



Trinity Term

[2016] UKPC 23

Privy Council Appeal No 0092 of 2014

JUDGMENT

**The Superintendent of Prisons and another (Appellants) vHamilton (Respondent)
(Anguilla)**

From the Court of Appeal of the Eastern Caribbean Supreme Court (Anguilla)

before

Lord Mance

Lord Kerr

Lord Clarke

Lord Carnwath

Lord Hughes

JUDGMENT GIVEN ON

27 July 2016

Heard on 5 July 2016

Appellants

Rupert T Jones (Attorney General)

Oliver Powell

Mary Haskins

(Instructed by the Attorney General's
Chambers)

Respondent

Tana'ania Small-Davis

Kerith T Kentish

(Instructed by Joyce Kentish and
Associates)

LORD HUGHES:

1.

The question in this appeal concerns the proper construction of section 7(2) of the Code of Discipline for Prison Officers in Anguilla, and in particular the scope of the power of the Prison Superintendent to refer upwards to the Governor charges which are brought against a prison officer.

2.

The Code of Discipline ("the Code") is given effect by section 41 and the Schedule to the Prison Regulations of Anguilla, which are in turn made under the Prison Act, Chapter P75-1. By section 1(1)

of the Code it is binding on all officers, who must conform to it. The Code then provides for disciplinary offences. Section 1(2) creates a residual or general offence of failure to conform to the Code. Then section 2 creates specific disciplinary offences in subsections which run from (a) to (p), and, in most of these, the different forms of the offence which are covered are listed in sub-subsections. So, for example, discreditable conduct is made an offence under section 2(a), and different forms of it are dealt with in sub-subsections (i) to (v), which concern disorderly behaviour, use of intoxicants or tobacco, bad language, assault on another officer and being unfit through drink when on duty.

3.

Sections 3 to 15 of the Code set out the procedure to be followed when complaint is made of an offence. For present purposes what matters is that after the charges have been reduced to writing and served on the accused officer, the initial responsibility for hearing the case is laid upon the Superintendent of Prisons by section 5:

“(1) The Superintendent shall, as soon as possible, hear the case and shall take or cause to be taken a full record of the proceedings, and the witnesses and shall sign such parts of the record as comprise evidence given by them, and the accused officer shall be shown the full record and sign it.”

4.

The critical section for present purposes is section 7, which includes provision for possible referral of the charge(s) upward to the Governor. It says:

“(1) The Superintendent may dismiss any charge after hearing the evidence.

(2) The Superintendent may, after hearing the evidence, refer any charge to the Governor and, unless he dismisses it, shall so refer a charge under section 1(2) or any provision of section 2 of this Code, other than the following sections -

2(a)(i), (iii), (b), (c), (d), (h)(ii), (l)(i), (m) or (n).

(3) Where the Superintendent refers a charge to the Governor, he shall inform the accused Officer.

(4) Where the Superintendent does not refer a charge to the Governor, he shall, unless he dismisses it, either -

(a) caution the accused Officer; or

(b) make one of the following disciplinary awards -

(i) admonition,

(ii) reprimand, or

(iii) severe reprimand.”

5.

The present respondent, Mr Hamilton, was a serving prison officer with the rank of deputy superintendent. He faced a total of nine disciplinary charges laid under the Code. All but one were laid under section 2(d)(i): neglect, without good and sufficient cause, promptly and diligently to perform his duty. The exception was laid under section 2(c): disobedience to orders. The Superintendent dismissed one charge (No 8). He referred six of the others (Nos 1, 2, 5-7 & 9 - all laid under section 2(d)(i)) up to the Governor, where one or more hearings ensued before a person

nominated by the Governor for the purpose. When the outcome of those hearings was that the Governor dismissed him, Mr Hamilton brought the present proceedings to challenge the power of the Superintendent to refer these charges up. It was and remains his contention that section 7 gave the Superintendent no power to refer up charges laid under the subsections or sub-subsections of the Code which are listed in section 7(2). Everything which happened after the referral up was accordingly, in his submission, ultra vires and of no effect.

6.

This contention succeeded in the High Court. The Court of Appeal agreed and dismissed the Superintendent's appeal. The Superintendent appeals further to Her Majesty.

7.

It will be seen that subsection 7(2) concludes with a list of charges for which a differential provision is made. The listed charges are:

Under 2(a)(i): discreditable conduct in the form of acting in a disorderly manner or any manner prejudicial to discipline or likely to bring discredit on the Service;

Under 2(a)(iii): using, whilst on duty, obscene, abusive or insulting language to another member of the Service;

Under 2(b): insubordinate conduct towards an officer whom it was his duty to obey;

Under 2(c): failing without good and sufficient cause to carry out a lawful order;

Under 2(d): neglect of duty (i) generally, (ii) by carelessness or neglect contributing to the escape of a prisoner or (iii) contributing by carelessness or neglect to the occurrence of loss damage or injury to any person or property;

Under 2(h)(ii): using obscene insulting or abusive language to a prisoner;

Under 2(l)(i): deliberately acting in a manner calculated to provoke a prisoner;

Under 2(m): absence without leave or lateness for duty;

Under 2(n): (i) wilful or negligent damage to or loss of clothing or equipment provided to him, or (ii) neglecting to report any damage to, or loss of, the same.

In the present case, the charges which the Superintendent referred up were all listed charges, all being laid under section 2(d)(i) (neglect of duty).

8.

The essential contention made for Mr Hamilton is that section 7(2) must be construed as meaning that:

(a)

the Superintendent **must** refer up charges **other** than the listed ones, but

(b)

he **may not** refer up the listed charges.

9.

Conversely, the argument of the Superintendent, and of the Attorney-General, is that section 7(2) means that:

(i)

the Superintendent **may** refer up **any** charge, but

(ii)

he **must** refer up non-listed charges.

10.

At first instance, the judge held that section 7(2) conferred a discretion on the Superintendent as to referral. She appears to have held that there were **no** charges where the Superintendent was **bound** to refer up. But whether she did so or not, she held that the purpose of the specification of the listed charges was to exclude them from any power to refer. She reached this conclusion in large part on the basis that the listed charges were, in general terms at least, the less serious amongst the full range of possible offences.

11.

In the Court of Appeal Mr Hamilton succeeded for different reasons. That court held that section 7(2) divided the range of charges into those where the Superintendent **must** refer (the non-listed ones) and those where he **could not** refer (the listed ones).

12.

It remains part of Mr Hamilton's argument that the listed offences are the less serious. Accordingly, he contended, the scheme of the Code is that such lesser offences were appropriate to the lesser disciplinary sentences available to the Superintendent, whilst the more serious non-listed charges were apt to be met by the greater sentencing powers of the Governor.

13.

It is certainly correct that the Code equips the Governor with greater sentencing powers than it does the Superintendent. The Superintendent's powers are caution, admonition, reprimand or severe reprimand, as stated in section 7(4), set out above. The Governor, if a charge comes to him, has the greater powers set out in section 12(1), which range from dismissal or requirement to resign, down via reduction in rank and forfeiture of increments to probation for up to 12 months. However, the Governor also has, by section 12(1)(g) the same powers as the Superintendent is given by section 7(4), so that he is not limited to his more severe sanctions.

14.

Up to a point it is true that the listed charges are likely to comprise the less serious offences. But it would be dangerous to derive any firm conclusion as to the correct construction of section 7(2) from this. Whilst more serious offences such as assault (section 2(a)(iv)), false statements (section 2(e)), financial misconduct (section 2(f)), improper relations with prisoners (most of section 2(h)), trafficking (section 2(j)) and corrupt practice (section 2(k)) are outside the listed charges, it is obvious that the circumstances of a listed charge may vary greatly in gravity. Repeated contumacious disobedience to orders (a listed charge) might in some cases be a good deal more serious than a single instance of assault on another officer (non-listed). The same might well be true of repeated neglect of duty (listed), which was, in effect, the allegation in the present case. Thus the selection of the listed offences on the basis of relative **likely** gravity is equally explicable on the grounds that for those listed offences it was thought unnecessary to make referral up mandatory, and it was felt sufficient to leave a discretionary power to refer if the circumstances of the offence(s) warranted it. Accordingly the relative gravity of the charges is equally consistent with the Superintendent's construction of section 7(2).

15.

Questions of construction begin with the ordinary and grammatical meaning of the words used. As everyone agrees, section 7(2) has two operative parts, providing for different rules for two classes of charge. Essentially the question is whether the closing words of section 7(2) - "other than the following sections [and the numbered list]" govern the whole of section 7(2) or the second part dealing with mandatory referral up. The Board entertains not the slightest doubt that on its face section 7(2) has the meaning for which the Superintendent contends (see para 9 above). The contrary contention, of Mr Hamilton, requires a quite unnatural reading of the words. It requires the section to be read, so far as concerns the listed offences, as if it said:

"The Superintendent may, after hearing the evidence, refer any charge to the Governor ... other than the following sections [and then the numbered list]."

This is, however, simply ungrammatical. "Any charge ... other than the following sections" is contrasting "charge" with "section". If section 7(2) were to mean what Mr Hamilton contends for, it would have contained at least the word "under", so as to read "any charge ... other than **under** the following sections ...". Conversely, the syntax is perfectly properly aligned with the Superintendent's proposed construction. The part of the section which catalogues the numbered listed charges relates to the immediately preceding words, which is what one would expect. It thus reads "... and, unless he dismisses it, shall so refer a charge under section 1(2) or any provision of section 2 of this Code, other than the following sections ...".

16.

This is also consistent with other provisions of the Code. Section 11 sets out the powers of the Governor, other than as to sentence, when a charge is referred to him. Section 11(2) provides:

"(2) Where the Superintendent has referred to the Governor a charge that he had power to deal with by himself, the Governor may remit the case to the Superintendent to be dealt with by him."

Thus this subsection contemplates a situation where the Superintendent has referred a charge up, but the Governor disagrees and thinks it could and should be dealt with by the Superintendent. Because it contemplates a situation in which the Superintendent has referred up a charge which he could have dealt with himself ("that he had power to deal with by himself"), it is simply inconsistent with Mr Hamilton's suggested construction of section 7(2). If Mr Hamilton were right about section 7(2) there could be no charge which the Superintendent could have dealt with by himself but which he had nevertheless chosen to refer up. So far as the Superintendent is concerned, on Mr Hamilton's construction, charges are binary. Either they **cannot** be referred to the Governor or they **have to be**.

17.

For Mr Hamilton, Ms Small-Davis valiantly contended that section 11(2) might be meant to deal with the case of the listed charge, where, as she contended, the Superintendent had no power to refer up, if he had erroneously purported to do so. But if that were so the rules would not give the Governor a mere power to remit; they would have to make remission mandatory, for the referral would have been unlawful. Nor would section 11(2) speak of a charge which the Superintendent "had power to deal with by himself" for, if Mr Hamilton's construction were correct, he would have had no choice but to deal with it himself.

18.

Ms Small-Davis also urged on the Board the contention that no safe conclusion could be reached upon the ordinary meaning and usage of the words of section 7(2) because it is, so she submitted,

ungrammatical also on the Superintendent's construction. That is because, says she, the saving "unless he dismisses it" is absent from the first part of section 7(2). If it be the case, she says, that the first part of the section confers a discretion to refer, it must plainly have been meant that such discretion could only be exercised if the Superintendent did not dismiss the charge. It is plainly correct that if the Superintendent dismisses a charge there can be no question of reference up, for there would then be nothing for the Governor to do. But the power to dismiss any charge is expressly provided for by section 7(1). It makes perfectly good sense for it not to be repeated in the first part of section 7(2), but for it to be emphasised in the second part in relation to charges which it is mandatory to refer up. Otherwise, the argument might be anticipated that a mandatory referral up precluded dismissal by the Superintendent.

19.

Next, Ms Small-Davis contended that the absence from the Code of any rubric setting out how any discretion to refer is to be exercised is a clear indication that no such discretion exists. One would expect, she suggests, at the least a provision such as "if in all the circumstances he considers his powers of disposal are inadequate" if a discretion has been conferred. There are certainly places in comparable legislation where a discretion is regulated by some such rule setting out the basis on which it is to be exercised. One of them is in these very Prison Regulations, where section 34(1) deals with offences by prisoners. There, the Superintendent has power to refer a charge to the Visiting Committee if he decides that, if the prisoner were to be found guilty, his powers of punishment would be inadequate. But the absence of such a rule explaining the basis on which a discretion is to be exercised is not, in the circumstances of this case, in any way inconsistent with the discretion existing. Without any such provision, the discretion has to be exercised on a rational basis and in accordance with the purposes of the Code and the Prison Regulations. It makes perfectly good sense for the framer of the Code to have left the circumstances for referral undefined, taking the view that the possible circumstances justifying it cannot exhaustively be anticipated. They would not necessarily in any event be limited to inadequate sentencing powers. Another example of a proper exercise of a discretion to refer (if it exists) would, as Ms Small-Davis realistically accepted, be the case where the Superintendent was himself a key witness to the alleged misbehaviour by the officer. There may well be others, for example the disabling ill-health of the Superintendent. The possible advantages and disadvantages of an attempt at a prescriptive set of factors on which the discretion is to be exercised cannot begin to prevail over the clear language of section 7(2).

20.

Ms Small-Davis contended, next, that unless section 7(2) were to be construed as she claims it should be there would be an unacceptable risk of breaches of natural justice occurring. This she says might happen because the accused officer would, on the Superintendent's construction, be exposed to the risk of referral up, and consequent possibility of greater punishment, without being put on specific notice of it. Mr Hamilton's claim in the present case has never been put on any basis other than ultra vires. There is simply no evidence what notice or want of notice there was as to the possibility of referral up. The Board entertains some doubt that any specific notice would be necessary, since section 7(2) itself constitutes the very plain warning of the risk, but that point is not before it for decision. What is clear is that whether any such notice is required or not cannot govern the meaning of section 7(2), which is clear in what it says and without doubt confers a discretion to refer the listed charges.

21.

Lastly Ms Small-Davis boldly contended that in the absence of Mr Hamilton's construction, section 7(2) would amount to an absurdity, because it would mean that the Superintendent could simply refer up every charge which came before him, except those he dismissed. There is no such absurdity in the Superintendent's construction. Given that there is a discretion, it must be exercised on ordinary principles. It must actually be exercised, and a blanket determination to refer up everything would be a denial of its existence. And it must be exercised rationally and in conformity with the purposes of the Code and the Regulations in which it is contained.

22.

There being no persuasive argument to the contrary, it is appropriate to return to the words used by the drafter of section 7(2). In the end, if there is ever a statutory word which normally constitutes a reliable indication of the creation of a discretion it is the word "may". Where "may" is contrasted in the same subsection with "shall", its meaning is, if anything, even clearer. The alternative construction put upon the section by Mr Hamilton involves reading "may ... refer any charge" in the first part, as "may not refer" the listed charges. That is simply an impossible construction. The sense of section 7(2) is not only apparent from its wording; it also achieves a perfectly rational common sense result. The potentially more serious (non-listed) charges have to be referred to the Governor unless the Superintendent dismisses them on his consideration of the evidence. The potentially less serious (listed) charges can be dealt with by the Superintendent without referral, but if he thinks that there is a good reason for referral up, he is entitled to take that course. Circumstances justifying referral up would include such gravity of alleged offence(s) that his powers of punishment were likely to be inadequate, but are not confined to such a consideration.

23.

For those reasons, the Board will humbly advise Her Majesty that the appeal by the Superintendent and Attorney General ought to be allowed. Mr Hamilton's claims ought to be dismissed. Unless reasoned written argument to the contrary is received within 14 days of the delivery of this judgment, an order that the respondent pay the costs of the appellant ought to follow.