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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW BY JAMES CLYDE REILLY

AND IN THE MATTER OF A DECISION OF THE GOVERNOR OF HMP MAGHABERRY TAKEN IN RESPECT OF PRISON ADJUDICATION No MY00894/09

TREACY J

Introduction

[1] The applicant is James Clyde Reilly, a life sentence prisoner, serving a sentence at HMP Maghaberry. His sentence is subject to periodic review by the English Parole Board. On 21 January 2010 the applicant was found guilty of an offence against prison discipline namely "fighting or wrestling" contrary to Rule 38(5) of the Prison & Young Offenders Centre Rules (NI) 1995.

[2] The applicant seeks judicial review relief firstly on the basis that the Adjudicating Governor failed to properly address the applicant's defence of self-defence and (in the amended Order 53 Statement) on the grounds that the conduct of the adjudication was unfair by reason of the following:

> **(i) The failure of the Governor to "ascertain the facts by questioning the accused" contrary to the Guidance given him in para.1.2 of the Northern Ireland Prison Service's "Manual on the Conduct of Adjudications" ("the manual"); in particular the Governor failed to ascertain how the applicant subjectively viewed the incident when considering whether the actions of the applicant could be said to**

be those of someone acting in his own reasonable self defence;

(ii) The failure of the Governor to "ask the prisoner whether they wished to request legal representation " contrary to the guidance given him in para.3.1 of the manual;

(iii) The failure of the Governor to follow para.20 of the model procedure set out in Annex A of the manual by failing to ask the applicant "whether s/he wishes to say anything further regarding the case, to comment on the evidence or to draw attention to any relevant considerations" *before* pronouncing guilt"

Background Facts

[3] On 17 December 2009 the applicant was involved in an incident with another prisoner, Liam McBride. The applicant avers that he was assaulted by McBride and took steps to defend himself and that at all times during the incident, until the incident was brought to an end by prison officers, he believed he was under attack or under threat of further attack from McBride and believed that he was acting reasonably in his own self defence.

[4] The incident was captured on CCTV footage which was played in Court. Having seen the CCTV footage relating to the incident the applicant's solicitor has averred that the applicant's description set out above of what took place was credible and that the applicant had a case to be considered as to whether he was reasonably defending himself on this occasion. The applicant was charged for a breach of prison discipline. The form 1127 recorded that he was charged under Rule 38(5) i.e. that he "fights or wrestles with any prisoner or other person". The particulars on the charge sheet alleged that:

"It is alleged that on Thursday 17/12/09 in My Braid you committed an offence against discipline in that you were fighting with PR B749 McBride".

[5] The charge was laid before the Governor on 19 December 2009 and first considered by him on 21 December 2009. At no time during the hearing on 21 December 2009 was the applicant asked if he wished to have legal representation.

[6] The charge was again considered by the Governor on 20 January 2010 and again at no time during this hearing was the applicant asked if he wished to have legal representation.

[7] On 28 January 2010 the applicant's solicitors, having viewed the CCTV footage with the applicant, forwarded correspondence and written representations

to the Governor on the proposed charge. In their written representations the applicant's solicitors commented that the CCTV footage lasted approximately 10 seconds, that it was apparent from a viewing that the applicant acted in self defence and that no Governor could reasonably conclude that the applicant did anything than to act in self defence, using reasonable force, following an act of unprovoked violence by McBride. They also served notice that in the event that the applicant was convicted of the offence that he would have no alternative but to challenge the decision in the High Court.

[8] The written representations also contained the solicitor's analysis of the CCTV footage with accompanying commentary in a blow by blow format in support of their contention that the applicant was acting in self defence.

[9] The charge was again considered by the Governor on 29 January 2010 and again at no time during this hearing was the applicant asked if he wished to have legal representation.

[10] At the reconvened adjudication on 29 January 2010 the Adjudicating Governor confirmed that he had the applicant's solicitor's submissions and invited the applicant to confirm whether or not he wished to maintain his plea of not guilty or change it. The applicant responded "No. It is self defence. You can clearly see that Brian hits me twice in the face." The applicant thereafter referred to the injury that he sustained in the form of a laceration in the eye area.

[11] The first staff witness was then called, Officer Hawthorne, who confirmed that a fight had started but that he did not see the fight start and that he ran to intervene and saw the two prisoners punching each other and then separated the fight.

[12] The Governor had the hospital confirm that the applicant had injuries above his right eye as a result of the incident. The following exchange then took place during the course of the adjudication:

> **"Governor ... as I have said to you several times when we have been viewing this tape to view it against the charge you are actually charged with in that you fight or wrestle with any other person and again by your own admission and by the evidence on the tape and what Officer Hawthorne said you are seen to be fighting with another person. ...**
>
> **Prisoner – In light of that, yeah, that is the charge. It is a quick thing. If you look at it the stills and my submissions you will see that McBride hits me twice first before I react.**

> **Governor – I will deal with that in a second. I accept what you are saying about the other prisoner throws the first punch. However, there is quite clearly a break in this fight where you then become the aggressor, move back down the walkway throwing a kick and throwing other punches and at a point you say that you grab his lapels. Even when you grab his lapels you are still throwing punches, so on the basis of the charge in that you fight or wrestle with any other prisoner I find you guilty beyond any reasonable doubt. This is, therefore, your opportunity to make a statement to me in mitigation before I pass an award."**

Following some comments in mitigation by the prisoner the Governor sentenced him to three days cellular confinement.

[13] On 22 February 2010 the applicant's solicitors wrote to the Governor requesting materials relating to the adjudication and on 3 March they wrote requesting that the Governor explain the "precise basis" upon which he found the applicant guilty. On 12 March 2010 the Governor replied, so far as material, in the following terms:

> **"I was the Adjudicating Governor in this matter. I can confirm that CCTV footage is preserved and stored in SIC. Northern Ireland Prison Service policy is that transcripts are not made available, save exceptional circumstances. James was charged under para.5 of Prison Rule 38: fights or wrestles with any prisoner or person.**
>
> ***During oral submission James confirmed that it was him on the tape and admitted that he was fighting.* Having considered all the recorded evidence available to me – officers statement, CCTV coverage and listening to oral testimony from the reporting officer and your client, I found James guilty beyond all reasonable doubt."** [Emphasis added]

[14] On 2 June the Governor swore a replying affidavit averring that in his view the footage showed the applicant fought with McBride and that he was satisfied that he had gone beyond self defence in that regard. At para.13 he outlined the thought processes that he alleges he had when adjudicating:

> **"… At internal page 9 of the transcript I referred to a clear break in the fight, after which the applicant became the aggressor rather than availed of the**

> **opportunity to move away from the incident. At the point of this break in the fight, the applicant was between 3-6 feet from an unlocked grill behind him while McBride was 6-8 feet away down the walkway in front of the applicant. As a resident of Braid House the applicant would have been well aware of the layout of this location and that this grill is never locked, further to this he had just passed through this open grill, having just been transported from the main prison. Given this fact, he also knew that two members of prison staff were 10-12 feet through the grill with the prison transport. Mr McBride was retreating. The applicant neither made effort to remove himself from the situation, nor shout for the assistance of prison staff but rather chose to reinstigate the fight. It was in respect of this stage of the confrontation that I was entirely satisfied that the applicant was guilty of fighting and that in my view he was not acting in self defence in that he could not honestly have believed that it was reasonable in the circumstances to use force against McBride to defend himself."**

[15] Mr Hutton, on behalf of the applicant, at para.20 of his skeleton argument points out that other than the reference to the break in the fight and the Governor's view that the applicant had been the aggressor none of the matters referred to in para.13 were the subject of comment by the Governor during the adjudication and none of the matters referred to were put in evidence during the hearing.

[16] In response to this averment the applicant, in his second affidavit sworn on 11 June avers as follows:

> **"11. In this regard I would reject the manner in which the Governor suggests that I should have been able to act in such a sanguine manner in the circumstances that presented themselves on that day. I was attacked by Liam McBride, a convicted murderer. The whole incident lasted approximately 10 or 15 seconds and even if the matters that the Governor makes reference to were in my mind, I did not have time to weigh them objectively in the manner suggested by the Governor. This was a confined space. Liam McBride attacked me once and I only reacted after that. I attempted to restrain him on a number of occasions. The brief "break" in the fight which the Governor described lasted a second or two whereupon he raised his fists and I believed he was to attack me again**

(having already attacked me once). At this time I was aware that I was already bleeding from the face. I did not have time to think about whether a grill was unlocked or an officer might be on his way; I did not have time to consider my options and could only think of defending myself against what I believed was a further imminent attack. If the Governor had asked me about any of this before convicting me, rather than proceeding directly to conviction I could have told him about the circumstances of the incident, as I reasonably believed them to be. He did not ask any such relevant questions.

12. Furthermore, I would point out at this stage, in any event, I had only been in Braid House for a period of two weeks and I do not accept that I was as familiar with the layout of that house as the Governor appears now to suggest."

Discussion

[17] It is common case that the criminal standard of proof applies and that self defence is a complete defence to the offence charged. This is made explicit in Annex D (p45) of the Manual although there is no elaboration on the width of the defence or the fact that, once evidentially raised, the defence will only fail if it is proved to the criminal standard that what the accused did was not by way of self defence.

[18] In **Blackstone's Criminal Practice 2009** the authors point out at **para.A3.36** that the basic rule remains that if the accused misjudges the degree of force permissible and uses excessive (or "disproportionate") force, he is deprived of a defence. The Courts apply the rule in a manner which takes account of the motives and situation of the accused.

[19] Thus in ***Palmer v The Queen*** **[1971] AC 814** Lord Morris of Borth-y-Gest said at p832:

> **"It will be recognised that a person defending himself cannot weigh to a nicety the exact measure of his necessary defensive action. If a jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought was necessary that would be the most potent evidence that only reasonable defensive action had been taken. A jury will be told that the defence of self defence, where the evidence makes its raising possible, will**

> **only fail if the prosecution show beyond doubt that what the accused did was not by way of self defence."**

[20] An interesting application of that principle is to be found in the judgment of the Court of Appeal in ***R v Nugent*** **[1987] 3 NIJB 9.**

[21] A Governor properly directing himself in respect of self defence, and particularly taking into account the possibility of an honest, if mistaken belief in the circumstances which justified force could not properly deal with such issues without addressing in evidence with the prisoner what he honestly believed in the circumstances at the relevant time. As the transcript demonstrates the Governor focused on the applicant's actions at the "break" in the fight without questioning the applicant as to what he honestly believed the circumstances to be at the material time. Had the matter been addressed in the appropriate manner before convicting the applicant he would have been given the opportunity to give evidence about the circumstances of the incident as he reasonably believed them to be. No such relevant questions were in fact asked.

Conclusion

[22] Accordingly I accept the applicant's submission that the Governor did not properly direct himself in terms of self defence and furthermore that his failure to direct relevant questioning to the applicant on this issue was unfair. For these reasons the adjudication must be quashed. I do not consider it necessary to deal with the effect of the failure on three separate occasions to request the applicant if he wished to have legal representation. Or of the further complaint relating to para.13 of the Governor's replying affidavit set out above that he took into account matters not referred to at the hearing in breach of the requirements of procedural fairness.