THE HIGH COURT
JUDICIAL REVIEW

[2018 No. 77 J.R.]

BETWEEN

BRIAN MCMORROW

APPLICANT

AND
THE GOVERNOR OF THE MIDLANDS PRISON
AND
THE IRISH PRISON SERVICE

RESPONDENTS

JUDGMENT of Ms. Justice O'Regan delivered on the 21st day of December 2018

Issues
1. Leave was granted to the applicant to maintain the within judicial review proceedings on the 29th January 2018. The reliefs sought in the statement of grounds of the 29th January are various declarations associated with the applicant's shared cell detention in the Midlands Prison to allow the use of a modesty screen and/or shower curtain by way of screening of the shower area and toilet area of the cell from the balance of the cell, the removal of which is said to amount to inhuman and degrading treatment contrary to Articles 40.3.1 and 40.3.2 of the Constitution and Article 3 of the European Convention on Human Rights and/or is a breach of the applicants right to dignity and to respect for his private life pursuant to the articles of the Constitution aforesaid and Article 8 of the ECHR. It is complained that the sharing of the cell while in detention without a modesty screen and/or a shower curtain unnecessarily compromises the applicant's rights to privacy and bodily integrity.

Factual matters
2. The applicant was convicted by the Central Criminal Court on the 22nd July 2013 of a number of offences for which he received a fourteen – year prison sentence with the final four years suspended on condition as in the warrant provided. The sentence commenced on the 11th November 2013.

3. While serving his sentence, the applicant is in a shared cell with one other prisoner. Prior to early January 2018, the applicant and his cellmate fashioned a shower curtain by way of a screen separating the balance of the cell from the shower and toilet area using a duvet cover and a piece of string. In early January 2018, the applicant was informed by letter of the intention of the respondent to remove all modesty screens and shower curtains from cells located on the applicant's wing of the prison following which by letter of the 10th January 2018, the applicant's solicitor wrote to the Irish Prison Service seeking confirmation on or before the 12th January 2018 that the curtain/screen in respect of the toilet and washing facilities would not be removed failing which an application for mandamus would be maintained. The letter asserted the applicant's right to privacy and indicated that this was being breached by the removal of the curtain or screen and was also in breach of Article 8 of the ECHR.

4. No undertaking was given and hence the proceedings. In the grounding affidavit of the applicant's solicitor, Matthew Byrne, of the 26th January 2018, it is complained that the failure to allow a modesty screen or shower curtain causes considerable embarrassment and distress and in the circumstances using the toilet or the shower is a degrading, humiliating and embarrassing experience and amounts to an infringement of the applicant's right of dignity and basic rights.

5. A statement of opposition of in or about 29th June 2018 has been filed. A preliminary plea is raised as to mootness because on the 20th of April the applicant was effectively afforded single cell accommodation, however after three days (on the 23rd of April) the applicant communicated with the respondent seeking to have his cellmate returned. In the event, at the hearing of the within matter, the claim that the matter is moot was not pursued by the respondent and indeed the circumstances surrounding the availability of the single cell accommodation was not relied on, save for the suggestion that these events should be considered in a balancing exercise, hereinafter dealt with.

6. In submissions to the court, it is clear that the respondent accepts that the applicant has a right of privacy and the applicant accepts that this right is not absolute. The issues therefore are as to whether or not the stance of the respondent is proportionate in all of the circumstances, the applicant arguing that it is disproportionate as the provision of limited screen to protect the applicant's right of privacy would at the same time enable the respondent to fulfil its obligation in providing for proper security of the prison and the safety of all prisoners. Furthermore, it is argued that such a modesty screen would not impose a disproportionate demand on the respondent nor be invasive or unreasonable, or amount to an effective micro – management of the respondent's functions. Although there is no evidence before the court as to the precise form, dimension, material or situation of the proposed modesty screen, nevertheless the applicant argues that this would not preclude the making of the declaratory relief sought.

7. In resisting the applicant's claim, the respondent states (at Para. 7 of the replying affidavit of Desmond O'Shea of the 29th June 2018) that following a routine search in the month of January 2018 as part of the respondent's ongoing duties to maintain security of the prison, it was found that a duvet cover sheet and a piece of string was used as a makeshift curtain to surround the toilet and shower facilities within the applicant's cell so that whilst in that part of the cell, the applicant could not be seen by any other person either inside or outside of the cell (see Para. 9 of that affidavit). In submission the respondent states that all similar cells having like screens were the subject matter of the same policy to remove the screens and therefore there was no arbitrary or discriminatory action taken as against the applicant and indeed no such action is alleged in these proceedings. At Para. 10 of the affidavit it is stated that concealing an area in the cell from view would thereby place the prisoner's safety at risk in the event that he collapsed, or was being subject to an assault where the prison officer could not see him on routine inspections. Within the prison system incidents of suicide, self – harm or unprovoked assaults present ongoing challenges for the governor and his staff and the duvet and string used could in fact be torn up and used as a ligature to self-harm or harm others. The respondent argues that it cannot make individual assessments of every prisoner on a regular basis, prison safety policies cannot be trumped by an individual prisoner's preferences or demands. At Para. 12 there is a description of walls within the cell the purpose of which is to provide a prisoner with such level of privacy as is consistent with the respondent's obligation to provide for proper security of the prison and safety of all prisoners. It is argued at Para. 13 of the affidavit that these arrangements represent a fair, reasonable and proportionate balance between the respondent's duties to keep the prisoner safe and the applicant's rights including his right to privacy.

8. In Para. 14, the respondent refers to other toilet facilities available to prisoners for seven or eight hours per day while outside the cell. The statement of opposition also denies that the level of discomfort which the applicant might suffer constitutes a material or significant interference with his day to day life or that modesty screens can easily be provided. In the circumstances, it is denied that

the applicant's constitutional rights have been breached or that he is entitled to damages. It is suggested that it is not the role of the courts to micro manage prisoners and provided the respondent does not act in an arbitrary, capricious or unjust manner, it is for the respondents to decide how best to strike a balance between the competing objectives of prisoner safety and individual prisoners' privacy concerns.

9. There are two replying affidavits, the first of Matthew Byrne of the 28th September 2018, and the second of Desmond O'Shea of the 6th December 2018. Both these affidavits address the provision of alternate single cell occupancy afforded to the applicant in April and for which the applicant sought the return of his cellmate three days later. However, otherwise the affidavit of Matthew Byrne of the 29th June 2018 as to the circumstances giving rise to the removal of the duvet cover and string and necessity to maintain cells in a manner that there is not a screened off area within the cell has not been countered. Insofar as the offer of a single cell to the applicant is concerned or indeed his requirement to have his cellmate returned to the cell, the only outstanding claim in this regard is that the respondent suggests that this fact should be taken into account in balancing the proportionality of the respondent's decision. It is argued that the applicant clearly would prefer companionship to privacy and therefore his complaints as to the lack of privacy are diminished whereas the applicant counters that because of the applicant's vulnerabilities choosing companionship was in fact in ease of the governor as to prison safety, and in any event, companionship over privacy is not the type of choice which should be afforded to deal with a right of privacy and is not appropriate to be taken into account in the analysis to be undertaken.

Discussion
10. I agree that the applicants' arguments relevant to the competing arguments at para.8 above are well-made and are preferable to the arguments of the respondent.

11. In a judgment of White J. of the 16th November 2017 in *Simpson v. The Governor of Mountjoy Prison and Ors* [2017] IEHC 561, substantial reliefs which were sought were refused, however, the court did grant a declaration that the imprisonment of the plaintiff over a specified seven – month period on a particular landing of Mountjoy Prison in circumstances where the plaintiff was :-

(a) held on a restricted protection regime,

(b) was normally confined to his cell for a period of 23 hours per day,

(c) was confined to a cell with another prisoner, and

(d) in which no in – cell sanitation was available,

constituted a breach of the plaintiff's constitutional right to privacy and dignity.

In the course of his judgment at Para. 389, White J. quotes from the judgment of McKechnie J. in *Holland v. Governor of Portlaoise Prison* [2004] 2 IR 573 to the effect that given that the right engaged was constitutionally based, any permissible abolition or interference, restriction or modification of that right should be strictly construed with the onus of proof being on he who asserted any such curtailment.

12. Clearly the order of White J. was to the effect that in the events the plaintiffs constitutional right to privacy had been breached and therefore the right to privacy was constitutionally based, and in my view the judgment of McKechnie J. therefore supports the proposition that in fact the onus of proof that any interference with this right is permissible is on the respondent.

13. In *Mulligan v. Governor of Portlaoise Prison* [2010] IEHC 269, MacMenamin J. cited applicable principles in dealing with prisoners alleging breaches of their constitutional rights. Insofar as it is claimed that the applicant has been exposed to inhuman or degrading treatment and/or a breach of Article 3 of the European Convention on Human Rights is concerned, MacMenamin J. says that a material consideration in determining this matter is the purpose and intention of the restriction and privations and in particular whether they are punitive, malicious or evil in purpose. A further consideration in this regard is as to whether or not there is evidence that the authorities are taking advantage of detention to violate constitutional rights. The conditions of detention should not be to seriously endanger a prisoner's life or health, and if such conditions potentially are life or health threatening, some legitimate reason as to inability to rectify the condition should be proffered.

14. In all of the circumstances, it appears to me that it is clear that inhuman or degrading treatment or a breach of Article 3 as aforesaid requires a minimum level of severity and within the context of the circumstances of the complaint herein such level of severity is not engaged.

15. McMenamin J. also dealt with the right of privacy which he acknowledged was subject to limitations imposed by detention and in dealing with such limitations a court must enquire into the extent in which considerations of security require such limitation as well as the extent of complaints made by a prisoner or other prisoners, the extent to which the vindication of a claimed right would be practical and the extent of the burden which might be placed on the authorities in the vindication of the right claimed. An assessment must be made whether the burden in all of the circumstances is proportionate to the right asserted in the overall context of the prisoner's conditions of detention.

16. As mentioned earlier, insofar as it is asserted that the protection of the privacy rights can easily and appropriately be remedied while having regard to the respondent's requirement to maintain prison safety is concerned, no costings or in fact details of the privacy screen which might be introduced are before the court. Furthermore, the complaint made by the applicant in advance of the proceedings is comprised in a letter of the 10th January 2018 from his solicitor which effectively requires an undertaking not to remove the duvet cover and string within the applicant's cell, failing which an application by way of mandamus will be processed.

17. In considering the proportionality balance which has to be struck, same was considered by Charleton J. in *Foy v. Governor of Cloverhill Prison* [2010] IEHC 529. The matter was also recently considered by Faherty J. in *Barry v. Governor of Midlands Prison & Anor* [2018] IEHC 279 in a judgment of the 11th May 2018. It is noted that in *Barry*, similar claims were made to that in the instant matter, save that Mr. Barry was a sole occupant of a two – person cell. Part of the complaint made was that he required the installation of a toilet or shower curtain or door in his cell. In that case, as in the present case, using the toilet or shower, Mr. Barry might be observed by a prison officer making routine checks. An affidavit similar to the affidavit that has been furnished on behalf of the respondent was provided to the court in the *Barry* matter. At Para. 51 of her judgment, Faherty J. was satisfied that the relief had to be considered having regard to the parameters of the courts' capacity to intervene as set out in Charleton J.'s *Foy* judgment and at Para. 52 she indicated that she had not been persuaded that even if she were to accept the applicant's contention that his constitutional right to privacy had been infringed, that the rationale underlying the first named respondent's prohibition of screens as

sought the removal of the duvet and towels flies in the face of reason or fundamental common sense. The court also indicated that due deference must be afforded to the first respondent and that it had not been established by the applicant that the decision of the first respondent to remove the make shift shower screen was arbitrary, capricious or unjust and the relief sought was refused.

18. In *Foy*, it was found that under the prison rules, the governor is entitled to decide on general matters of prison governance which are not already pre - decided by being made subject to specific prison rules. Apart from that, the manner in which the rules are implemented is a matter for decision by the governor. It was held at Para. 22 that exercising the balance is essentially a matter for the prison governor and thereafter it is stated that once a decision is made in curtailment of rights as continued notwithstanding the fact of imprisonment by way of remand or conviction, and would reasonable relate to the management of a prison and which are not arbitrary, discriminatory or wholly unreasonable, judicial review is not possible.

19. In *Szafranski v. Poland* ECHR Case 17249/12 a judgment of the 15th December 2015 of the European Court of Human Rights, the court noted at Para. 27 that in previous cases where insufficient partition between sanitary facilities and the rest of the cell was at issue, other aggravating factors were present and only their cumulative effect allowed it to find a violation of Article 3. Insofar as Article 8 was concerned, the right to respect private life was noted and under Article 8. subpara. 2, it is recorded that there should be no interference by a public authority except such as is in accordance with the law necessary for *inter alia*, public safety or the prevention of disorder or crime or for the protection of health or the rights and freedoms of others. In that matter a declaration under Article 8 was afforded. The respondent has sought to distinguish that matter from the instant matter on the basis that:-

> (a) photographic evidence was sought by the applicant in that case however was refused whereas this would not prevail in this jurisdiction.
>
> (b) Furthermore, the screening provided did not provide even a minimum level of privacy; this was not contradicted by the government.
>
> (c) In three of ten cells occupied by the applicant, closed toilets were available – that is not the case in the instant matter.

20. A further factor in my view to be taken into account in not following this particular judgment is the fact that in that case the government defended the arguments on the part of the applicant by merely stating that domestic law did not set out specific regulations as regards the equipping and separating off of a sanitary facility in a prison cell. A fulsome explanation therefore was not afforded by the Polish government and the case therefore cannot be equated in my view to the particular circumstances of the within matter. Furthermore, although the judgment is persuasive the judgments in *Foy* and *Barry* are in fact binding unless this Court finds good reason to decide that *Foy* and *Barry* were wrongly decided, which is not a proposition either urged by the applicant on the court or which this Court feels would be appropriate.

Conclusion

21. I am satisfied that the decision taken by the first named respondent in the instant matter was not arbitrary, capricious or unjust in the removal of the duvet and string which within the applicant's cell. Similarly, I am satisfied that it is not arbitrary, capricious or unjust for the first named respondent to take the view that no further screening within the cell should be provided. The explanations given by the first named respondent in the verifying affidavit of Desmond O'Shea, assistant governor, of the 29th June 2018 provides a rational basis for the measures adopted by the first named respondent which does not fly in the face of reason or fundamental common sense. Insofar as the onus is on the respondent that the interference with the applicant's right of privacy was permissible, I am satisfied that this onus has been discharged.

22. The reliefs sought are refused.