grounds advanced. Whilst the applicant may be afforded some indulgence as a lay litigant, particularly one who is currently in custody, that cannot allow the clear requirements of the jurisprudence to be overridden.

13. However, I do accept that there may be footage that could be relevant to the applicant's case and could assist him in proving matters that are central to his challenge which are clearly in dispute. In his decision granting leave, Barr J. stated the following at para. 29:-

"The applicant stated in argument, and it has not been denied on affidavit by the respondent, that since his confinement in the prison in December 2017, he has been followed on an almost continuous basis by a prison officer holding a video camera, who has been recording all of his movements. If that is indeed the case, then his assertion that the P19 reports against him are false, will be capable of being proved, or disproved relatively easy."

I am assuming that the reference to December 2017 should read December 2021.

14. The long period of time for which there is footage in existence, alongside the applicant's failure to specify what parts of it are relevant and why, supports the respondents' case that seeking the entirety of the footage from December 2021 to November 2022 is of questionable relevance and is excessive. Some of the absence of detail on affidavit or in the applicant's correspondence might be explained by the applicant's status as a lay litigant currently in custody but even so, I do not think the respondents should have to make the

entirety of the footage available, as the applicant has sought. The scope of the discovery must be narrowed. The applicant was adamant that he made daily requests to be moved in January 2022 and that the footage from 25 July 2022 would prove his case and disprove the veracity of the Governor's affidavit and Governor's log. I have had particular regard to the views of Barr J. when he granted leave as to the relevance of the footage in resolving the clear factual dispute between the parties, a dispute that goes to the heart of the applicant's case that the solitary confinement to which he was subjected was unlawful and was not justified by his conduct, as the respondent alleges, and that he did not refuse the respondents' asserted offers to move. I do not consider requiring the respondent to make discovery of footage for those days will be unduly onerous or excessive particularly as they have already agreed to make discovery of three days of footage that they identified.

15. I therefore direct the respondents to make discovery, in an appropriate format, of the VEAG camera footage of the applicant, to include any conversations he had with the Prison Governor or other prison staff, for every day in January 2022 and for 25 July 2022.

Indicative view on costs

16. My indicative view on costs, having regard to the provisions of s. 169 of the Legal Services Regulation Act 2015, in circumstances where the applicant has succeeded in securing some of the discovery that he was seeking, is that there should be no order as to costs because:-

- (i) The applicant will not have incurred any significant expenses as he is a lay litigant in custody;
- (ii) The applicant originally sought a great deal more discovery than he has succeeded in obtaining, some of which was agreed to by the respondent and did not have to be pursued in this application;
- (iii) The applicant's failure to clearly state dates on which he had requested a move from solitary confinement, along with the confusion caused by the fact that he accepted, in the course of making his application to court, that he had refused to move from solitary confinement on a number of occasions because he had a court application coming up. Had those dates and issues been properly clarified on affidavit or even in correspondence before the hearing of this application, there may have been scope for the respondents to have considered providing more footage by way of voluntary discovery.

17. I will put the matter back before me for the making of final orders, including the identity of the deponent and the time within which discovery is to be made, at 10:30am on the 8 February 2024.

The applicant appeared in person.

Counsel for the respondents: Joe Holt BL