Neutral Citation [2013] IEHC 608

THE HIGH COURT

JUDICIAL REVIEW

Record No: 2012/647 JR

BETWEEN:

WAYNE DUNDON

APPLICANT

-AND-

THE GOVERNOR OF CLOVERHILL PRISON, THE MINISTER FOR JUSTICE AND EQUALITY, THE ATTORNEY GENERAL AND IRELAND

RESPONDENTS

Judgment of Ms Justice Iseult O'Malley delivered the 3rd December, 2013.

Introduction

1. This case concerns the regime to which the applicant was subject between the 18th April, 2012 to the 7th September, 2012 while a prisoner in Cloverhill Prison. He seeks a declaration that for that period the regime was unlawful, in breach of his constitutional rights and fair procedures and in breach of Rule 62 of the Prison Rules, 2007. Rule 62 provides for a situation where the Governor of a prison directs that a prisoner be removed from structured activities, communal recreation and association with other prisoners. Essentially, the applicant's case is that throughout the relevant time he was, as a matter of fact, detained in conditions envisaged by Rule 62, without having the benefit of the formal procedures required by that Rule.

2. The respondents contend that the case is moot, on the basis that Rule 62 was formally invoked and applied from a date prior to the granting of leave in the proceedings. Furthermore, by the time the case came on for hearing the applicant had been transferred to a different prison. They also argue that the application is without merit in any event and that their actions in relation to the applicant were at all times lawful.

Rule 62 of the Prison Rules, 2007

> *62. (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.

Other relevant rules

3. To put the applicant's claim in context it is necessary to have regard to other provisions of the Rules, regarding the aspects of prison life which he says were restricted in his case.

Out-of-cell time and authorised structured activity

27. (1) Subject to any restrictions imposed under and in accordance with Part 3 of the Prisons Act 2007 and Part 4 of these Rules, each prisoner shall be allowed to spend as much time each day out of his or her cell or room as is practicable and, at the discretion of the Governor, to associate with other prisoners in the prison.

(2) ... each prisoner may, while in prison, engage or participate in such structured activity as may be authorised by the Governor (in these Rules referred to as "authorised structured activity") including work, vocational training, education, or programmes intended to ensure that a prisoner, when released from prison, will be less likely to re-offend or better able to re integrate into the community.

(3) In so far as is practicable, each convicted prisoner should be engaged in authorised structured activity for a period of not less than five hours on each of five days in each week.

Work

28. (1) Subject to this Rule, a convicted prisoner shall do work consisting of the performance of tasks necessary for the maintenance and operation of the prison.

(2) A prisoner may be directed to clean or sweep the landings, yards or other parts of the prison.

(3) Where a prison doctor certifies in writing that a prisoner is unfit for work, the prisoner shall not be allowed to engage or participate in work during the period to which the certificate concerned relates.

Exercise

32. (1) Each prisoner not employed in outdoor work or activities shall be entitled to not less than one hour of exercise in the open air each day, provided that, having regard to the weather on the day concerned, that is practicable.

(2) In so far as is practicable, each prisoner shall be permitted to have access to, and the use of indoor space and equipment, suitable for physical recreation, exercise or training, and shall be provided with appropriate instruction where necessary.

(3) (Omitted)

(4) (Omitted)

Ordinary visit

35. (1) Subject to the provisions of these Rules, a convicted prisoner who has reached the age of 18 years shall be entitled to receive by prior appointment not less than one visit from relatives or friends each week of not less than 30 minutes duration.

2) (Omitted)

(3) (Omitted)

(4) The Governor may permit -

(a) a prisoner to receive such number of visits in excess of the minimum number specified in this Rule, or

(b) any visit to which paragraph (1), (2) or (3) applies, to continue for a period in excess of the minimum period specified therein,

where he or she is of the opinion that to so permit would, in relation to the prisoner's welfare or rehabilitation, be beneficial.

(5) In the interest of good order and safe and secure custody -

(a) (i) the persons allowed visit any individual prisoner may be restricted by the Governor to persons nominated for the time being by the prisoner, and

(ii) the number of persons allowed visit any one prisoner at the same time may be restricted by the Governor to not more than three persons, and

(b) the Governor may restrict the number of persons who may be nominated by a prisoner in accordance with paragraph (5) (a) (i) but, in any case, the number of such persons may not be less than six.

(6) A prisoner who is entitled under this Rule to receive a visit may request the Governor to notify or cause to be notified those persons from whom the prisoner wishes to receive a visit, and the Governor shall do so, in so far as is practicable, and subject to the maintenance of good order and safe and secure custody.

(7) The Governor shall publish in the prison the days and times on which visits under this Rule may take place.

(Remainder of Rule omitted)

Regulation of visits

36. (1) In the interests of security, good order and government of the prison, visits to which Rule 35 (Ordinary visit) applies shall take place on such days and times as are designated by the Governor.

(2) A prisoner shall be notified of the name of any person who attends at the prison for the purposes of visiting the prisoner where the visit will be allowed

(3) A prisoner shall not be required to meet with a person who attends at the prison for the purpose of visiting the prisoner.

(4) Visits to which Rules 35 (Ordinary visit), 37 (Visit for prisoner committed in default of payment of money or in prison in default of bail) or 39 (Visit to foreign national) apply shall take place within the view and hearing of a prison officer, unless the Governor otherwise directs.

(5) No articles shall be exchanged between a prisoner and a visitor during the course of a visit, except with the permission of the Governor.

(6) Visits to which Rules 35 (Ordinary visit), 37 (Visit for prisoner committed in default of payment of money or in prison in default of bail) or 39 (Visit to foreign national) apply shall take place in a part of the prison designated for that purpose but the Governor may permit a visit to take place in a part of the prison other than a part so designated, where,

(a) a prisoner is certified by a prison doctor to be too ill to attend a visit in that part of the prison designated, or

(b) in the Governor's opinion it would not be appropriate for the visit to take place in the part so designated.

(7) (a) A part of the prison designated under paragraph (6) for visits shall have facilities to allow a prisoner and visitor to see and talk to one another but which prevent, through the use of screens or otherwise, physical contact between a prisoner and a visitor.

(b) The Governor may allow physical contact between a prisoner and a visitor when he or she is satisfied that such contact will not facilitate the entry into the prison of controlled drugs or other prohibited articles or substances.

(8) (Omitted)

(9) The Governor, where he or she believes it to be necessary in order to,

(a) prevent the entry into the prison of controlled drugs or other prohibited articles or substances,

(b) prevent a conspiracy to commit a criminal offence, or

(c) otherwise maintain good order and safe and secure custody,

may refuse to permit a visit to a prisoner by a person or persons.

(10) (Omitted)

Telephone calls

46. (1) The Governor may permit a prisoner to communicate with members of his or her family or his or her friends by means of telephone calls, for such period or periods of time and in accordance with such procedures, as the Governor shall determine.

(2) Subject to the availability of facilities, a convicted prisoner who is not less than 18 years of age shall be entitled to make not less than one telephone call per week to a member of his or her family or to a friend.

(Remainder of Rule omitted)

Education and library services

110. (1) In so far as is practicable, a broad and.flexible programme of education shall be provided in each prison to meet the needs of prisoners, through helping them -

(a) cope with their imprisonment,

(b) achieve personal development,

(c) prepare for life after their release from prison, and

(d) establish the appetite and capacity for lifelong learning.

(2) In particular, the programme referred to in paragraph (1) shall:

(a) encourage prisoners to participate in educational activities organised in the prison,

(b) give special attention to prisoners with basic educational needs, including literacy and numeracy needs.

(3) Subject to the maintenance of good order and safe and secure custody, each prisoner shall, in so far as is practicable, be permitted to participate in education as provided in the prison.

(4) The Governor, prison officers and all persons employed or engaged in the provision of services to prisoners shall actively encourage and facilitate participation in education as provided in the prison.

(5) The programme referred to in paragraph (1) may be provided in partnership with community based education bodies.

(6) In so far as is practicable, a library and information centre shall be provided in each prison, providing regular access to a wide range of informational, educational and recreational resources catering for the needs and interests of all prisoners.

(7) Subject to the maintenance of good order and safe and secure custody, each prisoner shall be entitled to avail of the library service provided in the prison at least once a week and be actively encouraged to make full use of it.

(8) A person providing educational or library services at a prison shall in the performance of his or her functions -

(a) comply with these Rules and any local order for the time being in force,

(b) treat prisoners with the same dignity and respect as would be afforded to any person availing of his or her services who is not a prisoner,

(c) cooperate with the Governor, prison officers and other persons employed or engaged in the provision of services to prisoners, and in the preparation and implementation of sentence management plans to which paragraph (6) of Rule 75 (Duties of Governor) applies, and

(d) develop and maintain links with appropriate community based services to facilitate, in so far as is practicable, post-release access to educational services.

(e) participate in and contribute to multi-disciplinary working in the prison for the effective delivery of services.

(9) A person working in the prison to provide an education or library service for prisoners may be required by the Minister to no longer work in the prison for stated reasons.

Provision of vocational training

111. (1) A broadly based programme of vocational and pre-vocational training shall, as far as is practicable, be provided in each prison designed to help prisoners to -

(a) occupy their time while in prison,

(b) achieve personal development,

(c) prepare for life after their release from prison,

(d) develop their vocational skills and talents, and

(e) improve their prospects of employment after their release from prison.

(2) Subject to the maintenance of good order and safe and secure custody, each prisoner shall, in so far as is practicable, be permitted to participate in vocational or pre-vocational training as provided in the prison and the Governor, prison officers and all persons employed or engaged in the provision of services to prisoners shall actively

encourage and facilitate such participation.

(3) A person providing vocational or pre-vocational services at a prison shall in the performance of his or her functions -

(a) comply with these Rules and any local order for the time being in force,

(b) treat prisoners with the same dignity and respect as would be afforded to any person availing of his or her services who is not a prisoner,

(c) cooperate with the Governor, prison officers and other persons employed or engaged in the provision of services to prisoners, and in the preparation and implementation of sentence management plans to which paragraph (6) of Rule 75 (Duties of Governor) applies, and

(d) develop and maintain links with appropriate community based services to facilitate, in so far as is practicable, access to work and training placements in the community and post-release work and training opportunities.

(e) participate in and contribute to multi- disciplinary working in the prison for the effective delivery of services.

(4) A person working in the prison to provide vocational or pre-vocational training for prisoners may be required by the Minister to no longer work in the prison for stated reasons.

The leave application

4. The applicant first applied for leave to seek a number of reliefs, mainly in the form of orders of *mandamus* aimed at permitting him to join the mainstream prison population and participate in communal recreation and education, on the 23rd July, 2013. On that date Peart J. directed that the leave application be brought on notice. On the 30th July the respondent sought time to file an affidavit and the matter appears to have adjourned over the Long Vacation.

5. On the 7th September, 2012 the respondent invoked Rule 62 in relation to the applicant.

6. Affidavits on both sides were filed in September and the leave application came on for hearing on the 1st October, 2012. Having regard to the fact that Rule 62 was by then being applied, the applicant sought and was granted liberty to amend his statement of grounds and leave to seek the sole relief referred to above.

The facts of the case

7. On the 18th April, 2012 the applicant was sentenced by the Special Criminal Court in respect of two charges of threatening to kill or cause serious harm and two charges of witness intimidation. He received sentences of six years on each of the former charges and four years on each of the latter, all sentences to run concurrently and to date from the 11th April, 2011 (being the date upon which he went into custody). The applicant was initially committed to Portlaoise Prison but was immediately transferred to Cloverhill.

8. In his grounding affidavit, sworn on the 17th July 2012 the applicant says that between the 18th April, 2012 and the 21st May, 2012 he was segregated from the main prison population and detained in the D2 block. (This seems to be incorrect and it seems to be more likely that it was from the 9th to the 23rd of May.) He describes this as the psychiatric block of the prison and avers that most of the other prisoners there were either suffering from psychiatric illness or were being punished. He says that while in D2 he was confined to his cell all day apart from three hours and fifteen minutes during which he was allowed into the TV room and one hour in the exercise yard.

9. The applicant was then moved to block D1 of the prison where he says that he continued to be segregated from the mainstream prison population and denied access to education and vocational training facilities. There were only two other prisoners with whom he could associate. His conditions and routine were the same as in D2, except that he now had a television in his cell, had limited access to a recreation room, was allowed to use the exercise yard for up to three hours a day and had limited access to a gym. He was not permitted to engage in "authorised structured activities" or communal recreation. He further complained that he had no access to educational or training facilities.

10. The applicant also deposed in this affidavit that he was not allowed to have "*normal contact visits of normal duration*" with his wife and young children, but had been permitted only screened visits of 15 minutes duration. He had been given no reasonable explanation for this.

11. The applicant deposed that he believed that these measures were not taken on the basis of any information or on the basis of his own behaviour that would cause the respondent to believe on reasonable grounds that permitting him to engage in association, activities or recreation with other prisoners would result in a significant threat to the maintenance of good order and secure custody. He specifically averred that he had committed no "*serious transgressions whilst in prison*" such as could give rise to such a belief on the part of the respondent. He said that he had never been given any legitimate or reasonable explanation for his situation. On occasions when he asked for an explanation he was told only that it was for his "own protection". He had never requested to be put into protective custody and had never been attacked or threatened by other prisoners.

12. On the 25th May, 2012 the applicant's solicitor wrote to the first named respondent as follows:

"We are instructed that our client is currently being held in wing D1 with only three other prisoners and is restricted from associating with the main prison population.

We are instructed that our client is not currently being provided with any education, training or job opportunities within the prison which, in our opinion, would not enable the objective of rehabilitation to be met.

We are further instructed that our client has been restricted to closed family visits during his stay in Cloverhill Prison. It is of note that our client's wife and children currently live in England and would thus have to make considerable travel arrangements to attend such a visit.

We feel that ...these conditions are unjustified as our client is not currently subject to any punishment and we would ask that you address these issues as a matter of urgency.

In the absence of a suitable remedy, we would ask you to confirm why our client is currently being accommodated in wing D1, why he is being kept separate from the general prison population, why he is not being provided with any education, training or job opportunities and why he is currently restricted to closed family visits. "

13. The response, dated the 6th June, 2012, was in the following terms:

"Regarding your letter of the 25 May 2012 please be advised that Closed visits are the norm in Cloverhill Prison and that your client is in Cloverhill Prison due to concerns regarding his safety.

Assuring you of our best intentions at all times. "

14. The first named respondent ("the Governor") swore an affidavit on the 10th September, 2012 for the purpose of opposing the leave application. In it, he deposes to the necessity to decide, when a prisoner arrives in the prison, on the most appropriate area to place him. In the applicant's case, the decision was to house him on the High Security D1 Block, and briefly the D2 block, following consideration of his circumstances including his criminal antecedents, his previous offence history and his recorded behaviour while detained by the Prison Service. Reference is made to the applicant's 23 previous convictions and the fact that he had 23 P19 reports (i.e. breaches of prison discipline) during previous custodial periods and a further four during the current one. These last four, and the punishment inflicted, are recorded as follows:

- 29/11/2011 Assaulted prisoner. Prohibition on Specific Activities/Other.
- 5/12/2011 Broke Spy Hole. Forfeiture of gratuity credited or to be credited.
- 9/5/2012 Refusing an order. Caution.
- 19/6/2012 Attempt to snatch medication. Prohibition on Specific Activities/Evening Recreation, Prohibition on using money/credit.

15. Previous P19s relate to fighting (one in 2003 and two in 2005), assault on an officer (2001), assault on another prisoner (2006), attempted assault (2007) and six incidents of possession of an unauthorised or prohibited article (2001, 2005, 2007 and 2008).

16. The Governor says that having assessed the security status and risk level of the applicant he took the view that the most appropriate area to house him was the High Security D1 block, which has higher levels of staffing and security than other areas of the prison.

17. The incident on the 9th May, 2012 is stated to be the reason for the applicant's temporary detention in D2 block. It arose from a situation where a prison officer was having an altercation with a brother of the applicant. The officer instructed the applicant to go to his cell. He refused and, according to the officer, "*attempted to barge through*" to get at his brother. At the disciplinary hearing the applicant said that he had just been trying to calm the situation and accepted that he should not have gotten involved. The officer stated that he accepted that the applicant was trying to calm his brother down. The result, as noted, was a caution.

18. In his affidavit the Governor refers to the incident as "*a serious disturbance of prison security*" which necessitated the separation of the brothers and therefore the decision was made to house the applicant in D2 block. While detained there, he had the same entitlements to medical attention, visits, phone calls, library and tuck shop access as other prisoners. It is accepted that he may have had reduced exercise and recreation periods owing to the various types of prisoners housed in D2. It is stated that at no time was he mixed with prisoners suffering from psychiatric disorders.

19. It is conceded by the Governor that the applicant may indeed have been told informally by prison staff that he was on D1 block "for his own protection" or words to that effect but, he says,

"the rationale for the decision was more extensive than this and also concerned other prisoners, good order at Cloverhill Prison and in particular the welfare and safety of prison staff Some of the matters taken into consideration involve confidential information and confidential sources, and as such were not matters, which I was in a position to reveal to the applicant. However, it was at all times made clear to the applicant that he was not being subjected to a punishment regime which had never applied. "

20. The Governor denies that the applicant was being deprived of facilities or opportunities as claimed. On this issue it must be borne in mind that the Governor swore his affidavit in September, 2012. At that time his averment was that classes were not normally scheduled in the summer months but that the Education Centre in the prison

"may be in a position to provide classes to the applicant in September, should he request them, although the availability of such places is subject to increasingly limited resources and as such a place cannot be guaranteed. "

21. He goes on to assert that the applicant's complaint regarding education was "*somewhat opportunistic*" insofar as the applicant had only made requests when the school was closed, and that he had then requested classes in Arabic, Turkish and Spanish.

22. The Governor then goes on to describe the facilities that were available to the applicant at the time. He had access to an indoor gym and to an outdoor recreation yard on a daily basis. He had access to the library and tuck shop to the same extent as other prisoners not on a punishment regime. He had, as all prisoners had, one free phone call of six minutes duration per day and was on many occasions granted extra calls.

23. It is averred that the applicant was never isolated or denied association with other prisoners. At the time the affidavit was sworn he had association with two other prisoners on the D1 High Security landing.

24. In relation to visits it is averred that the applicant had the same entitlements as other unrestricted prisoners, being four half-hour long visits per week.

25. The exhibited record of his visits shows that, apart from legal professional consultations, the applicant was visited in Cloverhill

once by a cousin on the 12th July, 2012; once by a brother on the 27th April, 2012 and once by his wife on the 27th February, 2012. Each of these visits was for half an hour. This record covers the period from the 27th January, 2012 to the 18th July, 2012 and it should be borne in mind that for most of the time up to April the applicant was in the Midlands Prison, where he was visited four times by his wife.

26. The Governor says that having regard to his particular family circumstances he could have been allowed a much longer visit and perhaps a morning and afternoon visit on the same day, but he had not requested this. He avers that

> *" ...the access to visitors afforded to the applicant is far greater than that provided for by the Prison Rules, 2007. "*

27. On the 7th September, 2012 (three weeks before the contested leave application and three days before swearing his affidavit) the Governor issued a direction pursuant to Rule 62(1) of the Prison Rules, 2007 in respect of the applicant. The basis for the decision is set out as follows:

> *"I say that on the 7th September 2012, I issued a direction pursuant to Rule 62(1) of the Prison Rules 2007, in respect of the Applicant on the basis of the continuing threat to the maintenance of good order and safe or secure custody within the Prison presented by him. I say that information supplied to me, and the Applicant's previous behaviour, caused me to believe that the Applicant poses a significant threat to the maintenance of good order or safe or secure custody.*
>
> *I say that the decision to invoke Rule 62, in respect of this Applicant, was made following full consideration of the Applicant's welfare together with his previous criminal convictions and history of very serious disciplinary transgressions within the prison system, as exhibited previously. I further say that very reliable information was made available to me in assessing the security risk posed by the Applicant. I say that the aforesaid confidential information relates to the Applicant's involvement inside and outside the prison in intimidation, attacks and threatening and assaulting of other prisoners and prison service staff, the organisation of distribution of contraband such as mobile phones and drugs, the Applicant's engagement in criminal activity within the prison and his links to other known criminals.*
>
> *I say that Rule 62 of the Prison Rules 2007 has been complied with fully and correctly. I say that on the 7th September 2012 the Applicant herein was informed in writing of the reasons for the aforesaid directions ...*
>
> *I say and believe that the placing of the Applicant in the High Security D1 and D2 block within the prison, in the circumstances outlined above, was both a proportionate and necessary step for the maintenance of good order within the prison. I say that at all times proper regard was had to the health and welfare of the Applicant and other prisoners and that this regime was not directed at the Applicant by way of an actual or de facto punishment.*
>
> *I say and believe that the Rule 62 segregation of the Applicant in the circumstances outlined above, was a proportionate and necessary step in order to prevent the Applicant from directing and engaging in serious criminal and unauthorised activity, a consequence which I say and believe posed a very real threat to the security and safety of Cloverhill Prison and the maintenance of good order within the prison. I say that at all times proper regard was had to the health and welfare of the Applicant and say that at all times the Applicant was lawfully and properly detained in accordance with the Prison Rules 2007. "*

28. The written record of the Governor's directive advises the applicant that the decision has been made and that he will be placed on restricted activities. It recites that the reason for the placement is that

> *(A) information has been supplied to the Governor*
>
> *(B) the prisoner's behaviour has been such as to cause the Governor to believe, upon reasonable grounds*

that to permit him 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. "*

29. The reference here to engagement, participation or association presumably relates to the activities, the restriction of which is permitted by Rule 62.

30. In a replying affidavit, the applicant says that because he was isolated from the mainstream prison population he was deprived of opportunities to engage in vocational or pre-vocational training programmes such as the Community Return Programme or the Integrated Sentence Management Programme. Both of these require participation in productive work or training in the prison. He says that he applied for courses in woodwork, plastering and welding but these are not available in Cloverhill. The reason for that, he believes, is that Cloverhill is a remand prison and he goes on to assert that he is the only prisoner in the prison serving a sentence.

31. The same consideration applies, he deposes, to the fact that only screened visits are possible in Cloverhill. He queries the legitimacy of his detention in a remand prison when vocational training and contact visits are the norm in other prisons.

32. The assertion that he was the only sentenced prisoner in Cloverhill is not in fact correct- at the time there were, apparently, routinely between 100 and 120 prisoners in that prison who were serving sentences.

33. The applicant takes issue with the averment by the Governor that he has the same amount of time out of his cell, on a daily basis, as all other prisoners and says that he has two hours and 15 minutes less than ordinary prisoners. He does not agree that he could associate with two other prisoners at that time. He could associate with one named man on a regular basis but met the other named man only in the gym.

34. The applicant does not accept that his two breaches of discipline since the 18th April, 2012 could be described as serious and argues that he had done nothing between the 19th June, 2012 and the 7th September, 2012 that could justify the invocation of Rule 62 on that date. He denies the allegations implicit in the Governor's reference to confidential information quoted above.

35. The main point made by the applicant is that in reality he was segregated from the prison population and held under conditions associated with Rule 62 detention before the 7th September and that nothing changed after that date, other than compliance by the Governor with the information and review requirements of that Rule. It is suggested that invocation of the Rule represented *"a tacit*

acknowledgment" that he had previously been subjected to a restrictive regime similar to Rule 62 without compliance with the Rule. It is also described as

> *"a cynical attempt ...to belatedly legitimise the aforementioned conditions and thereby frustrate these Judicial Review proceedings. "*

36. There is an averment in this affidavit that the procedures provided for in Rule 62 are not in accordance with the requirements of the Constitution or the European Convention on Human Rights. This contention is not covered by the leave granted in the case and I do not propose to consider it.

37. In a supplemental affidavit sworn on the 24th September, 2012 the Governor states that he personally informed the Applicant that he was on a restricted regime on the High Security D1 block for his own safety and that of other prisoners. He believes that the Applicant was "*well aware*" of the reasons for his placement there.

38. The Governor states that following a request made on the 24th August, 2012, the applicant was granted a two-hour unscreened visit with his wife and single application for repeated unscreened visits but that it was explained to him that each visit had to be applied for separately.

39. It is again averred that the applicant has the same out-of-cell time as other prisoners.

40. The Governor then gives details as to the applicant's association with other prisoners. (Again, it must be borne in mind that the evidence relates to the applicant's situation last year.) He was associating with one man on a continuous basis. He could associate with five other named men in the gym five times a week (though it appears from a later affidavit that this ceased in or around the middle of August by reason of unspecified difficulties). It is stated that the number of prisoners that he was allowed to associate with varied from time to time depending on whether prisoners with whom he was permitted to associate were in custody in Cloverhill or not.

41. In a final supplemental affidavit sworn on the 11th December, 2012 the Governor names four other individual prisoners with whom, he says, the applicant had association during specified periods between the 18th April and the 29th June, 2012. He notes that a prison is a dynamic environment where prisoners are regularly moved and accommodated according to logistical and security criteria.

42. Finally, he says that, as previously indicated, Rule 62 was invoked in respect of the applicant "*out of abundance of caution*. "It is again denied that his regime prior to the date of invocation was one that amounted to a Rule 62 regime.

43. It should perhaps be noted that at the conclusion of the exchange of affidavits the applicant appears not to continue to maintain that he had only had family visits of 15 minutes, or that he was the only sentenced prisoner in Cloverhill, or that he had not had any disciplinary action taken against him during this period of custody. Nor does he deny the assertion that he only requested educational facilities when the school was closed, or that he asked for classes which were, in some instances at least, unlikely to be available.

44. Conversely, it should be noted that the Governor does not contend that he was furnished with any new information regarding the applicant that he did not have prior to September, 2012, bringing about the decision to invoke Rule 62, or that there was any change in the applicant's regime as a result of placing him under the restriction entailed by the Rule.

The issue of mootness

45. In these factual circumstances the respondents say that the proceedings are moot and that declaratory relief would have no impact on the applicant's rights.

46. It should be noted her that the respondents have told the court in plain terms that the decision of the Governor to invoke Rule 62 was a "pragmatic" reaction to the institution of these proceedings, intended to save the time and money that would be expended upon litigation.

47. They rely upon the analysis of the mootness doctrine in the decisions of the Supreme Court in *McDaid v Sheehy* [1991] 1 I.R. 1 (referring to *Murphy v Roche* [1987] I.R. 106 at p. 110) and *G. v Collins* [2004] IESC 38 (and the quotation therein from the Canadian case of *Borowski v Canada* (1989) 1 S.C.R. 342), and the judgment of Clarke J. in *P.V. (A Minor) v Courts Service* [2009] 4 I.R. 264.

48. The applicant relies upon *Grant v Roche Products (Ireland) Limited* [2008] 4 I.R. 679 and says that these proceedings are the only means that the applicant has to vindicate his rights in the case of injustice done.

49. The extract from *Murphy v Roche*, quoted with approval in *McDaid v Sheehy*, is a passage from the judgment of Finlay C.J. where he said

> *"There can be no doubt that this Court has decided on a number of occasions that it must decline, either in constitutional issues or in other issues of law, to decide any question which is the form of a moot and the decision of which is not necessary for the determination of the rights of the parties before it. "*

50. In *G. v Collins*, the plaintiff was a wife who had been prosecuted for alleged breaches of a protection order. The order itself had been discharged by agreement between the spouses and the criminal charges were withdrawn. Nonetheless, the plaintiff sought to maintain an action challenging the constitutionality of the relevant statutory provisions relating to protection orders.

51. Giving the judgment of the Court, Hardiman J. said that

> *"proceedings may be said to be moot where there is no longer any legal dispute between the parties. "*

52. He approved the following definition of mootness from *Borowski v Canada*:

> *"An appeal is moot when a decision will not have the effect of resolving some controversy affecting or potentially affecting the rights of the parties. Such a live controversy must be present not only when the action or proceeding is commenced but also when the Court is called upon to reach a decision. The general policy is enforced in moot cases unless the Court exercises its discretion to depart from it. "*

53. The issue of mootness was also considered by the Supreme Court in *O'Brien v Personal Injuries Board* [2006] IESC 62. In that

case, referred to in the extract quoted from the judgment of Clarke J. in *P.V (A Minor)*, the court was concerned with the refusal of the respondent Board to deal directly with the applicant's solicitor as his duly appointed agent. The High Court judgment, which was in the applicant's favour, was given in January 2005. The Board appealed, but while its appeal was pending, it issued its statutory authorisation permitting the applicant to proceed with his claim in the courts, in January 2006. The applicant therefore argued before the Supreme Court that the case was moot, because there would be no future requirement for the Board to deal with him at all.

54. Giving the judgment of the Court, Murray C.J. referred to *G. v Collins* and the passage cited from *Borowski v Canada*. He went on to observe that while the courts in most systems of law are reluctant to try issues which are abstract, hypothetical or academic, the breadth of the concept and its rigid or discretionary application are informed by national judicial policy. Application of the doctrine may also be influenced by the nature of the jurisdiction of the court concerned and the nature of the remedy sought.

55. In the case before the court, Murray C.J. considered that the respondent Board had "a real current interest" in the issue. Another relevant aspect of the case was that the statutory obligations of the Board, as defined by the High Court, applied not only to the applicant's past claim but to any future claim that he might have in respect of personal injuries. The court did not consider it necessary to calculate the likelihood of such a claim occurring, finding that it was sufficient to state that it could not be precluded as *"a real possibility", "one that is not so remote as to be purely hypothetical"*. Murray C.J. went on:

> *"I do not think that it can be truly said that a decision on the appeal would not have the effect of resolving further 'some controversy affecting or potentially affecting the rights of the parties.' Nor do I consider that the passage of time has caused these proceedings to 'completely lose its character as a present live controversy'. In fact both parties, although in different forms, have an interest in the outcome of the appeal. "*

56. In *Salaja v Minister for Justice, Equality and Law Reform* [2011] IEHC 51, the applicant, who was a foreign national with permission to reside in the State for the purpose of study, had made repeated applications to the respondent for permission to work. His claim for judicial review concerned the validity of the most recent refusal, but after the institution of the proceedings he had made a fresh application for permission, which was not yet determined. The respondent then sought an order dismissing the case as being moot. Having considered *0'Brien v PIAB*, Hogan J. refused the order sought. At paragraphs 27 to 29 of the judgment he said:

> *"That is broadly the position here. It is probably safe to assume that Mr. Salaja is largely indifferent as to the precise circumstances in which such a permission might be granted. He doubtless hoped that the Minister might be swayed by the fact that he had new parental obligations following the birth of Cara and that, as a result, he would not have to pursue this litigation. It was for this and other reasons he made afresh application for permission. None of this means, however, that he no longer has any interest from a legal perspective in litigating the validity of the first refusal, although - as we have already noted-this would change were such permission to be granted. Quite the contrary: Mr. Salaja has every interest in seeking a judicial determination as to the validity of the original ministerial decision and he would obtain a real (and not simply a purely theoretical) benefit were he to succeed in such a challenge. The fact that he has made other subsequent applications for such a permission does not take from this fact in the slightest, since were he to succeed, the Minister would be obliged to re-consider the original application, and, perhaps, re assess the outcome of the other (as yet) unsuccessful applications.*
>
> *In these circumstances, I consider that Mr. Salaja 's circumstances are indistinguishable in principle from those of the respondent Board in 0'Brien and that the case, accordingly, is not moot.*
>
> *Of course, I fully recognise that there may be instances where the conduct of an applicant for a statutory permission or a licence might well be abusive. This might be especially so where the applicant persisted with multiple and repetitious applications or where totally inconsistent and confusing positions were adopted in legal proceedings, such as the form of "procedural gambling" identified by Clarke J in her judgment in Odulana v. Minister for Justice, Equality and Law Reform. High Court, June 25, 2009. In such circumstances, the courts might either be prepared to strike out the relevant legal proceedings on the grounds of abuse of process. The courts might likewise be prepared in the exercise of discretion to refuse to grant relief where the applicant had deliberately pursued an alternative remedy which was inconsistent with the stance originally taken in the judicial relief proceedings: see, e.g., the judgment of Butler J in The State (Conlon Construction Co. Ltd.) v. Cork County Council, High Court, July 31, 1975. But I cannot say that the applicant has engaged in abusive behaviour in this fashion. It is, perhaps, unfortunate - and probably rather tiresome for the Minister - that he has submitted repeated applications, but he doubtless felt that he was justified in bringing new material to the attention of the Minister following the birth of Cara in May, 2010."*

57. *P. V. (A Minor)* concerned the validity of a refusal by the Courts Service to accept a faxed document, which purported to be an application to be made in court the following day and which had not been served on the proposed respondent to the application, in lieu of a summons. By the time the judicial review proceedings came on the original dispute between the parties had been disposed of and the circumstances giving rise to the attempt to make an application in the manner described were, as found by Clarke J., highly unlikely to arise again. Clarke J. gave his views on the issue of mootness (in paragraphs 5.5 to 5.8 of the judgment) as follows:

> *"In the United States, an issue is not deemed moot if it is capable of repetition, yet evading review. This will be the case where there is a reasonable expectation that the same complaining party would be subjected to the same action again. Likewise Irish Courts have held that proceedings may not be considered moot where the matters raised concern issues which have future ramifications for the parties involved. In Goold, the Supreme Court, in holding that the proceedings were moot, noted that there was no "live, concrete dispute between the parties", with a decision on the issues having no direct impact on the parties involved. The court, in reaching that conclusion, took into consideration the fact that the protection order in that matter had been discharged by agreement between the parties and the criminal proceedings taken on foot of alleged breaches of the order had been dismissed.*
>
> *In O'Brien v. Personal Injuries Assessment Board [2007] I IR. 328, this Court granted declaratory relief having determined that the respondent concerned had acted unlawfully in the exercise of its statutory powers by refusing to deal with the applicant's duly appointed solicitor in connection with his claim for damages for personal injuries. The respondent appealed, but during the appeal the applicant received an authorisation from the respondent to institute proceedings in respect of his claim for personal injuries. Such proceedings were then commenced. As a consequence of such authorisation and the initiation of the relevant proceedings, the applicant was no longer obliged to deal with the respondent. The Supreme Court rejected the argument that the appeal was moot as the respondent Board had a real and current interest in the issues pending appeal before the court regarding the exercise of its statutory powers. Murray C.J. framed the question as whether the case was moot in the sense of being "purely hypothetical or academic" and noted that this was a case in which the respondent had a wider interest than the applicant insofar as the conclusion and*

declaration of the High Court affected the manner in which the respondent exercised its statutory functions not only vis-a-vis the applicant but with regard to many other applications made to it. Murray C.J. found that it was obvious that respondent Board had a real, current interest in the issues pending on appeal before the court for the purpose of a final determination of the controversy between the parties regarding the exercise of its statutory powers.

It is clear from the above authorities that the starting point of any consideration of mootness has to be a determination as to whether the issue sought to be litigated is still alive in any meaningful sense such that it can not, in the words of Murray C.J. in O'Brien, be "purely hypothetical or academic". In addition there may be circumstances where it may be appropriate to nonetheless determine issues even though such issues may, strictly speaking, be moot. For example, the types of issues with which the Supreme Court was concerned in O'Brien stemmed from a situation where the same issue was likely to arise for the respondent in very many cases, and where the respondent was faced with an adverse judgment of this court from which it sought to appeal. While the issue might have become irrelevant to the applicant in that case (given that his personal injury litigation had gone beyond the stage of the Personal Injuries Assessment Board), it was still very much alive from the perspective of the respondent. Likewise there may be cases, such as those identified in the American jurisprudence, where, in practical terms, it may be impossible to have a final determination on important legal issues unless the courts (and in particular Appellate Courts) are prepared to relax a strict application of a mootness rule.

However, it is clear that the cases where the court should depart from the general rule should be limited and the discretion to entertain moot proceedings should be sparingly exercised having regard, as the Supreme Court of Canada noted in Borowski, to the underlying rationale of the mootness rule in the first place. "

58. *Grant v Roche Products* was a case where the father of a deceased young man sued the defendant on the basis of a belief that a medical product manufactured by it had caused his son to take his own life. This being a case brought under the fatal injuries provisions of the Civil Liability Act, 1961, there was a statutory limit on the general damages recoverable. The defendant offered the full amount of the statutory figure, plus costs to be taxed in default of agreement, in settlement of the matter. The plaintiff refused the offer.

59. The application brought by the defendant to dismiss the action was not on the basis of mootness, but rather an invocation of the inherent jurisdiction of the court to dismiss an action that was pointless, in that it could confer no benefit on the plaintiff. The argument made was that in a civil action of this type the only remedy available to a plaintiff was damages, and the plaintiff had already been offered the maximum quantum that could be awarded under the statute. This application failed both in the High Court and on appeal.

60. The Supreme Court rejected the submission that the action was concerned only, or should be concerned only, with damages. Much of the analysis in the judgment is concerned with the Constitutional obligation of the State to vindicate, by its laws, the right to life of the individual citizen. It was pointed out that the action taken by the father under the Civil Liability Act was, in the circumstances, the only legal mechanism capable of providing such vindication for the alleged wrongdoing of the defendant.

Conclusions on mootness
61. It is clear that the policy of the courts is to decline to hear cases which are purely hypothetical or academic. It is, however, equally clear that a case is not moot if the controversy still affects or potentially affects the rights of the parties.

62. The applicant in this case is still a prisoner and is still subject to the provisions of the Prison Rules in whichever institution he is detained. He has a real and ongoing interest in the manner in which they are applied to him. Having regard to the history of the case, it may be said that the possibility that he will again be subjected to restrictive conditions is not, to use the language of *0'Brien v PIAB*, so remote as to be purely hypothetical.

63. It also seems that this is the sort of situation where, if the court does not relax the strict rules of the doctrine, this important issue might not be capable of being determined. In this regard I have in mind the fact that the Governor in this case has told the court that he invoked Rule 62 as a "pragmatic" reaction to the initiation of litigation, hoping to thereby save the time and expense involved. (From the respondents' point of view it was necessary to establish this as a fact lest it be thought that there was any concession involved as to the lawfulness of the previous regime.) I do not want to be taken as deciding in this case that that was necessarily improper but it points to the possibility that in cases such as this the issue is one that may "evade capture", in the American phrase, if an overly strict view is taken of mootness.

64. I therefore conclude that the case is not moot.

Submissions on the substantive issue
65. The applicant's case is based mainly on the judgment of Edwards J. in *Devoy v The Governor of Portlaoise Prison* [2009] IEHC 288. In that case the applicant had been serving a sentence in Mountjoy when he was, without notice, transferred to Portlaoise on foot of a Ministerial order. There, he was placed in isolation in a segregation unit and, he alleged, was permitted to leave his cell only for short periods of the day and only to walk up and down the corridor. He was denied access to educational, training or leisure facilities. His visiting entitlements were restricted to non-contact screened visits. No complaint had been made against him of breach of prison discipline and Rule 62 was not invoked.

66. The respondents maintained that the action taken was justified as being in the interest of the maintenance of good order and safe and secure custody in the prison. It was further pleaded that it was necessary to protect the life of persons not in custody.

67. After an extensive and comprehensive analysis of the legal issues, Edwards J. made the following observations which are relevant to this case and which I respectfully adopt.

"The management and governance of the nation's prisons is a matter for the executive. It is provided for in the Prisons Acts 1826 to 2007, and in particular the Prisons Act 2007, and the rules made by the third named respondent under s. 35 of that Act, namely the Prison Rules 2007. Under this scheme of legislation, and in particular Rule 75 of the Prison Rules day to day governance of a prison is entrusted to the Governor of the prison who is responsible for its management subject to the directions of the third named respondent, and of the second named respondent through its Director General. The Governor of each prison has a broad discretion which is reflected in Rule 75(3) of the Prison Rules 2007, which states:

"The Governor shall develop and maintain a regime which endeavours to ensure the maintenance and good order, and

safe and secure custody and personal well-being of the prisoners."

However, in applying the Prison Rules the Governor must apply them in a manner which is respectful of and intended to vindicate the constitutional rights of the prisoner to the extent that they are not abrogated or suspended by the very fact of his being sentenced to a term of imprisonment. Among the residual constitutional rights of a prisoner which are not abrogated or suspended is the right to be treated humanely and with human dignity. The Prison Rules recognise this and indeed Rule 75 (2) (iii) requires the Governor "to conduct himself or herself and perform his or her functions in such a manner as to respect the dignity and human rights of all prisoners. "

…..

This Court is completely satisfied that the applicant does not enjoy a specific constitutional right to associate either with the general prison population or with particular prisoners within the prison. That said there is no question but that we have moved on from the days of routine solitary confinement and the types of regimes described so vividly by the leading penologist Michael Ignatieff in his book entitled "A Just Measure of Pain- The Penitentiary in the Industrial Revolution 1750 - 1850 ". 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.

Moreover, even in the absence of specific expert evidence on the question, it is easy to appreciate as a matter of common sense that total or substantial isolation from the society of one's fellow man, may over time amount to a form of sensory deprivation and be inhumane and abusive of the prisoner's psychological welfare and constitute a breach of his right to bodily integrity. Again recognition of this is reflected in the Prisons Act 2007, and the Prison Rules. Although the disciplinary provisions of the code allow (inter alia) for solitary confinement as a penalty for breach of discipline such a penalty can only be applied "for a period not exceeding 3 days". Moreover, among the penalties expressly outlawed are penalties consisting of any form of sensory deprivation, penalties of indeterminate duration and penalties which amount to cruel, inhumane or degrading treatment.

Having said all of that, in most instances restrictions placed on a prisoner's ability to associate will have no implications for the humaneness of his/her treatment, or for his/her human dignity or for his/her right to bodily integrity. As has been pointed out by Counsel a prisoner cannot reasonably have an expectation of confinement in any particular prison, in any particular wing of a prison, on any particular landing within a prison, or within any particular cell. Once a prisoner has been received at whatever prison his/her committal warrant specifies the first and second named respondents must have, and do in fact have, the widest possible discretion as to the prisoners placement from time to time within the prison system and issues ancillary thereto, including the question as to with whom he or she may have society. "

68. On the facts of the case, Edwards J. held against the applicant in relation to his contention that his regime of detention amounted to isolation and thereby constituted a breach of his constitutional rights, including the principle of proportionality. The evidence was that

> *"... though there are significant restrictions on his ability to associate with other prisoners, he can associate and is associating with the other prisoner in his unit. Moreover, he regularly sees his teacher, his fitness instructor, his chaplain, the Governor, the Chief Officer, the medical officer and has visits from approved family members. "*

69. Edwards J. further accepted that the respondents, as agents of the State, had a duty to protect the right to life of persons whose lives were threatened, where they could do so by taking appropriate action. However, he considered that in those circumstances they should not have resorted in the first instance to "extraordinary measures" when it would have been perfectly possible to achieve the desired objective by restricting the applicant's entitlement to associate using Rule 62. He went on:

> *"The respondents are obliged to comply with the Prison Rules save in exceptional circumstances of overwhelming urgency justifying direct reliance on the State's duty to preserve life. There is no evidence before the Court as to why Rule 62 could not have been invoked. On the face of it neither urgency, nor the need to protect the confidentiality of a source, nor any issue of State security, could justify the non-adherence to the Rules as all of those issues could have been readily accommodated. "*

70. In the circumstances, Edwards J. granted a declaration that the decision to restrict the applicant's association other than in accordance with Rule 62 was unlawful.

71. On behalf of the applicant in the instant case, Mr. Micheal P. O'Higgins SC says that he comes foursquare within the above principles.

72. On behalf of the respondents, Ms. Deirdre Murphy SC mounts a robust attack on the legitimacy of the applicant's case. She places the dispute within a context of what she describes as "a battle of wits" between prisoners and the authorities, in which the Prison Rules are being used to shoehorn the applicant's case into the parameters of *Devoy* and the Court is sought to be used to control the manner of the applicant's detention. (The phrase "battle of wits" is taken from the judgment of O'Neill J. in *Creighton v Ireland*, unrep., 13th June, 2013, a personal injuries claim in which the plaintiff was awarded damages in respect of an assault in prison.)

73. *Devoy* is distinguished on the basis that neither the prisoner nor the Governor in that case knew the reason for the measures taken against him, whereas this applicant was told the reason for his placement. He was permitted to associate; he had generous visits; he was unlocked for the same hours as others; he had access to the gym and the tuck shop. It is noted that a number of factual assertions in the affidavits were not correct.

74. The applicant, it is said, was held in conditions of high security but not isolation. He had communal recreation, although the relevant community was small. It is conceded that the level of association available can drop from time to time.

75. As mentioned previously, it is asserted by counsel that the decision to invoke Rule 62 was a pragmatic response to the institution

of these proceedings, and should be taken as an effort to save time and money rather than as an acceptance that the previous regime was unlawful. It was further submitted that the reason Rule 62 requires oversight is that it contemplates isolation. The applicant has not been isolated.

76. It was submitted that the court should be slow to interfere with the assessment of the Governor, which was that it was not safe to let the applicant into the general population. This assessment was based on evidence from the applicant's previous periods in custody and on Garda sources.

Conclusion

77. It is not necessary to set out at any length the authorities that support the proposition that the governor of a prison has a very wide discretion as to the manner in which he fulfils his obligations to the prisoners in his or her custody while complying with the duty to maintain order and safety. I fully agree with the analysis of Edwards J. in *Devoy* in this respect. However, I also agree that the discretion, which is conferred by the Prison Rules, must be exercised in compliance with those Rules. I do not regard the Rules as a sort of weapon to be used by either prisoners or the lawful authorities in a "battle of wits" or otherwise- they are the rules made by the Minister, mandated by the primary legislation enacted by the Oireachtas. They confer authority on the Governor and protect him or her in the exercise of that authority. In short, they are the law as far as both prisoners and Governor are concerned.

78. The issue here is not whether the Governor may or may not establish differing levels of security in different areas of a prison, to deal with perceived differences in the security risks posed by different prisoners. There was no debate on this point but in my view it would be difficult to argue that he or she could not. The question is whether a Governor may restrict the normal life of a prisoner, as envisaged by the Rules, without recourse to the provisions of the Rules that specifically permit such restriction.

79. In *Devoy*, it was accepted by the respondent, and held by Edwards J. that there is a "presumption" arising out the combination of Rules 27 and 62 in favour of a prisoner being permitted to associate with other prisoners. On the authority of *Devoy* I conclude that where a restriction on such association reaches the point at which Rule 62 becomes applicable, it should be invoked so that the notification and oversight provisions take effect.

80. For the avoidance of doubt it should be made clear that the courts have no role in the micro-management of these issues. It is also accepted that a prison setting is fluid. Prisoners come and go, whether by way of release or transfer, movement to another part of the prison or travelling to court or hospital etc. The status of a prisoner remaining in the unit does not alter with each such development. However, it may be of assistance to recall that Rule 62 requires a weekly review. It seems to me that where a prisoner's situation is *de facto* akin to a Rule 62 regime for a period of days approaching that length of time, and does not appear likely to change within it, consideration must be given to formalising the regime.

81. The situation in this case appears to have been that the applicant was placed in a high security part of the prison and I see no reason to criticise the Governor's decision in that regard. While in there he could associate only with other prisoners similarly placed. I also accept that, within the context of that placement, there was likely to be a degree of change from time to time, as prisoners came and went. There were times during the period in question when the applicant had the company of a number of other men. However, the fact that stands out is that for much of the period he had association with only one other prisoner on a continuous basis, with some contact with one other man. During such times, he seems to have been in a comparable position with the applicant in *Devoy*, if not slightly worse given that he had no educational activity. I consider it to be highly relevant that the applicant's situation did not change in any material way after the formal decision to place him on Rule 62, whatever the motivation for that decision was.

82. It may well be that the applicant asked for education only at inopportune times from the point of view of the authorities, but it appears from the Governor's affidavits that in any event nothing would have been available until September, and no guarantee could be given that he would receive anything then. This is a material consideration when one is examining the potential effect on a prisoner of restrictions in relation to association and recreation.

83. It seems to me that where a Governor maintains a high security unit of this nature, it is necessary to monitor the situation of prisoners in it. Where, as in this case, the numbers in the unit drop and a prisoner is not authorised to engage in education, work or training, it is incumbent on the Governor to consider either relaxing the regime to which the prisoner is subject or invoking Rule 62 if the conditions for such invocation exist. Assuming, from the way that this case ran, that the Governor was unwilling to do the former, I conclude that he should have made a formal decision in relation to the latter - on the evidence presented, he had grounds for so doing from at least the 9th May, 2013. This would have conferred upon the applicant the protection involved in regular review and notification and, if the situation continued for more than three weeks, the oversight of the Director of the Prison Service.

84. It was urged upon the Court that the applicant had access to generous family visits and could have had more, had he made application in the proper way. I should perhaps state here that I do not consider that the applicant has made out any legitimate complaint in relation to family visits. However, the Rules concerning structured activities and association are separate to those relating to family visits.

85. I should also say that, for the same reasons as in *Devoy*, I do not consider that the applicant has established any breach of his constitutional rights.

86. I will hear the parties further as to the content of the declaration to be made.