

THE HIGH COURT

[2023] IEHC 762

[Record No. 2023/1511JR]

BETWEEN

STEPHEN MALONE

APPLICANT

AND

GOVERNOR OF CLOVERHILL PRISON

RESPONDENT

EX TEMPORE JUDGMENT of Mr Justice Liam Kennedy delivered on the 29th day of December 2023

1. On 29 December 2023 I refused leave to seek judicial review in these proceedings. As requested, I set out below the reasons for my decision. In doing so, I have expanded on and reordered my oral reasons in the interests of greater clarity by, in particular, adding references to the seminal decision which I did not have to hand in the course of the vacation sitting but upon which I relied.

2. The applicant was granted bail on consent on 15 December 2023 on conditions, including €100 to be lodged on his own bond. He was not in a position to lodge the €100 on that date and therefore could not be immediately released. However, he was eventually able to arrange for payment to his solicitors on Sunday 24 December 2023, Christmas Eve, with a view to meeting the bail conditions.

3. Rather than paying the money in cash to the prison (which, I was informed, was an alternative option), his solicitors arranged to transfer the funds by electronic fund transfer (“EFT”). They contacted Cloverhill Prison (“Cloverhill”) to confirm that the EFT had been or was being made and to confirm that the applicant would be released. Cloverhill had not yet received the payment and advised that it could take some days to come through. Indeed, anybody who has used EFT would realise it is not always as instantaneous as one might anticipate. It may take time for bank to action its customer’s EFT payment instructions. Furthermore, even after transmission has been effected by the payer’s bank, there may be further delays before the payment is confirmed by the payee’s bank as a credit in cleared funds in the payee’s account. Such delays are frustrating from the payer’s perspective (since they regard the money as having been paid) and such delays can of course be exacerbated over holiday periods. Indeed, the applicant’s solicitor’s website sensibly warned its customers of the need to “*allow more time for your payments to reach the receiving bank*”.

4. It is unfortunate that the payment required by the order and the bail agreed on 15 December 2023 was only made on Christmas Eve and that it was effected by electronic transfer. These two circumstances, for which the respondent was not responsible, inevitably deprived the applicant of the opportunity of being released for Christmas. However, the applicant contends that the respondent breached his rights by failing to release him even after it may have received the EFT payment.

5. The applicant exhibited extracts from his solicitors’ bank’s website. It appears from these documents that the EFT instructions on Christmas Eve, Sunday 24 December 2023 may have led to the receipt of the funds by Cloverhill’s bank at some stage on Wednesday 27 December 2023. Unfortunately, there is no evidence as to when, in turn, Cloverhill might have been expected to have received confirmation from its

bank of the payment into its account in cleared funds. While the applicant cannot be expected to have any insights into the operation of Cloverhill's bank account, it should be possible to confirm the time that would be taken in the normal course of business for EFT payments received by an Irish bank to be credited to their customer's accounts in cleared funds. The material exhibited appeared to confirm the distinction (albeit in respect of incoming rather than outgoing payments) between a payment being received by that bank and its being credited to the customer's account, implying a potential time lag between a payment reaching Cloverhill's bank and its appearing as cleared funds in its bank account. No obligation to release the applicant could have arisen before then.

6. The applicant's solicitors diligently sought to follow up on 27 and 28 December to check that the funds had been received by the respondent and that the applicant would be released without delay. A number of telephone calls and emails were initially directed to the individual who had dealt with the matter before the break. Unfortunately, he was away on annual leave. Contrary to what might be regarded as best practice, the individual's "out of office" message did not identify colleagues who could be contacted in his absence. Other attempts to contact the prison by telephone and email on 28 December were also fruitless. The applicant was understandably upset and frustrated by the delay in securing his release.

7. Concerned by the difficulty in contacting Cloverhill to confirm that the funds had been received and that the applicant would be released and anxious to progress matters before the new year, the applicant's legal advisors decided to apply for leave to seek judicial review with a view to obtaining orders for *mandamus* and other reliefs, including damages and costs. The applicant's High Court bail application was already listed for Tuesday 2 January 2024 in any event (because of an anticipated difficulty in raising the money for bail) but the applicant was concerned to progress matters before

then. The applicant's legal team urgently drafted proceedings and sent the presumed legal representatives of the prison a copy of the draft proceedings on the eve of the Court application on Friday 29 December 2023.

8. Happily, the delivery of the draft proceedings had the desired effect. While the issues were still being resolved, progress was being made and counsel for the applicant was able to inform me that it appeared that the matter would be satisfactorily resolved in early course. Noting that the anticipated release of the applicant following confirmation of receipt of the payment could still leave outstanding issues (such as a possible damages claim and a claim for the costs of the proceedings), Counsel suggested an adjournment of the leave application. However, having already acceded to the request for an urgent vacation sitting and having reviewed the papers to prepare for that hearing, I deemed it was more appropriate and a better use of judicial resources to deal with the application rather than leaving it for another occasion, which would require duplication of effort on the Court's part. The matter proceeded on that basis.

9. Counsel for the applicant then made the application for leave, essentially reviewing the facts as outlined above and as set out in greater detail in the Statement of Grounds and the grounding affidavit. I also asked Counsel for more details of the communications and correspondence between the parties prior to the application because I was not satisfied by the details of the chronology in the grounding affidavit. Counsel duly provided details of further communications from the bar, twice actually passing up to me her instructing solicitor's mobile phone so I could review screenshots to establish what messages had been sent, when, and to whom. This was a suboptimal way of providing evidence which should have been on affidavit, but I accommodated the applicant and his counsel to ensure that they had a sufficient opportunity to explain the chronology.

10. Even allowing for the evidence from the bar including such screenshots and also the question of mootness, I remained concerned that the issuing of these proceedings was certainly premature and perhaps entirely unnecessary. The timeframe allowed by the applicant in respect of the receipt and processing of the EFT over the Christmas period before seeking leave was, based on the evidence before me, unreasonably narrow in the circumstances. The applicant's representatives should have appreciated that an EFT sent on Sunday, Christmas Eve, would inevitably take time, firstly to be transferred from the solicitors' account by their bank to Cloverhill's bank and, secondly, for the latter to process and credit the payment to Cloverhill. Accordingly, there was always going to be a delay before Cloverhill could reasonably be expected to have received confirmation of receipt of payment in cleared funds.

11. It would have been more helpful if the individual who dealt with the matter on Cloverhill's behalf on Christmas Eve had mentioned that they would be away until the new year and if they had informed the applicant's solicitors who they should contact in his absence. Presumably, the prison has arrangements to check for receipt of EFT payments at appropriate intervals, including over holiday periods. Such arrangements are necessary in the context of bail conditions because individuals, such as the applicant, are constitutionally entitled to be released once the prison confirmed receipt of the cleared funds. They enjoy the presumption of innocence and must be released once bail conditions are met. Nor is it in the interests of the State or the taxpayer (or those of the overstretched prison service) to unnecessarily detain remand prisoners who are entitled to bail once bail conditions are satisfied.

12. However, putting the applicant's own evidence at its height, Cloverhill does not appear to have acted or delayed unreasonably in the circumstances of the holiday period to such an extent that judicial intervention was warranted at that point. Nor am I

satisfied that it was necessary or appropriate to proceed directly to seek judicial review on 29 December 2023.

13. In my view, before taking that step the applicant's solicitors could and should first have escalated the matter more formally and more effectively. For example, they could have hand-delivered formal, hard-copy communications to Cloverhill and its representatives in terms designed to ensure that the recipient escalated and addressed the matter appropriately and immediately. A more assertive strategy would have been more likely to ensure that the matter received immediate attention (also avoiding the risk that emails and calls might not be picked up over the holiday period). I doubt that it would have been necessary to issue judicial review proceedings if the applicant's legal team had taken such proactive steps in the first instance.

14. Nor is it clear why it was necessary to seek judicial review rather than to avail of other routes, which might have brought matters to a head more effectively and quickly, or whether judicial review proceedings were, in practice, likely to resolve the issue in advance of the hearing already scheduled for 2 January 2024. (There was no discussion of the possibility of as an application for *habeas corpus* which, on reflection might have been an effective way to progress matters. Accordingly, my decision on the leave application did not have regard to that possibility).

15. It is significant that the communications on 28/29 December 2023 in relation to the imminent proceedings seemed to break the apparent impasse. That fact calls into question the appropriateness, or at least the timing, of the proceedings. In my view, if there had been sufficient engagement and escalation before drafting proceedings and certainly before applying for leave to seek judicial review, the need for the proceedings would probably have been avoided. I agree that, if all such reasonable avenues had been exhausted to no avail, then it would have been appropriate to seek the intervention of

the Courts. However, I am not satisfied that all avenues were sufficiently exhausted in this instance.

16. In summary, the welcome engagement between the respective legal teams on 28/29 December seems the most likely way to achieve a just, sensible and satisfactory outcome which vindicates the applicant's rights. However, such engagement begs the question as to the sufficiency of the applicant's earlier attempts to escalate the matter before seeking leave to issue judicial review proceedings.

17. While I commend the diligence, commitment and zeal of the applicant's legal advisors, their energies may have been better directed to more exhaustive engagement with the respondent's representatives before turning to litigation, although I acknowledge that such communications would have been hampered by the time of year.

18. I do not consider that the applicant has shown an arguable case for leave in circumstances in which the respondent was given such a limited time to respond, particularly since the attempts to engage with the respondent and its representatives were not as exhaustive as they should have been. The proceedings "jumped the gun", so to speak.

19. The factors identified in *G v DPP* [1994] 1 I.R. 374 as requiring consideration on applications for leave to seek judicial review include whether: (a) the facts averred to in the affidavit would be sufficient, if proved, to support a stateable ground for the relief sought; (b) by reference to those facts there is an arguable case in law that the applicant is entitled to such relief; and (c) the only effective remedy open to the applicant is by way of judicial review or, if there is an alternative remedy, that judicial review is, in the circumstances, a more appropriate procedure. Finlay C.J. noted that these conditions are not exclusive, and that the Court retains a general discretion,

judicial review being an entirely discretionary remedy that may require “*consideration of whether the matter concerned is one of importance or triviality ...*”

20. In the light of those three factors and the particular circumstances of the case, including the compressed timescale, I do not believe that this is an appropriate case for judicial review or for the exercise of judicial review. In terms of the former Chief Justice’s salutary remarks about importance and triviality, the Courts would of course regard the liberty of any individual as highly important, but the issues raised by this particular case are largely the result of circumstances which are not of Cloverhill’s making. The evidence does not suggest that it has behaved or delayed unreasonably to an extent which would justify judicial intervention.

21. I am particularly concerned whether other, more appropriate remedies have been exhausted. I am not satisfied that this was the case for the reasons outlined. Further engagement may well have resolved the matter without the need for proceedings. The simplest alternative would have been to pay another €100 and to seek a refund when the situation was clarified. However, the applicant clearly had great difficulty funding the first payment, so this was unlikely to be open to him. However, if such a payment was not a realistic alternative, it was open to the applicant’s lawyers to engage further with Cloverhill and its representatives. I expect that the urgent despatch of more formal correspondence, to the right people, would have led to the breakthrough which was ultimately achieved. Such avenues ought to have been exhausted before seeking leave to seek judicial review.

22. In any event, as a result of the welcome engagement between the parties, it appears that the proceedings are now moot. While the door would not be closed in the (hopefully unlikely) event of future difficulties, the mootness of the current proceedings is a further reason not to give leave at this stage. However, as outlined above, even apart

from mootness, I am not satisfied that it was necessary or appropriate to issue proceedings until other avenues had been exhausted.

23. In summary, it is extremely unfortunate that the individual was not immediately released on the agreement of the bail conditions and the making of an order accordingly. That could have been achieved much sooner if the monies had been paid in cash on Christmas Eve or, indeed, at any time after 15 December. However, I am not satisfied that Cloverhill can be said to have breached the applicant's constitutional rights and accordingly I do not believe that, even taking the applicant's case at its height, a Court would be likely to grant the relief sought. If there are future issues, the applicant can of course issue any fresh proceedings if necessary and appropriate. However, I see no basis in the current circumstances for these proceedings and no benefit in prolonging them, particularly given the significant demands on the judicial review list. Accordingly, I am refusing to grant leave to seek judicial review and I am declining to make any order for costs.