

THE HIGH COURT

JUDICIAL REVIEW

[2014 46 JR]

BETWEEN

PETER CLARKE

APPLICANT

AND

THE HEALTH SERVICE EXECUTIVE, MINISTER FOR HEALTH, MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Birmingham delivered the 4th day of September 2014

1. The applicant who is 69 years of age is currently serving a prison sentence at the Midlands Prison. He is imprisoned there on foot of orders of the Circuit Court dated the 11th January, 2013, (Judge O'Hagan sitting at Monaghan Circuit Court) and the 24th March, 2014, (Judge McCabe sitting at Dundalk Circuit Court).

2. On the 11th January, 2013, he was sentenced in respect of two sexual assaults to which he had pleaded guilty to a term of five years imprisonment, the sentence was backdated to the 10th of September, 2011 and provision was also made for seven years post release supervision. The applicant has lodged an appeal against the severity of the sentence, but the appeal has yet to come on. The sentence hearing of the 24th March, 2014, was consequent on his conviction in September 2013, on two counts of sexual exploitation of a child contrary to s. 3 of the Child Trafficking and Pornography Act 1998, the facts being that he had approached two twelve year old girls in September 2011 and offered them €5 to engage in sexual activity. A sentence of five years imprisonment with the last three years suspended was imposed, but the order of the court on this occasion left his release date of the 9th June 2015 unaltered.

3. The essential case made on behalf of the applicant is that prison is not an appropriate environment for him. Indeed, that it is inappropriate to the extent that his incarceration gives rise to a breach of his rights under the Irish Constitution and his rights under the European Convention on Human Rights.

4. The background against which the complaints in relation to the circumstances surrounding his incarceration are laid, is that it is reported that some 30 years ago he was diagnosed as being schizophrenic. The diagnosis is said to have been made in the aftermath of a road traffic accident that the plaintiff had been involved in and in which he suffered a head injury. It does not appear that the reported diagnosis of schizophrenia was ever actively followed up on. More recent diagnosis has focused on the frontal lobe dementia process, possibly linked to the road traffic accident, and the suggestion of schizophrenia has receded.

5. The applicant has a long history of sexually inappropriate behaviour. For a period while he was living with his brother, a degree of restraint and supervision was brought to bear. Unfortunately his brother suffered a stroke and entered a nursing home and has subsequently died in early 2012. .

6. The level and intensity of the applicant's sexually inappropriate behaviour intensified when his late brother ceased to be in a position to exercise influence.

7. Since 2007, the applicant has spent periods of time in prison on a number of occasions, usually on foot of remands in custody. In June 2011, the applicant commenced a course of anti-androgen therapy, designed to decrease libido by reducing levels of male hormones. On the 27th July, 2011, he was released on bail in the care of his elderly sister. However, on foot of an allegation that he re-offended in September 2011, he went back into custody, this appears to be one of the two matters dealt with by the Circuit Court in Monaghan on the 11th January, 2013 and involved an incident with a 10-year old child in a public place. The applicant was first committed to Castlerea prison, and was then transferred to Arbour Hill prison in February 2012, but after just one day there he was transferred to Cloverhill prison following an incident with a female staff member. When sentenced in January 2013, he was moved to Wheatfield prison and was transferred from there to the Midland prison in September 2013. During his period in custody, the applicant has been the subject of eight prison disciplinary reports or P19 reports, all but one of which were for inappropriate behaviour towards female prison staff.

8. From the perspective of the authorities, he has not been an easy prisoner to deal with. While in Wheatfield, he was placed on the "West 2" area of the prison, a protection area within the prison and segregated from the general prison population. This would seem to have been for his own safety, but also the Governor issued a direction that under no circumstances were female staff to be with the applicant, and where only female nursing staff were available, that two male prison officers were to be present at all times.

9. Following his transfer to the Midlands prison, he has been dealt with as a vulnerable prisoner and has been held on the "C 1" wing for his protection and safety. While in the Midlands, he has been under regular review by the prison psychiatric team and has been placed on a waiting list for transfer as an inpatient to the Central Mental Hospital pursuant to the provisions of s. 15 of the Criminal Law (Insanity) Act 2006. It is the view of both Dr. Conor O'Neill, Consultant Forensic Psychiatrist at the Central Mental Hospital who has seen him on a number of occasions during his period in prison and of Mr. Desmond O'Mahony, Consultant Forensic Clinical Psychologist that prison is not an appropriate place for Mr. Clarke. There is a concern that his unusual personality presentation renders him at risk of assault by fellow prisoners. Indeed, it is the case that the applicant has been assaulted by other prisoners on a number of occasions while in custody. One incident involving the burning of the leg of his tracksuit bottoms and another incident resulted in Mr. Clarke experiencing a fracture of his cheek bone. The applicant's legal advisers have taken the view that prison is definitely not an appropriate environment and that Mr. Clarke requires placement in a secure and supervised environment such as, they believe could be provided for in a nursing home or other supervised sheltered accommodation.

10. The applicant, through his legal advisers on the 21st May, 2012, sought to be admitted to the nursing home support scheme, a scheme which offers financial support towards the cost of long term nursing home care. The application was accompanied by reports from Dr. Conor O'Neill and from Mr. Desmond O'Mahony. However, the applicant was unsuccessful. The applicant through his legal advisers appealed the decision of the 19th July, 2012, which had refused to admit him to the nursing home support scheme. At this stage, the applicant on the suggestion of Dr. O'Neill was assessed by Dr. Andrew Eustace, Consultant Psychiatrist, with Highfield Health Care. In relation to the possibility of nursing home care, Dr. Eustace commented that Peter remained relatively independent in his activities of daily living, that he appeared to have a good working knowledge of his finances, was able to dress himself, wash himself and seemed to manage in the prison environment. Dr. Eustace added that it did not appear from the notes that there was a particular concern about his self care while he was in the care of his sister and that thus his need for placement was more to provide a secure environment so that the risks of re-offending would be reduced than any need for nursing home care as such. Significantly, Dr. Eustace added:

"I feel that it would be unlikely that any nursing home would be willing to take on such a gentleman and I am not aware of where there are nursing homes with purely single sex environments. Peter would benefit from a male only environment, to monitor his compliance with his medication and reduce his risk of re-offending. Peter is open to moving into this environment. Facilities for Peter are available in the private sector and his funds could be managed by his solicitor. However, Peter's funds are finite and any facility taking on Peter would like a guarantee that when his funds are used up, the HSE would continue to fund him in that environment."

11. The applicant's appeal was also supported by way of a report following an assessment by Dr. Kidd, Consultant Psychologist and Neuro Psychologist, who felt that his future accommodation needs should be in a closely supervised arrangement to provide him with the necessary feed back and restraint regarding his inappropriate behaviour. However, the applicant's appeal of the refusal to admit him to the nursing home support scheme was rejected by letter of the 23rd August, 2013. In the letter of rejection, it was accepted by the HSE that the applicant would require "continuous monitoring of his behaviour now and possibly into the future for some time, based on professional judgments and assessments". The HSE appeared to accept that the applicant required living arrangements within a same sex facility which would be staffed by male staff. However, the conclusion was that the applicant's needs did not equate to a need for nursing home care.

12. For my part I am bound to say that I have been surprised at the level of focus on nursing home care. Like Dr. Eustace, and I of course do not have his expertise in this area, I would be very surprised if any nursing home would agree to take Mr. Clarke. I'm not aware of single sex nursing homes, but if such existed one would imagine that like most nursing homes a high proportion of the staff are likely to be female. Even if that was not the case, it is a feature of most nursing homes that residents are visited by family members and, if sufficiently mobile taken out by their families and then returned after the day out. In the ordinary course of events one would expect that many of the family members involved in this interaction with residents will be female and some of the family members visiting would be children, probably including grandchildren or even great grand children of the residents. With the nursing home proposal rejected the applicant's legal advisers wrote to the HSE and the remaining respondents asking that suitable residential facilities be identified and made available.

13. In relation to the question of admission to a psychiatric hospital the position is that Dr. O'Neill had stated in a report dated the 14th July, 2011 that there was no indication for psychiatric hospitalization at the time of his assessment on the day of the report. In that report Dr. O'Neill had said that Mr. Clarke didn't present as suffering from dementia, psychotic illness or any diagnosable medical disorder as defined in the Criminal Law (Insanity) Act 2006. He found that there was no evidence that Mr. Clarke's offending behaviour was driven or motivated by mental disorder or evidence to support the defence of not guilty by reason of insanity. However, a different note was struck by him later in a letter to Dr. Joe Rowley, Consultant Psychiatrist at Louth County Hospital where he said that he was writing specifically for the purpose of seeking assistance in obtaining a nursing home placement for Mr. Clarke. In the course of the letter written on the 22nd March, 2012, at a time when Mr. Clarke was a remand prisoner Dr. O'Neill commented "in the event that a nursing home placement were to be arranged, it is likely that Mr. Clarke would be bailed". Dr. O'Neill was of the view that Mr. Clarke was very vulnerable and inappropriately placed in a prison setting and had been assaulted on a number of occasions. Dr. O'Neill said that he was very concerned for Mr. Clarke's safety in a prison setting. Later in the letter Dr. O'Neill said that in the context of asking for the assistance of the services in County Louth in obtaining an appropriate nursing home placement for the man that he thought that Mr. Clarke could be safely and appropriately managed in a single sex nursing home.

14. In a still later report dated the 17th October, 2013 based on an assessment on the 2nd September, 2013, Dr. O'Neill observed that Mr. Clarke's condition met the criteria for mental disorder as defined in the Criminal Law (Insanity) Act 2006 though his condition did not meet the criteria for mental disorder as defined in the Mental Health Act 2001. Dr. O'Neill concluded this report by stating that he had arranged for Mr. Clarke to be placed on the waiting list for admission to the Central Mental Hospital under Section 15 of the Criminal Law (Insanity) Act 2006 in the light of his vulnerability in prison, for further assessment as to the possible progressive nature of his organic impairment and facilitate ongoing care planning. Section 15 of the Criminal Law (Insanity) Act 2006 to which Dr. O'Neill made reference is in these terms.

Transfer of prisoner to designated centre

(1) Where – (a) a relevant officer certifies in writing that a prisoner is suffering from a mental disorder for which he or she cannot be afforded appropriate care or treatment within the prison in which the prisoner is detained and (b) the prisoner voluntarily consents to be transferred from the prison to a designated centre for the purpose of receiving care or treatment for the mental disorder, then the governor of the prison may direct in writing the transfer of the prisoner to any designated centre for that purpose.

(2) Where two or more relevant officers certify in writing that a prisoner is suffering from a mental disorder for which he or she cannot be afforded appropriate care or treatment within the prison in which the prisoner is detained, then the Governor of the prison may direct in writing the transfer of the prisoner to any designated centre for the purpose of the prisoner receiving care or treatment for the mental disorder notwithstanding that the prisoner is unwilling or unable to voluntarily consent to the transfer.

The Central Mental Hospital is a designated centre for the purpose of this section but no other facility in the State has been so designated.

15. Notwithstanding that the issue has been around for a very considerable time and that the applicant's advisers have been seeking a solution on behalf of the applicant it is pointed out with some force by them that the proceedings that have been initiated are restrained and measured. An order providing for the release of Mr. Clarke is not sought. There is no application for mandatory relief being pressed and even the declaratory reliefs sought are non-prescriptive, recognising that there may be different ways in which the needs of Mr. Clarke can be met and that the authorities must be afforded a degree of discretion in that regard. The respondents are less than impressed about the claims made in relation to the restrained and non directive nature of the proceedings and instead protest that significant divergences emerge between the case against them as pleaded and as expanded upon in the written

submissions and what has advanced in all argument.

16. Notwithstanding the complaint that the nature of the case being made has shifted it is appropriate to look at the reliefs sought in the statement of grounds. So far as material they are these

- i. An order of mandamus by way of an application for judicial review requiring the respondents and/or each and/or either of them to identify and/or arrange for appropriately supervised and supported residential facilities which could be made available to the applicant on his release from prison
- ii. An application by way of an application for judicial review that the incarceration of the applicant in prison for any period due the lack of suitable, less restrictive, alternative residential facilities gives rise to a disproportionate interference with his constitutionally safe guarded rights deliberately and/or bodily integrity and/or due process of law and/or fair trial rights as guaranteed under Article 38.1 and/or Article 40.1 and/or Article 40.3 of the Constitution and is therefore unlawful.
- iii. A declaration by way of an application for judicial review that any prolongation of the applicants custodial sentence due to an identified risk of re-offending which risk could be safely managed through the provision of suitable alternative and less restrictive residential facilities is unlawful as giving rise to a disproportionate interference with the applicants fundamental rights including his rights to personal autonomy, liberty, bodily integrity, equality and trial in due course of law which said rights are safe guarded under Article 38.1 and/or 40.1 and/or 40.3 of the Constitution.
- iv. A declaration by way of an application for judicial review that the prolongation of the applicants custodial sentence by reason of the lack of suitable alternative less restrictive residential facilities breaches his right to freedom from inhuman and degrading treatment and/or his right to liberty and/or his fair trial rights and/or his rights to a private life and/or his right to equality in the exercise of these rights as guaranteed under Articles 3 and/or 5 and/or 6 and/or 8 and/or 14 of the European Convention on Human Rights
- v. A declaration by way of an application for judicial review that in failing to identify and provide suitable alternative accommodation facilities for the applicant, the respondents and/or each and/or either of them are not performing their functions in compliance with their obligations under s.3 of the European Convention of Human Rights Act 2003.

17. There are a number of observations that can be made. First of all, a starting point for consideration of this issue has to be that Mr. Clarke is in prison because courts of competent jurisdiction have ordered that he should serve a sentence of imprisonment. The sentences imposed have not been altered or set aside on appeal but that said, it is clear that Mr. Clarke is a vulnerable prisoner presenting with particular needs within the prison system. He has needs which require to be addressed between now and his release date in June of next year. Moreover, his lawyers appear to envisage that his needs will continue way beyond his scheduled release date. They see his long term needs being met in a nursing home facility or in a bespoke sheltered environment created for him.

18. So far as the current situation is concerned Mr. Clarke is receiving the support of the prison psychiatric service and is on a waiting list for transfer to the Central Mental Hospital. Unfortunately, waiting lists, as we are all aware occur across the health service. Equally waiting lists occur across many countries and certainly are not confined to any one jurisdiction.

19. There is an obvious difficulty with courts intervening so as to effectively prioritise the situation of a particular applicant seeking a service. That difficulty is more pronounced when mandatory orders are sought and no doubt in recognition of this the applicant has not pressed for mandatory orders which would direct that he receive specified treatment or that he would be placed in a particular location so the relief sought at para. (d) (i.) which involves an order of mandamus requiring the respondents to identify and/or arrange for appropriately supervised and supported residential facilities for the applicant on his release from prison has not been pressed. However, even declaratory orders give rise to difficulties and are not to be made lightly. Declaratory orders are sought on behalf of applicants precisely because it is anticipated that they will prove effective and that the executive will respond promptly and effectively to the declaration that is made. However, insofar as the capacity and freedom of the executive to make decisions in relation to the allocation of resources and decisions as to the order in which applicants for a service will be dealt with are constrained by the making of such an order then declaratory orders do have implications for the separation of powers.

20. That Mr. Clarke is a vulnerable person is not in doubt. However, he is not the only vulnerable prisoner in the system and he is not the only prisoner presenting with psychiatric issues. A psychiatric service and indeed a psychological service is provided by the prison system. Provision is made for the transfer in certain circumstances of prisoners to the Central Mental Hospital. Mr. Clarke and his advisers would wish that a more extensive range of services would be made available. That is a very understandable aspiration and one that would be widely supported. However, it is an objective that raises issues as to the allocation of resources and is one which must be pursued in the political arena. It is not a situation where intervention by the courts would be appropriate. Save in truly exceptional circumstances, it is not the function of the Courts to give directions as to the level of services to be provided within the prison system. No doubt arguments could be made on behalf of many prisoners that the need for them to serve a prison sentence could be avoided if a bespoke facility designed to provide for their specific needs was put in place, but that does not provide a basis for a judicial review. Insofar as Mr. Clarke is saying that he has been sentenced to a term of imprisonment and that a term of imprisonment is not appropriate, then the way to raise that issue is through an appeal to the Court of Criminal Appeal.

21. The difficulties associated with putting in place a long term regime after a prison sentence has been served are if anything even more fundamental. The suggestion is that the State, probably through the Health Service Executive, would provide a long term residential placement staffed exclusively by males. The suggestion is premised on the expectation that Mr. Clarke would go voluntarily to the unit to be established and would voluntarily adhere to the regime that would be put in place. It is likely that Mr. Clarke would take up a place if offered one, but it is impossible to know how long he would remain there or whether he would remove himself from there whether on a short term or long term basis. If a unit is to be established to cater for Mr. Clarke and perhaps others with a similar profile then it would appear essential that the monitoring and supervision regime which would need to be put in place would be underpinned by statute. It might be that Courts would be empowered by legislation when passing sentence to direct that an individual would be required to reside at a particular unit in the context of post release supervision. Any such legislation would certainly be complex and sensitive and would give rise to civil liberties issues and there would be obvious implications from a constitutional and European Convention on Human Rights perspective. What is proposed is altogether too far reaching to be dealt with by way of declaratory Court orders.

22. There is a still further problem in making orders where there is so much uncertainty as to what the situation will be when Mr. Clarke finishes his sentence. It is possible that with the assistance of post release supervision that Mr. Clarke will refrain from further offending. Alternatively, there is the possibility that Mr. Clarke will re-offend at some stage and if that happened and if he were to receive a custodial sentence and find himself back within in the prison system, then the question of a transfer to the Central Mental

Hospital or perhaps to some other facility that might be designated at that stage might well arise for consideration. Again, there is the possibility that at some stage the question of hospitalization under the Mental Health Acts would arise for consideration. What the situation will be after Mr. Clarke's release from his sentence is so uncertain at this stage that any attempt by the Court to intervene whether by way of declaratory relief or otherwise would be quite inappropriate.

23. In summary, while I have considerable sympathy for Mr. Clarke recognising as I do that prison must be a very difficult environment for him, I do not believe that this is an appropriate case for an intervention by the courts and I must refuse the applicant the reliefs that he seeks.