THE SUPREME COURT

Record No. 132/06

Denham J.
Geoghegan J.
Kearns J.

BETWEEN/

ALAN BURNS AND JOHN HARTIGAN

Applicants/Respondents

and

THE GOVERNOR OF CASTLEREA PRISON

Respondent/Appellant

and

THE MINISTER FOR JUSTICE, EQUALITYAND LAW REFORM

Notice Party

Judgment of Mr. Justice Geoghegan delivered the 2nd day of April 2009

The net question which arises on this appeal is whether a prison officer against whom complaints have been made of alleged breaches of the Disciplinary Code for Officers is entitled to legal representation at an oral hearing before the Governor of the Prison established under the Prison (Disciplinary Code for Officers) Rules, 1996 (S.I. No. 289 of 1996). The issue comes before this court in the form of an appeal from an order of the High Court (Butler J.) quashing a penalty determination by the Governor of Castlerea Prison in an application for judicial review brought by the above-named respondents Alan Burns and John Hartigan, the two accused prison officers.

Rule 8(2) of the Disciplinary Code embodied in the above cited rules reads as follows:

> *"The accused officers shall be present throughout an oral hearing and may put forward his or her answer to the allegation and call any relevant witness."*

The mandatory part of that sub-rule required the accused prison officers to be present at the hearing. In obedience to that provision, both respondents were present but the Governor conducting the hearing was informed that they were only present for that reason and were not going to participate in the hearing as the Governor had, both in prior correspondence and at the hearing itself, expressly refused them legal representation. Significantly, the express grounds given by the Governor for the refusal was that the Disciplinary Code did not provide for legal representation.

The learned High Court judge took the view that the charges were sufficiently serious to warrant legal representation and that in those circumstances such representation ought to have been provided notwithstanding the absence of any specific mention of such representation in the rules. I will be giving details of the charges in due course and I will also return to the judgment of Butler J. I would like to refer first to the legal case put forward on behalf of the Governor in this court.

Mr. James O'Reilly, S.C. appearing for the Governor argued strongly in support of the view which the Governor had taken that, under the rules, legal representation is not provided for and is, therefore, not permissible. The rules do provide for advocacy assistance but only from officers within the prison service. It would appear, however, that, as in this particular case, it was common practice for trade union representatives to act as advocates. It was not clear to me as to whether they were in the nature of seconded officers of the prison service. Mr. O'Reilly, in accordance with his instructions, was anxious to protect the principle enunciated by the Governor that the rules did not permit of legal representation and he fully conceded that that was the ground on which the Governor refused it. For this reason, he appeared understandably reluctant to engage with the court on the question of whether, even if the norm would be to disallow legal representation, there would be a discretion open to the Governor to permit it in an appropriate case. Examples of the kind of cases where it might arise were usefully listed by Webster J. in **R. v. Secretary of State for the Home Department, ex parte Tarrant** [1985] 1 Q.B. 251. I would adopt that list as a broad guideline and I will return to it later on in this judgment.

Mr. Horan, S.C., counsel for the respondents has sensibly agreed that if this court takes the view that the Governor had a discretion as to whether to allow legal representation or not, this court can then go on to decide whether in all the circumstances the decision which the Governor in fact made would have been the correct one on any exercise of that discretion. This will avoid futile and unnecessary expense in returning the matter either to the Governor or to the High Court.

I turn now to the basic facts of which it is necessary only to give a brief outline. The respondents were, at all material times, prison officers in Castlerea Prison. On the 26th April, 2002, they were detailed to escort a prisoner from the prison to Merlin Park Hospital in Galway for a medical examination. The respondents left the prison with the prisoner at 10.25 a.m. on that morning and returned to the prison at 6.25 p.m. that evening. As a consequence of a report made following a routine check by Assistant Governor Melvin three days later, the Assistant Governor reported that he had discovered that *"the prisoner's business"* was completed at 12.40 p.m. and that the escort returned to the prison at 6.35 p.m. There was an immediate *prima facie* allegation that the length of time in which the respondents were on the escort was wholly excessive with the consequence of an improper overtime claim. When Assistant Governor Melvin reported to the Governor, the latter directed further investigations. Statements were in due course made by the respondents. The investigations culminated in complaint forms pursuant to the above cited rules of 1996 being sent to the respondents on the 15th July, 2003. The complaints were threefold and read as follows:

"1. That on the 26th April, 2002 while assisting on the escort to Merlin Park Hospital, Galway i/c of Prisoner Anthony Massey you made a false and inaccurate statement with intent to deceive.

2. That on the 26th April, 2002 while assisting on an escort to Merlin Park Hospital, Galway i/c of Prisoner Anthony Massey you failed to carry out your duties in a prompt and diligent manner.

3. That on the 26th April, 2002 while assisting on an escort to Merlin Park Hospital, Galway you knowingly solicited an unauthorised gratuity."

In each of these complaint forms, the accused officers were referred for a summary of the evidence on which the allegations were based to Assistant Governor Melvin's report of the 25th April, 2002.

Following on the oral hearing already referred to, identical letters were written to each of the respondents by the Governor of the prison dated the 8th July, 2003 and in the following terms:

> *"I refer to the oral hearing held on the 7th July 2003 in accordance with the Prison (Disciplinary Code for Officers) Rules, 1996 on charges issued against you on 15th January 2003.*
>
> *In response to the charges as outlined against you, you stated through your advocate that you were 'not taking any part in the hearing because of deprivation of legal representation'.*
>
> *As pointed out to you at the hearing and indeed to your legal representatives in a correspondence of the 18th June anno. the code does not allow for any such legal representation in these matters.*
>
> *I am satisfied, based on the evidence presented and in the absence of any rebuttal of this evidence, that the alleged breaches of discipline have been proved.*
>
> *I am satisfied that there was unnecessary delay on the departure and intentional delay during the escort.*
>
> *Your conduct on this escort was totally unacceptable, created unnecessary overtime and contravened Governor's orders regarding escorts.*
>
> *As a consequence of your breaches of discipline I am reprimanding you with entry on your record sheet and I am recommending to the Minister that you should suffer reduction in pay by way of forfeiture of one increment for twelve months."*

The letter was then signed by the Governor, Daniel J. Scannell. Further letters in identical terms dated the 8th July, 2003 and also signed by the Governor were sent to each of the respondents and each of those letters read as follows:

> *"Following upon the adjudication of charges placed against you on the 7th July 2003, I am directing, for operational reasons, that future duties assigned to you shall be performed within the*

prison complex. This direction shall be reviewed after a period of twelve months.

I am satisfied that the time you spend on the escort was excessive and that a reasonable return time would be 3.30 p.m. as against 6.35 p.m. as you claimed. You are required to make good these three hours overtime payment which have been paid to you."

Nothing particularly turns on this, but I would be quite satisfied that stipulations contained in that second letter did not form part of the penalty as such but did, of course, arise as a consequence of what happened. The prison authorities clearly decided that if the respondents were unreliable escorts their duties should henceforth be internal. It was an operational decision as it is clearly stated to be. The requirement of reimbursement of three hours overtime payment was also simply a claim for a sum considered now to be due to the State.

The respondents obtained leave to seek judicial review of the Governor's decision. That judicial review was based on some additional grounds over and above the ground that legal representation ought to have been granted. However on the appeal the legal representation issue is the only issue and that is the only matter with which I intend to deal. On that primary issue the operative part of the judgment of Butler J. in the High Court makes clear that the learned High Court judge quite rightly was of the view that the absence of reference to legal representation in the rules did not necessarily preclude it. He claimed to be reinforced in that view by the judgment of Ó Caoimh J. in **Garvey v. Minister for Justice, Equality and Law Reform** (unreported judgment in the High Court 5th December 2003) where in a somewhat analogous situation that judge held that if the code was to exclude legal representation it could easily have done so by the use of clear and plain language. While that observation is valid, the Constitution itself might require legal representation in exceptional cases irrespective of the wording. The learned High Court judge pointed out that Ó Caoimh J. in the **Garvey** case in considering the very same rule had observed as follows:

"While these rules provide for representation by a fellow officer, I am satisfied that they do not either expressly or impliedly restrict any right to legal representation."

Butler J. rightly followed this approach. The question which I have to consider is whether he was correct in his view that on any proper exercise of the discretion by the Governor, legal representation would have been permitted. Butler J. expressed his views this way:

"The breaches with which the respondents stood accused were not in the least trivial, in that, at the very least, they suggested dishonesty on the part of the applicants in carrying out their duty. The potential penalties which the applicants faced included recommendations for a reduction in rank and dismissal from the prison service. I am satisfied that in the instant case natural or constitutional justice required that the applicants should be entitled to legal representation."

While there is obviously room for legitimate difference of opinion as to the proper exercise of a discretion in any given set of circumstances, I would take the view that legal representation was clearly unnecessary in this case. On one view, none of the charges were serious enough in the objective sense. However, I am reluctant to use that terminology given that at least one of them involves the alleged making of a deliberately false statement with intent to deceive. From a human point of view, that is a serious allegation in the mind of an accused but in the context of the factual matrix to this case, the charges could very easily be defended without a lawyer. The issues were factual issues connected with the day to day running of the prison. It is difficult to see why a lawyer would be required. The rules specify who is to be an advocate and, therefore, subject to the overall obligation of fairness they should be followed. The cases for which the Governor would be obliged to exercise a discretion in favour of permitting legal representation would be exceptional. They would not necessarily be related even to the objective seriousness of the charges if the issues of proof were purely ones of simple fact and could safely be disposed of without a lawyer. In any organisation where there are disciplinary procedures, it is wholly undesirable to involve legal representation unless in all the circumstances it would be required by the principles of constitutional justice.

I mentioned earlier in this judgment the **Tarrant** case. The criteria to be considered in the context of a request for legal representation as set out by Webster J. in that case have stood the test of time in the U.K. and I think that on a *prima facie* basis they could safely be adopted in this jurisdiction. I would add a rider however. In listing them, I am merely suggesting that they are the starting off points to be considered. Even if the case falls within one of these categories, in the context say of the Prison Officers Code, the Governor would still be entitled to consider whether a fair hearing would require a lawyer. The six matters suggested by Webster J. are as follows:

1. The seriousness of the charge and of the potential penalty.

2. Whether any points of law are likely to arise.

3. The capacity of a particular prisoner to present his own case.

4. Procedural difficulty.

5. The need for reasonable speed in making the adjudication, that being an important consideration.

6. The need for fairness as between prisoners and as between prisoners and prison officers.

I would approve of that list but it is a list merely of the kind of factors which might be relevant in the consideration of whether legal representation is desirable in the interests of a fair hearing. Ultimately, the essential point which the relevant Governor has to consider is whether from the accused's point of view legal representation is needed in the particular circumstances of the case. I would reiterate that legal representation should be the exception rather than the rule. In most cases the provisions of the rules will simply apply.

There are two other matters which I should mention. The first is that in the hearing in the High Court, Butler J. on the prompting of counsel had regard to a document called *"Memorandum of Understanding"* which preceded the 1996 rules, in interpreting those rules. However, since the delivery of the judgment of the High Court in this case on the 16th March, 2005, this court, in a judgment delivered the 18th July, 2005 by Hardiman J. and with which McCracken J. and Laffoy J. concurred in the case of **Curley v. Governor of Arbour Hill Prison** [2005] 3 I.R. 308, has held that the *"Memorandum of Understanding"* may not be used for the purpose of interpreting 1996 rules. For that reason, I have made no reference to that memorandum but at any rate consideration of it would have made no difference to the view I take on this appeal. The second matter relates to an argument made on behalf of the respondents based on Rule 5 of the 1996 Rules. That rule reads as follows:

> *"Nothing in these rules shall affect the right of a Governor or any officer whose duties include the supervision of another officer to deal informally (whether by advice, caution or admonition as the circumstances may require) with a breach of discipline of a minor nature."*

The argument was made that since the Governor thought fit to hold an oral hearing under Rule 8 and not deal with the matter under Rule 5, he was thereby accepting that the breaches of discipline in this case were not of a minor nature and that it further followed from that that any hearing in relation to them required legal representation. I would wholly reject that argument. Indeed if it was sound, the effect of it would be that there would be an entitlement in every case where there was an oral hearing to have legal representation. That would be contrary both to the clear intention of the rules and to any requirement of constitutional or natural justice.

For the reasons which I have set out therefore, I would allow the appeal and I would consider that the court should make an order setting aside the order of the High Court quashing the Governor's decision.