

THE HIGH COURT

[2022] IEHC 55
[RECORD NO. 2020/571 JR]

BETWEEN

DARREN DELACEY

APPLICANT

-AND-

**THE GOVERNOR OF WHEATFIELD PRISON, IRELAND AND THE ATTORNEY GENERAL
RESPONDENTS**

JUDGMENT of Mr. Justice Barr delivered electronically on the 1st day of February, 2022.

Introduction.

1. These proceedings arise from a disciplinary inquiry held by Assistant Governor Lorraine McCarthy of Wheatfield Prison (hereafter referred to as "the Assistant Governor") into the conduct of the applicant, a prisoner in Wheatfield Prison, for alleged possession of a mobile phone.
2. The applicant seeks to quash the outcome of this inquiry, in circumstances where he was found guilty of the two disciplinary offences which had been alleged against him; together with a consequential order setting aside any records indicating that he was found guilty of breaches of the Prison Rules.
3. The inquiry arose from a random search of the applicant's cell by Officer Grady of Wheatfield Prison on 7th August, 2020. The applicant was not present at the time of the search. Officer Grady found a mobile phone in the cell, which had been concealed in taping that had been used to affix plastic as a form of shower curtain in the shower cubicle.
4. Officer Grady subsequently issued a P.19 report, in which it was alleged that the applicant had committed two breaches of prison discipline. These were; possession of a prohibited article and possession of an article of which the prisoner did not have permission (contrary to Schedule 1, paras. 19 and 20 of the Prison Rules 2007).
5. In accordance with rule 66(2) of the Prison Rules 2007, the Assistant Governor elected to hold an inquiry into the alleged breaches of prison discipline. This hearing was held on 9th August, 2020. At the hearing, the applicant accepted that the mobile phone had been found in his cell, but denied knowing that it was there and denied ownership of it. The applicant sought to have the phone examined, to bolster his claim that had nothing to do with the phone.
6. The Assistant Governor outlined that the phone could not be examined for the purposes of the disciplinary hearing, as it was in the possession of An Garda Síochána. In her report, she stated that "*the phone was found in your cell.*" She then stated that the applicant was responsible for all items in his cell. It was on that stated basis that she found the breaches to have been proven and imposed sanctions on the applicant accordingly.
7. It is this decision of the respondent that the applicant seeks to have quashed by the court. The essence of the applicant's challenge is that (i) there was a breach of fair

procedures in that he was not permitted to examine the phone; (ii) the Assistant Governor applied the wrong legal test; (iii) in breach of fair procedures, he was not told of the Assistant Governor's concerns in relation to his alleged lack of knowledge of the phone and (iv) the imposition of a sanction of restrictions on visiting rights was ultra vires.

Background.

8. The applicant is currently serving a custodial prison sentence for offences contrary to s. 15(a) of the Misuse of Drugs Act 1977. He was serving this sentence in the Midlands Prison until 31st March, 2020, on which date he was transferred to Wheatfield Prison. The applicant is currently imprisoned at Wheatfield Prison, he is due to be released on 28th November, 2024. He has been the only occupant of his cell since 13th May, 2020.
9. On 7th August 2020, the applicant's cell was the subject of a random general search by Officer Grady. During the course of the search, the officer found a mobile phone concealed behind tape in the shower cubicle of the cell. A plastic bag had been taped over the shower cubicle privacy wall with opaque sticky tape (presumably for privacy reasons, as a sort of make-shift shower curtain), as the wall was circa 1.3m in height. Although, it must be noted that the Assistant Governor, in her affidavit of 28th August, 2020, stated that the plastic bag was not required for reasons of privacy owing to the mid-height level wall of the shower cubicle. Subsequently, in cross-examination, the Assistant Governor accepted that that the shower cubicle was not very private.
10. It was accepted by both parties that the applicant did not put the plastic bag in place; it had been in situ before he moved into the cell. The phone was found rolled in tape, affixed into the corner of the plastic bag, where it had been taped to the wall of the shower cubicle. The Assistant Governor, in her affidavit of 28th August, 2020, described the device as carefully concealed and 'not easy to find'.
11. Upon finding the mobile phone, Officer Grady issued a P.19 alleging that the applicant had committed two disciplinary breaches. These were:
 - (a) Contrary to Schedule 1, para. 19 of the Prison Rules 2007, the applicant "*has in his or her cell or room or has in his or her possession any prohibited article,*"
 - (b) Contrary to Schedule 1, para. 20 of the Prison Rules 2007, the applicant "*has in his or her possession an article in a part of the prison where he or she is not permitted to be in such possession,*".
12. On 9th August, 2020, the Assistant Governor held an inquiry into the breaches of discipline alleged against the applicant. At the hearing of the inquiry, the applicant denied the committal of any disciplinary breaches. Although he accepted that the phone was found in his cell, he stated that it had 'nothing to do with him' and that he did not know that it had been there.
13. In order to support this position, the applicant requested that the mobile phone be examined in order to compare the list of contacts and call log on the phone, to his own

list of contacts maintained by the prison. The applicant alleged that this would have shown that the numbers on the phone were not associated with him and would support his claim that the phone was not his.

14. The Assistant Governor told the applicant that it was not possible to examine the phone for the purposes of the disciplinary hearing, as the phone was no longer in the possession of the prison authorities. Possession of a mobile communications device in prison is a criminal offence; therefore the phone had been given to An Garda Síochána to be investigated by them in ascertaining whether the applicant would be prosecuted for this offence. It was on this basis that the Assistant Governor stated the phone could not be examined by the applicant.
15. Further, in affidavit evidence and during the course of cross-examination, the Assistant Governor stated that she had believed the applicant's assertion that the phone had not belonged to him, but did not believe that he did not have knowledge of its presence in his cell. For this reason, she deemed it unnecessary for the phone to be examined, as she was of the opinion that an examination of the phone could merely confirm what she already believed to be true; that the phone was not the property of the applicant. She stated that the content on the mobile phone was not relevant to the issue of possession of the phone, and so she did not examine it.
16. She stated that while she believed that the phone was not the applicant's; it was not unusual for a prisoner to hold contraband for another prisoner, for various reasons, such as; friendship, coercion, or reward. However, she stated that ownership of the device was irrelevant to the disciplinary issue and an examination of the phone was not necessary, as she believed the phone to be owned by another prisoner, but was in the applicant's cell with his knowledge. During the course of cross examination, the Assistant Governor accepted that she had not put this factual scenario to the applicant.
17. The Assistant Governor found the allegations in the P.19 report to have been proven. Her report states that the phone was found in the applicant's cell and that each prisoner is responsible for the items in their cell. It also stated that his version of events was considered.
18. Following this finding, the applicant contacted his solicitor, Ms. Deborah Cody of Michael Kelleher Solicitors, on 11th August, 2020 and informed her of the events that had occurred. By letter dated 12th August, 2020, the applicant's solicitor wrote to the respondent and asked to be furnished with a copy of the P.19 report.
19. By letter dated 13th August, 2020, the applicant's solicitors again wrote to the respondent and asked that the findings against the applicant be overturned and removed from the applicant's record, on the basis that he was not given an opportunity to examine the key piece of evidence against him. Failing this, the solicitor stated that judicial review proceedings would be instituted against the respondent.

20. The respondent replied to the applicant solicitor's letter on 13th August, 2020, stating that, under rule 7(1) and (3) of the Prison Rules 2007, the Assistant Governor was authorised to place articles found during the course of a search, which may be regarded as evidence in any criminal proceedings, into the custody of An Garda Síochána.
21. The Assistant Governor also stated that the applicant's version of events was considered, but ultimately, he was found guilty. It was further stated that the applicant did not deny that the phone had been found in his cell and that he was the sole occupant of the cell.

Submissions of the Applicant.

22. Counsel for the applicant, Mr. Michael O'Higgins SC, argued that the decision of the Assistant Governor was unlawful on two grounds: Firstly, it was submitted that, because the plaintiff was not afforded an opportunity to have the phone examined, the inquiry was not compliant with fair procedures and/or rule 67 of the Prison Rules 2007. Further, it was submitted that the Assistant Governor knew of the existence of evidence which could be relevant to the applicant's case (i.e. the information contained on the mobile phone), but failed to investigate this evidence, which was a breach of the applicant's right to a fair procedures. It was also submitted that the applicant should have been made aware of particular considerations that the Assistant Governor considered to weigh against the applicant's case, in order to address same, and that withholding that position from the applicant amounted to a breach of fair procedures.
23. Secondly, it was submitted that the Assistant Governor had applied an incorrect legal test in finding that the allegations against the applicant had been proven. The applicant submitted that the Assistant Governor had applied a test of strict liability, treating knowledge of the possession of the phone as irrelevant to the breach of discipline. It was further submitted that, although the Assistant Governor may have subsequently explained a more nuanced decision-making approach in affidavit evidence and through cross-examination, the position of the Assistant Governor at the time of the disciplinary hearing was that knowledge of possession was not necessary to find the applicant guilty.

(a) A Breach of Fair Procedures/Rule 67 of the Prison Rules 2007

24. The plaintiff, at the disciplinary hearing conducted by the Assistant Governor, asked that the phone be examined in order to verify his claim that it did not belong to him and that he was not associated with the phone. This request was rejected by the Assistant Governor for the reasons outlined above.
25. Counsel for the applicant referred to rule 67(6) and (7) of the Prison Rules 2007, governing the way in which an inquiry into a breach of prison discipline is to be conducted. These provisions provided that a prisoner was entitled to be given an opportunity to have explained to him or her evidence submitted in support of an allegation of a breach of prison discipline.
26. Counsel submitted that the applicant should have been afforded the opportunity to examine the phone, as evidence in support of the breaches of prison discipline alleged against him. Counsel relied on rule 67(10) of the Prison Rules 2007 to submit that the

Assistant Governor could have adjourned the hearing in order to allow this examination to have taken place.

27. It was submitted that the Assistant Governor's refusal to allow the evidence to be examined, either by the applicant or someone else, amounted to a breach of rule 67 of the Prison Rules 2007 and a breach of fair procedures. Counsel relied on the decision of *Kenny v Governor of Portlaoise Prison* [2017] IEHC 581, in which Ní Raifeartaigh J. held that the applicant in the case before her was entitled to have the opportunity to see the evidence relied upon by the Governor in sanctioning him and comment upon it as a "simple and basic requirement of fair procedures". Counsel also relied on the decision in *Doolan v Governor of Arbour Hill Prison* [2019] IEHC 211 to support this submission.
28. Counsel for the applicant further submitted that the position of the Assistant Governor, that she believed the phone was not his personal property, but found this fact to be irrelevant to the disciplinary breach at issue, should have been put to the applicant to allow him to comment. In that regard, the decision in *Mishra v Minister for Justice* [1996] 1 IR 189 was relied on.
29. It was submitted that in light of the foregoing authorities, the requirements of fair procedures applied to prison disciplinary hearings. Therefore, it was submitted that, fair procedures would dictate that the applicant should have been made aware of the Assistant Governor's adverse considerations of his case, that is; that she didn't believe that he was unaware of the phone's existence, or that she thought that he may have been holding the phone for another prisoner, and the applicant ought to have been allowed to address same.
30. Counsel referenced the dicta of Ní Raifeartaigh J. in *Kenny v Governor of Portlaoise Prison* to rebut the assertion of the respondent that an examination of the phone was not necessary, as it would not have changed the outcome of the process. Counsel also noted the case of *O'Brien v Bord na Móna* [1983] IR 255 to support this submission.
31. During cross-examination, the Assistant Governor accepted that the disciplinary breach may have been quashed, if there was evidence of inactivity on the phone for the time during which the applicant was the occupant of the cell. She further stated that she did not know why that evidence was not investigated. Counsel submitted that the failure to examine the phone amounted to a breach of the applicant's right to a fair procedures, regardless of whether that specific line of enquiry would have been successful.
32. Counsel accepted that rule 7(3) of the Prison Rules 2007 authorised the Assistant Governor to place evidence into the custody of An Garda Síochána. However, it was submitted that that did not prevent the Assistant Governor from retaining the evidence until the conclusion of the applicant's disciplinary hearing. It was submitted that there was, arguably, an obligation to retain that evidence in order to comply with rule 67(6).

(b) Legal Test Applied by the Governor

33. It was submitted that the Assistant Governor had applied the incorrect legal test in finding the applicant guilty of the disciplinary breaches mentioned above. Counsel submitted that the respondent failed to consider whether the applicant had knowledge that the phone was in his cell. She viewed the true test as being whether the phone was found in his cell; seeing knowledge of possession of the phone as irrelevant. Counsel for the applicant relied on *Lowcky v Gibb* [1967] 2 QB 243 and *DPP v Ebbs* [2011] IECCA 5 in support of the submission that knowledge was a necessary ingredient to prove possession of a prohibited article.
34. Counsel submitted that paras. 19 and 20 of Schedule 1 of the Prison Rules 2007 should be interpreted in light of the foregoing decisions; in order to be found guilty of an offence under those paragraphs, a prisoner must have knowledge that the prohibited article was in their possession.
35. It was submitted that the respondent applied the incorrect legal test in considering the offences to be proven, on the basis that the mobile phone had been found in the applicant's cell and he was the sole occupant of the cell. The applicant quoted from the affidavit of the Assistant Governor, sworn on 28th August, 2020, wherein she stated:
- "...[T]he issue to be determined by me was whether the applicant had a prohibited item in his cell. I say that I did take account of the applicant's denials of ownership but mobile communications devices are highly-prized commodities in prisons and I did not believe the applicant was unaware of it being in his cell. I say that in any event, the applicant's denials were not dispositive of the issue to be decided by me as prisoners bear personal responsibility for all items of property in their cells."*
36. Counsel relied on this passage to submit that the Assistant Governor was suggesting that a lack of knowledge of the mobile phone would not be dispositive of a breach of discipline, because prisoners are responsible for all items within their cell and the applicant did not deny that the phone was found in his cell.
37. Counsel also referred to the report of the P.19 hearing wherein the Assistant Governor stated *"Report is proven, the phone was found in your cell. You are responsible for the items in your cell."* Counsel submitted that the wording used, suggested that the basis for the decision was solely the fact that the phone was in the cell and the applicant was responsible for anything found within his cell. It was submitted that the absence of any reference to the applicant's knowledge that the phone was in the cell, was of significance.
38. In her affidavit of 7th December, 2020, the Assistant Governor stated that she *"believed the applicant that the phone was not his but ... did not believe that he was unaware that there was a contraband item in his cell."* Further in that affidavit and during the course of cross-examination, the Assistant Governor stated that she had reached the conclusion that the applicant was guilty based on the evidence before her, having considered: the amount of time he had been the sole occupant of the cell; the manner in which the phone was concealed and the unlikelihood of a third-party placing it there without his knowledge.

39. Counsel submitted that this clarification of the Assistant Governor's decision-making process only became clear during cross-examination. He submitted that that process was not clear from the original report, and even if it were; this should have been put to the applicant in compliance with fair procedures.
40. It was submitted that it appeared from the original report, that the Assistant Governor had applied a test of strict liability to the offence at the time of the original hearing, although ultimately resiling from that position in affidavit evidence and during the course of cross-examination, wherein she explained a more nuanced decision-making process.

Submissions of the Respondent.

41. Counsel for the respondent, Ms. Siobhán Ní Chúlacháin BL, made submissions on two main issues. These were:

- (a) Jurisdiction of the court to interfere with a decision of the Governor
- (b) Alleged breaches of fair procedures.

(a) Jurisdiction of the Court to interfere with the Governor's Decision

42. It was submitted that, under the Prison Rules, the Assistant Governor had a wide discretion as to issues of governance within the prison. In particular, counsel referred to rule 75(3)(i) which states as follows:

"The Governor shall -

- (i) develop and maintain a regime which endeavours to ensure the maintenance of good order and safe and secure custody and personal well being of prisoners".*

43. It was accepted that the applicant was entitled to fair procedures as set out in the statutory scheme under the Prison Rules 2007. However, it was submitted that this was not equivalent to the procedures which are employed during the course of the adversarial process.
44. Counsel relied on the decision in *Pok Sun Shum v Ireland* [1968] ILRM 593, to support their submission that the circumstances in which an applicant should be appraised of adverse findings against them and be afforded the opportunity to comment on them, will depend on the facts of the particular case.
45. Counsel submitted that the present proceedings were similar in nature to those outlined in the case of *Ezeani & Allen v Minister for Justice* [2011] IESC 23, which involved an assessment of the credibility of a marriage to a non-national. Counsel referred to the dicta of Fennelly J., wherein he stated that decision-makers are not obliged to set out every detail of the case against an affected person during the course of decision-making.
46. Counsel also relied on the decision of *Dunne v Governor of Wheatfield Prison* [2019] IEHC 445, where contraband had been found in the applicant's cell and the applicant had denied having knowledge that the prohibited articles were in his cell, claiming that he did not lock his cell and that others would have had access to it. He asked that the

contraband and CCTV footage of his cell be preserved, in order to be investigated by An Garda Síochána to bolster his claims. That request was refused. O'Regan J. ultimately found that the applicant had not demonstrated a factual basis to establish any want of fair procedures or breach of rule 67(6) of the Prison Rules 2007. Counsel also relied on *Egan v Governor of Wheatfield Prison* [2014] IEHC 613, from which O'Regan J. quoted with approval.

47. Counsel relied on the decisions mentioned above, as well as rule 75(3) and *Devoy v Governor of Portlaoise Prison* [2009] IEHC 288, to submit that a wide margin of appreciation is afforded to the Governor in exercising a supervisory role over the general running of a prison.
48. It was submitted that, although this court has authority to intervene in the event that a prisoner had suffered a breach of their right to fair procedures during the course of administrative decision-making within a prison, the court should be slow to engage in micro-management of that decision-making. It was asserted that the prisoner/applicant in judicial review proceedings must establish a clear basis for intervention by the court.
49. In support this assertion, counsel referred to *Foy v Governor of Cloverhill Prison* [2010] IEHC 529 and *SF v Director of Oberstown* [2017] IEHC 829. Counsel submitted that this court should only intervene in decisions by prison authorities in truly exceptional cases.

(b) Breaches of Fair Procedures

50. It was submitted that on a clear statutory interpretation of rule 67(6), the examination or explanation of evidence to a prisoner is not an absolute entitlement. It was submitted that the Assistant Governor had accepted that the applicant was not the owner of the phone, and so an examination of the mobile phone was not necessary. Counsel submitted that an examination of the phone would not have provided him with a better defence.
51. Counsel sought to distinguish the cases of *Kenny v Governor of Portlaoise Prison* and *Doolan v Governor of Arbour Hill Prison*, because the applicants in those matters had been denied examination of the evidence used to determine the conviction. Counsel reiterated that an examination of the phone would not have materially changed the Assistant Governor's position in the matter, as she believed his assertion that he did not own it; therefore a failure to examine the mobile phone did not amount to a breach of fair procedures.
52. It was submitted that there was an onus on the Assistant Governor to ensure the preservation of evidence for a possible investigation by the Gardaí. Counsel submitted that in allowing the prisoner to examine the phone, evidence could have been tampered with.
53. Counsel submitted that there did not exist a want of fair procedures in this case, that the Assistant Governor did not apply a test of strict liability, but rather, she had not believed the applicant's assertion that he did not know that the phone had been in his cell. Further, it was submitted that the Assistant Governor was not obliged to inform the applicant of

every reason she had for disbelieving him in order to uphold his right to fair procedures. On that basis, counsel for the respondent submitted that the decision of the Assistant Governor should be upheld.

Conclusions.

54. Before coming to the specific issues that arise for determination on the hearing of this application, it is necessary to set out in brief terms the relevant statutory provisions and authorities that govern the issues that arise for determination. The Prison Rules 2007 (SI 252/2007) set out the provisions in relation to management of prisons in general and in particular, in part 4, they deal with the issues of control, discipline and sanctions.
55. Rule 7(1) of the Prison Rules provides that:
- "(1) Where in the course of a search under these Rules a prison officer or a member of the Garda Síochána finds or comes into possession of anything that he or she believes relates to the commission or alleged commission of an offence, he or she may, subject to paragraph (2), seize and retain it for use as evidence in any criminal proceedings, or in relation to any proceedings for a breach of prison discipline, for such period from the date of seizure as is reasonable or, until the conclusion of any such proceedings."*
56. Rule 67 contains provisions in relation to the holding of an inquiry into breaches of prison discipline. It provides that where the Governor intends to hold an inquiry into an allegation of breach of prison discipline, he or she shall inform the prisoner by notice in writing of the nature of the alleged breach. Where the Governor decides to hold an inquiry it shall commence not later than the next day after the prisoner has been given the required notice and not later than seven days after the Governor has made his or her decision, unless the Governor upon reasonable grounds is of opinion that more time is required to enable the inquiry to be conducted effectively. The rules provide that the hearing of the inquiry can be adjourned from time to time, as necessary.
57. Rule 67(6) and (7) contain provisions in relation to the hearing that is to be conducted. They provide as follows:
- "(6) The prisoner shall be entitled to be told what is alleged against him or her and to hear or be given an opportunity to examine or have explained to him or her any evidence given or submitted in support of an allegation that he or she committed a breach of prison discipline."*
- "(7) The prisoner shall be entitled to reply to any allegation that he or she has committed a breach of prison discipline and, with the consent of the Governor, to call a witness to give evidence. A prisoner shall give notice prior to the commencement of the inquiry of a witness he or she wishes to call to the inquiry."*
58. Matters that are deemed to constitute a breach of prison discipline are set out in Schedule 1 to the Statutory Instrument. It is provided therein that a prisoner shall be guilty of a breach of prison discipline if he or she... (19) *has in his or her cell or room or has in his or*

her possession any prohibited article; (20) has in his or her possession an article in a part of the prison where he or she is not permitted to be in such possession. It was common case between the parties that a mobile phone was an article that a prisoner was not entitled to have in his possession within the prison.

59. The relevant legal authorities clearly establish two things. Firstly, the courts will be slow to interfere with decisions taken by a prison Governor in relation to the general management of the prison and also in relation to the management of particular prisoners within the prison. It has been emphasised in a number of decisions that the court will show deference to the decision taken by a prison Governor, as he or she is the person responsible for maintaining safety and good order within the prison. The cases make it clear that the court will not engage in micromanagement of the prison: see *Dundon v Governor of Cloverhill Prison* [2013] IEHC 608; *Killeen v Governor of Portlaoise Prison* [2014] IEHC 77; *Foy v Governor of Cloverhill Prison*.
60. Secondly, while disciplinary proceedings in the prison are not required to mirror those applicable to a criminal trial, they must still adhere to the requirement to provide fair procedures. In this regard, McDermott J. stated as follows in *Egan v Governor of Wheatfield Prison*, at paragraph 33:

"...It is of the utmost importance that the Governor be able to conduct prompt, informal hearings and apply any appropriate sanctions as soon as reasonably practicable in order to maintain good order and discipline in the prison..."

61. The requirement for disciplinary hearings conducted within prisons to comply with the dictates of fair procedures was stated clearly in *Kenny v Governor of Portlaoise Prison*. In that case it was held that there was a breach of the applicant's right to fair procedures by virtue of the fact that in deciding whether there was a breach of discipline, the Governor had acted on evidence from CCTV showing the applicant's girlfriend transferring something to the applicant when they embraced at the start of a visit within the prison, but the applicant was not permitted the opportunity to view the CCTV footage. In the course of her judgment, Ní Raifeartaigh J. stated as follows at para. 13:

"However, it seems to me that the Prison Rules are required to be read and informed by principles of constitutional fair procedures. It is of course well established that the requirements for fair procedures in the course of hearings conducted in accordance with the Constitution vary according to the circumstances: Mooney v. An Post [1994] WJSC-HC 1443, Kiely v. The Minister for Social Welfare [1977] I.R. 267, and McAuley v. Commissioner of An Garda Síochána [1996] 3 I.R. 208. What is necessary in terms of fair procedures in one situation may not be necessary in another. I certainly do not think that the situation arising in the present case required anything like the full panoply of an adversarial hearing, but it does seem to me that the basic evidence, namely the CCTV, upon which the decision-maker was proposing to base his decision, should have been shown to the prisoner so that he could have an opportunity to comment upon it."

62. Later in her judgment, the learned judge commented upon the fact that even though the CCTV footage may have been very clear in relation to the guilt of the applicant in respect of the breach of discipline concerned, that did not obviate the requirement for him to be shown the relevant CCTV footage. She stated as follows at para. 14:

"It may well be that the CCTV footage was so clear that nothing the applicant could ever have said would have changed the assistant governor's mind on what he had seen. However, I do not think the content of fair procedures should be dictated in a particular case or generally by a view as to whether it would have made any difference to the outcome. Cases are often heard in the courts where the prosecution case appears open and shut, but a defendant is not disentitled to the normal procedures by reason of this fact."

63. The decision in *Kenny* was followed in *Doolan v Governor of Arbour Hill Prison*. In that case, the applicant was charged with a breach of prison rules by having made telephone calls to his son and instructing him to place material that was disparaging of the victim of the crime, which concerned a sexual assault, on a particular website. It was held that the applicant was entitled to a copy of the transcript of the relevant telephone conversations and screenshots of the relevant pages on the website. In the course of her judgment, Murphy J. held that on a proper construction of rule 67(6) of the Prison Rules, a prisoner was entitled to hear the evidence and where there was real evidence relied upon, the prisoner was entitled to examine it. The court was satisfied that there was a clear breach of fair procedures in the Governor's failure to produce to the applicant, the evidence on which the governor relied in finding against him, and in addition, there was a failure to comply with the requirements of rule 67(6), which entitled a prisoner to have the opportunity to examine the evidence against him: see paras. 32 and 34 of the judgment.
64. In *Dunne v Governor of Wheatfield Prison*, O'Regan J., while noting the decisions in *Kenny* and *Doolan*, held that in the circumstances of that case, there was no breach of fair procedures in the Governor's refusing to allow the applicant to carry out a fingerprint analysis of a knife that had been found secreted under the mattress on the bed in his cell.
65. Allied to the requirement of fair procedures, is the requirement that the person charged with the breach of discipline is fully apprised of the matters that are weighing on the decision-maker's mind and is given an opportunity to address them. In *Administrative Law in Ireland (5th Edition 2019)* by Hogan, Daly and Morgan, it is stated that *"The applicant must be apprised of what is bothering the respondent and allowed the opportunity, if possible, to meet the difficulty."*
66. In *Mishra v Minister for Justice*, the applicant's application for citizenship had been turned down because of a general assumption that he would later emigrate, despite his solemn declaration to the contrary. Kelly J. (as he then was) said that if the applicant were to be turned down on this basis, *"fundamental fairness"* required *"he be given an opportunity to clarify his position"*.

67. Finally, it should be noted that even where the decision-maker feels that there is nothing that the applicant could say to change his mind on an issue, there is still a requirement to comply with the dictates of a fair hearing. In *Glover v BLN Ltd* [1973] IR 388, the Supreme Court rejected the submission that a failure to hold a hearing was justified because there was nothing the plaintiff could have said to change the outcome. Walsh J. dealt with that assertion by stating that "*This proposition only has to be stated to be rejected. The obligation to give a fair hearing to the guilty is just as great as the obligation to give a fair hearing to the innocent*". A similar statement was made in the *Kenny* case.
68. Turning to the arguments raised by the applicant, it is necessary to keep in mind his defence to the charge of breach of prison rules. He accepted that the phone had been found in his cell. However, he vehemently denied any knowledge of it. His defence was succinctly summarised in the report of the disciplinary hearing, in the following terms:
- "I didn't know it was there. The curtain was there when I moved in. There was tape all around it when I moved in and I didn't go near it and you couldn't see through the tape. Check the numbers on it. I can guarantee that it's nothing to do with me. I've never had a phone in prison."*
69. It is against that background that one has to consider the refusal by the Assistant Governor to allow the applicant to examine the phone. The court is satisfied that the failure of the respondent to allow the applicant an examination of the phone, constituted a breach of his right to fair procedures.
70. By "examination" the court does not mean that the applicant had a right to physically examine the phone. That was not possible, due to the necessity to preserve the chain of evidence in relation to the phone, as it was likely to be evidence in any criminal prosecution that may arise, given that possession of a phone by a prisoner within a prison constitutes a criminal offence. It was for that reason that the phone had been handed over to the Gardaí.
71. However, what the applicant really wanted was access to the call history and the contact list on the phone. That could have been requested by the prison authorities from the Gardaí. It was evidence that the Gardaí would probably have taken from the phone in any event. If the Gardaí had refused to provide that information, then that would have been a different matter; but no request was made for it by the prison authorities.
72. The Assistant Governor stated that no such request was made of the Gardaí, because the information which would be provided by such an examination was not necessary, as she had accepted the applicant's assertion that he did not own the phone. However, the court accepts the argument made on behalf of the applicant that, while the primary purpose of that information would have been to show the likely ownership of the phone, that was not the only evidence that the call history and the contact list would have provided.

73. The call history and the contact list would have shown (i) the likely owner of the phone and in particular, if it was the previous occupant of the cell and (ii) were any calls made in the eight weeks during which the applicant had been in sole occupation of the cell. That evidence could have been of relevance to his plea of lack of knowledge of the phone.
74. If it were established that the likely owner was the previous occupant of the cell, and if it transpired that he had been transferred from the cell at short notice, it is possible that he could have left the phone behind. In her evidence, the Assistant Governor stated that it was unlikely, given the high value of phones within prisons, that the previous occupant would have left it behind him. She stated that it would have been more likely that he would either have sold it to another inmate, or given it to a friend in the prison. However, if the previous occupant was being transferred for his own safety, it is possible that a prison officer may have watched him while he was packing; or if the previous occupant had been told at short notice that he was going to an open facility, prior to release, he may not have bothered retrieving the phone for fear of detection. While a phone is undoubtedly valuable within the prison, it would have had little monetary value to the previous occupant in the open facility, or after his release.
75. The call history would have shown when the phone was used to either make or receive calls. If it had not been used in the eight weeks while the applicant had been in occupation of the cell, this would tend to support his defence, as it would be unlikely that if he was merely holding the phone for another prisoner for whatever reason, that the phone would not have been used by its owner in that period.
76. Furthermore, if the phone had not been used within that eight week period, it might indicate that the phone had been in situ prior to the applicant entering the cell. In which case, on the presumption that the cell was searched and thoroughly cleaned after the previous occupant left and before the applicant entered the cell, without it being detected, that would tend to support the applicants contention that he had not seen the phone in his cell in the previous eight weeks.
77. In this regard, it is noted that the Assistant Governor was of the view that the phone had been very well concealed and that such concealment would have taken some time to put in place. Accordingly, the court is of the view that the contact list on the phone and the call history on it, were not solely of relevance to the issue of ownership.
78. While all of the above is conjecture; nevertheless, it is possible that an examination of the phone may have provided support to the applicant's plea that he had had no knowledge of it being in his cell. The court finds that there was a breach of fair procedures in not even trying to obtain the necessary information from the Gardaí.
79. Before turning to the second ground of challenge, the court would note that it was somewhat surprising that the phone was not shown to either the applicant, or the Assistant Governor who conducted the disciplinary inquiry, nor were either of them furnished with a photograph of it. It seems unusual, to put it no higher, that a person

should be charged with possession of an item, when they are not shown the item, or even a photograph of it.

80. Turning to the second ground of challenge, that the Assistant Governor applied the wrong legal test when finding the applicant guilty of breaches of the prison rules, the court is satisfied that on this ground too, the applicant has established that the Assistant Governor acted on the wrong legal basis and accordingly her finding must be set aside.
81. The concept of possession at law includes two elements: actual control of an item, either on one's person, or in a place or vehicle controlled by the person, and knowledge that they have control of the item. The classic statement of the law in this regard was provided by Parker L.C.J. in *Lowckyer v Gibb*:

"In my judgment, it is quite clear that a person cannot be said to be in possession of some article which he or she does not realise is, or may be, in her handbag, in her room, or in some other place over which she has control. That, I should have thought, is elementary; if something were tipped into one's basket and one had not the vaguest notion it was there at all, one could not possibly be said to be in possession of it."

82. In *DPP v Ebbs* [2011] IECCA 5, the Court of Criminal Appeal had to interpret s. 9 (4) of the Firearms and Offensive Weapons Act 1990, which provided that a person was guilty of an offence where he or she "*has with him in any public place*" a flick knife or other article made or adapted for use for causing injury to or incapacitating a person. O'Donnell J. (as he then was) held that in order for a person to be considered to "*have*" an article with him or her, there was a requirement of knowledge of the article. He noted that "*an intent to have the prohibited article*" was necessary.
83. While the Assistant Governor has stated in her affidavits that she made a finding that the applicant had knowledge of the presence of the knife in his cell due to the following facts: the length of time for which he had been in sole occupancy of the cell prior to the discovery of the phone; the time it would have taken to effect such concealment of the knife within the cell and the high value of phones within prisons; it is fair to say that that stance came somewhat late in the day. There is no reference to these facts, or to the issue of knowledge, in her report of the disciplinary hearing.
84. Indeed, the report seems to state that liability for the presence of the phone rested on the fact that the applicant was the sole occupant of the cell for eight weeks prior to its discovery and it had been found in his cell. In the section of her report dealing with her decision, the Assistant Governor merely stated:

"Report is proven, the phone was found in your cell. You are responsible for the items in your cell. I take into consideration the version you have provided. I impose a sanction of loss of 14 days all privileges."

85. When the applicant's solicitor sought clarification of the grounds on which his client had been found guilty of breach of the prison rules, Assistant Governor McCarthy stated as follows in her letter dated 13th August, 2020:

"Evidence provided by Mr Delacey during the hearing regarding the numbers on the phone was taken into consideration. However he was found guilty of misconduct 19 "has in his or her cell or room or has in his or her possession any prohibited articles". Mr Delacey did not deny the phone was found in his cell, of which he was the sole occupant since 13 May 2020."

86. These statements tend to support the assertion made by the applicant that at the conclusion of the disciplinary inquiry, Assistant Governor McCarthy told him that she believed his story, but that she had to punish him because the phone was located in his cell.
87. Having read the affidavits and heard the cross examination of Assistant Governor McCarthy, the court is of the view that on the balance of probability, the Assistant Governor proceeded on the basis of strict liability, to the effect that the prisoner was responsible for all the items in his cell and therefore the applicant was responsible for the phone that had been located therein.
88. While it may well be possible to infer the fact of knowledge on the part of the applicant, from the matters referred to by Assistant Governor McCarthy in her affidavits, the court is not satisfied that that was in fact what was done in this case. The court is satisfied that the Assistant Governor applied a test of strict liability, which was not the correct test to apply when considering whether the applicant was in possession of the phone and was therefore in breach of subparagraphs 19 and 20 of Schedule 1 to the Prison Rules.
89. Even if the court is wrong in this finding, the court is satisfied that the concerns which the Assistant Governor had in relation to the issue of knowledge and the basis on which she had those concerns, were not put to the applicant for his comment in advance of the finding of guilt being made by the Assistant Governor. Notwithstanding the simplicity of disciplinary hearings within the prison regime, it is only fair that a prisoner be given an opportunity to address the matters that are on a decision-maker's mind prior to any finding of guilt being made. The court is satisfied that the relevant matters, being the length of time during which he was the sole occupant of the cell, the difficulty and time that it would have taken to conceal the phone within the cell and the high value of phones within prisons, if said at all, were only raised after the Assistant Governor had made a finding of breach of the prison rules and when she was imposing a punishment in respect of such breaches.
90. Given the findings of the court on these grounds, it is necessary to set aside the finding that the applicant was guilty of breach of the Prison Rules, which was made following the holding of the disciplinary inquiry on 9th August, 2020. In such circumstances, the issue of severance of that part of the punishment in relation to the limitation on visiting rights, does not arise for consideration.

91. It would appear from the foregoing that any reference to the finding of breaches of discipline made against the applicant would have to be removed from his prison record.
92. As the punishment that was imposed may have been fully served by now, it may not be necessary to make an order for the rehearing of the disciplinary charges. However, the court will hear the parties on the terms of the final order.
93. As this judgment is being delivered electronically, the parties will have two weeks within which to furnish brief written submissions on the terms of the final order and on costs and on any other matters that may arise.