

# THE HIGH COURT

[2022] IEHC 719  
[2022 No. 4507 P]

**BETWEEN**

**THE BOARD OF MANAGEMENT OF WILSON'S HOSPITAL SCHOOL**

**PLAINTIFF**

**AND**

**ENOCH BURKE**

**DEFENDANT**

## **RULING of Mr. Justice Brian O'Moore delivered on the 21<sup>st</sup> day of December, 2022**

1. This is my Ruling on the continued imprisonment of the Defendant, Enoch Burke. It follows a hearing this morning, which in turn arose from an earlier set of appearances before Dignam J. These form an essential part of the narrative, and will shortly be described.
2. On the 5th of September 2022 this Court (Quinn J) made an Order committing Mr. Burke to prison. Mr. Burke has been incarcerated ever since. The purpose of his imprisonment has been to compel Mr. Burke to comply with Orders made by Stack J (on an interim basis) and Barrett J (on an interlocutory basis). It is important to note that the Order of Stack J only lasted for a limited period, namely until the hearing seeking an interlocutory injunction took

place. The interlocutory injunction, ordered by Barrett J, is also for a temporary period and will expire when the trial of the action takes place and the underlying claim is decided.

3. The case is one brought by Mr. Burke's employer, a school in Westmeath. Mr. Burke is a teacher of History and German at the school. The action arises from a policy adopted by the school as to how transgender people are to be addressed. Unfortunately this policy, which in turn has resulted in a disciplinary process against Mr. Burke, has lead to these proceedings.

4. The Order made by Stack J, on the ex parte application of the school, restrains Mr. Burke from attending at the school premises, and from attempting to teach any classes or any students at the school.

5. The Order of Barrett J, which has bound Mr. Burke since the 7<sup>th</sup> of September 2022, is in broadly similar terms. It restrains Mr. Burke from attending the school premises, attempting to teach classes or students, interfering with a substitute teacher's duties, failing to comply with the directions of the school board, and from trespassing on school property.

6. Mr. Burke has refused to purge his contempt, despite having had the opportunity to do so. Lest there be any doubt about it, complying with these Orders does not in any way compromise Mr. Burke's religious beliefs or require him to do anything in violation of those beliefs. These Orders did not and do not oblige Mr. Burke to address anyone in a particular way or to use a specific style or title. In essence, they prohibit him from entering the school's premises or interfering with the school's educational activities. As far as I am aware, no

religious conviction is violated by having to stay at home; still less is any religious belief compromised by having to refrain from entering private school property.

7. The school's action is in the Chancery List of the High Court. The practice in this list for some time has been to case manage appropriate cases. Given this practice, the Chancery Registrar wrote to the parties on the 11th of October 2022 in these terms;

*“...in every case where a person is subject to ongoing committal to prison, fines or sequestration of assets consideration will be given to case managing the underlying action. This will allow the proceedings to move to a conclusion sooner rather than later.”*

The parties were then told that they would be heard on whether case management directions should be made, and directed the school's solicitors to provide an electronic copy of the pleadings by noon the following day.

8. The reaction to this was surprising, and emerged at a hearing before this Court commencing at 8.30 am on the 14th of October 2022, at which Mr. Burke strongly opposed any expedited trial of the action. Notwithstanding that opposition, on that date directions were made to enable a trial to take place either just before or just after Christmas. While the school complied with these directions, and expressed support for case management of the action, Mr. Burke did not. He later sought a stay on any further progress of the action before this Court, leading to a hearing on the 7th of November 2022. The depth of Mr. Burke's feeling is conveyed by his description of an early trial in these terms;

*"The trial of the action is an abomination to our laws, to our Constitution and to the*

*cornerstone of religious liberty"* - Transcript of Hearing of the 7th November 2022, at page 8.

The nature of Mr. Burke's resistance to case management and an early trial need not be set out in detail here. One example of the reasons relied upon by him will suffice. With regard to the requirement that the school promptly provide certain documents, Mr. Burke submitted;

*"And I do point out that that email contained a deadline of less than 24 hours for the provision of certain documentation. And I have to say that this beggars belief. I mean it is extraordinary, in the High Court, and I won't read out the submissions here, but it's really extraordinary that such a deadline would be contained in any documentation from a registrar." - ibid.*

9. This argument, like so many of Mr. Burke's submissions on the stay motion, made no sense. Firstly, the direction that the school deliver documents was obeyed by it without comment, still less complaint. Secondly, such a direction is by no means unusual in either the Chancery List or the Commercial Court. Thirdly, and most piquantly, Mr. Burke's stay motion was initiated by an application made shortly after noon on the 24th of October 2022. At that time, an Order was sought for the production of Mr. Burke before the Court that afternoon so that he might move the application for a stay. Accordingly, Mr. Burke feels that a direction from the Court that solicitors provide documents within 24 hours is "really extraordinary", but sees nothing unusual about seeking his production to Court, escorted by prison officers, to commence a significant application on a few hours' notice to the school.

10. The gist of Mr. Burke's opposition to case management, and an early hearing date, was that he wanted the trial to take place after the Court of Appeal had heard his challenges to a selection of the Orders made by this Court.. In a Decision dated the 19th of December 2022 I rejected his application, finding that no injustice would be caused by having the trial before the appeal hearing in mid-February 2023. However, the bringing of the stay motion and Mr. Burke's refusal to comply with the directions made on the 14th of October have in themselves put back the trial of the action. As is observed in my Decision on the stay motion, had both parties cooperated with case management it is entirely possible that the trial would now be over and (depending on the outcome) Mr. Burke could be at liberty.

11. Mr. Burke's continued imprisonment has been subject to review by the Court. As recently as the 13th of December, Mr. Burke refused to secure his release, which he could have done by agreeing to comply with the Order of Barrett J. That hearing was conducted by Dignam J. Later that week, the parties were asked by Dignam J to attend a hearing for the purpose of considering whether Mr. Burke should be released from custody while the school was closed over the Christmas holidays. Mr. Burke showed no interest in such a development, as will be set out later in this Ruling

12. In due course, I will set out my conclusions on Mr. Burke's erratic response to these proceedings, the relevant part of which is summarised here. For the moment, I will conclude this narrative by describing what happened at this morning's hearing when the question of Mr. Burke's immediate release was addressed.

13. Mr. Burke, having been given the time sought by his sister and legal adviser to consult with her, had estimated that his submission would last 10 minutes. In fact, almost all of his allotted time was taken up with comments, queries, and complaints about the Decision on his stay motion. In making these observations, Mr. Burke overlooked the section of the brief Decision which stated that (had case management been accepted) the trial of the action would have been well advanced by now. Mr. Burke was also aggrieved at the fact that the Decision was released 6 weeks after the hearing of his stay motion. In making this complaint, he ignored the portion of the Decision that stated it had taken some weeks for the transcript of the DAR to be made available. It is also somewhat counter intuitive for a person seeking to stay proceedings to express unhappiness about the timing of a ruling. In any event, the Decision was given within a short time after receipt of the transcript and any suggestion of delay is simply misplaced. On the question of possible release, he refused to participate in any meaningful way as (he claimed) to do so would acknowledge the legitimacy of his imprisonment. This does not follow; he could certainly have engaged with the proposal that he now be released while at the same time maintaining that he should never have been imprisoned. Staying in jail is a strange way of protesting that one should not be imprisoned in the first place.

14. Counsel for the school stated that it was in the Court's hands, that there was no concern or objection to the release of Mr. Burke during the school holidays as the school would be closed, and that the only worry on the school's part was what would happen when it reopened in early January.

15. In considering whether or not to release Mr. Burke at this time, there are six factors to take into account. They are;

1. Mr. Burke's Failure to Obey a Court Order.

2. The School's Attitude.

3. The Christmas Holidays.

4. The Use of Public Funds.

5. Alternative Measures.

6. Mr. Burke's Motivation.

1. Mr. Burke's Failure to Obey a Court Order.

16. Mr. Burke is in continuing breach of a Court Order. He has consistently refused to agree to stay away from the school. He has advanced no coherent reason for this disobedience. The purpose of his ongoing detention is to compel him to respect Orders made by this Court. Keeping him in jail is therefore a logical response to his behaviour. However, the mere fact that Mr. Burke continues to refuse to comply with the Order does not automatically mean that he is stay in prison indefinitely, without reference to other factors. Such a robotic response to Mr. Burke's behaviour would be insufficient. While the fact that he threatens, if released, to flaunt the relevant Order is a powerful reason to continue Mr. Burke's incarceration, it is not in itself definitive. The other considerations should be taken into account.

## 2. The School's Attitude.

17. The school initiated this action, obtained the interim and interlocutory injunctions, and sought the attachment and committal to prison of Mr. Burke. It is the property and activities of the school which are protected by the Order. While subordinate to the views of the Court, the school's position is of therefore some importance. As the school now does not oppose Mr. Burke's immediate release, it follows that it is satisfied that the interests protected by the Order are not (in its view) threatened by such a development, at least in the short term.

## 3. The Christmas Holidays.

18. Mr. Burke has mischaracterised his possible release at this time as a "Christmas gift". Apart from the fact that it is not for the Court to act in such a way, it is always open to the Court at any time to review a coercive Order and this is what Dignam J proposed would be done. It is just common sense for the Court to invite the parties to reflect on the purpose (if any) of having Mr. Burke kept in jail at a time when the school is to be closed for an extended period. That is especially the case where Mr. Burke's imprisonment is to procure his compliance with an Order that he not enter or teach at the school. One factor which must now be considered, therefore, is what useful purpose is to be served by having Mr. Burke incarcerated now. In my view, his continued imprisonment is not necessary at this time, certainly over the Christmas period.

19. Mr. Burke's initial reaction to the intervention of Dignam J is, nonetheless, important in one specific respect. At the hearing on the 15th of December Mr. Burke stated, according to the Digital Audio Recording, that;

*"But I am not looking for a reprieve and I do not wish to leave Mountjoy as a criminal on reprieve but rather to leave it justified in my cause, which is the cause of religious freedom."*

Mr. Burke went on, towards the end of his address;

*"I showed up to do my work and I was arrested and committed to Mountjoy prison by an Order of this Court. wish to leave Mountjoy prison and be justified in my cause with that Order overturned and I have indeed appealed that Order to the Court of Appeal. I believe it to be unjust, unreasonable, unfair and contrary to the Constitution."*

Mr. Burke concluded his participation by suggesting that there was no point in attending this morning's hearing.

20. In his written submissions supporting his stay motion, Mr. Burke referred to every relevant Order made against him as being astonishing. Mr. Burke's own attitude towards his potential release is surprising. He has not only refused to support such a development but has actively disparaged the proposal. Crucially, he has said in terms that he has no wish to leave prison except on his own terms. These are that he is vindicated by the Court of Appeal, and that he then leaves jail "justified in my cause". I will return to this.

#### 4. The Use of Public Funds.

21. The power to impose coercive measures in order to secure compliance with Orders is an essential one. It ensures, for the benefit of all of us, that the rule of law is effective. While such Orders are for the benefit of society as a whole, society also has an interest in the proper use of scarce public resources.

22. When these proceedings began, Mr. Burke was on paid administrative leave. That remains the case. One logical way in which the current stalemate could have been brought to an end was the completion of the disciplinary process, initiated by the school, which led to the placing of Mr. Burke on leave. However, after the proceedings began Mr. Burke brought an application to restrain the school from continuing with its disciplinary procedure. This in turn caused the school to undertake to pause that process and agree that it would only recommence it on giving sufficient notice to Mr. Burke to allow him to apply to this Court to injunct the school. The school, for reasons which are not absolutely convincing, has never given this notice to Mr. Burke.

23. The end result is that there is a complete stand off between the parties. For three months, the school has paused the disciplinary process that led to these proceedings. Mr. Burke remains on full pay and, as the school shows no sign of reactivating the internal procedures, he is likely to remain on full pay for the foreseeable future. Possibly the school would restart the disciplinary process when this action has concluded, but (as already noted) Mr. Burke has delayed an early trial.

24. In the meantime, Mr. Burke is refusing to purge his contempt, and will not explore an early release because he will only leave Mountjoy when he is vindicated by some higher court. One cannot exclude the possibility that, if the Court of Appeal does not find him "justified in [his] cause" Mr. Burke will ask the Supreme Court to intervene.

25. While this impasse persists, the taxpayers are burdened with paying Mr. Burke's salary at the same time as they are paying for his upkeep in Mountjoy. It is difficult to know which is the more costly. The Irish Penal Reform Trust gives the average annual cost of an "available, staffed prison space" at about 80,000 euro, as of 2021. Mr. Burke seemed to suggest to the court that teachers are paid between 50,000 and 100,000 euro per annum (Transcript of 7th November 2022, at page 15). Whatever the figures, it is intolerable that the public is paying, until some indefinite future date, the cost of Mr. Burke's incarceration as well as his wages. This is especially so where Mr. Burke appears to be refusing to countenance his immediate release for reasons which simply make no sense. This double draw on the public finances, in the very peculiar circumstances of this case, is a factor supporting Mr. Burke's release at this time.

##### 5. Alternative Measures.

26. The classic approach to the defiance of a Court Order by an individual is to imprison the person involved. It is not the only one. The Court can, for example, impose financial sanctions on the person in contempt. This can be done either instead of or in conjunction with

incarceration. It may well be that such coercive measures will be considered in the event that Mr. Burke is released, but breaches the Order when the school starts up again in January. In any event, the fact that the Court can deal flexibly with any future breach of the Order is a modest consideration in favour of release at this time. It may also ease the school's concerns about what will happen when it reopens.

#### 6. Mr. Burke's Motivation.

27. In all of his Court appearances, of which there have been many, Mr. Burke has emphasised his religion. He claims to believe that his incarceration arises from decisions of this Court which go to "abolish religious liberty" (Transcript of 7th November 2022, at page 8). Mr. Burke asserts that his religious beliefs prevent him from describing transgender people as "they", and projects his imprisonment as some sort of punishment visited upon him because he has stood up for these beliefs. He is incorrect in this, as his jailing has been brought about by his own decision to attend the school when he knew that he had been ordered not to do so.

28. However, there is no doubt that Mr. Burke and his views about transgender people are much better known now than before he was sent to Mountjoy Jail on the 5th of September. In early August, he was an ordinary History and German teacher in a Westmeath school. He is now a household name. His imprisonment has played a central part in this.

29. A number of key decisions made by Mr. Burke during the course of this litigation were quite illogical.

Firstly, he has chosen to interpret the Orders by Stack J and Barrett J as requiring him to act in a manner inconsistent with his religious beliefs. As a result, he says, he cannot comply with them. He therefore faces jail because of his religious convictions, or so he maintains.

30. This is wrong. As already noted, the Stack Order merely requires Mr. Burke to stay away from the school. Though more elaborate, the Barrett Order is to similar effect. The portion of that Order obliging him to comply with the directions of the school Board does not mean that Mr. Burke must do anything against his religious convictions, given that he is on enforced leave. The balance of the Barrett Order prevents interfering with the substitute teacher, and trespassing on school property. Obeying either Order was not inconsistent with Christian principles, and it is strange that Mr. Burke would behave as if this was so.

31. Secondly, when offered the prospect of a very early trial Mr. Burke rejected and frustrated this possibility. As set out earlier in this Ruling and in the Decision on Mr. Burke's stay motion, had the case management proposed by the Court been accepted by the parties the full hearing of this action would probably now be underway or imminent. The case might actually have been decided. The Order of Barrett J would either be spent, or be close to being redundant. If Mr. Burke had won the case, he would be free. Even if he had lost, it is by no means certain that he would have been subject to final Orders of the sort granted by Stack J and Barrett J, which underpin his current imprisonment, He advanced utterly unconvincing

grounds to stay the progress of the action before this Court. The argument most heavily relied upon by Mr. Burke was that the High Court Orders appealed had been wrongly made, and it would be unjust if his appeals were not decided by the Court of Appeal because they may have become moot. That is an argument properly made to the Court of Appeal, and is itself no reason to stop in its tracks the case before this Court. Mr. Burke acted in a way likely to prolong his imprisonment rather than bring it to an end.

32. Thirdly, and most strikingly, Mr. Burke treated with disdain the initiative of Dignam J to consider his early release given the fact that the school would close for Christmas. Again, he acted in a way designed to prevent his release. Instead, he candidly stated that his purpose was to achieve a departure from prison, on his terms, when he was found to be "justified" by the Court of Appeal in the stance he had taken. As already described, Mr. Burke this morning adopted an approach which lacked coherence. Yet again, at that hearing he refused to do anything to facilitate his release.

33. It is difficult to avoid the conclusion that Mr. Burke is exploiting his imprisonment for his own ends. This would explain why he took such an unreal view of what the Orders of this Court involved. It would explain why he resisted an early trial which could have seen him free now, or on the cusp of freedom. It would explain why, after over 100 days in prison, he rejected the proposal of Dignam J that could have led to his immediate release.

34. The purpose of this form of imprisonment is to coerce an individual into obeying a Court Order. This is unattractive, but true. However, this purpose is turned on its head when the person concerned is prepared to endure the undoubted discomforts of incarceration in order to obtain some greater benefit, at least as they see it. The only plausible interpretation of Mr. Burke's actions is that he sees some advantage in his continuing imprisonment, otherwise he would have either avoided his jailing or taken the opportunity to bring it to an end. In those circumstances, Mr. Burke's continued jailing would only facilitate whatever he feels he is currently achieving by being in prison. The Court will not enable someone found to be in contempt of court to garner some advantage from that defiance. This factor suggests that Mr Burke's release should be open ended, and not just for the Christmas period.

## CONCLUSION

35. Having considered all the factors set out in this Ruling, I have concluded that this is one of the very rare cases where the coercive imprisonment should stop, at least for the moment. This is not a unique case. Coercive imprisonment was brought to an end in by Finnegan P in *Shell v McGrath* [2006] IEHC 108, and by Allen J in *Wardglade Limited v Deery* [2021] IEHC 255. In those two judgments, the Court ended, on a permanent basis in respect of the relevant Orders, the incarceration of individuals despite the fact that they had not purged their contempt. In the current case, I am ordering the release of Mr. Burke but only on the basis that the school can come back to Court to seek his attachment and committal, the sequestration of his assets, or any other appropriate measure in the event that he does not comply with any Court Order, including the Order of Barrett J.

36. On that basis, Mr Burke is to be released from custody as soon as this can practicably be done. This release is not for any set period. Mr Burke will remain at liberty unless and until any further Court Order is made imprisoning him. The only threat to Mr Burke's continued freedom will arise if he again breaches any Order of this Court, including the existing Orders.