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THE HIGH COURT

JUDICIAL REVIEW

[2013 No. 721 J.R.]

BETWEEN

NATHAN KILLEEN

APPLICANT

AND

GOVERNOR OF PORTLAOISE, IRISH PRISON SERVICE AND MINISTER FOR JUSTICE AND EQUALITY

RESPONDENTS

[2013 NO. 722 J.R.]

BETWEEN

DESMOND DUNDON

APPLICANT

AND

GOVERNOR OF PORTLAOISE, IRISH PRISON SERVICE AND MINISTER FOR JUSTICE AND EQUALITY

RESPONDENTS

[2013 NO. 723 J.R.]

BETWEEN

JOHN DUNDON

APPLICANT

AND

GOVERNOR OF PORTLAOISE, IRISH PRISON SERVICE AND MINISTER FOR JUSTICE AND EQUALITY

RESPONDENTS

JUDGMENT of Mr. Justice Hedigan delivered on the 25th day of February 2014

1. The applicants seek the following reliefs:-

(1) an order of *certiorari* quashing the decision to segregate the applicants, or in the alternative an order of *certiorar*i quashing the refusal to transfer them to another prison and the mainstream prison population;

(2) a declaration that holding the applicants in segregation is a breach of their constitutional rights;

(3) an injunction directing the respondents to:-

(i) transfer the applicants out of segregation and into the general prison population in Portlaoise Prison or into the general prison population in another prison;

(ii) allow the applicants to engage in authorised structured activities;

(iii) allow the applicants to participate in communal recreation;

(iv) allow the applicants to associate with the general prison population;

(v) allow the applicants to avail of the prison's educational facilities;

(vi) allow the applicants to avail of the prison's vocational facilities;

(vii) allow the applicants to visits of normal duration;

(4) a declaration that the indeterminate close confinement of the applicants is unlawful and unconstitutional;

(5) a declaration that the respondents were in breach of the prison rules;

(6) a declaration that the current detention of the applicants is unlawful;

(7) a declaration that the respondents have failed to perform their functions in a manner consistent with the European Convention on Human Rights in holding the applicants in solitary confinement;

(8) a declaration that the respondents have failed to perform their functions in a manner consistent with the European Convention on Human Rights in refusing to allow the applicants to engage in authorised structured activities; and

(9) a declaration that the segregation of the applicants other than in accordance with rule 62 of the Prison Rules, 2007 (S.I. No. 252/2007) is unlawful.

2. **Background**

2.1 The applicant in the first set of proceedings is serving a five year term of imprisonment for burglary imposed on 22nd July, 2011, dating from 30th July, 2010. He is currently awaiting trial before the Special Criminal Court in November 2014 for the murder of James Cronin in 2008 and is also due to stand trial before the Special Criminal Court in April 2014 for the murder of Roy Collins in 2009.

2.2 The applicant in the second set of proceedings is serving a term of life imprisonment for the murder of Kieran Keane imposed on 20th December, 2003, which was imposed concurrently with a 15 year term of imprisonment for an offence of attempted murder and a seven year term for false imprisonment contrary to s. 15 of the Non-Fatal Offences Against the Person Act 1997.

2.3 The applicant in the third set of proceedings is serving a term of life imprisonment for the murder of Shane Geoghegan imposed on 13th August, 2013, and a five and a half year term of imprisonment imposed on 18th April, 2012, for an offence of threatening to kill April Collins contrary to s. 5 of the Non-Fatal Offences Against the Person Act 1997.

2.4 On 3rd November, 2012, all three applicants were transferred to Portlaoise Prison from the Midlands Prison following certain security concerns there and following an altercation with a fellow prisoner there. It was decided pursuant to rule 62 of the Prison Rules 2007,in the interest of security and good order in the prison, that they could not be accommodated within the general prison population. Since their transfer to Portlaoise Prison, they have been detained together in unit 3 in the A Block of the prison, a self contained eight cell unit, and have not been allowed to associate with the general prison population. Notices of their status under rule 62 were initially served on the applicants up to January 2013 but not thereafter when the authorities apparently considered that the conditions of their imprisonment had been improved.

2.5 On 27th September, 2013, the solicitor for each applicant wrote to the first named respondent querying his segregation and requesting his transfer to another prison. This was followed up with a reminder letter to Governor Moran on 1st October, 2013. The applicants have been detained together in this segregated unit for more than a year. They are allowed to associate with each other for at least three hours per day. The applicants have access to a yard and to some exercise equipment. Although they have complained of the lack of educational facilities, it is apparently the case that they have never actually requested such or made use of the available facilities in this regard. In his evidence in court, Mr Murphy said the plan was to move the applicants into a new unit, number 5. It has additional facilities including a full gym, kitchenette and a large classroom. They will have a yard to themselves and will be unlocked to the same extent as the general prison population.

3. Rule 62 of the Prison Rules 2007 provides as follows:-

(1) Subject to Rule 32 *(Exercise)* a prisoner shall not, for such period as is specified in a direction under this paragraph, be permitted to -

(a) engage in authorised structured activities generally or particular authorised structured activities,

(b) participate in communal recreation,

(c) associate with other prisoners,

where the Governor so directs.

(2) The Governor shall not give a direction under paragraph (1) unless information has been supplied to the Governor, or the prisoner's behaviour has been such as to cause the Governor to believe, upon reasonable grounds, that to permit the prisoner to so engage, participate or associate would result in there being a significant threat to the maintenance of good order or safe or secure custody.

(3) A period specified in a direction under paragraph (1) shall not continue for longer than is necessary to ensure the maintenance of good order or safe or secure custody

(4) Where the direction under paragraph (1) is still in force, the Governor shall review not less than once in every seven days a direction under paragraph (1) for the purposes of determining whether, having regard to all the circumstances, the direction might be revoked.

(5) A prisoner in respect of whom a direction under this Rule is given shall be informed in writing of the reasons therefor either before the direction is given or immediately upon its being given, and shall further be informed of the outcome of any review as soon as may be after the Governor has made a decision in relation thereto.

(6) The Governor shall make and keep a record of -

(a) any direction given under this Rule,

(b) the period in respect of which the direction remains in force,

(c) the grounds upon which the direction is given,

(d) the views, if any, of the prisoner, and

(e) the decision made in relation to any review under paragraph (4).

(7) The Governor shall, as soon as may be after giving a direction under paragraph (1) (c), inform the prison doctor, and the prison doctor shall, as soon as may be, visit the prisoner and, thereafter, keep under regular review, and keep the Governor advised of, any medical condition of the prisoner relevant to the direction.

(8) The Governor shall, as soon as may be after giving a direction under paragraph (1)(c), inform a chaplain of the religious denomination, if any, to which the prisoner belongs of such a direction and a chaplain may, subject to any restrictions under a local order, visit the prisoner at any time.

(9) The Governor shall, as soon as may be, submit a report to the Director General including the views of the prisoner, if any, explaining the need for the continued removal of the prisoner from structured activity or association under this Rule on grounds of order where the period of such removal will exceed 21 days under paragraph (4). Thereafter, any continuation of the extension of the period of removal must be authorised, in writing, by the Director General.

3.2 On 20th November, 2013, the respondents wrote an open letter to the applicants consenting to a declaration that the respondents had breached rule 62 of the Prison Rules 2007 in full and final settlement of the application herein, together with an agreement to pay costs to date. Thus it is not in dispute that the segregation of the applicants from the general prison population without applying the provisions of rule 62 of the Prison Rules 2007 from January 2013 was a breach of this rule. This decision appears to have been in response to the judgment of O'Malley J. in *Wayne Dundon v. Governor of Cloverhill Prison* [2013] IEHC 608 delivered on 12th March, 2013. Following delivery of this judgment, the respondents reapplied rule 62 in what they referred to as "a precautionary measure".

The Applicant's Submissions

4. The applicants complain that they are being kept in indefinite segregation confinement in a special part of the prison in isolation from their fellow prisoners. They complain of a lack of educational, gym and recreational facilities. This segregation they claim is having a deleterious affect on their mental and physical wellbeing. The applicants, through their legal advisers, acknowledge that they are problem prisoners for the respondent, but claim their continuing segregation is in breach of their constitutional rights and ECHR rights. They rely upon the law outlined by McKechnie J. in *Holland v. Governor of Portlaoise Prison* [2004] 2 I.R. 573 where, in connection with limiting the right of a prisoner to the society of others, he stated at para 30:

> "any such limitation must, not only be reasonable but also… must pass this test of necessity; otherwise such interference cannot be justified with the result that an infringement may be declared."

McKechnie J. continued at para 32:-

> "Given that the right in issue in this case is constitutionally based, it can I think be taken that any permissible abolition, even for a limited period or any interference, restriction or modification on that right should be strictly construed with the onus of proof being on he who asserts any such curtailment. In addition, the limitation should be no more than what is necessary or essential and must be proportionate to the lawful objective which it is designed to achieve. That a test of proportionality, where relevant, is now applied when considering constitutional rights is beyond doubt. In *Heaney v. Ireland* [1994] 3 IR 593 at p. 607 Costello J. described this principle as follows:-
>
> > 'In considering whether a restriction on the exercise of rights is permitted by the Constitution, the courts in this country and elsewhere have found it helpful to apply the test of proportionality, a test which contains the notions of minimal restraint on the exercise of protected rights, and of the exigencies of the common good in a democratic society. This is a test frequently adopted by the European Court of Human Rights and has recently been formulated by the Supreme Court in Canada in the following terms. The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right. It must relate to concerns pressing and substantial in a free and democratic society. The means chosen must pass a proportionality test. They must:-
> >
> > (a) be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations;
> >
> > (b) impair the right as little as possible, and
> >
> > (c) be such that their effects on rights are proportionate to the objective …'"

4.2 The applicants claim that their segregation fails this test. The respondents, they claim, have not exhausted alternative forms of detention. The applicants further rely on the judgment in *State (Richardson) v. Governor of Mountjoy Prison* [1980] ILRM 82 where Barrington J. held that:-

> "Not all of his constitutional rights are abrogated or suspended."

He continued further that a convicted prisoner "must submit to, and is entitled to the protection of the prison rules" and he further held that "the prisoner's subsisting rights can often be ascertained from the prison rules themselves, read in the light of the Constitution".

The Respondent's Submissions

5. The respondents argue that the applicants are prisoners of such notoriety and violence that they are a danger to good prison order and safety. They cite instances of intelligence in Midlands Prison that the applicants, whilst held there before being transferred to Portlaoise were planning some form of trouble. It was believed they were seeking to provoke a confrontation involving about 130 other

prisoners. Other prisoners had expressed fears of being sucked into this trouble. Following their removal from the general prison population, they were involved in a serious altercation with another prisoner. It was this which precipitated their removal to Portlaoise. As recently as September 2013, a three way telephone call was recorded by the prison authorities in which it was believed that the life of the governor was explicitly threatened by the applicants. They remain in the respondents' eyes an ongoing threat to the good order of the prison and the safety of themselves, other prisoners and prison staff. The respondents have produced considerable evidence of these fears to the court. Moreover, the respondents also argue that in fact the evidence shows that the applicant's account of their isolation as given to Dr. Lambe, their psychologist was misleading. In fact, the evidence shows they have presently enhanced conditions. Moreover, they have never sought educational facilities. It is conceded their access to the exercise yard has been, at times, restricted. Their prospective move to unit 5 will answer all their claims with regard to prison amenities. Thus the respondents submit that their segregation meets the tests set out in the applicant's submissions.

Decision

6.1 It is conceded the applicants are problem prisoners. It is further conceded that the prison authorities have not only the right but the duty to manage the prison so as to secure its safety for all. It is axiomatic that the courts cannot micromanage the individual prisoner or the prison generally, see O'Malley J. in *Wayne Dundon v. Governor of Cloverhill* (cited above). It is clear that rule 62 of the Prison Rules allows for the segregation from other prisoners of a particular prisoner where the governor believes on reasonable grounds that to allow that particular prisoner to associate with other prisoners would result in there being a significant threat to the maintenance of order or safe or secure custody in the prison. This provision is, initially, for segregation for very limited periods and subject to close review by the governor including supervision by the prison doctor. Any direction given under this rule must be recorded in writing by the governor including the views of the prisoner. However, in the context of this application, rule 62(9) is a very significant one. It contemplates a longer kind of situation than exists herein where it provides in its last sentence:-

> "Thereafter, any continuation of the extension of the period of removal must be authorised, in writing, by the director general."

No provisions as required by Rule 62 (4), (5), (6), (7) or (8) applies to the situation contemplated by (9). This provision relates to where it may be considered necessary to maintain a more long term form of segregation.

6.2 The prison rules at Rule 75 and 85, place an obligation on the governor and staff to respect the dignity and human rights of prisoners. It is well established that, whilst certain of a prisoner's right are abrogated or suspended as necessitated by their imprisonment *per se*, not all of those rights are. A prisoner is required to submit to the prison rules but is also protected by them. Their subsisting rights may often be ascertained from the prison rules read in the light of the Constitution (see *State (Richardson) v. Governor of Mountjoy Prison* [1980] ILRM 82).

6.3 In *Devoy v. Governor of Portlaoise Prison* [2009] IEHC 288 at p. 83, Edwards J. dealing with a situation of solitary confinement held that there is a presumption in favour of association between prisoners subject to the good order of the prison:-

> "Because man is a social animal the Court recognises that the humane treatment, and respect for the human dignity, of a prisoner requires that he or she should not be totally or substantially deprived of the society of fellow humans for anything other than relatively brief and clearly defined periods. To that extent a prisoner such as the applicant may be entitled to a degree of freedom of association as an aspect of his constitutional right to humane treatment and human dignity. The Prison Rules expressly recognise this. The combined effect of Rules 27 and 62 is to reflect what Counsel for the respondents fairly described as a 'presumption' in favour of a prisoner being allowed to have a degree of association subject to the good order of the prison…"

6.4 I gratefully adopt this passage. It is clear from the above that the good order of the prison and the safety of the prisoners as a body may at times require that certain prisoners, notably those of a violent disposition, be segregated from the main body of prisoners. It is not an ideal or desirable situation but it must be obvious to all that such a situation is likely to arise where long term prisoners, particularly those convicted of offences involving extreme levels of violence, are confined together in the same prison.

6.5 This segregation may be required in certain circumstances and it must be for the prison authorities to determine when. It is something that should only occur in exceptional situations (see Connolly v. Governor of Wheatfield Prison [2013] IEHC 334, Hogan J). When it does, such segregation should be kept under review. Rights are be ing curtailed and it is clear both from national and international jurisprudence that the principle of proportionality must be applied. See *Holland v. Governor of Portlaoise Prison* (cited above). See also *Ramirez Sanchez v. France* Application 59450/00, 4th July, 2006, Grand Chamber, para.136 where the European Court of Human Rights dealt with the issue of the social isolation of the prisoner. He had been held in solitary confinement for eight years and two months. In view of the length of this period of isolation, the court considered that a rigorous examination was called for to determine its justification. Were these measures necessary and proportionate? What safeguards were afforded the applicant? In that case, an independent judicial review on the merits of and reasons for such a prolonged period in solitary confinement was essential.

Thus national and international requirements are broadly the same:-

> (a) There must be good reasons – the segregation must be necessary – the onus is on the authority to justify.
>
> (b) It should be no more than is necessary to meet the requirements of the occasion i.e. safety and security.
>
> (c) It should be proportionate to the objective sought.
>
> (d) There should be ongoing review.

In the event of prolonged segregation there should be available judicial review of the necessity and proportionality of the measure.

6.6 Applying these principles to this case; the segregation has been for a protracted period. It has far exceeded the 21 days contemplated by rule 62(4) to (8). The prison authorities are now into a situation provided for in rule 62(9). The decision as to whether to segregate for a period longer than 21 days, must be one of prison management. Rule 62(9), however, is silent as to review of any ongoing segregation. This is in somewhat stark contrast to the detailed provisions provided at (4) to (8) in relation to short periods up to 7 days. The rules as noted above, must however be read in the light of the Constitution. This, as further noted above, requires good reason, minimum interference with rights and proportionality of the segregation. There must be available for lengthy periods, just as for short ones, a process of review. Judicial review of the merits and reasons for a prolonged period of isolation should be available.

6.7 In his affidavits dated 31st October, 2013, in all three applications, Brian Murphy, Director of Prison Operations, has set out in relation to each of the three, the measure of risk posed by them. The measure of the risk he describes is very high. In keeping with the normal rules of judicial review, it is not for this Court to assess those risks but rather to determine whether they exist and constitute evidence upon which the respondents may rationally base a decision that segregation from the main prison population is the only way to resolve the security problem they pose. These affidavits have demonstrated to the satisfaction of the court that there are such reasonable grounds to believe that segregation is necessary in this case. The history of each, including the crimes of which they have been convicted and their disciplinary history as prisoners, is very striking and would give cause for alarm to anyone responsible for their security and that of those with whom they would normally congregate.

6.8 Minimum interference and proportionality seem to be interlinked in this case. By this, I mean that the proportionality of the response (the segregation) must be judged by balancing both its effect on them and the requirements of security. All three claim to have suffered substantial effects on their mental equilibrium. They rely upon the report of their psychologist, Dr. Kevin Lambe. He reviewed correspondence from their solicitors and interviewed each applicant. I am satisfied that the three applicants each misled Dr. Lambe in recounting the history and conditions of their imprisonment. Nonetheless, I note that Dr. Lambe concluded that the first applicant was at "significant risk of developing a serious mental illness", the second was "at risk of developing an enduring change in personality" and the third was not suffering from any mental illness but his symptoms could be described as "psychiatric" in another person. He was depressed and afraid he was going crazy. I do not think these effects on the three applicants should be considered as anything other than serious even allowing for their misleading Dr Lambe as to their history. Mr. Murphy himself expressed unhappiness at their segregation. The effect described by Dr. Lambe seems the inevitable consequence of this or any segregation of a small group of prisoners from the general population of the prison. However, their segregation, although a most undesirable measure, seems the minimum necessary to ensure the safety of the prison and its inhabitants. Their interaction with other prisoners and prison staff seems at the very heart of the risk they pose. That being so, it appears their segregation is proportionate because it is rationally based, is clearly connected to the objective pursued, it is not arbitrary and it is the minimum interference because its very nature i.e. segregation is required by the threat they have posed and continue to pose to the safety and security of the prison population. Moreover, it is planned to move the applicants into a new unit, number five. This unit has additional facilities including a full gym, kitchenette and a large classroom. They will have a yard to themselves and will be unlocked to the same extent as the general prison population.

6.9 As noted above, the segregation involved has now moved well beyond the maximum 21 days envisaged by rule 62(9). The consequential provision in rule 62(9) is that any extension of the period of removal (segregation) must be authorised in writing by the director general. No provision is made for review in the rules where the authority to remove is transferred to the director general. These rules, however, must be read in a constitutional manner and therefore it seems to me that some form of review analogous to that provided by rule 62(4) must be read into rule 62(9) so as to render lawful any authorisation given thereunder. It seems to me that the director general ought to review any removal ordered under this rule at least once every three months or upon request by the prisoner or his legal advisers providing such requests are not made vexatiously. Such review ought to be carefully recorded and should comply *mutatis mutandis* with the provisions set out in rule 62(6), (7) and (8). The director general should give the prisoner or his legal advisers the opportunity to consider the grounds advanced for further removal prior to authorising any continuation of their removal. The prisoner or his legal adviser should be notified promptly by the director general of his decision together with the reasons therefor. Full, detailed records of this process should be accurately kept so as to assist the court in any further application in considering the lawfulness of continuing segregation. As to review by an independent judicial authority in cases of prolonged isolation in solitary confinement; such confinement is not in issue here. It is however open to any prisoner to appeal to the courts for an appropriate declaration and other orders where the terms of his imprisonment are not in accordance with his constitutional rights. Such review can consider the proportionality of any measure restricting his constitutional rights (see Meadows v. Minister for Justice, Equality & Law Reform [2010] 2 IR 701).

6.10 Thus, it seems to me that the continuing segregation of the applicants is justified in the light of the Constitution and meets the standards set by the European Court of Human Rights provided a review by the director of prisons, such as is outlined above, is carried out by the director general of prisons. The first of these should be carried out three months from today. Save for a declaration which may be made on consent that the detention of the applicants from 26th January, 2013 to 25th October, 2013 was not in accordance with rule 62 of the Prison Rules, none of the other reliefs sought may be granted.