

**THE HIGH COURT
JUDICIAL REVIEW**

[2020 No. 204 J.R.]

BETWEEN

CAOLAN SMYTH

APPLICANT

AND

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

RESPONDENTS

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 21st day of May, 2020

1. The applicant is a remand prisoner awaiting trial for attempted murder before the Special Criminal Court. His trial is due to commence on 5th October, 2020. On 9th March, 2020 an *ex parte* application was made for relief to seek judicial review, the primary relief being an order of *certiorari* quashing a decision to detain the applicant in a segregation unit, as well as six claims for declarations, four claims for *mandamus* or injunctions and a claim for damages including exemplary damages. Meenan J. made an order that leave would be heard on notice on 24th March, 2020.
2. On the latter date, it seems to have been agreed between the parties that the hearing should be telescoped, but no formal order was made to that effect. A statement of opposition was delivered dated 17th April, 2020 and the matter was then listed on 27th April, 2020 before McDonald J., at which point the case was pencilled in for telescoped hearing on 26th May, 2020.
3. As of that time, the question of cross-examination hadn't emerged, but on 14th May, 2020 application was made to Meenan J. for liberty to seek an order for cross-examination and production of the applicant. Permission to bring such a motion was granted, and I am now dealing with that application. I have received helpful submissions from Mr. Keith Spencer B.L. (with Mr. Mícheál P. O'Higgins S.C.) for the applicant and from Mr. Paul Carroll S.C. (with Mr. Tom Fitzpatrick B.L.) for the respondents.

Should Assistant Governor O'Shea be produced for cross-examination?

4. The general principle is that if there is a clear conflict of admissible evidence on a relevant issue in a judicial review, then there should be cross-examination (see *Banik v. Minister for Justice & Equality* [2019] IEHC 785, [2019] 10 JIC 2208 (Unreported, High Court, 22nd October, 2019) and the authorities cited therein). Is there such a conflict here?
5. Mr. Spencer wants to cross-examine the respondent's deponent, Assistant Governor O'Shea, on all three affidavits including one which was sworn in response to the present motion itself. All three (while drafts were provided earlier) were in fact sworn together on 21st May, 2020. The issues can, however, best be identified by reference to paragraph numbers in the first affidavit.
6. Paragraphs 5 to 7 set out what the Governor did in terms of making a direction for segregation, dated 31st January, 2020, pursuant to r. 63 of the Prison Rules. That account seems to be essentially just a statement of fact as to what he did. The applicant

says contrary to the Governor's statement that no comment was made in response and that he did comment, but the form has actually been exhibited which is signed by the applicant and says that he "*didn't make any comments*", but this has to be viewed in the context that there is an expressed disclaimer as to him wanting to be removed from r. 63 which is set out in extenso under the heading "*Disclaimer*", so it does not seem to me that there is any real conflict here as to the fact that the applicant expressed his objection to the direction.

7. The Governor says that the direction has been kept under review and he says it was made on the basis of a serious threat to the applicant's life. The applicant's position is that there is no threat to his life. Paragraph 8 of the Governor's affidavit refers to confidential information that the applicant is at significant risk and Mr. Spencer says he wants to explore that.
8. On one view, whether the application of r. 63 is necessary is a conflict between the parties, although strictly speaking the Governor is saying that he has received confidential information and the applicant is not really in a position to say that the Governor did not receive such information. Such confidential information is clearly privileged and is not something that can be meaningfully explored in cross-examination anyway. I appreciate that this approach causes a difficulty for any applicant who wishes to challenge the necessity for any measure that is based on confidential information. 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.
9. As regards conditions of detention, para. 11 of the Governor's affidavit denies the allegation that the applicant is on "*23-hour lockup*". He refers to the applicant's potential for association with other prisoners, but Mr. Spencer says it is not in fact in dispute that the applicant doesn't actually associate with others on his landing. He says he wishes to explore that issue with the Governor, but cross-examination in Judicial Review has to deal with a conflict of admissible evidence rather the exploration of issues as such.
10. The applicant's account of being on "*23-hour lockup*" does not stack up because he talks in his own affidavit about up to one hour of exercise including showering time and one hour in the yard. He also refers in para. 8 of his affidavit to "*22-hour lockup*". While on one view there is something of a difference as to whether the applicant's time out of his cell is up to two hours or up to three hours, the Governor points out that the applicant hasn't kept his story straight and that the statement of grounds makes an express allegation of a "*23-hour lockup*" which the applicant is not actually standing over (see reliefs 2 and 5 and grounds 1 and 9). On that basis, it seems to me that the applicant's story is insufficiently consistent for one to say that there is a clear conflict of admissible evidence warranting cross-examination.

11. At para. 15, the Governor says that the applicant's complaints of denial of educational and vocational facilities are unfounded because the applicant did not apply for such facilities. The applicant says he did apply for those facilities and claims that there are other letters written to that effect which have not been produced by the Governor. He has not exhibited them either, and more fundamentally it is questionable whether cross-examination is the most appropriate way to obtain documents. However, putting the issue in context, the Governor has indicated (and this has not been contradicted) that all school facilities have been suspended from 13th March, 2020 so the issue seems to be of marginal relevance anyway. An issue also blew up about requesting audio discs, which it emerges were the property of the applicant, so again there does not seem to be any real conflict on that point.
12. At para. 18, the Governor refers to intelligence possessed which was deemed to be credible and I have dealt with that issue earlier.
13. At para. 21, he states that the prison does not have the facility to accommodate professional visits in the evening time. The real issue here is not so much a conflict of fact, but whether it is permissible or appropriate for the prison to decline to facilitate evening professional visits. That seems to me to be a legal point for submission and argument, rather than one which requires cross-examination in the absence of any clearly identified conflict as to the factual position.

Production order

14. Having regard to the security considerations averred to by the respondents, I will direct that the applicant can observe the hearing by video link as opposed to having to be produced physically. There does not seem to be any great necessity or added value for production and that indeed seems to be accepted on his behalf by Mr. Spencer in a context where the court is not minded to direct cross-examination.

Order

15. Accordingly, in terms of the reliefs sought in the notice of motion the order will be:
 - (i). that an order for cross-examination be refused;
 - (ii). that a production order be refused, but in lieu thereof I will direct that the applicant is to be facilitated in observing proceedings by video link;
 - (iii). subject to hearing counsel, I am minded to leave any other procedural directions to the judge hearing the matter on 26th May, 2020 assuming the hearing goes ahead on that date.