THE HIGH COURT

[2015 No. 358 J.R.]

BETWEEN

STEPHEN DOLAN

APPLICANT

AND

THE GOVERNOR OF MOUNTJOY PRISON

AND

THE IRISH PRISON SERVICE

RESPONDENTS

JUDGMENT of Ms. Justice Faherty delivered on the 22nd day of June, 2017

1. At the time of the hearing of the within application, the applicant was a prisoner serving a sentence, for the most part in Mountjoy Prison, ("Mountjoy") and latterly (from 12th January, 2017) in Castlerea Prison. These proceedings concern the circumstances of the applicant's incarceration in Mountjoy. At the outset of the hearing, the court was informed that the applicant's due release date was 27th March, 2017.

2. Essentially, it is the applicant's claim that at specific times during his incarceration in Mountjoy, the circumstances of his detention were in breach of the Prison Rules as contained in S.I. No. 252 2007 ("the Rules"). Before considering the matter further, it is apposite, in the context of the pleadings and the parties' respective submissions, to set out the relevant Rules. These are:

> "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) Subject to Rule 72 (Authorised structured activity), 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.
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> (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.
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> …
>
> 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.
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> …
>
> 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 therefore 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).

…

(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.

63. (1) A prisoner may, either at his or her own request or when the Governor considers it necessary, in so far as is practicable and subject to the maintenance of good order and safe and secure custody, be kept separate from other prisoners who are reasonably likely to cause significant harm to him or her.

(2) A prisoner to whom paragraph (1) applies may participate with other prisoners of the same category in authorised structured activity if the Governor considers that such participation in authorised structured activity is reasonably likely to be beneficial to the welfare of the prisoner concerned, and such activity shall be supervised in such manner as the Governor directs.

(3) The Governor shall make and keep in the manner prescribed by the Director General, a record of any direction given under this Rule and in particular

(a) the names of each prisoner to whom this rule applies,

(b) the date and time of commencement of his or her separation,

(c) the grounds upon which each prisoner is deemed vulnerable,

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

(e) the date and time when the separation ceases.

…

75. (1) Subject to the directions of the Minister and the Director General, the Governor shall be responsible for the management of the prison 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; and

(ii) assist and encourage prisoners in -

(a) coping with their imprisonment,

(b) achieving their personal development,

(c) taking responsibility for their lives, including offending behaviour, and

(d) preparing for reintegration into society after release.

(4) The Governor shall

(i) endeavour to ensure the fitness for duty of all prison officers and good conduct in the performance of such duties;

(ii) promote awareness of and ensure compliance with statutory obligations in regard to health, safety and welfare in the workplace;

(iii) have in place plans, equipment and procedures and ensure that prison officers are trained to perform their duties to meet fire, riot and other such emergencies.

(5) The Governor shall ensure that these Rules are applied fairly, impartially and without discrimination and that all persons to whom these Rules apply are made aware of these Rules and of the consequences of any breach of prison discipline under these Rules.

…

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.

…

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.

The applicant's placements within Mountjoy and other institutions

3. According to the respondents' statement of opposition, as verified by the affidavit of Malcolm O'Sullivan, Assistant Governor of Mountjoy Prison, sworn 11th January 2016, on the 6th November, 2014, the applicant was sentenced to two years' imprisonment backdated to 15th April, 2014, and was committed to Mountjoy. (It is noted that the applicant's solicitor's grounding affidavit also refers to the applicant having been sentenced on 13th March, 2015, to four years imprisonment with one year suspended.)

Between 6th November, 2014, and 23rd July, 2015, the applicant was detained at the following locations, by and large, in Mountjoy:

From To Location
06/11/2014 07/11/2014 Reception
07/11/2014 07/11/2014 C Base
07/11/2014 08/11/2014 A1
08/11/2014 12/11/2014 C Base
12/11/2014 12/12/2014 D2 West
12/12/2014 16/12/2014 Midlands
16/12/2014 17/12/2014 C Base
17/12/2014 21/12/2014 C Base West
21/12/2014 04/01/2015 Portloaise
04/01/2015 07/01/2015 Reception
07/01/2015 27/01/2015 C Base
27/01/2015 29/01/2015 D2 West
02/01/2015 12/02/2015 D3 West
12/02/2015 26/03/2015 C Base West
26/03/2015 27/03/2015 Reception

27/03/2015 05/05/2015 C Base
05/05/2015 08/05/2015 B Base
08/05/2015 24/06/2015 C Base
24/06/2015 23/07/2015 B Base
23/07/2015 11/01/16 C Base West
4. During the periods underlined above, the applicant had available to him educational and gymnasium ("gym") facilities, although the respondents contend that he did not avail of them during all of these periods.

5. The applicant was entitled to a minimum of one hour of outdoor activity every day irrespective of his location, as provided for in Rule 32. In the course of the within proceedings, no issue was taken in respect of the operation of this particular Rule, albeit that the applicant contends that he was deprived of access to gym facilities.

6. The applicant was a Rule 63 prisoner (protection prisoner) for each of the following periods:

From To Location
8/11/2014 12/11/2015(sic) C Base
12/11/2014 12/12/2014 D2 West
16/12/2014 17/12/2015(sic) C Base
17/12/2014 21/12/2014 C Base West
27/01/2015 29/01/2015 D2 West
29/01/2015 12/02/2015 D3 West
12/02/2015 26/03/2015 C Base West
05/05/2015 05/05/2015 D3 West
08/05/2015 24/06/2015 C Base
24/06/2015 23/07/2015 B Base
23/07/2015 11/01/2016 C Base West
7. According to Mr. O'Sullivan's supplemental affidavit, sworn 27th June, 2016, from 12th January, 2016, to 27th June, 2016, the applicant was housed in the following locations within Mountjoy, and was a protection prisoner during this time:

From To Location
12/01/2016 24/02/2016 C Base West
24/02/2016 16/04/2016 C3 West
16/04/2016 19/04/2016 Close Supervision
19/04/2016 27/06/2016 C3 West
8. The applicant remained in Mountjoy until his relocation in January, 2017, to Castlerea Prison.

9. The respondents' evidence demonstrates that while detained in Mountjoy, the applicant was on Rule 62 for each of the following periods:

From To Location
07/01/2015 27/01/2015 C Base CBU Rule 62
27/03/2015 05/05/2015 C Base CBU Rule 62
10. For the purposes of the present proceedings, the applicant does not challenge his categorisation as a Rule 62 prisoner for the said periods and he does not dispute that such a categorisation deprived him of access to authorised structured activity, including education and gym facilities. Nor does the applicant challenge his categorisation at specific times as a Rule 63 prisoner.

The applicant's complaints to the Governor
11. According to the applicant's solicitor, on 19th May, 2015, he wrote to the first named respondent seeking a transfer for the applicant from C Base in Mountjoy to C Base in St. Patrick's Institution (Mountjoy West) "in order to continue his education". The first named respondent was advised that "in the last 9 months [the applicant] has only been able to access education for 1 month and he requests to be transferred for this reason". A letter in similar terms was sent on 28th May, 2015. As no response was received to the said letters, the applicant's solicitor wrote again on 3rd June, 2015, with a similar request. It was submitted that there was a failure on the part of the first named respondent to allow the applicant access to education and the gym which was a breach of his rights.

12. The first named respondent replied on 8th June, 2015, in the following terms:

> "It is a matter for the governor of the prison to decide on an operational level as to where in the prison individual prisoners should be held. Your client is categorised as a Protection Prisoner and as such, this limits the area of the prison where he can be safely held. He has been moved to Mountjoy West on a number of occasions in the past six months but due to his extremely poor behaviour it has been necessary to remove him from the area. On two separate occasions he was moved to C Base West, the area he is now looking to transfer back to.
>
> On the first occasion in December, 2014 he assaulted an officer by striking him and also spitting at him in the face.
>
> In March '15 he engaged in a dirty protest in a cell in C Base West.
>
> On the 31st '15 March he refused to be [searched] and also assaulted an officer. This again took place in the C Base West.
>
> The reality is that your client has been given ample opportunity on a number of occasions to remain in C Base West but due to his aggressive and violent exchanges with staff it has been necessary to remove him from the area.
>
> In addition to being in C Base West he has also been on D2 and D3 West on various occasions. Again he had to be removed from these [landings] after he deliberately flooded his cell causing considerable damage.
>
> During the course of his present sentence … he has been the subject of 17 disciplinary reports (P19).
>
> His request to move to C Base West is refused at this stage. His behaviour will be continuously assessed and any movement from present location will be considered should circumstances change and merit it."

13. In his response on 12th June, 2015, the applicant's solicitor stated that the first named respondent did not address the

"continuing failure to allow [the applicant] access to education and also to the gym".

14. On 22nd June, 2015, Noonan J. granted the applicant leave to seek judicial review by way, *inter alia*, of orders of *mandamus* and *certiorari*, and declaratory relief in respect of the applicant's complaint regarding the failure of the first named respondent to act in accordance with the Rules.

15. In the course of his oral submissions, counsel for the applicant distilled the relief being sought by the applicant, as follows:

> (i) a declaration by way of an application for judicial review that the applicant should not have been be deprived of authorised structured activities, including educational and exercise facilities, simply by virtue of the fact that he was separated from other prisoners, save in accordance with the application by the first named respondent of Rule 62;
>
> (ii) a declaration that the respondents have, in multiple instances, breached the Prison Rules, including *inter alia* rules 32, 62, 63, 110 and 111.

16. In summary, the grounds upon which relief is sought are:

> •The respondents have acted unreasonably, erred in law and acted in breach of duty including a breach of statutory duty by failing to provide educational and exercise facilities to the applicant;
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> • The respondents have acted unreasonably, erred in law and acted in breach of duty including a breach of statutory duty by not adhering to the following Rules:
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> ☐ Rule 32 relating to the provision of exercise
>
> ☐ Rule 62 relating to the removal of prisoners from structured activity or association with other prisoners
>
> ☐ Rule 63 dealing with the protection of vulnerable prisoners
>
> ☐ Rule 110 dealing with educational and library services
>
> ☐ Rule 111 dealing with the provision of a vocational training
>
> •The applicant's said imprisonment in the C Block of Mountjoy Prison, without the provision of any educational facilities and gym facilities amounts to the imposition of an arbitrary punishment and is in breach of prison rules and the applicant's rights including his entitlement to fair procedures, right to dignity, right to bodily integrity and right to rehabilitate himself.
>
> • The first named respondent has failed to address the continuing deprivation to the applicant of access to educational and gym facilities.

17. The respondents' statement of opposition disputes the applicant's contention and denies that there has been any breach by the first named respondent of the relevant Rules. At para. 9 it is asserted as follows:

> "The main wings for protection prisoners were C West and D west. Any prisoner requiring protection not able to be housed on these wings in Mountjoy due to behavioural, protection or capacity issues were located in C Base for a time and also B Base. Due to the changes, it was not possible to provide educational or gym facilities in all of these areas particularly in areas under transition such as C Base and B Base. While the Applicant presented with significant protection and behavioural issues, every effort was made to place him in an area with the maximum services available. However, due to his behaviour and the Governor's responsibility to ensure that decisions were made for the good management of the prison and providing a safe and secure environment for all prisoners, the Applicant had to be moved on numerous occasions. The Applicant could not be accommodated on any of the main wings in Mountjoy as there was a credible serious threat to his life. He had to be moved from the two protection wings at various times due to his own violence and destructive behaviour. He was transferred to the Midlands prison on 12th December 2014 to facilitate him coming off protection and to give him access to a more expansive regime but when there he requested 23 hour protection and had to be transferred back to Mountjoy. Attempts were made to return him to an area where educational and gym services were available but until the change in his behaviour in July 2015, relocations within Mountjoy and transfers to other prisons were not successful resulting in further moves."

18. The respondents accept that while detained in B Base and C Base, the applicant would not have had access to educational services or to a gym. They go on to assert that the applicant's relocations (while a protection prisoner) to areas within Mountjoy that did not have access to educational or gym facilities were caused by his own behaviour. In this regard, it is asserted that in a period from 7th November, 2014, to 26th July, 2015, twelve incident reports were prepared in respect of the applicant and that between 16th September, 2014 and 30th June, 2015, he received eighteen written P19 reports, nine of which resulted in a sanction. It is further asserted that he received two further P19s on 10th November, 2015, and 18th November, 2015, respectively, the first of which resulted in a sanction.

19. Under the heading "Educational services", the respondents state as follows:

> "Mountyjoy West Educational Unit operates an open door policy in the C Base school. Prisoners present voluntarily for classes. If they have not been interviewed, they are still welcome to attend and their name will be added to the list. In D Wing prisoner groups are 'colour coded' for protection purposes. These groups use the school separately, but every prisoner within a particular 'colour group' is welcome to attend whether they have been interviewed or not. The Applicant claims by letter from his solicitor dated 28th May 2015, that he only had access to educational facilities for one month out of the previous nine. He was only detained in Mountjoy for seven months at that date. There is no record that this letter was ever received by the Governor and the first record of any complaint regarding access to educational services was received by letter dated 3rd June 2015. A response was sent promptly by letter dated 8th June 2015. It was made clear to the Applicant that the reason he was being detained in locations where educational facilities were not available was due to his own behaviour and that if that improved, he would be considered for a transfer to a wing that did have educational services available. This relocation was made on 23rd July [2015] by which time his behaviour had in fact

> improved significantly. The governor of a prison has to decide where an individual prisoner will be housed based on the good management of the prison. It was determined that it would not be 'good management of the prison' to house the Applicant on C Base West."

20. It is also asserted that the applicant first applied for educational services on 11th November, 2014, and was timetabled for classes in a number of subjects. It is stated that "his attendance at classes was sporadic due to protection issues and he spent a lot of time in his cell by his own choice". It is asserted that there was no application for education services between 27th January, 2015, and 22nd February, 2015. It is asserted that the applicant next sought to engage in educational facilities on 23rd February, 2015, and attended English classes until mid March. It is asserted that school facilities were not available to the applicant between 26th March, 2015, and 5th May, 2015, as he was a Rule 62 prisoner. It is further contended that there is no record that the applicant himself made any application to the Governor to be admitted to school. It is pointed out that from 1st July, 2015, until 31st August, 2015, the school was closed for annual holidays and was not available to any prisoner. It is also stated that the applicant did not apply to be re-entered in school until 14th September, 2015, and that following interview he attended classes and was considered to be co-operative and well mannered by his teachers.

21. The respondents go on to plead:

> "It is denied that the Respondents, or either of them, have acted unreasonably, and/or erred in law and/or acted in breach of duty including statutory duty as alleged or at all. Exercise facilities were available to the Applicant at all material times. Educational facilities were available at all times when the Applicant's own behaviour permitted the first named Respondent to house him in an area where Education Facilities were available".

22. In his affidavit sworn 11th April, 2016, the applicant avers that, following the institution of the within proceedings, he was moved by the respondents to C Base West and he claims that this move was to render his judicial review proceedings moot, an allegation which the first named respondent has denied. The applicant further avers that, following an assault by another prisoner on or about 22nd February, 2016, he was moved from C Base to C3 landing and that whilst detained there he had no access to the gym or to education facilities, despite at the time being on an enhanced regime. He avers that, prior to the move to C3 (which he claims was on a 23 hour lock up basis), he was undertaking FETAC level educational courses.

23. In his supplemental affidavit, Mr. O'Sullivan avers that the services available on C3 West "depend on the status of the prisoner". He goes on to state:

> "Those prisoners subject to protection – Rule 63 prisoners – will not have the same regime as those who are not subject to protection.
>
> Rule 63 prisoners housed on C3 West have access to one hour outdoor activity daily and a minimum of one hour on the landing for cleaning, phone calls and laundry. In reach services such as addiction counselling, psychology services, Probation Service and Integrated Sentence Management are all available on a daily basis as required. Education services are not available to Rule 63 prisoners on this landing. C3 West also houses non protection prisoners with whom Protection prisoners [cannot] mix with for safety reasons. These prisoners can avail of all services and have a normal unlock regime".

24. Mr. O'Sullivan goes on to state that, in an effort to facilitate the applicant with access to education while on this wing, a decision was made to allow him open association as part of the enhanced regime available to ordinary inmates on C West. It is claimed that within two weeks of doing this the applicant was found to have used the open visits available to him on this regime to receive a prohibited article from his visitor, as a result of which his "enhanced" status was removed.

25. Mr. O'Sullivan goes on to aver as follows:

> "On 26th March 2015, the applicant was removed from C Base West following a serious assault on a member of staff on 21st March 2015. He was detained under Rule 62 for a period of time. After this detention he continued to require protection within Mountjoy Prison. He refused to be moved to a protection wing where educational and gym facilities such as those sought by him herein were available. Instead, he sought a return to C Base West
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> …
>
> C Base West is a protection landing but it enjoys a normal unlock regime. For that reason it is suitable only for compliant inmates who can mix with all inmates on that landing. The applicant did not fit that profile based on his behaviour.
>
> On 23rd July 2015, Prison Management agreed to return the Applicant to C Base West. On 10th November 2015 the Applicant attacked another prisoner with a pool ball concealed inside a sock. For operation reasons, the victim of this assault was moved within the prison and the Applicant was left in C Base West."

His affidavit continues:

> "Following the attack on the Applicant on the 23rd February 2016 and from information available to Prison Management, it was clear that it was no longer safe for the Applicant to mix with other inmates in C Base West and he was moved to C3 West on protection. He remained there until 16th April when he was moved to Reception and then two days later to a Close supervision cell. This move was made as a result of a P19 for prohibited a article (suspected drugs) received during a visit. …
>
> The Applicant was moved from the close supervision cell on the 19th April 2016 and housed in C3 West. This is the only other area in the Mountjoy campus available for protection inmates such as the Applicant where some services are available to him as set out above. He remains a protection inmate."

26. In response to the applicant's evidence that he had been requesting facilities on a daily basis and had not received same, Mr. O'Sullivan avers:

> "These services have at all times been available to the Applicant, as they are provided on D West which is the dedicated protection wing within Mountjoy Prison and also in C Base West to a lesser degree. The Applicant has at all times refused to move to D West and by his own actions necessitated his removal from C Base West on two occasions. The management of protection inmates is highly staff intensive and the staffing of D West is such as to allow and facilitate

access to services for various groups of protection inmates on a daily basis."

27. Mr. O'Sullivan later avers:

> "The Applicant remains on C3 West and he has not been moved off that landing since being moved from C Base West. Where possible we give all inmates a chance to improve the services available to them through encouraging better behaviour. The Applicant has been given multiple chances to do exactly that and has failed on each and every occasion to display the kind of behaviour which would allow him to continue to access every service in a safe manner and in a manner which represents no threat to other inmates. Each time Prison Management are forced to restrict the Applicant's regime it is the last option considered and only considered in the interest of his safety and the safety, security and good order of the Prison. …
>
> The affidavits sworn by or on behalf of the Applicant are replete with incorrect and false assertions which ignore completely the facts and the history of his detention. Throughout his detention, the only barrier to his access to services has been threats against him, his threatening others, his refusal to comply with searches, his involvement with drugs and his tendency towards the use of violence against staff and prisoners."

The applicant's submissions

28. It is the applicant's core submission that, for the majority of his time in Mountjoy Prison (both before and after the grant of leave), he was deprived of access to authorised structured activity, including education. It is contended that this deprivation occurred in circumstances where the applicant was not under Rule 62 (save for two discrete periods). Accordingly, it is submitted that he should have had access in Mountjoy to authorised structured activity, which was denied to him. Counsel contends that the provisions of Rule 63 (2) make it clear that the applicant is not to be deprived of his right to take part in authorised structured activity. Specifically, there is no evidence that the first named respondent was ever of the view that participation in such activities was not reasonably likely to be beneficial to the applicant's welfare. This, counsel submits, is the only basis pursuant to Rule 63 (2) on which the applicant could be deprived of access to authorised structured activities while a protection prisoner. Accordingly, the crux of the applicant's case is the first named respondent's unlawful deprivation of the applicant's legal entitlements while he was on protective custody.

29. It is submitted that while the provision of "a broad and flexible programme of education" is mandated by Rule 110 (1) to be afforded to prisoners "insofar as is practicable", and whilst Rule 110 (3) mandates such access "subject to the maintenance of good order and safe and secure custody" and "insofar as is practicable", these provisions do not override Rule 63 (2) given that it is implicit in that Rule that the first named respondent cannot prevent a protection prisoner from participating in authorised structured activity solely on the basis that they are in protective custody. This is the applicant's core submission, albeit it is acknowledged that it may prove more problematic for the first named respondent to provide authorised structured activities for prisoners in protective custody. In underscoring his principal submission, counsel for the applicant refers to the provisions of Rule 110 (4) which mandate the first named respondent to "actively encourage and facilitate participation in education as provided in the prison". It is further submitted that pursuant to Rule 75 (5), there is an obligation on the first named respondent to ensure that the Rules are applied fairly, impartially and without discrimination.

30. Counsel submits that the schedule of the applicant's incarceration over a period of eight months from 6th November, 2014 to 23rd July, 2015, makes it clear that there was a period of approximately 60 days when the applicant could avail of educational facilities but, by the same token, there was a period of five months when he could not avail of such facilities, although he was not a Rule 62 prisoner in those months (save for two discrete periods already referred to).

31. It is submitted that, insofar as the first named respondent asserts that the applicant's detention in locations which were without educational facilities was due to his own behaviour, and that if his behaviour improved he would be moved to a location with such facilities, that is not what the Rules provide. Counsel contends that it is significant that the statement of opposition does not allege that it was not practicable to provide educational facilities for the applicant while in protective custody. Counsel also points to the first named respondent's concession (at para. 5 of Mr. O'Sullivan's second affidavit) to the effect that education facilities are not available to protection prisoners on C3 West, albeit that non protection prisoners housed in this wing can avail of such services.

32. It is further submitted that it is clear from para. 22 of Mr. O'Sullivan's affidavit that the applicant's access to education and other activities is restricted by reason of where it is he is located in the prison, whereas the Rules provide that if his right to education is to be restricted or removed, it must be in accordance with Rule 62 and the inherent safety provisions built into that particular Rule. It is submitted that if the applicant's behaviour caused the deprivation of his access to education, Rule 62 should have been invoked, as provided for in the Prison Rules. Had this been done, the applicant would have had the benefit of the protections provided for in that rule. In support of his arguments, counsel cites the decision of O'Malley J. in *Dundon v. The Governor of Cloverhill Prison* [2013] IEHC 608. It is submitted that the applicant's circumstances had clear resonance with *Dundon* since, for a considerable period of time, he was deprived of access to authorised structured activity.

The respondents' submissions

33. The respondents accept that, under the Rules, a prisoner has the right to access education and other services but contend that this is not an absolute right and that, given the circumstances particular to the applicant, there has been no breach of the Rules. As testified to by Mr. O'Sullivan, the applicant's access to education was bound up to issues surrounding his status as a protection prisoner, and where he had to be placed within Mountjoy as a consequence of those issues.

34. It is submitted that the applicant's contention, that while a Rule 63 prisoner he should have been classified under Rule 62 on each occasion he was deprived of access to authorised structured activity, is untenable. Counsel also submits that the applicant is asking the Court to read into Rule 63 a mandatory requirement that education and other facilities should be provided to prisoners who are under Rule 63.

35. It is submitted that pursuant to Rule 63 (2), the applicant "may" participate in authorised structured activity if the Governor considers it reasonably likely that it would be beneficial to him. Rule 63 (2) does not say that the applicant "shall" participate in such activity or that he should be afforded such activity. It is submitted that Rule 63 (2) allows for the first named respondent to make such activities available to the applicant at the first named respondent's discretion. Accordingly the applicant's contention that his rights were breached is not correct. Unlike the situation in *Dundon*, it is not the case that the applicant 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.

36. It is submitted that the applicant was allowed and did take up access to education while a Rule 63 prisoner when his behaviour permitted, as outlined by Mr. O'Sullivan. That, counsel submits, is an indication that the first named respondent's discretion was fairly exercised and, in those circumstances, the Court should be slow to interfere. It is also the case that when education facilities were made available to the applicant he did not always avail of same. Accordingly, the applicant was not deprived totally of access to education while a Rule 63 prisoner. If the situation were otherwise, then the first named respondent might have a difficulty in convincing the Court that the exercise of his discretion was reasonable.

37. It is submitted that at all times the first named respondent exercised his discretion in accordance with the Rules. Many attempts were made to transfer the applicant to wings within the prison (and to other prisons) that had access to the relevant services, but on each occasion the applicant's behaviour deteriorated to such an extent that he had to be moved again, in accordance with the good management of the prison.

38. Rule 110 provides that a prisoner is entitled to access to "a broad and flexible programme of education". However this access is to be provided "insofar as is practicable" and the participation of a prisoner in education is "subject to the maintenance of good order and secure custody", as provided in Rule 110 (3). Equally, the provision of and access to vocational training as provided for in Rule 111 is in the same terms, i.e., "as far as practicable" and "subject to the maintenance of good order and safe and secure custody". This, counsel submits, is a legal world away from the concept of an absolute "right" of a prisoner to engage with education and other services within the prison.

39. Insofar as the applicant contends that the first named respondent has abused his discretion or exercised it improperly, the test is not what the Court would do but rather whether the first named respondent took irrelevant matters into consideration or failed to take relevant matters into consideration. It is submitted that this has not been established in the present case.

40. As is clear from Rule 75, the first named respondent is responsible for the management of the prison. What is required under that Rule is the first named respondent's best endeavours, as evident from Rule 75 (3).

41. In support of her contention that the first named respondent was entitled to conduct a balancing exercise vis-à-vis the applicant's access to education, counsel relies on the decision of the Court of Appeal in *McDonnell v. Governor of Wheatfield Prison* [2015] IECA 216.

42. It is further contended that the first named respondent has put before the Court that, when it could be provided, access to education was afforded to the applicant as a Rule 63 prisoner. Moreover, the first named respondent has provided reasons as to why on other occasions such access was not possible.

43. It is submitted that the applicant was involved on each and every occasion when his status or location within the prison changed. There were occasions when the applicant was subjected to assault or threat of assault which required his being afforded protection under Rule 63. However, on occasions, the applicant himself was the protagonist. The applicant was not a category of prisoner who required protection at all times. It is clear from Mr. O'Sullivan's affidavit that the applicant presented a challenge to the prison system and that he has failed to acknowledge or take responsibility for his own actions, as he is required to do, as opined by Ryan P. in *McDonnell* (at para. 102). It is submitted that Mr. O'Sullivan's evidence is replete with instances when the applicant's privileges had to be withdrawn due to his behaviour. It is equally clear that, when the applicant as a protection prisoner was offered a wing in the prison with access to education facilities, he refused to move there for his own reasons. In all of the circumstances, there has been no lack of proportionality in the way in which the applicant has been treated.

Considerations

44. The applicant's complaints largely revolve around the period November, 2014, and June, 2015, when it is alleged that he was deprived of access to authorised structured activity, as provided for in Rules 27 and 63(2) of the Prison Rules. There is no dispute but that for the majority of this time period the applicant was a protection prisoner pursuant to Rule 63. As set out in the statement of opposition as verified by Mr. O'Sullivan on 11 January, 2015, "there was a credible serious threat to [the applicant's] life" which necessitated the invoking by the first named respondent of Rule 63(1). Indeed, Mr. O'Sullivan's later affidavit (sworn 27th June, 2016) makes it clear that the applicant retained this status for the latter half of 2016 also and remained a protection prisoner at the date of the swearing of that affidavit.

45. As stated by Ryan P. in *McDonnell v. Governor of Wheatfield Prison:*

> *"Regulation 63 has nothing to do with punishment; this is a measure of protection for vulnerable prisoners. It is an authorisation to the Governor to keep a particular prisoner separate from other prisoners who represented a danger to him. The Regulation envisages a situation where there is danger from some number of other prisoners. The Governor has to keep a record under r. (3) of the details including the date and time when the separation ceases — sub-rule (e)." (at para. 77)*

46. The available record for the period November, 2014, to June, 2015, shows that the applicant had available to him educational and gym facilities on approximately fifty eight days in this time period. Within that time block, there were two discrete periods (7th January, 2015 - 27th January, 2015 and 27th March, 2015 - 5th May, 2015) when the first named respondent invoked Rule 62 (1), the effect of which was to bar the applicant from participating in authorised structured activity or association with other prisoners. Rule 62 is invoked when the governor of a prison has reasonable cause to believe that allowing such participation or association "would result in there being a significant threat to the maintenance of good order or safe or secure custody". The applicant makes no complaint about the invocation of Rule 62, nor indeed about his categorisation as a Rule 63 prisoner.

47. Excepting the days in the time period November, 2014, to June, 2015, when authorised structured activity was, in fact, available to the applicant, and those periods when he was subject to Rule 62, the applicant contends that, for the balance of that time block, he should have been afforded an opportunity to participate in authorised structured activity, as provided for in Rule 63(2). It is contended that the failure to afford him educational and gym facilities during the aforesaid time block (and, it is submitted, in the latter half of 2015) was in breach of the Prison Rules. It is further contended that, if it was the applicant's behaviour during the relevant time periods which caused the denial of access to education and gym facilities, then before his participation in these activities could be lawfully denied, the first named respondent was required to invoke Rule 62. It is submitted that, in the absence of Rule 62 having been invoked, there was no lawful basis to deny the applicant participation in education and other structured activity.

48. Counsel for the respondent fundamentally disagrees with this submission and argues that the first named respondent properly exercised the discretion afforded him under the Prison Rules in the decisions taken with regard to the applicant's placement as a protection prisoner within Mountjoy.

49. In *Dundon v. The Governor of Cloverhill Prison*, O' Malley J. described the interplay between the governor's discretion in the management of a prison as provided for in the Prison Rules and the rights and protections afforded prisoners by the same Rules, in the following terms:

> *"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 of 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."*

50. At para 83, O'Malley J goes on to state:

> *"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."*

51. In the present case, the starting point for the Court's deliberations is Rule 63. As is clear from Rule 63(1), the sole criterion for its invoking is the protection of a prisoner from harm from other inmates. The right of a protection prisoner to participation in authorised structured activity is provided for in Rule 63(2). In effect therefore, Rule 63(2) carries over such rights to educational and other facilities which prisoners generally enjoy under Rule 27 to circumstances where a prisoner finds himself or herself the subject of the categorisation of "vulnerable prisoner" requiring "protection", subject of course to the qualifications contained in Rule 63(2).

52. Counsel for the applicant argues that the right to access to educational and other facilities as provided for in Rule 63(2) is not qualified by the provision "in so far as is practicable", unlike, for example, Rules 75, 110 and 111. I note however that Rule 27(3) qualifies the right of access to authorised structured activity, as follows:

> "**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." (emphasis added).

Similarly, Rule 110, which mandates "a broad and flexible programme of education for each prisoner", also provides, at sub rule(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."

53. Albeit that the phrase "in so far as is practicable" does not appear in Rule 63(2), I do not perceive Rule 63(2) as providing for the type of unqualified entitlement to access to authorised structured activity as advocated by counsel for the applicant in these proceedings. I do not accept the suggestion, inherent in counsel's submissions, that the provisions of this Rule give a protection prisoner more enhanced rights to education than those which are provided for in the Prison Rules generally.

54. It is trite to say that a prisoner in respect of whom Rule 63 is invoked may not necessarily be a model prisoner and behaviour issues may arise while the prisoner is on protection in much the same way as they may arise when a prisoner has a "normal" status within the prison, in the sense of not being a protection prisoner. This may result, as it undoubtedly did in the applicant's case, in decisions being made to transfer protection prisoners from one protection wing to another, for safety and security reasons and for the good management of the prison. Such decisions may have the effect of depriving a protection prisoner of the access to authorised structured activity as previously enjoyed in the protection wing from where he or she is being moved, again as happened to the applicant.

55. As to the applicant's specific complaints in these proceedings, it is, I believe, important to take account of the factual matrix which pertained to him in the relevant time frames, as deposed by Mr. O'Halloran whose averments (in the main) have not been put in issue by the applicant, either in his affidavit sworn on 11th April, 2016, or by the swearing of any supplemental affidavit.

56. The first named respondent's primary response to the applicant's averment that he "had not been receiving any education, gym or spiritual facilities in the prison", is that such services were available at all times to the applicant in D West "which is the dedicated protection wing within Mountjoy" but that the applicant "has at all times refused to move to D West". The position has not been put

on affidavit by the applicant that he could not receive protection on the D West protection wing, and there is no evidence before the Court to say why it was that the applicant would not relocate to this protection wing. This is a factor which the Court must take account of in assessing whether the applicant has been unlawfully deprived of access to education and gym facilities.

57. It is also the case that, during the relevant time frames, the first named respondent, on occasion, housed the applicant, as a protection prisoner, in another protection wing, namely C Base West, where education and other facilities were available to him, albeit in a more limited way than on D West. An assault on a staff member on 26th March, 2015, necessitated the applicant's removal from this unit and resulted in the imposition of Rule 62 until 5th May, 2015, and thus the lawful deprivation of educational and other facilities. At para. 8 of Mr. O'Sullivan's second affidavit, it is averred that, although the applicant was still a protection prisoner after Rule 62 was lifted, "he refused to be moved to a protection wing where educational and gym facilities…were available" and "sought a return to C Base West". According to Mr. O'Sullivan, at this particular time, the applicant did not fit the profile of "compliant inmates" who could mix with all inmates on C Base West. I do not find any reason from the evidence that is before the Court to find that the first named respondent's decision in this regard was otherwise than a valid exercise of the discretion which vests in the first named respondent in and about the management of the prison, to fulfil his obligations to prisoners and to maintain order and safety.

58. I also note that, on occasions, the applicant was held in protective custody in B Base and C Base in Mountjoy. A significant timeframe in this regard ran from 27th March, 2015, to 5th May, 2015, when the applicant was housed in C Base as a Rule 62 prisoner. (He was also a Rule 62 prisoner at this location in January, 2015) After the lifting of Rule 62 in May, 2015, he remained in C Base (and D Base) for over two months as a protection prisoner. It is accepted that the applicant did not have access to education or to the gym at this time. The respondent has explained that, at the times the applicant was housed in these areas, they were undergoing modernisation as a result of which educational and gym facilities were not available. To my mind, this explanation comes within the ambit of what was "practicable" in terms of the provision of educational facilities at the given time.

59. The general thrust of the applicant's counsel's submissions is at all relevant times when the applicant, as a protection prisoner, was without education and other facilities in Mountjoy, he was unlawfully deprived of such facilities in the absence of the first named respondent having invoked Rule 62. It is submitted, effectively, that when housing the applicant on protection wings which did not have educational and other facilities, it was incumbent on the first named respondent to invoke Rule 62, so that the applicant would at least have the benefit of its oversight and protection provisions. I cannot accept this argument. To take for example, the applicant's circumstances as of 8th May, 2015, following the lifting of Rule 62 which had been imposed on him for an assault on a staff member. A decision was made to house him in C Base, a protection wing which did not have educational facilities. The Court has already said that that decision was a valid exercise of the first named respondent's discretion under the Rules. To my mind, it would have been an entirely illogical and indeed unlawful exercise of the first named respondent's discretion if on 8th May, 2015, the applicant had been subjected to Rule 62 to justify his placement in C Base, in circumstances where the available record does not evidence any behavioural issues as might have warranted the imposition of the Rule. Had the first named respondent adopted the approach advocated by counsel for the applicant, then, in my view, that would have not have been a lawful exercise of the first named respondent's discretion.

60. Needless to say, if the evidence established that the applicant had been housed in C Base (or indeed in any other protection wing which did not provide for access to educational and other facilities) indefinitely, without review by the first named respondent, then the first named respondent's decisions in this regard, in all probability, would not withstand judicial review, given the prominence which the Rules gives to access to education. It is established, however, that on 27th July, 2015, the applicant was moved back to C Base West (a location he had sought), where educational and gym facilities were available. I note that the applicant contends that his move to C Base West at this time was effected so as to render his judicial review proceedings moot. However, the first named respondent contends that it came about as a result of an improvement in the applicant's behaviour. The Court will not comment further on this matter save to note that the applicant had previously been housed for a period in C Base West and where he had access to education.

61. Counsel for the applicant also argues that the first named respondent goes to enormous lengths to highlight the applicant's bad behaviour as justification for the imposition of Rule 63. While I note the tenor of the applicant's argument in this latter regard, it is not the case that the respondent categorised the applicant as a Rule 63 prisoner because of his behaviour: the respondent's evidence clearly says that the applicant was under threat to his life while in Mountjoy and accordingly Rule 63 (1) was invoked for his protection. However, that being said, the respondent also makes clear that it was the applicant's behaviour while a protection prisoner which resulted, on occasions, in his having to be moved from the protection wings within Mountjoy where educational and other facilities were available, to other protection wings where such facilities were not available or only available to a limited extent. The case is also made by the respondent that the applicant himself refused to relocate to the dedicated protection wing within Mountjoy. It is these factors, the respondent contends, that led to the *de facto* deprivation of access to educational and gym facilities for the applicant during specific periods.

62. Overall, the applicant's particular complaints cannot be divorced from the first named respondent's entitlement and duty to manage the prison so as to secure its overall good management in the interests of safety and security. There is no persuasive indicator, from the matters put before the Court, that the first named respondent's actions vis-à-vis the applicant were designed to restrict his normal life (as a protection prisoner) in the prison without recourse to the Prison Rules. Rather, the picture which presents is of the logistical difficulties posed by the applicant's status as a protection prisoner (where there are only a discrete number of locations within Mountjoy where he can be safely housed), coupled with both his refusal to be housed in the dedicated protection wing of Mountjoy, and issues surrounding his behaviour. Undoubtedly, the decisions taken to move the applicant from protection wing to protection wing because of behavioural issues came with the resultant loss, on occasions, of access to authorised structured activity. While that loss is there, I am not persuaded, having regard to all the circumstances of this case, that it has been made out that the first named respondent breached the Prison Rules.

63. Ultimately, it is for the prison authorities to decide where to house prisoners within the prison, either for their safety (if they are protection prisoners) or for the safety of others. Such decisions may impact on access to facilities for prisoners within the prison, as it undoubtedly did with regard to the applicant.

64. However, for the Court to say that the education facilities should have been available to the applicant on all days when he was a Rule 63 prisoner, irrespective of where he was located in the prison, would be an exercise by the Court of micromanaging the prison, contrary to the dictum of O'Malley J. in *Dundon*.

65. In the course of her submissions, counsel for the respondent urged on the Court that the applicable legal backdrop against which the within challenge should be viewed is to be found in the decision of the Court of Appeal in *McDonnell v. Governor of Wheatfield Prison* [2015] IECA 216. That case concerned a prisoner who had been subjected to repeated and continuous directions under Rule 63 because of credible evidence of a threat to his safety within the prison from persons connected to the victim of his crime.

Notwithstanding the length and circumstances of the applicant's protective custody in that case, the Court of Appeal did not find a breach of his constitutional rights. In the course of his judgment, Ryan P. stated:

> *"98. It is for prison authorities to decide what measures are necessary for the safety of prisoners. That includes rule 63 orders. It is not for the High Court to second-guess decisions of fact in that regard, but they are subject to review as administrative decisions in accordance with the principles set out in a series of cases, including Holland, Walsh, Kinsella and Connolly.*
>
> *99. A prisoner has a remedy in the courts under Article 40 if his conditions are unlawful, which includes torture or inhuman or degrading treatment, but obviously that only arises in extreme circumstances.*
>
> *100. A high level of threat or some extreme circumstances may justify severely restrictive conditions of detention on a temporary basis. Justification is a function of the level of threat to life or safety measured against the severity of the temporary conditions. Ultimately, that judgment is one for the Court but a wide margin of appreciation has to be allowed to the Governor and his staff.*
>
> *101. There is a grievance procedure available to a prisoner under the Prisons Act 2007 which is itself subject to judicial review.*
>
> *102. A prisoner is obliged to cooperate with the management of the prison in protecting his own safety, health and welfare during his detention. He cannot, by his wilful disruption or breach of discipline or refusal to obey rules or to cooperate, contrive to bring about a situation in which his conditions are unpleasant or worse, and nevertheless obtain relief from the courts."*

66. In *McDonnell*, Ryan P. was not satisfied that there was any breach of the prisoner's right to bodily integrity because of the circumstances of his detention. In so finding, the learned Judge had regard to a number of factors, as set out in para. 105 of the judgment:

> *" In particular, the declaration that Mr. McDonnell was being kept in solitary confinement in breach of his constitutional rights did not reflect a sufficient or correct analysis of the complex issues in the case because:-*
>
> *a. The nature of the threat to Mr. McDonnell is grave;*
>
> *b. The only purpose of the conditions is protection;*
>
> *c. These arrangements are temporary;*
>
> *d. The authorities wish to alleviate conditions as much as they can and as soon as possible;*
>
> *e. The situation is reviewed constantly;*
>
> *f. The actual conditions, although harsh, are not intolerable;*
>
> *g. Mr. McDonnell does have contact with other persons besides prison officers, for example, listeners and family, as well as legal advisers, medical personnel, psychology and psychiatry services;*
>
> *h. Opportunities for prisoner social contact on this wing are limited because of the circumstances consigning them to that location;*
>
> *i. Part of the problem is in the control of Mr. McDonnell himself, which is not a matter of blame but recognition of a fact, because of*
>
> *i. his own status*
>
> *ii. his relationship with the other two suitable fellow occupants of the wing;*
>
> *j. There is no element of punishment;*
>
> *k. The Governor accepts that the situation is difficult and harsh and is endeavouring to improve conditions."*

67. Counsel for the respondent argues that, when viewed against the above checklist, in particular the matters highlighted at (a) to (j), the first named respondent has more than adequately dealt with the applicant, as is evident from the contents of Mr. O'Sullivan's affidavits. It is submitted that this is particularly so in circumstances where the first named respondent afforded the applicant, while a Rule 63 prisoner, educational services when he could do so.

68. Counsel for the applicant submits that the respondent's reliance on *McDonnell* is misplaced in circumstances where the applicant asserts a breach of the Prison Rules, not his constitutional rights.

69. While there is a difference between the arguments canvassed on behalf of the applicant and those made on behalf of the prisoner in *McDonnell*, I find the approach adopted by Ryan P. at para.105 of his Judgment instructive for this Court's determination as to whether the applicant has been unlawfully deprived of access to education and/or to gym facilities.

70. I regard the following factors as persuasive indicators that the applicant's complaint that he was unlawfully denied access to education and gym facilities has not been made out:

> (a) At all relevant times (for the purposes of the within application), the applicant was a protection prisoner. Accordingly, to fulfil his obligation to secure the applicant's safety, the first named respondent was obliged to house him in such locations within Mountjoy as were deemed suitable to ensure his protection;
>
> (b) As a protection prisoner, the applicant was afforded the opportunity (which he declined) to be housed in D Wing (the dedicated protection wing) where educational and gym facilities would have been available to him;

(c) On occasions, while housed in other protection wings (for example, D 2 West, D 3 West, C Base West and C 3 West), he had access to educational facilities;

(d) His removal from C Base West in January and March, 2015, respectively, was as a result of Rule 62 having been invoked, with the resultant (lawful) loss of access to authorised structured activities, which is not challenged in these proceedings;

(e) After the lifting of Rule 62 in May, 2015, the applicant was considered, at that time, not to fit the profile for a return to C Base West, but was considered suitable for a return to C Base West in July, 2015, where he had access to educational and other facilities;

(f) The available record suggests that the applicant had the opportunity to access educational and other facilities between July, 2015, and February, 2016, while housed in C Base West;

(g) When moved for behavioural reasons in February, 2016, from C Base West to C 3 West, although this wing did not offer protection prisoners access to education and other facilities unlike non-protection prisoners on that block, an exception was made for the applicant (in or about March, 2016) to allow him open association with non-protection inmates and access to education and other services;

(h) As of the date of Mr. O'Sullivan's second affidavit, the applicant's status was as a protection prisoner housed on C 3 West where, exceptionally, he had access to education facilities available to non-protection inmates on that wing;

(i) The records demonstrate that the applicant did not always avail of the availability of educational and other services;

(j) There were occasions when access to education was not available to any prisoner, for example during July-August 2015;

(k) Part of the problem concerned the applicant's own behaviour and his refusal to move to a protection wing where educational and other facilities were available;

(l) The preponderance of the evidence suggests that the first named respondent's objective in housing the applicant at the relevant times was in accordance with his mandate to afford protection to the applicant and to ensure the safety of other prisoners and good order within the prison.

Summary
In all of the circumstances of this case, the relief sought is denied.