THE HIGH COURT

JUDICIAL REVIEW

[2018 87 JR]

BETWEEN

PETER BARRY

APPLICANT

AND

THE GOVERNOR OF THE MIDLANDS PRISON

AND

THE IRISH PRISON SERVICE

RESPONDENTS

JUDGMENT of Ms. Justice Donnelly delivered on the 23rd day of July, 2019

Introduction

1. In these judicial review proceedings, the applicant is claiming relief related to the conditions of his detention by the respondents in so far as they concern his cell accommodation, his health care and his diet. The applicant is serving a custodial sentence and is under the direct care of the first named respondent in the Midlands Prison. The second respondent is an executive agency with responsibility for prisons. The applicant has a diagnosed medical condition, namely Crohn's disease; a debilitating ailment that affects the intestine causing various distressing and uncomfortable symptoms including fatigue, intestinal ulcers and severe pain which can result in the intestine being emptied with frequent bouts of diarrhoea.

2. Having been granted leave to apply for judicial review on the 5th February, 2018, the applicant seeks the following reliefs: -

> (i) an order of *certiorari* of a decision of the first named respondent, by letter dated 20th November, 2017, that the respondent's will not provide an unqualified assurance that the applicant will be detained in a single cell for the duration of his imprisonment;
>
> (ii) a declaration that as a result of a recognised medical condition, being Crohn's disease, he is rendered unsuitable for shared cell detention and a resultant injunction;
>
> (iii) an injunction directing that he should be provided with medically dependent dietary requirements;
>
> (iv) a declaration that the respondents failed to provide him with an adequate and appropriate diet during his detention and as a result has been exposed to risk and harm amounting to a breach of his right to bodily integrity and dignity;
>
> (v) an injunction directing that the respondents provide to the applicant all necessary medication for the proper management and control of his Crohn's disease.

3. The applicant claimed his treatment was in breach of his rights to privacy, dignity and not to be subjected to inhumane and degrading treatment as guaranteed by Article 40.3.1 and 40.3.2 of *Bunreacht na hÉireann* ("the Constitution") and Articles 3 and 8 of the European Convention on Human Rights ("ECHR"). The applicant canvassed his claims in extensive affidavits. His case can be broken down into three substantive issues; the applicant's cell accommodation, diet and medical treatment.

4. The applicant averred that having to share his cell, the difficulties associated with his diet and the deficiencies in receiving prescribed medication adversely impacted upon his daily life within the prison. He claimed that he had exhaustively sought to have these issues resolved prior to taking the proceedings.

The Evidence and Submissions

The applicant: cell accommodation

5. The applicant's principal complaint about his cell accommodation was that the first respondent refused to give him an unqualified undertaking that he would not be required to share a cell with another inmate in the future. Since July, 2016, the applicant has been a sole occupant of a double occupancy cell save for a period of 41 days between September and November, 2017.

6. The applicant complained that on or around the 1st September, 2017, another prisoner was placed in his cell. The applicant said that he wrote a number of communications internally and externally through his solicitor with the prison which complained that he had been exposed to an uncomfortable, embarrassing and undignified environment in terms of the practicalities of his living conditions. The applicant said that the side effects of his medical condition is such that exposure to another person in a confined environment was deeply embarrassing. The applicant also said that the nocturnal habits of the prisoner placed in his cell meant that he could not sleep which he said left him feeling weak and exhausted.

7. It should be noted that the applicant had taken a previous judicial review application complaining about the physical condition of his cell. His application was refused by the High Court (see *Barry v Governor of Midlands Prison and Minister for Justice and Equality* [2018] I.E.H.C. 279). On behalf of the applicant, it was accepted that this application was not a "rerun" of that decision. Part of the claim in that case had been that certain conditions in his cell had been in retaliation for the successful compromise of separate proceedings in his favour. Insofar as the applicant sought to make the claim here that his conditions were imposed as a "*covert campaign of reprisal against the applicant due to his institution and success in settling earlier judicial review proceedings*", this Court is satisfied that this general claim was already heard by the High Court and rejected in the decision in Barry decision above. No material has been put before the Court which could permit the Court in these proceedings to interfere with that earlier finding.

8. The applicant relied upon *Mulligan v Governor of Portlaoise Prison* [2010] I.E.H.C. 269 to argue that the degree of invasion of his

right to privacy was severe as he was required to engage in toileting and personal hygiene routines in the presence of any cell companion. The applicant also relied upon *Simpson v Governor of Mountjoy Prison* [2017] I.E.H.C. 561 to submit that he enjoys a right to privacy during the currency of his detention and that interference and invasion of this right can be easily and appropriately remedied by the respondents guaranteeing him a single cell. The applicant also relied upon *Kinsella v Governor of Mountjoy Prison* [2011] I.E.H.C. 235 to support his submission that his detention should not breach the basic tenets of his constitutional rights.

The respondents: cell accommodation

9. The affidavit of Assistant Governor Desmond O'Shea averred that no other prisoner in the Midlands Prison has ever been given an undertaking of the kind sought by the applicant. Assistant Governor O'Shea averred that the nature of the applicant's offences dictated that he had to be housed with other prisoners who have been convicted of similar type offences so as to ensure his safety and the safety of other prisoners. Assistant Governor O'Shea averred to further challenges that effectively restricted the options open to the respondent when determining the accommodation available to prisoners. Assistant Governor O'Shea said that the governor required the power to house prisoners as he sees fit in order to ensure the smooth running of the prisons. Assistant Governor O'Shea said that at all material times the respondents have attempted reasonably to provide the applicant with single cell accommodation and will continue to do so as long as the operational needs of the prison allows for that.

10. An affidavit was sworn by Dr Sohail Rasool, a doctor employed at the Midlands Prison. Dr Rasool confirmed that the applicant had engaged with him in a multiplicity of communication about his personal history and medical needs, and on at least one occasion he relayed a message to the prison authorities about applicant's request for a single cell accommodation. Dr Rasool averred that it was his opinion that a single cell accommodation had no direct therapeutic effect on the management of Crohn's disease but acknowledged that it may be helpful in terms of the applicant's privacy.

11. The respondents relied upon *Simpson* to argue that prison authorities are afforded a wide margin of appreciation in respect of how they implement any prison regime and that the fact of imprisonment will curtail the rights of the imprisoned. The respondents also relied upon *Foy v Governor of Cloverhill Prison* [2012] 1 I.R. 37 and *Walsh, Ryan and Byrne v The Governor of Midlands & Ors* [2012] I.E.H.C. 229 as confirmation of the approach adopted in Simpson. The respondents also relied upon *Barry v Governor of Midlands Prison and Minister for Justice and Equality* [2018] I.E.H.C. 279 which was followed in *McMorrow v The Governor of the Midlands Prison and the Irish Prison Service* [2018] I.E.H.C. 765 to support their submission that the prison authority had to balance the management of prisons with the safety and wellbeing of prisoners within their care. The respondents also relied on *The State (McDonagh) v Frawley* [1978] 1 I.R. 131 to highlight that prisoners can expect a limitation of their constitutional rights whilst in custody with some rights being abrogated or suspended, even to a significant degree.

The applicant: dietary and medical care requirements

12. The applicant made complaints about an inadequate and inappropriate diet to meet his health concerns arising from his Crohn's disease. His disease requires a high calorie diet. The pleadings were unspecific about the nature of the inadequacies/inappropriateness of the applicant's current diet. The complaints exhibited referred to various factors such as a list of food to which he was intolerant and which, according to the applicant, was ignored by the respondents. He also complained about the quality of the food e.g. it was "slop", and about a failure to provide extra portions. There was no evidence about the medical nature of his food intolerances.

13. Counsel on his behalf submitted that the respondents are responsible for the provision of an adequate diet for the applicant. He submitted that their failure to recognise that the applicant's medical condition is contingent upon dietary intake, has exposed the applicant to harm, injury and exceptional distress.

14. The applicant submitted that Rule 23 of the Prison Rules 2007 ("the Prison Rules") provided him with an express right to an adequate diet. Further, the applicant relied on *Gan v Governor of Arbour Hill Prison* [2011] I.E.H.C. 247 to submit that special dietary needs of a prisoner should be properly catered for whilst they are detained.

15. The applicant also submitted that he has not received adequate healthcare provisions to assist him in managing his Crohn's disease. The applicant submitted that the respondents are under a duty to provide healthcare to the applicant of a similar standard that he would receive, or be entitled to receive from the state, as if he were not imprisoned, relying *inter alia* on Rule 33 of the Prison Rules. The applicant submitted that he has been exposed to the respondents' repeated failure to ensure that the applicant receives his necessary medication. He referred in particular to instances where vitamins and "Motilium" (a drug to assist in digestion) were not provided.

16. The applicant also relied on *Mulligan* to submit that any complaints made by a prisoner prior to proceedings being issued were relevant for the Court assessing whether not the subject of complaint has taken place. The applicant also relied upon *Pozaic v Croatia* [2014] E.C.H.R. 1357 to submit that the right not to be subjected to inhuman and degrading treatment under Article 3 ECHR dictates that prisoners have the right to a minimum level of healthcare which should be compatible with human dignity. Further, the applicant relied upon *Taddeei v France* [2010] E.C.H.R. 36435 to submit that the prison authorities are under a duty to give sufficient consideration to the applicant's need for specialised care.

17. The applicant's solicitor, Mr Matthew Burns, averred that the respondents failed to accommodate the applicant's request to attend an external medical practitioner at the Midlands Regional Hospital on two occasions in March, 2019 for the purpose of obtaining a medical report on the applicant's current state of health. Mr Burns averred that the respondents had initially placed handcuffs that were extremely tight on the applicant before being due to be escorted on his first medical appointment made for 8th March, 2019. Mr Burns averred that these handcuffs were so tight that they were unbearable for the applicant to sustain and as a result had to forgo his appointment on this occasion. Mr Burns averred that a subsequent appointment was made for the 22nd March, 2019 at 2pm but the applicant was also not able to attend this appointment due to the respondents' failure to reply in time to confirm the appointment with the Midlands Hospital.

18. Mr Burns also averred to a further missed appointment with a dietician at Midlands Hospital on foot of a recommendation by Dr Rasool which was made for 28th February, 2019. Mr Burns averred that this was further evidence that the respondents did not attempt to reasonably accommodate the applicant's healthcare requirements by facilitating appointments with medical professionals.

19. The applicant submitted that the respondents' failure to provide a diet in accordance with his medical condition and the failure to ensure he receives his medications is wrongful and has unnecessarily compromised his right to health, bodily integrity and dignity. He submitted these could be easily remedied with minimal interference with the operations of the prison. The failure to do so amounted to a breach of his fundamental rights under the Constitution and the European Convention on Human Rights. He claimed that the infringement of and the failure to protect these rights amounted to cruel, inhuman and degrading treatment.

The respondents: dietary and medical care requirements

20. In an overarching submission, the respondents submitted that the issues raised by the applicant in respect of his diet and access to medical treatment were not matters for a judicial review application as the applicant failed to identify a clear decision capable of review. Even if it was reviewable; the respondents had acted reasonably and within jurisdiction on those issues.

21. Referring to the evidence filed on behalf of the respondents, counsel submitted that the applicant's medical care needs have been sensitively accommodated as the applicant has had extensive healthcare contacts with medical staff. Counsel submitted that at all stages the respondents acknowledged and took seriously the applicant's diagnosis of Crohn's disease. The respondents submitted that the level of access to healthcare and actual healthcare provided to the applicant has been more than reasonable. Counsel also submitted that where the medical team make recommendations in relation to the applicant's medical conditions, they are implemented insofar as the respondents can facilitate the request.

22. Dr Rasool averred to the prison population's diverse and varied clinical needs which posed challenges for the prison authorities. Dr Rasool said the applicant had 464 health care contacts with various medical practitioners. Dr Rasool confirmed that the applicant is on a number of regular prescribed medications which are, by way of standard practice, reviewed regularly by the medical team when they are in contact with the applicant. Dr Rasool said that the prescribed medications are dispensed by a designated Prison Pharmacy and the system was professional and monitored. If there are some instances where the correct prescription is not available on any particular day, then every effort is made to rectify this within a reasonable time. In his view all reasonable efforts have been and are made to facilitate him in terms of his medical needs.

23. Caitriona Keane, principal solicitor at the Office of the Chief State Solicitor, addressed on affidavit some of the issues related to the appointments made by the applicant in respect of attending medical professionals outside of the prison. Referring to the attendance by the applicant with a medical professional to obtain a medical report on the applicant's current state of health, Ms Keane averred that Mr Justice Noonan, during case management on the 23rd January, 2019, was put on notice that the applicant intended to file a medical report. To the best of her recollection this was to be completed by a medical professional conducting a documentary review of the applicant's medical records and if necessary the applicant would be examined. Ms Keane averred that Mr Justice Noonan directed that this was to completed by 29th February, 2019. Ms Keane averred that she received a letter from the applicant's solicitor on the 26th February, 2019 which confirmed that they had obtained the services of a medical expert but they were out of the country until the 12th March, 2019. Ms Keane averred that she received another letter dated the 28th February, 2019 which identified Dr Murat Kirca of the Midlands Regional Hospital as the proposed medical practitioner for the medical assessment.

24. Ms Keane averred that the applicant's solicitor did not confirm until the 6th March, 2019 that Dr Kirca was able to examine the applicant on the 8th March, 2019 at 12pm. Ms Keane averred that this was the first point at which the applicant put the respondents on notice of the date and time of the external medical appointment. Ms Keane averred that although this was extremely short notice, the respondents were willing to accommodate the applicant's request. However, Ms Keane averred that the applicant did not attend this medical appointment owing to the applicant's concerns about the tightness of handcuffs which the respondents placed on the applicant before being escorted. Ms Keane averred that the prison officers who were accompanying the applicant to the medical appointment checked the handcuffs and they had been fitted in accordance with standard procedures.

25. Ms Keane averred that a further medical appointment was made for the 22nd March, 2019 at 2pm which the respondents were notified at 11.40 on the 21st March, 2019. Again, Ms Keane averred that although this was extremely short notice, the respondents sought to accommodate the applicant and confirmed with his solicitor he would be escorted by the Irish Prison Service ("IPS") to the medical appointment. Ms Keane averred that the applicant's solicitor replied to this confirmation by noting that the IPS's confirmation email came too late and the medical appointment made for the 22nd March, 2019 at 2pm could not accommodated by the hospital.

26. Ms Keane also referred to the applicant's missed appointment with a dietician at the Midlands Hospital which was made for the 28th February, 2019. Ms Keane averred that the reason the respondents were not able to accommodate this request was due to the fact that the applicant had not communicated the existence of the appointment with the dietician until two days before the actual appointment. Ms Keane averred that due to the short notice of the applicant's request and a general shortage of staff in the prison on that particular date, the respondents were unable to accommodate this request. Ms Keane averred that if more time had been given to the respondents, they would have been able to arrange an escort for the applicant.

27. Ms Keane averred that the failure by the applicant to attend Dr Kirca for a medical examination was in no way attributable to the respondents. Ms Keane stated that the respondents had at every opportunity sought to accommodate the applicant's request to attend Dr Kirca for a medical examination. Ms Keane further averred that in her opinion, the applicant's failure to attend the various medical appointments was directly attributable to applicant's own conduct and his contention that the respondents breached his fundamental rights was entirely without foundation.

28. In respect of medications, Assistant Governor O'Shea averred that the provision of medical care in prisons is different to that outside the prison context. Specifically, medications that would normally be available over the counter or bought in a supermarket will be included on prescriptions to allow prisoners gain access to these medications. The applicant complained in his affidavit, *inter alia*, that over the counter medications such as vitamin C, Motilium and Fortistip were not readily available to him. Assistant Governor O'Shea stated that in some exceptional instances, IPS, experience delays in obtaining these over the counter medicines but prescriptions were filled as soon as reasonably possible thereafter. Assistant Governor O'Shea stated that the Midlands Prison have around 1,878 prescriptions per day and as a result the applicant is one of many with medical needs.

29. Counsel for the respondents contested the applicant's claim that the frequency of the applicant's attendances with medical professionals inferred that he was receiving inadequate care; most of the appointments were at the applicant's request. Counsel submitted his attendance at these medical appointments was evidence of the applicant's medical care being met. Further, counsel submitted that whilst there has sometimes been delays in procuring the applicant's medications, these delays were outside of the immediate control of the respondents and any delayed medication was always delivered to the applicant as soon as possible.

30. In respect of the applicant's dietary needs, counsel contested the applicant's claim that his dietary needs were not being met and pointed to the fact that the respondent has gained weight since his committal at the Midlands Prison as evidence that the applicant's dietary needs were continually being met. Dr Rasool noted that the applicant's weight went from 57kg to 65kg since the applicant's committal. In Dr Rasool's affidavit, he acknowledged that a high calorie diet was important in respect of those suffering from Crohn's disease but stated that diet was ultimately one part of the treatment for a person with Crohn's disease. Dr Rasool averred that a high calorie diet was recommended by a doctor on the prison medical team and was communicated to the kitchen supervisor.

31. Assistant Governor O'Shea in his affidavit said that on an objective basis the diet provided to the applicant was suitable for his needs and he refuted the applicant's contention that his dietary needs were not being met. Assistant Governor O'Shea also averred

that the Midlands Prison serves over 1,600 meals per day excluding breakfasts which amounted to 584,000 meals per year. Assistant Governor O'Shea also said that the prison service has not received any other complaints from other prisoners, some of whom suffer from Crohn's disease. Further, Assistant Governor O'Shea noted that the prison authorities was responsible for accommodating an array of other dietary needs within the prison such as vegetarians, vegans, Muslims, lactose intolerant and colitis disease sufferers.

Objection on Grounds of Delay
32. Rule 21(1) of the Rules of the Superior Courts, as substituted by Statutory Instrument 691/2011 ("Superior Court Rules") provides that: -

> *"[a]n application for leave to apply shall be made within three months from the date when grounds for the application first arose".*

Rule 21(3) provides that:-

> *"[n]otwithstanding sub-rule (1), the Court may on an application for that purpose, extend the period within which an application for leave to apply for judicial review may be made, but the Court shall only extend such period if it satisfied that:-*
>
> > *(a) there is a good and sufficient reason for doing so, and*
> >
> > *(b) the circumstances that resulted in the failure to make the application for leave within the period mentioned in sub-rule (1) either –*
> >
> > > *i. were outside the control of, or*
> > >
> > > *ii. could not reasonably have been anticipated by the applicant for such extension.*

33. In *MOS v The Residential Institutions Redress Board and the Superior Court Rules Committee and the Minister for Justice and Equality* [2018] I.E.S.C. 61, the Supreme Court (Finlay Geoghegan J) concluded that the exercisable jurisdiction of the Court in applications to extend time remains a discretionary jurisdiction which must be exercised in accordance with the relevant principles in the interests of justice. The decision clarifies that the Court must have regard to all the relevant factors and circumstances, which includes the decision sought to be challenged, the nature of the claim made that is invalid or unlawful and any relevant facts and circumstances pertaining to the parties. The Supreme Court decision does not envisage any absolute rule in relation to what may be taken into account or constitute a good reason or a good and insufficient reason. Rather, the exercise of the necessary discretion involves the balancing of factors to allow the Court make its own determination. In MOS the Supreme Court emphasised that O. 84, r. 21 does not impose an absolute limitation period given that the Superior Court Rules provide for an extension of time.

34. In the applicant's statement of grounds at para. 57 it is stated that: -

> *"any delay in initiating proceedings (if it could be referred to as delay at all) arose from circumstances outside of the applicant's control because the applicant could not have known that the respondents would fail to meaningfully address his correspondence and complaints on a timely basis."*

35. Counsel for the applicant also submitted that delay, if any, on his part is excusable in that the applicant took all necessary local level steps with reasonable expedition. This was a reasonable approach taken by the applicant and should be considered by the Court in determining the issue about time. Counsel submitted that the balance of justice strongly favours the applicant.

36. Counsel for the respondents pointed to the dates on which the applicant first made complaints regarding his diet and medical treatment; he could have brought the judicial review proceedings from January, 2017. Counsel pointed to the other proceedings he had brought and contended that there was no reason why he did not bring these claims within those proceedings. There was no objection on the ground of delay to the issue of the occupancy of the cell as this issue had only arisen in November, 2017, i.e. within 3 months of the date of the application for judicial review in February, 2018.

37. The respondents submitted that the reasons stated by the applicant were not adequate given that the prison authorities were effectively bombarded with complaints from the applicant. Counsel placed emphasis on *O'Donnell v Dun Laoghaire Corporation* [1991] I.R.L.M. 301 where Costello J. stated that any assessment of an applicant's excuse –

> *"must be an objective one and the court should not extend the time merely because an aggrieved plaintiff believed that he or she was justified in delaying the institution of proceedings."*

This approach was approved by Fennelly J. in *de Roiste v Minister for Defence* [2001] I.R. 190.

Determination on the issue of delay
38. In view of this Court, it is important to take into account all the relevant factors in accordance with the Supreme Court's decision in *MOS* in assessing whether the reasons offered are good and sufficient to justify the court exercising its discretion. In the present case, a number of particular factors persuade the court that the reasons are good and sufficient. These are that: -

> (a) he is a prisoner who has made continual complaints regarding these issues and correctly sought redress within the prison system;
>
> (b) they are ongoing issues,
>
> (c) they concern alleged ongoing breaches of fundamental rights, in particular the right not to be subjected to inhuman and degrading treatment;
>
> (d) he has another complaint for which he does not require any extension; and
>
> (e) the complaints form a pattern of treatment which is said to breach these fundamental rights.

39. In assessing whether the taking of proceedings was outside his control or could not reasonably have been anticipated, regard must also be had to the factors set out above. In this case, an unfortunate situation arose because not every complaint was

answered by the respondent. This is perhaps explicable by the sheer number of his lengthy complains which were quite repetitious. It is quite marginal as to whether his claim that he could not have known that the respondents would fail to meaningfully address his complaints on a time basis can really have been a factor that was outside his control or could not reasonably have been anticipated. In the interests of justice and on the particular facts of this case, it is appropriate to lean in his favour in so interpreting that it was so out of his control.

40. The Court recognises that in *MOS*, the Supreme Court also stated that in most cases where there is good and sufficient reason to extend time, it is probable that the Court will also be able to make a positive finding under the second sub-rule. In another case, where the prison authorities feel they have given appropriate and sufficient explanation as regards repetitive complaints, it may be advisable to give more explicit notice that no further correspondence will be engaged in save where new issues arise. That would put a prisoner on explicit notice that the time for taking any further procedures has begun to run. In the circumstances, I will extend the time for bringing these proceedings.

Analysis of the Court on the substantive issues

General Principles on Prisoner Rights
41. The starting point is that arising from the essential attribute of imprisonment, namely the deprivation of liberty, imprisonment restricts the extent of the rights enjoyed by a prisoner. Imprisonment does not extinguish certain residual constitutional rights. Edwards J. in *Devoy v Governor of Portlaoise Prison* [2009] I.E.H.C. 288 confirmed that:-

> *"…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."* (para 83).

42. The subsistence of rights enjoyed by imprisoned persons, such as the applicant, was also described in positive terms by Hogan J. in *Connolly v Governor of Wheatfield Prison* [2013] I.E.H.C. 334. At paras. 14 and 15 Hogan J. confirmed:-

> *"….that the Preamble to the Constitution seeks to ensure that the "dignity and freedom of the individual may be assured." While prisoners in the position of Mr. Connolly have lost their freedom following a trial and sentence in due course of law, they are still entitled to be treated by the State in a manner by which their essential dignity as human beings may be assured. The obligation to ensure that the dignity of the individual is maintained and the guarantees in respect of the protection of the person upheld is, perhaps, even in (sic) more acute in the case of those who are vulnerable, marginalised and stigmatised.*
>
> *While due and realistic recognition must accordingly be accorded by the judicial branch to the difficulties inherent in the running of a complex prison system and the detention of individuals, many of whom are difficult and even dangerous, for its part the judicial branch must nevertheless exercise a supervisory function to ensure that the essence of these core constitutional values and rights - the dignity of the individual and the protection of the person - are not compromised: see, e.g., Creighton v. Ireland [2010] IESC 50, per Fennelly J."*

43. Connolly is authority establishing that this Court has a supervisory jurisdiction, invoked in these judicial review proceedings, to intervene in the conduct of the prison where constitutional rights are being compromised. In *Mulligan*, MacMenamin J. identified constitutional rights of prisoners and what protection of those rights entailed: -

> *"[108] The following unenumerated constitutional rights arise: (i) protection against inhuman or degrading treatment; (ii) the right to protect life and health from serious endangerment; (iii) the right to privacy; (iv) and bodily integrity. These are considered below sequentially but as numbered here. To this general identification I would add:-*
>
> *(a) the right to bodily integrity necessitates that the Executive should protect the right to health of persons held in custody as well as is reasonably possible in all the circumstances (The State (C.) v. Frawley [1976] I.R. 365);*
>
> *(b) there is also a right, be it framed negatively or positively not to be exposed to inhuman or degrading treatment. Here a material consideration in determining the constitutional status of the matter complained of is the purpose and intention of the restriction and privations; in particular whether they are punitive, malicious or whether they are evil in purpose (The State (C) v. Frawley);*
>
> *(c) a further relevant consideration is whether there is evidence that State authorities are taking advantage of detention to violate constitutional rights or to subject the applicant to inhuman or degrading treatment (The State (Richardson) v. Governor of Mountjoy Prison [1980] I.L.R.M. 82);*
>
> *(d) the conditions of detention must not be such as to seriously endanger a prisoner's life or health (The State (Richardson) v. Governor of Mountjoy Prison)*
>
> *(e) if the conditions of detention are potentially life or health threatening, a court should ask whether there is evidence that the authorities are for some legitimate reason unable to rectify the conditions (The State (Richardson) v. Governor of Mountjoy Prison);*
>
> *(f) there is a right of privacy subject to limitations imposed by detention;*
>
> *(g) a court must inquire the extent to which considerations of security, including the protection of prisoners themselves, requires a limitation of their rights (The State (Richardson) v. Governor of Mountjoy Prison);*
>
> *(h) a court should inquire as to the extent of complaints made by a prisoner or other prisoners (The State (Richardson) v. Governor of Mountjoy Prison);*
>
> *(i) a court must assess the extent to which the vindication of a claimed right would be practical (Murray v. Ireland [1985] I.R. 532);*

(j) a court must establish the extent of the burden which might be placed on the authorities in the vindication of the right claimed; whether the burden is in all the circumstances proportionate to the right asserted in the overall context of the prisoner's conditions of detention (Murray v. Ireland);

(k) there is a right of freedom to communicate; the limitation of which is subject to the principle of proportionality as must all such limitations on a constitutional right. Other constitutional rights may also arise in the future (Holland v. Governor of Portlaoise Prison [2004] IEHC 208, [2004] 2 I.R. 573.);

(l) a court must establish the extent to which, on the facts of this case, the nature of the constitutional wrong asserted necessitates the application of other principles applicable to the law of torts (McDonnell v. Ireland [1998] 1 I.R. 134)".

General Principles on Conditions of Detention

44. The most recent authority on conditions of detention is Simpson in which the applicant prisoner claimed that the requirement to "slop out" infringed the rights which are cited in these proceedings such as the right to privacy and the right not to be subjected to inhuman and degrading treatment. At para. 432 of White J. stated that:-

"…. 'no fact or set of facts can be take in a vacuum'. Instead the focus of any analysis, as already outlined, ought to be whether the totality of the conditions of detention constitutes a violation of the Convention."

45. Further, White J. set out a summary of the legal position as regards the restrictions on constitutional and ECHR rights at para 388 of his judgment as follows:

"The nature of those restrictions and the qualification of those restrictions, was helpfully summarised in the decision of McKechnie J. in Holland v. Governor of Portlaoise Prison [2004] 2 I.R. 573.

389 The head note states:

'2. That, by virtue of a lawful sentence of imprisonment being imposed on and being served by a prisoner, that person, for the duration of his sentence, had to suffer not only interference with the exercise of his constitutional right to liberty but had to suffer such restrictions on other constitutional rights which were necessary in order to accommodate the serving of that sentence. However, all other rights survived a prisoner's incarceration and must be capable of exercise by him in the context of his incarceration.

The State (Fagan) v. Governor of Mountjoy Prison (Unreported, High Court, McMahon J., 6th March, 1978); The State (Richardson) v. Governor of Mountjoy Prison [1980] I.L.R.M. 82; Murray v. Ireland [1985] I.R. 532 and Kearney v. Minister for Justice [1986] I.R. 116 applied. Breathnach v. Ireland [2001] 3 I.R. 230 distinguished.'

'3. That any infringement or restriction on the exercise of a constitutional right of a prisoner must be not more than what was necessary or essential for the protection of the interest or objective which grounded the justification for such interference or restriction in the first place. Kearney v. Minister for Justice [1986] I.R. 116 followed.'

'4. That, given that the right in issue was constitutionally based, any permissible abolition, even for a limited period, or any interference, restriction or modification on that right should be strictly construed with the onus of proof being on he who asserted any such curtailment.'

'5. That a test of proportionality was applied when considering constitutional rights. Heaney v. Ireland [1994] 3 I.R. 593 followed.'

The Proportionality Test

390 The parties agreed that this test applied to the alleged breach of the constitutional right to privacy. It is more nuanced in an allegation of torture, or inhuman and degrading treatment.

391 The test is that as set out in the judgment of Costello J. in Heaney & Anor v. Ireland & Anor [1994] 3 I.R. 593 at p. 606:-

……

392 If there has been a finding of torture or inhuman or degrading treatment, no issue of proportionality can arise. You cannot have proportionate torture or inhuman or degrading treatment. If torture arises intent is automatically imputed.

393 When one is considering what is material to a finding of inhuman and degrading treatment a type of proportionality test is applied, Once that finding is made, there can be no excuse for it based on proportionality."

46. Charleton J. in *Foy v Governor of Cloverhill Prison* [2012] 1 I.R. 37 and *Walsh, Ryan and Byrne v The Governor of Midlands & Ors* [2012] I.E.H.C. 229 expressly acknowledged that the fact of imprisonment, of necessity, curtails certain rights of the imprisoned within the context of prison governance. Charleton J. stated in *Foy* at paras. 18-19 confirmed that: -

"Imprisonment cannot amount to an unlawful infringement of the rights of the family if the order to imprison is validly made and the conditions of detention humanely recognise such rights as the prisoner retains within the context of reasonable management and governance of a lawful place of detention."

47. White J. in Simpson concluded at para. 39 that: -

"a prison governor and his staff are allowed a wide margin of tolerance from a Court in ensuring good order and safety

and security of prisoners."

48. The good order, safety and security of prisoners was considered by Faherty J. in Barry at paras 44-45 where she stated: -

> *"[t]he salient question for the Court is whether the circumstances of this case are such that warrant the relief sought by the applicant, namely an order directing the restoration of the screening mechanism the applicant previously had or the installation of half door. In all the circumstances of this case, I am satisfied that the relief sought by the Applicant is not warranted. I am satisfied that any such order would constitute an undue interference by the Court with the management of the Midland Prison, which is a function reserved to the first respondent under the Prison Rules. Rule 75, in part, provides:*
>
> > *1. Subject to the directions of the Minister and Director General the Governor shall be responsible for the management of the prisoner of which he or she is governor.*
> >
> > *2. The Governor shall at all times conduct himself or herself and perform his or her functions in such a manner as to:*
> >
> > > *i. Influence prisoners for good by his or her example;*
> > >
> > > *ii. Maintain the respect of the prisoners in the prison; and*
> > >
> > > *iii. Respect the dignity and human rights of all prisoners.*
> >
> > *3. The Governor shall:*
> > > *i. Develop and maintain a regime which endeavours to ensure the maintenance of good order and safe and secure custody and personal well-being of prisoners….*
>
> *In the course of his affidavit, Mr O'Shea has set out the rationale for the layout of the cell which the applicant occupies. In particular he asserts that if screens such that sought by the applicant in situ, this would impede the ability of Prison Officers to ascertain whether a prisoner behind such a screen was in good health or otherwise. In particular, he emphasised the reason (the prevention of suicide attempts by prisoners) as to why prisoners when in their cells must be visible to Prison Officers. The Court cannot gainsay or fault the respondents' rationale in this regard. The Court must recognise that in the management of the prison, in particular with regard to ensuring the safety and well-being of prisoners, the first respondent has a wide discretion, subject of course to the requirement to act fairly and humanely in the exercise of that discretion and in the application of the Prison Rules."*

49. This approach adopted by Faherty J. was subsequently followed by O'Regan J. in *McMorrow v The Governor of the Midlands Prison and the Irish Prison Service* [2018] I.E.H.C. 765 which examined issues of a very similar nature to those before the High Court in *Barry*.

The Court's Determination

50. This Court accepts, as a starting point in these judicial review proceedings, that those subject to custody have, by virtue of their committal, a restriction placed on the scope of the rights they enjoy; but that restriction does not extinguish their rights entirely. The degree to which fundamental rights can be limited is dependent on the rights affected. For instance, the right to be free from inhuman and degrading treatment as enshrined in Article 3 of the ECHR and in the Constitution is an absolute right which cannot be limited by the respondents. Other rights, such as the right to privacy as protected by article 8 of the ECHR and in the Constitution, can be limited in line with the exceptions contained within that right. It is necessary to make careful assessment of the nature of the applicant's claims.

Prison Detention

51. In accordance with *Simpson*, this Court will examine the totality of the conditions of detention as "no fact or set of facts can be taken in a vacuum". The applicant claimed a breach of privacy because he has been on some occasions in the past and may in the future, be required to share a cell with another prisoner. The applicant has argued that this breach of privacy is so significant that it constitutes inhuman and degrading treatment in light of his Crohn's disease.

52. The evidence from Assistant Governor O'Shea, demonstrates a sound basis for the previous necessity for the applicant to share a cell and for the refusal to guarantee him sole occupancy into the future. Assistant Governor O'Shea's affidavit confirmed that the necessity to place another inmate in the same cell as the applicant was premised on a prevailing accommodation need in the Midlands Prison and within the prison system generally. There was no cogent evidence presented that this decision to require the applicant to share a cell was "*punitive, malicious or evil*". The applicant's concerns did not extend beyond mere assertion. I am satisfied that the requirement to share a cell was directly attributed to a prevailing accommodation need which is especially heightened given the limited accommodation availability for prisoners who are convicted of sexual offences.

53. There was also no evidence presented that the state authorities were effectively taking advantage of the applicant's detention to violate his fundamental rights. The Court accepts that there is evidence to the contrary as demonstrated by the respondents' willingness to allow the applicant to continue in a single cell accommodation so long as there is no change to the prevailing accommodation needs in the prison.

54. Additionally, the Court must also assess the applicant's specific circumstances to determine whether his right not to be subjected to inhuman or degrading treatment or punishment has been breached. The right is absolute but the Court is obliged to assess all the circumstances.

55. The applicant in his affidavit submitted that having to share a cell with another inmate for the 41 days caused him to feel exposed to "*an uncomfortable, embarrassing and undignified environment in terms of the practicalities of his living conditions*". I accept that it must have been a deeply embarrassing and a very difficult circumstance for the applicant to have to share a cell given the practicalities of managing his Crohn's disease which is especially heightened in light of the close proximity he shared with the other inmate.

56. The burden is however placed on the applicant to prove that the conditions he faced was such that it constituted torture, inhuman or degrading treatment. It is not sufficient for a prisoner claiming a declaration of a breach of this right merely to establish that his constitutional rights have been restricted or impaired in the course of his detention in the absence of evidence to support

that assertion. The applicant must prove that in all the circumstances giving rise to the conditions complained of exceeds a threshold characterised by the phrase "inhuman and degrading". Moreover, the case law makes it clear that the custodial conditions under challenge must obtain a level of severity before a declaration of inhuman and degrading treatment could be made. Embarrassment, sub-optimal conditions or a simple breach of privacy do not axiomatically amount to inhuman and degrading treatment.

57. I am satisfied that the evidence presented by the applicant falls short of reaching the required threshold. The applicant did not produce any medical evidence to substantiate his case that there was a medical necessity in favour of single cell accommodation to help him manage his Crohn's disease. Further, Dr Rosool noted that in his opinion there was no direct therapeutic benefit arising from a single cell accommodation. Thus, there was no particular medical requirement for single cell occupancy.

58. It is also noted that in the case of this applicant, his complaints about privacy and its effect on him are no more than assertions of the impact which any court might readily expect on any prisoner experiencing those conditions. Thus, his circumstances did not include any particular psychological effect on him over and above what might be experienced by any other prisoner. This is not to say that such evidence is required in every case claiming a breach of inhuman and degrading treatment; it is not so required. In some cases, common sense will dictate that certain treatment may amount to inhuman and degrading treatment (see the comments of Edwards J in *Devoy*). In this case, the observation about lack of specific evidence are made to highlight that the same treatment applied to different people may, in certain circumstances amount to inhuman and degrading treatment for one but not for the other.

59. Moreover, it is noted that it is unfortunate that the applicant did not provide any evidence in these proceedings of the physical layout of the prison cells. The Court has not been given any evidence of the shape, size or layout of the prison cell in furtherance of the applicant's submissions, although the conditions appear to be those set out in the *Barry* decision referred to earlier. In that case, the High Court rejected his general claim of a breach made on the basis of the physical condition of the cell

60. Undoubtedly, there is some embarrassment at having to share a cell when suffering from a bowel disease, however on the evidence before me, there is no interference with his dignity or his privacy to such an extent as would make it inhuman and degrading to require him to share his cell with another person. The ideal would be that such a prisoner would not have to share accommodation. I do not consider that to require the applicant to do so crosses the boundary into being absolutely prohibited as a violation of his inherent dignity as a human being. It is not per se, inhuman and degrading to require a prisoner with a bowel disease to share a cell with another, in the absence of some specific factor such as inadequate physical sanitary or living space, medical necessity or some other factor particular to the individual prisoner. I am not satisfied that the applicant has proven any other relevant factor.

61. I have also not been persuaded that there has been a violation of his constitutional right to privacy by requiring him on occasion to share his double cell. It is not disputed that such a right may be restricted in the context of the good governance of the prison. Moreover, this Court must recognise that the prison management have a wide margin of tolerance in their assessment of that governance. This Court accepts the position set out by Faherty J. in her judgment in *Barry* where she held that governors in prisons have a duty to ensure the good order, safety and security of prisoners without undue interference by the courts.

62. The first respondent in the present case is entitled to reserve to himself the entitlement to require the applicant to share a (double occupancy) cell where the good order, safety and security of prisoners is at issue. There is no evidence before this Court to establish that the decision already taken in respect of the sharing of his cell was unlawful, disproportionate or in breach of his rights. There is also no basis for imposing a duty on the respondents to provide a single cell to the applicant for all time. This would amount to an undue restriction on the first respondent's entitlement to manage the prison accommodation without undue interference with the courts. In light of the applicant's requirement for segregation within the prison system, it could not and would not be appropriate to lay down in an injunctive form a prohibition of requiring him to double up when deemed appropriate by the first named respondent. For the avoidance of doubt, the Court reiterates that it has seen no evidence in terms of particular interference with his rights by requiring him to double up.

63. In light of the above and all of the applicant's submissions, it is the view of this Court that it is not appropriate to grant the applicant his request for an order compelling the respondents to guarantee him a single cell accommodation.

Dietary and Healthcare Provision

64. The applicant also alleged that the respondents failed to provide him with an adequate level of access to healthcare and an adequate diet. The general principles set out above apply equally to the issues of dietary and healthcare provision. In following *Mulligan* this Court addresses these allegations on an objective basis and in the context of the Governor's discretion to operate the prison in a reasonable manner.

65. The applicant submitted that his sometimes restricted access to medication necessary to manage his Crohn's disease, was in breach of his fundamental rights. I am satisfied to accept Assistant Governor O'Shea explanation that medications in prisons sometimes take a little longer to acquire in contrast to those accessing medication outside of prison. This is due to the nature of prison and the requirement of following certain procedures in place for the purpose of the safety and security of prisoners. This Court accepts that these procedures to acquire medication are necessary to ensure that the prison authorities maintain a safe and secure prison.

66. Assistant Governor O'Shea also explained that whilst there may have been some delays in obtaining medication, those delays were largely down to the difficulty of obtaining the medication in question and were delivered to the applicant as soon as they became available. Further, Dr Roscool provided evidence that prescriptions are administered professionally within the prison system. This Court accepts that the confines of imprisonment will inevitable restrict the fundamental rights enjoyed by the applicant. This is evident in the fact that he may experience short delays in obtaining his medication.

67. I am satisfied therefore that while there may have been certain occasions when his (mainly non-prescription required) medication was not available to him immediately, these lapses have been explained due to the requirements and difficulties of prison management. The delays do not appear to have been excessive and there is no indication of any sustained failings in this regard. While it is less than ideal to have any break in a chain of medical/pharmaceutical supplies, especially where they concern medically directed dietary needs, the evidence presented by the applicant does not reach the threshold required to prove inhuman and degrading treatment. I am satisfied therefore that in respect of his access to medication, there has been no breach of his rights under the ECHR or the Constitution.

68. The applicant also submitted that he had difficulty accessing medical professionals. The applicant submitted that this was evident in the fact that he was unable to attend medical professionals for treatment as a matter of general course in managing his Crohn's disease and also to attend for the purpose of obtaining a current medical report on the applicant's state of health before the trial hearing. Additionally, the applicant was also not able to attend a dietician at the Midlands Hospital as the respondents were unable to

accommodate this request.

69. In light of all of the evidence placed before this Court, I am satisfied that the applicant has been able to attend medical professionals as a matter of course to assist him in managing his Crohn's disease within the prison system. This is evidenced by way of the number of appointments he has been able to attend. There is no medical evidence before me to substantiate the applicant's claim that he has not been provided with the necessary medications in respect of his Crohn's disease. Furthermore, as set out above there is medical evidence from the respondent's that demonstrates that his Crohn's disease has been recognised in prison and that all reasonable efforts have been made to facilitate him in terms of his medical needs. I reject his claims regarding inadequate access to medication. The applicant was referred to a dietician by the prison medical team but any delay in obtaining an appointment is due to the usual delays within the Health Service Executive and cannot be the responsibility of the respondents.

70. It is also the view of this Court that the applicant's contention that his fundamental rights have been breached by the respondents' failure to accommodate the applicant's attendance at the Midlands Hospital for an appointment with Dr Kirca for a full medical examination is unsubstantiated in light of the evidence presented. In the first place the applicant did not place his own evidence before the Court as to what he says occurred but instead relied upon his solicitor's evidence. In turn the respondents relied upon the evidence of their solicitor. As the onus was on the applicant to prove the circumstances in which he says he was denied the opportunity to attend, the Court does not find it so proven.

71. The Court accepts however that it is unfortunate that the applicant has been unable to attend either of his appointments, but the evidence presented by Ms Keane, even absent hearsay, outlined the various attempts and arrangements made by the respondents to accommodate the applicant's attendance at his external medical appointments which were both at very short notice. It is the view of this Court that the respondents appear to have done everything reasonably within their powers to accommodate the applicant's attendance at his external medical appointments. This is evidenced by the respondents' engagement with the applicant's solicitor and the provision of escorts who were ready to accompany the respondent on the given dates.

72. The Court accepts that the respondent has not been able to attend an appointment with a dietician at the Midlands Hospital which was made for the 28th February, 2019. The evidence presented before this Court demonstrates that the reason for this non-attendance was due to the short notice and a staff shortage on the date in question. These issues put the respondents in a difficult position given their duties to other prisoners to maintain a safe and secure prison and the failure to attend this medical appointment was essentially outside of the control of the respondents. It is to be noted however that the above appointment with a dietician appears to have been made directly with the applicant and the respondents were not on notice of that date until it was too late to facilitate it. As stated already, the applicant did not organise his own medical reports or dietician's report prior to instigating these proceedings and only appeared to try to organise the same at the eleventh hour. Any failings of proof due to difficulties in organising attendance for medical reports cannot in those circumstances be placed at the respondents' door.

73. In considering the applicant's submission that his fundamental rights have been breached by the respondents' failure to provide him with a proper and adequate diet to assist him manage his Crohn's disease, this Court accepts that the respondents have a wide ranging duty to prisoners and part of this duty include a duty to give inmates an appropriate diet as expressed in the Prison Rules. In *The State (Richardson) v. Governor of Mountjoy Prison* [1980] I.L.R.M. 82 Barrington J. determined that rights should be read in light of obligations arising in the prison rules and the Constitution.

74. Part of the applicant's submission was that the respondents have not adequately recognised the applicant's medical condition which is contingent upon dietary intake. This Court accepts Ryan J.'s approach in *Gan* which placed an obligation on the prison authorities to ensure special dietary needs are properly catered for when a prisoner is detained. Further, the Court accepts that the applicant has brought his requirements to the attention of the respondents.

75. In view of the evidence before this Court, it is accepted that the respondents have expressly acknowledged the applicant's medical condition. Furthermore, the evidence put before this Court demonstrates that the respondents have taken all reasonable steps to ensure the applicant has access to an appropriate diet. In light of the evidence placed before the Court, it is accepted that diet forms only part of treatment in assisting the applicant manage his medical condition. There is no evidence before me that gives rise to an obligation on the respondents to provide the applicant with a personalised diet. The evidence establishes that the diet for Crohn's is a general high calorie diet and there is no evidence that the applicant has any other medically required needs. His preferences for specific foodstuffs or amount of food cannot be elevated to the status of right to a particular diet in the absence of, in his case, medical evidence of need for such diet. The duty on the respondents as regards diet encompasses a broader duty to other inmates within their custody and they must be entitled to manage the prison effectively, efficiency, safely and securely without the courts attempting to micro manage the dietary preferences as distinct from the needs of prisoners. The respondents cater for a large array of dietary needs during course of their role in running the Midlands Prison. I accept that the respondents have taken all reasonable steps to ensure that the applicant has been given an adequate diet.

76. In light of all of the evidence placed before this Court, it is accepted that the respondents have given the applicant proper and adequate medical care and have met his dietary requirements to the best of their ability thus far. There is nothing to suggest that this will change for duration of the remaining custodial sentence being served by the applicant.

Cumulative

77. The applicant also submitted that taking his contentions cumulatively, the failure by the respondents to provide the guarantee of a single cell occupancy and the failure by the respondents to provide an appropriate diet and/or access to medical treatment, constitute a violation of his fundamental rights.

78. This Court has considered all of the evidence presented by the applicant and the respondents. Even when taken together there is simply no evidence that his rights have been violated. The applicant's claims do not reach the threshold required to prove a breach of his fundamental rights.

Conclusion

79. The Court has considered the three areas of complaint made by the applicant, namely his claim to single cell occupancy for the duration of his imprisonment and his claim of inadequate medication and inadequate diet in the circumstances of his diagnosis with Crohn's disease. Having considered the evidence before me and for the reasons set out above, I am satisfied that the applicant is not entitled to the reliefs sought by him in these judicial review proceedings.