

**THE HIGH COURT**

[2023] IEHC 463  
[Record No. 2023/3 JRP]

**BETWEEN:-**

**STEVEN PENROSE**

**APPLICANT**

**AND**

**THE GOVERNOR OF MOUNTJOY PRISON, THE IRISH PRISON SERVICE AND THE  
DEPARTMENT OF JUSTICE**

**RESPONDENTS**

**JUDGMENT of Mr. Justice Barr delivered *extempore* on 25<sup>th</sup> July, 2023.**

**Introduction.**

**1.** This is a contested leave application, in which the applicant seeks leave to proceed by way of judicial review seeking a number of reliefs, in relation to his detention in solitary confinement in Mountjoy prison.

**2.** The applicant brings these proceedings as a lay litigant. For that reason, the court must allow him considerable latitude in relation to the manner in which his application for leave to proceed by way of judicial review, has been pleaded.

**3.** The respondents resist this application on a number of grounds, which will be set out in detail later in this judgment.

**Background.**

**4.** The applicant was sentenced to life imprisonment on 13 December 2021, for the murder of one Philip Finnegan on 10 August 2016. That sentence was backdated to 17 May 2017, being the date on which the applicant entered custody in respect of that charge.

**5.** Since 2017, the applicant has been detained primarily in Mountjoy prison, although he spent three weeks in Cork prison in 2022. It is also asserted that he spent some periods of time in a number of other prisons since 2017, including Cloverhill prison, Wheatfield prison, and Castlerea prison.

**6.** The essence of the applicant's case, as set out in his written Statement of Grounds as lodged in the Central Office on 6 March 2023, and as more particularly set out in his amended grounding affidavit, sworn on 22 July 2023, which was filed in court on the moving of the leave application on 25 July 2023;

is to the effect that the terms of his imprisonment in Mountjoy prison, whereby he alleges that he has been placed in solitary confinement in his cell for 23.5 hours per day, with only a very limited access for exercise in a small enclosed yard, which he alleges does not have direct sunlight, is unlawful. The applicant submits that there are no factual or legal bases justifying these conditions of confinement within the prison. He asserts that the decision of the Prison Governor to place him in solitary confinement since his conviction in December 2021, has been in breach of his human rights, as guaranteed under the Constitution and the European Convention on Human Rights.

**7.** The applicant has also included in his statement grounding the leave application, a large number of other allegations of misconduct and inappropriate treatment towards him by various members of the prison staff. In particular, he alleges that he has been unlawfully denied any, or any reasonable, access to have visits with members of his family; he alleges that his correspondence has been interfered with; he alleges that he has been prevented from lodging various court applications.

**8.** More particularly, the applicant alleges that there is no lawful basis on which he has been placed in solitary confinement since December 2021. He alleges that insofar as the Prison Governor has sought to rely on various breaches of prison discipline, which had been recorded on P19 forms, these are false allegations and the determinations of breach of prison discipline on his part contained therein, are without substance and are untrue. In support of that assertion, the applicant states that since almost the commencement of his incarceration in Mountjoy prison, he has been followed on a near continuous basis by a prison officer holding a video camera, which was recording his every movement. He stated that in these circumstances, he would be able to prove beyond doubt that he has not been guilty of any breaches of discipline, as alleged in the various P19 forms.

**9.** In resisting the application for leave to proceed by way of judicial review, counsel for the respondents, Mr. Holt BL submitted that the within application was not maintainable for a number of reasons: first, while the applicant has made some very serious allegations against the servants or agents of the respondents and in particular, against prison officers in Mountjoy prison, there has been no proof supplied by the applicant of any wrongdoing by prison officers in this regard. It was submitted that the applicant has not identified any decision on the part of any of the respondents which he wants quashed. It was submitted that this is a fundamental flaw in his application for judicial review, as judicial review is a remedy that is designed to challenge decisions of statutory bodies and other persons exercising statutory decision-making powers. Furthermore, it was submitted that not only has the applicant failed

to identify a decision which he maintained should be quashed, he has not identified any basis on which any such decision ought to be quashed.

**10.** Secondly, it was submitted that this was really a claim for damages by the applicant in respect of various wrongdoing, which he alleges was carried out against him by servants or agents of the respondents. It was submitted that this was clear from the opening sentences of his grounding statement, where he stated that he wanted to lodge a civil suit against the respondents for damages for deliberately committing human rights abuses against him.

**11.** It was submitted that as this was the true relief which he wished to pursue in these proceedings, it was clear that these were not judicial review proceedings; insofar as he wished to mount a claim for damages, that ought to be pursued by way of a plenary action. In this regard, counsel referred to the previous judgments of Holland J in *Penrose v. Hackett and Cowley* [2023] IEHC 120 and in *Stephen Penrose v. Hannon and Moore* [2023] IEHC 121, where in each case it had been held that insofar as the applicant was seeking damages for assault in one case and for false imprisonment in the other, that judicial review was not the appropriate remedy; rather, the applicant should proceed by way of a plenary action. It was submitted that similar considerations apply in this case.

**12.** Thirdly, it was submitted that the applicant's application herein is out of time, insofar as it sought to question any matters that had arisen more than three months prior to the date of lodgement of his papers on 6 March 2023.

**13.** Fourthly, it was submitted that many of the matters in respect of which the applicant sought to proceed by way of judicial review, were not matters that were amenable to judicial review, e.g. the allegedly high prices charged in the prison tuck shop; the taking of his pillow and television remote control from his cell and the adequacy of the fork that was provided to him to eat his meals.

**14.** Fifthly, it was submitted that there were other avenues of redress that were available to him in respect of many of the matters of which he complained. It was submitted that the applicant could avail of the internal prison complaints system in relation to many of his complaints of alleged misconduct on the part of prison staff. Insofar as he complained about allegedly false charges been made against him in the P19 forms; those could have been appealed either in relation to the substance of the charge or in relation to the sanction imposed, but the applicant had not availed of that opportunity. It was submitted that in these circumstances, he should not be allowed to challenge these matters in a judicial review application.

**15.** Sixthly and finally, it was submitted that there was an obligation to comply with the duty of candour when moving an application for leave to proceed by way of judicial review. It was submitted that the applicant had not complied with this duty when he had complained that he had been denied adequate visits with his family; that his correspondence had been interfered with; and that he had been blocked in bringing various applications before the courts. It was submitted that all of those allegations were untrue. It was further submitted that the applicant had been deliberately evasive and untrue in his statements contained in his grounding statement in this regard, because the various records that had been exhibited to the affidavit sworn by Mr. David Tracey, Assistant Governor in Mountjoy prison, on 5 May 2023, had clearly established that the applicant had been afforded numerous visits with members of his family; he had engaged in extensive correspondence with a large range of people and statutory bodies, including the European Court of Human Rights; and he had had telephone contact with a range of people, including with his lawyers. It was submitted that by failing to disclose these matters to the court, he had displayed a lack of candour, sufficient to disentitle him to leave to proceed by way of judicial review.

**Conclusions.**

**16.** Although the test which the court must apply when considering an application to proceed by way of judicial review is well known, being the test set down in *G v. DPP* [1994] 1 IR 374, it is worthwhile reiterating the test that was set down by Finlay C.J. at p. 377/378:

*"An applicant must satisfy the court in a prima facie manner by the facts set out in his affidavit and submissions made in support of his application of the following matters:—*

*(a) That he has a sufficient interest in the matter to which the application relates to comply with rule 20 (4).*

*(b) That the facts averred in the affidavit would be sufficient, if proved, to support a stateable ground for the form of relief sought by way of judicial review.*

*(c) That on those facts an arguable case in law can be made that the applicant is entitled to the relief which he seeks.*

*(d) That the application has been made promptly and in any event within the three months or six months time limits provided for in O. 84, r. 21 (1), or that the Court is satisfied that there is a good reason for extending the time limit. The Court, in my view, in considering this particular aspect of an application for liberty to institute proceedings by way of judicial review should, if possible, on the ex parte application, satisfy itself as to whether the requirement of promptness and of the time limit have been complied with, and if they have not been complied with, unless it is satisfied that it should extend the time, should refuse the application. If, however, an order refusing the application would not be appropriate unless the facts relied on to prove compliance with r. 21 (1) were subsequently not established, the Court should grant liberty to institute the proceedings if all other conditions are complied with, but should leave as a specific issue to the hearing, upon notice to the respondent, the question of compliance with the requirements of promptness and of the time limits.*

*(e) That the only effective remedy, on the facts established by the applicant, which the applicant could obtain would be an order by way of judicial review or, if there be an alternative remedy, that the application by way of judicial review is, on all the facts of the case, a more appropriate method of procedure.*

*These conditions or proofs are not intended to be exclusive and the court has a general discretion, since judicial review in many instances is an entirely discretionary remedy which may well include, amongst other things, consideration of whether the matter concerned is one of importance or of triviality and also as to whether the applicant has shown good faith in the making of an ex parte application."*

**17.** Where an application for leave to proceed by way of judicial review is heard on notice to the respondent, the test remains the same as if the application were made on an *ex parte* basis. The only difference is that in crossing the threshold for leave to proceed by way of judicial review, the applicant faces a slightly more difficult exercise, due to the fact that the respondent is in a position to lead evidence and legal argument to the effect that the applicant has not satisfied the test laid down in the *G v. DPP* case.

**18.** The court does not propose to set out in detail the matters referred to in the affidavits sworn on

behalf of the respondents. An affidavit was sworn by Ms. Carole Sullivan, acting assistant secretary in the Department of Justice, sworn on 27 April 2023. In that affidavit, she set out evidence of a significant amount of correspondence sent by the applicant to the Minister for Justice, setting out complaints that he had in relation to his trial before the Central Criminal Court; alleged defamatory statements that had been leaked by the Prison Governor to the media; allegations of interference with his correspondence and legal documents; and a complaint of excessive use of force by a prison officer.

**19.** Ms. O'Sullivan noted that on 14 October 2022, the Minister's office had sought observations from the IPS in respect of the applicant's claim that he was in solitary confinement. On 12 January 2023, the IPS responded, stating that the applicant was on restricted regime due to his continuous threats against staff. They referred to a number of the applicant's P19 reports for threatening staff, attempted assault, weapon holding, sending a sexually graphic note to a female member of staff; and for deliberately exposing himself to a female prison officer.

**20.** An affidavit was sworn by Mr. David Tracey, Assistant Governor in Mountjoy prison on 10 May 2023. In that affidavit, Mr. Tracey stated that the applicant had received a total of 118 P19's for breaches of prison discipline; of which 61 had been received by the applicant since his committal to Mountjoy prison in May 2017. He went on to give a detailed breakdown of the matters that had been dealt with by way of P19 reports. He exhibited a record of the various P19's that had issued, which included a description of the alleged breach of prison discipline, and a statement of the sanction imposed in each case. He noted that the applicant had not appealed any of the P19's that he had received since 2017.

**21.** Having made a number of legal submissions as to why the applicant's application was not maintainable at law; Mr. Tracey denied that there had been any wrongdoing by any member of the IPS, or its staff, as alleged by the applicant, or at all. He gave the following justification for the applicant's current conditions of incarceration:

*"He has at all times been detained in accordance with the provisions of the Prisons Act 2007, as amended and the Prison Rules 2007, as amended. Insofar as there has been any restriction on his constitutional, statutory or other rights during his period of detention, the same has been (I) necessary for the purposes of prison discipline, safety of staff and/or prisoners (including that of the applicant himself) and security of the prison, (II) proportionate, and (III) authorised by law."*

**22.** Mr. Tracey went on to give further details in relation to the applicant's detention regime in

Mountjoy prison. He outlined how the applicant had been placed in the Challenging Behaviour Unit due to his well-documented behaviour, which were evident from the list of his P19 offences, including frequent serious breaches of prison discipline. He outlined how the applicant had been offered one hour of exercise a day, which he usually availed of. He was also offered a shower and an opportunity to clean out his cell each day. He was offered physical visits, video calls, family phone calls and calls to his solicitor, in line with the existing prison regimes.

**23.** Mr. Tracey went on to outline how the applicant had been offered a move to a group of prisoners, which had been formed pursuant to rule 63 of the Prison Rules. He outlined how the applicant had been successfully moved to the B1 landing on 13 February 2023. However, he had been moved back to the CBU on 19 April 2023, for exposing himself to a female officer.

**24.** Mr. Tracey accepted that restrictions would have been imposed from time to time on the applicant's visits from his family, which sanctions were imposed in relation to various breaches of prison discipline as found further to the P19 reports. He exhibited a record of these P19 sanctions. He stated that the applicant had not appealed either the P19 findings, or the sanctions imposed. He denied that the applicant had been denied either contact with his lawyers or other bodies, or had been denied access to the courts. He exhibited records showing the visits received by the applicant from his lawyers and family; correspondence he received and correspondence he sent to various people and records of telephone calls that he made. He ended by denying all of the allegations made by the applicant against the IPS and its staff.

**25.** It is clear from the affidavits filed on behalf of the respondents and from the extensive exhibits thereto, that the allegations made by the applicant in his Statement of Grounds will be strongly contested by the respondents. There is no denying that their evidence in this regard is on paper, impressive. However, insofar as it is alleged that the placing of the applicant in solitary confinement was due as a result of sanctions imposed following various P19 reports, this is not borne out by the P19 records themselves. In relation to the current year, 2023, the records disclosed three alleged breaches of prison discipline: that on 28 January 2023, the applicant interfered with and damaged a fire sensor in his cell, for which he received the sanction of a caution and reprimand; that on 2 February 2023 he had a prohibited article in the cell, for which the sanction imposed was a prohibition on specific activities/evening recreation, prohibition on personal visits, except to allow one visit per week from a family member, and the prohibition on using money/credit; that on 19 April 2023 he indecently exposed

himself to a female officer, for which the sanction imposed was a caution, prohibition on specific activities of evening recreation, use of gym and on personal visits, save to allow one visit per week from a family member. There was also prohibition imposed on using money/credit and the prohibition on making phone calls, save to allow one per week to a family member. Those sanctions were due to end on 31 May 2023.

**26.** In these circumstances, it does not appear that the P19 records contain any justification for his continued solitary confinement; insofar as the sanctions imposed expired as of 31 May 2023 and in any event, they did not specifically refer to placing him in solitary confinement, as a sanction.

**27.** It may be argued by the Prison Governor that having regard to the totality of the P19 reports against the applicant since his detention in 2017, that the decision to place him in solitary confinement is a reasonable, proportionate and lawful decision. That is an issue for another day.

**28.** I am satisfied that placing a prisoner in solitary confinement, whereby he is in a single cell for approximately 23 hours per day, with very limited opportunity to exercise and no opportunity to mingle with other prisoners, is a serious interference with his rights as a prisoner, I am satisfied that such decision must be justified by the prison authorities on the basis of cogent evidence. I do not say that such evidence is missing in this case, but I am satisfied that the applicant has demonstrated sufficient concern in this regard, such that he should be given leave to proceed by way of judicial review to challenge the decision of the governor to maintain him in solitary confinement. He is not out of time to challenge that decision, as that decision rolls on from day to day.

**29.** The applicant stated in argument, and it has not been denied on affidavit by the respondent, that since his confinement in the prison in December 2017, he has been followed on an almost continuous basis by a prison officer holding a video camera, who has been recording all of his movements. If that is indeed the case, then his assertion that the P19 reports against him are false, will be capable of being proved, or disproved relatively easily.

**30.** I am satisfied that the applicant has crossed the low threshold for leave to proceed by way of judicial review as set down in the *G v. DPP* case. Accordingly, I will make the following orders in this case:

- (a) I grant the applicant leave to proceed by way of judicial review in respect of the following reliefs: an order of *certiorari* in respect of the decision made by the Prison Governor to place the applicant in solitary confinement;



(b) If the court finds that the decision to place the applicant in solitary confinement was unlawful; the court may direct a hearing in relation to the assessment of damages to which the applicant may be entitled, as a result of the finding of the unlawfulness of that decision;

(c) The court reserves the question of the costs of this application to the trial of the action.

**31.** The court also gives the following directions in the matter: the applicant is to serve a copy of his amended grounding affidavit sworn on 22 July 2023, on the Chief State Solicitor within three weeks of today's date. The respondents shall have six weeks from receipt of the applicant's amended grounding affidavit, within which to file their opposition papers.

**32.** The matter will be listed for mention before the judge dealing with the Non-Jury/Judicial Review list, at 10.45 hours on Wednesday, 11 October 2023, for such further directions and/or for obtaining a hearing date, as directed by the judge dealing with the list. For that purpose, I will make a production order in respect of the production of the applicant in the Four Courts, Dublin 7, at 10.45 hours on 11 October 2023.

**33.** I will place a stay on my judgment herein for a period of two weeks and if within that period, the respondents lodge a notice of appeal, then the stay is to continue until the final determination of the matter before the Court of Appeal.