

Unapproved



**THE COURT OF APPEAL
CIVIL**

Neutral Citation: [2024] IECA 111
Court of Appeal Record Number: 2023/284
High Court Record Number: 2022/753 JR

**Power J.
Meenan J.
O'Moore J.**

BETWEEN:

CAROLINE EGAN

RESPONDENT

- AND -

THE GOVERNOR OF CLOVERHILL PRISON

APPELLANT

JUDGMENT of Ms Justice Power delivered on the 7th day of May 2024

1. I have read the judgment of Mr Justice O'Moore and, in the light of his analysis of the failures of due process, I agree with his conclusion that the appeal should be dismissed. For my part, however, I want to underscore the fact that central to this appeal was the question as to how Rule 36(9) of the Prison Rules, 2007, as amended ('the Rules') is to be interpreted and that this Court has confirmed that, as a matter of law, the Governor is correct in his contention that Rule 36(9) applies to a visit to a

prisoner 'by any person'.¹ As stated in the principal judgment (at para. 46), 'Rule 36, dealing with "Regulation of Visits" is not confined to any particular form of visit and therefore applies to visits by legal advisors to clients in custody.' This Court's unequivocal answer to this legal question should provide significant clarification for the Governor as it should for all visitors to the prison.

2. The respondent's success in this appeal is, therefore, somewhat nuanced. Whilst the Governor acted contrary to what fair procedures required in accepting staff members' complaints about Ms Egan without having heard her version of events, the trial judge, in my view, erred in holding that a prison Governor has *no* power under the Rules to exclude a solicitor from seeing clients.² One might anticipate that such a power would be exercised only in exceptional situations. However, the critical point of principle is that it *may be exercised* under Rule 36(9)(c) where circumstances would warrant it and where due process has been observed in advance of reaching a decision.

3. The fact that a specific provision is made under Rule 38 for visits by a legal adviser does not in any way diminish the scope of Rule 36. Such a provision is entirely for the benefit of *prisoners*. Rule 38 simply reflects the reality that the right of reasonable access to a lawyer for persons in custody is a well-established right under the Constitution. (See *The People (Director of Public Prosecutions) v. Madden* [1977] IR 336; *The People (Director of Public Prosecutions) v. Healy* [1990] 2 IR 73; and *The People (Director of Public Prosecutions) v. Gormley and White* [2014] 2 IR 591). The right is also recognised at European level. A detainee's right of access to a lawyer constitutes an important counterbalance to the vulnerability of a person in custody, provides a

¹ Appellant's legal submissions, para. 27.

² Transcript of the High Court Ruling, p. 3, lines 1 to 3.

fundamental safeguard against coercion and ill-treatment and contributes to the prevention of miscarriages of justice and the requirements of a fair trial. (See *Salduz v Turkey* (Application No. 36391/02) (2009) 49 EHRR 19, §§ 53-54; *Ibrahim and Others v. the United Kingdom* (Applications Nos. 50541/08, 50571/08, 50573/08 and 40351/09 2016, [GC], 13 September 2016), § 255).

4. It is clear from a reading of Rule 38 that its provisions relate to a *prisoner's* entitlement to certain safeguards and that it is not for the purpose of according some special prerogative or elevated status to a person who holds legal qualifications. There is nothing in Rule 38 to suggest let alone provide that a legal adviser is excluded from the general scope of application of Rule 36(9)(c) when it comes to the regulation of prison visits. Where, under the Rules, it is intended to exempt legal advisers from the scope of a particular provision, such an exemption is unambiguous. Thus, for example, it is clear from the terms of Rule 36(4) that visits from a legal adviser do not fall within the scope of visits which shall '*take place within the view and hearing of a prison officer*'. If it had been intended to exempt legal advisers, as a class of visitors, from the scope of Rule 36(9)(c), then such an exemption, in my view, would have had no ambiguity about it.

5. The Governor, in this case, received complaints from some prison staff concerning Ms Egan's alleged conduct towards them. The complaints alleged ranged from Ms Egan '*ranting*' to being '*very hard to deal with*' to being '*rude and degrading*' and it was said that her emails, again allegedly, were '*regularly of an aggressive nature*'. Prison can be a difficult place where tensions may ignite, instantaneously. Responsibility for its governance and for the safety and security of all is an onerous one. Whilst the good order of a prison may not be imperilled by *an* instance of rudeness

or passive aggression on the part of a solicitor, as noted in the principal judgment at para. 48, such behaviour, were it to persist unchecked, could well have the potential, in my view, to create a substantial risk within a prison environment. If the consequent upset and resentment among staff towards such behaviour were left to fester unaddressed by a Governor, it could well contribute to imperilling good order or jeopardizing the overall safety of a prison. Had prison staff in this case decided, for example, to withdraw their services rather than deal with what was perceived as Ms Egan's '*upsetting*' conduct, that would almost certainly have presented a significant risk in terms of prison management and safety. Thus, given the potential for the sudden amplification of tensions and the consequent risk that would be created thereby, it was incumbent upon the Governor to take, seriously, the complaints he had received from prison staff and to seek to have them resolved.

6. The difficulty, of course, lay in the process that the Governor followed in dealing with the complaints he received. Whilst a debate arose at hearing as to whether Ms Egan's *constitutional* rights were engaged, and that is a matter to which I shall return, there is little doubt that she was certainly a person 'affected' by the Governor's decision. The requirements of fair procedures '*are not set in stone*' as noted by Fennelly J. in *Ezeani and Another v. Minister for Justice, Equality and Law Reform & Ors* [2011] IESC 23 and administrative decisions, generally, ought not be encumbered by the full panoply of rights associated with a criminal trial. Nevertheless, a person affected by such a decision must be given reasonable notice of the matters which are of concern to the decision-maker and must be afforded an opportunity to be heard. As Mr Justice O'Moore points out, the Governor did not seek a response from Ms Egan before forming a view. He accepted the version of events presented by staff without affording her an

opportunity to be heard. This, in itself, is sufficient to conclude that the decision he made was one vitiated by error.

7. That said, the respondent, in my view, contributed, significantly, to the evolution of the subsequent course of events that transpired. Basic courtesy, at the very least, would have required that she reply to the Governor, if only to inform him, politely, that, in her view, he was mistaken in having accepted his staff's version of events. Instead, she chose to ignore the Governor and his correspondence which he sent to her on 27 April, 3 June, and 10 June 2022. That, in my view, was entirely unacceptable.

8. Confronted by Ms Egan's deafening silence and her unwillingness to engage with or deny the issues raised by the prison staff, the Governor was placed in a difficult position. Be that as it may, there were failings of due process in the approach he adopted, and these have been set out in the principal judgment. I accept that the Governor had an obligation to notify Ms Egan that unless she responded to the complaints he had received and engaged with the prison authorities in relation thereto, he would have no option but to consider imposing a restriction on her next visit to the prison, particularly, in circumstances where he was confronted with a situation which, if left unresolved, had the potential to jeopardize good order and safety.

9. It is stated at para. 22 of the principal judgment that the evidence available establishes, indisputably, that Ms Egan's ability to earn a living as a solicitor was significantly disrupted by the impugned decision. For my part, I find that, at its height, the evidence was that it was *'not practical'* for another solicitor to visit Ms Egan's clients; that whilst she was *'partially able to obtain video-link consultations'* with some clients, she had *'a strong preference for in-person consultations'* to build and sustain her practice; and that her exclusion was *'quite disruptive'* and was having *'a significant*

impact on her relationship with her clients, some of whom *'had indicated a desire to instruct a different solicitor'* based on a perception that she would not meet them in person. There was a reference in the Statement of Grounds to the exclusion having *'the potential'* to impact on Ms Egan's ability to earn a livelihood but there was no evidence of actual losses incurred in terms of earning a livelihood. Whilst the issue was debated at the hearing of the appeal, it arose from counsel for the Governor's submission that the court should give consideration to the principle of judicial restraint particularly, in this case, because there was no suggestion that Ms Egan's constitutional right to earn a livelihood had been affected. Importantly, in my view, Ms Egan had not pleaded that her constitutional right to earn a living had been infringed. Pleadings are important. They *'set the parameters for the jurisdiction of a court'* to decide the issues identified and they ensure fairness in the process. (*Casey v. Minister for Housing, Planning and Local Government & Ors* [2021] IESC 42). The way in which a claim is pleaded in judicial review applications is, as the Supreme Court has underscored, a factor *'of some importance'* where, arguably, the requirement for clarity and specificity in pleadings and the extent to which the statement of grounds defines and confines the issues to be determined could be regarded as *'more strict'*. (*Casey*, paras. 27 to 29). It is instructive and important that none of the reliefs claimed in the judicial review proceedings included a declaration that the respondent's constitutional right to earn a living was breached and there was, as already noted, a remarkable paucity of *actual* evidence concerning the extent of any loss sustained in this regard.

10. To conclude, Ms Egan's refusal to engage with the Governor or to afford him the basic courtesy of a reply from 27 April until 28 June 2022 contributed, significantly, in my view, to the unfortunate events in this case ending in litigation. Had she accepted

the Governor's invitation to attend a meeting, asserted her denial of any abusive behaviour and affirmed that she had no intention of ever engaging in such conduct, then that, in all likelihood, would have ended the matter.

11. I can accept that it would have been preferable for the Governor to have attempted to resolve matters by invoking his 'inherent jurisdiction' as the person with general authority for the management of the prison (*Foy v. Governor of Cloverhill Prison* [2012] 1 IR 37) although, even then, it is difficult to envisage a resolution in the face of a refusal to engage. For the reasons set out above, however, I would hesitate to say that a dispute such as the one that arose in this case is one that could never relate to '*good order*' within the meaning of that term as used in the Rules. Whilst a more informal attempt at resolution would have been desirable, this in no way detracts from the fact that following the litigation that did ensue, this Court has confirmed the Governor's contention that Rule 36(9)(c) of the Prison Rules is *not* confined to any particular form of visit and that it applies to visits by legal advisers to clients in custody.