

**JUDICIAL REVIEW
THE HIGH COURT**

**[2024] IEHC 441
RECORD NUMBER 2022 /240JR**

BETWEEN

ALAN COYNE

APPLICANT

AND

**THE GOVERNOR OF CASTLEREA PRISON, MINISTER FOR JUSTICE AND EQUALITY,
IRELAND AND ATTORNEY GENERAL**

RESPONDENTS

Judgment of Ms Justice Denise Brett, delivered on Tuesday, 18th June 2024.

The proceedings:

1. By way of *ex parte* docket dated the 8th of February 2022, together with a Statement of Grounds dated the 22nd of March 2022, the Applicant initiated judicial review proceedings seeking various reliefs against the Respondents arising from close confinement measurements imposed on him in the First Respondent's prison from 14th to 28th February 2022, as a result of being identified as a close contact of Covid 19 present in the prison. The application was grounded upon the affidavit of Ms Fiona Baxter, solicitor for the Applicant, sworn on the 22nd of March 2022 ("*2022 Affidavit*").
2. By Order of the High Court (Meenan J.) made on the 4th of April 2022, the necessary leave application was directed to be brought on notice to the respondents. This application came on for hearing, and was fully contested, on the 15th of June 2023 (Meenan J.). By Order dated 11th of July 2023, leave to bring these judicial review proceedings was granted by the Court but for more limited reliefs only, being a claim for damages and ancillary declarations. Reliefs relevant to the Covid regime were refused, being effectively spent.
3. Notwithstanding the more limited grant of leave by the High Court, a Notice of motion dated the 13th of July 2023 was served by the Applicant seeking all of the original reliefs, premised upon the grounds set out in the original Statement of Grounds, already served. No further affidavit was filed at that time. No affidavit of the Applicant personally has been filed in the proceedings.
4. A Statement of Opposition, dated the 6th of February 2024, was delivered by the Respondents, together with the verifying affidavit of Ms Donna Craven, Director of

Corporate Services for the Irish Prison Service and affidavit of Mr Niall Higgins, Assistant Governor of Castlerea Prison, both sworn on the 6th of February 2024, in response to the proceedings.

5. The affidavit of Ms Creaven runs to 26 paragraphs with 15 exhibits (376 pages in all) and sets out the systems and processes devised by the Irish Prison Service to manage Covid outbreaks in the national prison system, and includes the First Respondent's prison, adapted from general health guidance in the community. The brief affidavit of Mr. Higgins' is directed solely to outlining the cleaning system and schedule operated in the prison at the time. The Applicant has not sworn any affidavit contesting the averments in either affidavit.
6. By way of Notice of Motion dated 3rd of April 2024, the Applicant now seeks an order for leave to cross examine both Respondent deponents on the contents of their respective affidavits, which application is grounded upon the affidavit of Ms Fiona Baxter sworn on the 20th, March 2024 ("*2024 Affidavit*").
7. Legal submissions have been filed on behalf of the parties; by the Applicant dated 17 May 2024 and the Respondents dated 31 May 2024.

The Applicant's arguments:

8. The Applicant's primary argument was to the effect that he should be entitled to cross examine the Respondent deponents on their affidavits 'to tease out' the various averments made therein, in particular in the affidavit of Donna Creaven, and 'explore the rationale' for the Applicant's confinement.
9. In the March 2024 affidavit of Ms Baxter grounding the motion, three particular topics arising in Ms Creaven's affidavit are touched upon as necessitating such cross examination, namely: the Applicant remaining in quarantine notwithstanding returning a negative COVID test himself; what are alleged to be 'vague assertions' regarding restrictions on access to showers and the return to work of prison officers after only seven days when quarantine for the Applicant was a fortnight.
10. Counsel did not identify any conflict arising on the factual matters set out by Ms Creaven and indeed expressly argued he was not required to do so as Order 40 was not restricted to identifying a fact in conflict. Mr. McDonagh SC asserted that probing cross examination of the State Respondents was appropriate given the obligation on the State in judicial review to 'play with all their cards open on the table', particularly where constitutional rights were in issue and the question of the proportionality of any interference with such rights arose. Reliance was placed on *Holland v Governor of Portlaoise Prison [2002] IEHC 208*, (McKechnie J.) and *SF v Director of Oberstown Children's Detention Centre [2017] IEHC 829* (Ní Raifeartaigh J.) in this latter regard.
11. Insofar as any conflict of fact was suggested, the averment of the Applicant's solicitor in her earlier 2022 affidavit that "[t]he Applicant requested cleaning materials to clean his cell but was refused same" was contrasted with the cell-cleaning practices

said to have operated at the time, set out in the affidavit of Mr. O Higgins in February 2024.

12. Mr. Farrell SC, on behalf of the Respondents, emphasised the nature of judicial review proceedings grounded on affidavit; the free-roving nature of the cross examination being sought, amounting to a radical reformulation of the established test; the comprehensive nature of the affidavit of Ms Creaven, with detailed exposition of the protective measures necessary for a Covid 19 outbreak in a prison, with which the Applicant had not engaged in reply; and the absence of any factual conflict or contradictions in the affidavits, albeit he acknowledged the differences on the cleaning regime. He did not argue such differences merited cross examination but if the court was so minded to permit, he urged the setting of careful parameters on any such cross examination.

The law:

13. The cross-examination contended for by the Applicant flies in the face of well established authority confirming the need to establish a conflict between affidavits which requires resolution in order to fairly determine the proceedings before cross examination will be permitted. Whether the conflict is as to fact (the most general view) or inference / opinion on agreed facts (per O' Donovan J. in *Director of Corporate Enforcement v Seymour* [2006] IEHC 369) or otherwise, the common denominator throughout the authorities on any application to cross examine a deponent is the existence of a conflict requiring resolution before the proceedings can be fairly determined one way or the other. Cross examination in non-plenary hearings is the exception rather than the rule. The Court of Appeal (Noonan J) in *Hegarty v Garda Commissioner* [2021] IECA 398, at [31]-[36] have summarised the principles arising, availing of *Delany and McGrath on Civil Procedure* (4th Ed). Both parties referred to the 5th edition in the course of argument, which sets out the position at paragraphs 21-117 to 21-127, including the several authorities (at n.256) underpinning the general approach of the courts (confirmed in *Hegarty*) "*that leave to cross examine will only be granted if there is a conflict of fact upon the affidavits that is necessary to resolve in order to determine the proceedings*".
14. Kelly J. in *IBRC v Moran* [2013] IEHC 293 at [15] indicated: "*it is incumbent upon an applicant for such an order to demonstrate (1) the probable presence of some conflict on the affidavits relevant to the issues to be determined and (2) that such issue cannot be justly decided in the absence of cross examination.*" The Applicant refers to *Bank of Ireland v Ward* [2019] IEHC 235 (McGrath J) at paragraph 11 of his submissions, confirming this position.
15. Counsel for the Applicant also relied upon two further cases of *EE v Child and Family Agency* [2016] IEHC 777, in which Humphries J permitted cross examination in the context of a particular family rights case. This judgment was reversed on appeal ([2018] IECA 159) and I do not rely on it. *AIB & Ors. V O Callaghan & Ors* [2021] IEHC 14 (Simons J), were summary summons proceedings where cross examination was permitted on "*sweeping statements which go well beyond the mere citation of or comment upon the content of documents*" it also does not assist the Applicant. That

application concerned the different context of a summary summons procedure and Order 37 r.2 Rules of the Superior Courts. I do not consider it an equivalent comparator to the instant application. A number of contradictions were evident across the affidavits in that case, including across those of the defendants. In my view, it cannot be said the affidavit of Ms Creavan explaining the creation and operation of the various measures and operational practices necessitated by Covid 19 in the prison context amounts to the 'sweeping statements' akin to the criticised commentary in the AIB case.

Decision:

- 16.** Against such weight of authority, I cannot accept the unbridled, broader cross examination the Applicant seeks is appropriate in these proceedings. One of the principles summarised by the Court of Appeal in *Hegarty* (above), citing the 4th edition of *Delany & McGrath*, confirms that "*in order for the requisite conflict to arise, it will be necessary for the party seeking cross examination to have filed an affidavit challenging the accuracy of the matters upon which cross examination is sought*" at [31]. No such affidavit has been filed by the Applicant. Ms Creavan has set out the Respondents' position at length in her February 2024 affidavit, with extensive exhibits. No attempt to proffer conflicting or challenging evidence has been advanced by the Applicant. There is no assertion the procedures adopted were in some way wrong. There was no evidence the Covid 19 regime applied in the prison context as outlined by Ms Creavan was inappropriate. No appropriate alternative prison regime was suggested. No foundation for any cross examination of Ms Creavan has been laid. No conflict has been identified with her affidavit, much less one which requires resolution for fair determination of these judicial review proceedings.
- 17.** The height of any factual conflict identified by the Applicant is the bald assertion in Ms Baxter's original March 22 affidavit that no cleaning products were provided to the Applicant as against the cleaning regime said to have operated in the prison at the time, as outlined by Mr. O Higgins in his affidavit of February 2024. The Applicant himself has not sworn to any position and, more pertinently, has not engaged with the matters detailed in Mr. O Higgins affidavit. In those circumstances I do not find that the earlier bare assertion, in a solicitor's affidavit rather than of the Applicant's own evidence, is sufficient to establish the necessary conflict of fact. "*Mere denial or non-acceptance of facts deposed to by a respondent cannot, without more, give rise to a right to cross-examine*" (per Noonan J in *Hegarty*, at [36]).
- 18.** Cross examination of a deponent in judicial review is appropriate for the specific purpose of resolving a determinative conflict of fact (see *RAS Medical Ltd v The Royal College of Surgeons of Ireland [2019] 1 IR 63*) and should be confined to that purpose. The nature of the cross examination sought by the Applicant is more in the nature of exploration, investigation and interrogation of the issues which is appropriate, in my view, to a plenary action with full oral evidence.
- 19.** In this regard, with damages being the substantive relief remaining, I was informed at the hearing that this was specifically addressed before Meenan J in the course of the contested leave application. The Applicant had the opportunity then to seek to have

these judicial review proceedings converted to plenary action but did not avail of that opportunity. Counsel for the Applicant specifically confirmed to the Court he was not seeking to do so in the course of this application when questioned on it. Mr. Farrell argued the 'buyer's remorse' in any belated appreciation of a plenary hearing when it came to a desire for cross examination, but highlighted such action is in the wrong jurisdiction given the likely damages arising. In any event, any desire for a plenary hearing is not a sufficient reason to recast the long accepted test for directing cross examination of a deponent in judicial review proceedings.

20. In addition, it seems to me that the arguments the Applicant wishes to advance, particularly on proportionality and breach of constitutional and convention rights, can be advanced by way of legal submissions on the facts set out, as occurred in the *Holland* and *S.F.* cases relied upon. *Dunnes Stores v Dublin City Council [2016] IEHC 724* at [17] confirms that cross examination would be inappropriate where the matters in dispute can be adequately or more properly dealt with by way of legal submissions. In that case he also noted that "*a roving cross examination is not permissible*".

21. In all the circumstances, I refuse the application.