Neutral Citation: [2015] IEHC 112

THE HIGH COURT

[2014 No. 636 JR]

BETWEEN

DANIEL McDONNELL

APPLICANT

AND

THE GOVERNOR OF WHEATFIELD PRISON

RESPONDENT

JUDGMENT of Mr. Justice CREGAN delivered on the 17th day of February 2015

INTRODUCTION

1. The issue in this case is whether a Governor of a prison can keep a prisoner in solitary confinement for almost a year for his own safety or whether such a restriction is disproportionate, unlawful and a violation of the prisoner's constitutional rights.

PROCEDURAL HISTORY

2. The solicitors for the applicant first wrote to the prison authorities in respect of this matter on 16th September, 2014. No reply was received to this letter. Further letters were sent on 22nd September, 2014 and on 26th September, 2014. On 1st October, 2014 the prison authorities responded. On 3rd October, 2014 the applicant's solicitor replied raising a number of queries and seeking further information, including the period in which the current direction under r.63 would be renewed. No reply was received to this letter. Indeed the applicant was served with a new direction under r.63 on 19th October, 2014, and indeed a further one on 14th January, 2015.

3. On 24th October, 2014 the applicant's solicitor wrote to the respondent indicating that they would bring Article 40 proceedings unless the applicant was placed on a regime allowing for his interaction with other prisoners.

4. On 28th October, 2014 counsel for the applicant moved an *ex parte* Article 40 application on behalf of the applicant before Barton J. in the High Court. Barton J. indicated that he could not hear the full hearing in the Article 40 proceedings due to pre-existing commitments in his diary. Therefore he directed that the application be moved elsewhere.

5. On 29th October, 2014 counsel moved an *ex parte* Article 40 application before Kearns P. in the High Court. Kearns P. indicated that the matter should proceed by way of judicial review and granted leave to issue a notice of motion for judicial review returnable to 4th November, 2014.

6. The matter then proceeded by way of judicial review proceedings in the High Court. The statement required to ground the application for judicial review and notice of motion were dated 30th October, 2014. A statement of opposition and replying papers were filed on the 18th December, 2014.

7. In the application for judicial review the main reliefs which the applicant is seeking are

> (1) A declaration that the respondent has breached the applicant's constitutional rights including his right to bodily integrity and his right to fair procedures and constitutional justice.
>
> (2) A declaration that the respondent has breached the applicant's rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms and in particular Article 3, Article 6 and Article 13.
>
> (3) An order of certiorari quashing the respondent's directions made under r. 63 of the Prison Rules 2007.

8. In addition, the applicant sought a declaration that the applicant was being deprived of his personal liberty otherwise than in accordance with law. However counsel for the applicant indicated that, whilst that remained in the case, he was not seeking to place any particular emphasis on it at this time.

THE RELEVANT FACTS

9. The applicant was born on 4th October, 1994 and is now 20 years of age. On 24th January, 2014 the applicant was convicted of the murder of Ms. Melanie McCarthy McNamara. Following his conviction he was sentenced to life imprisonment and he is currently detained on foot of this conviction in Wheatfield Prison.

10. After the applicant was convicted of murder, on 24th January, 2014, he was imprisoned in Mountjoy Prison for about 28 days. However the prison authorities in Mountjoy apparently believed that there was a threat to his safety in that prison and as a result he was transferred to Wheatfield Prison. The applicant has been imprisoned on the west 2 wing of Wheatfield Prison since he arrived in February 2014.

11. Since his arrival in Wheatfield Prison in February, 2014 the applicant has been subject to repeated and continuous directions under r.63 of the Prison Rules 2007. The respondent has made these directions because he is in possession of credible evidence of a threat to the applicant's safety within the prison from persons connected to Ms. Melanie McCarthy McNamara. However the applicant does not accept that there is a threat to his safety within the prison.

12. Since the applicant arrived in Wheatfield he has received the following r.63 directions:

> (i) On 18th March, 2014 – the reason for the detention was stated to be "own protection". There is no specific end date on this form.

(ii) 3rd April, 2014 – again no specific end date is apparent.

(iii) 22nd April, 2014 – again no end date is recorded.

(iv) 26th May, 2014 – again no specific end date is recorded.

(v) 11th July, 2014 – again no specific end date is recorded.

(vi) 19th August, 2014 – again no specific end date is recorded.

(vii) 18th September, 2014 – this r.63 direction contains a review date of 18th October, 2014.

(viii) 18th October, 2014 – no end date is set out in this direction.

(ix) 21st November, 2014 – again no end date is set for this direction.

(x) 14th December, 2014 – no end date is recorded.

(xi) 14th January, 2015 – again no end date is recorded.

13. Thus the applicant has been subjected to eleven r.63 directions which have been running continuously from 18th March, 2014 to date – a period of eleven months.

14. The reason given for all of these r.63 directions is that it is for the applicant's own protection because he is under threat from other prisoners because of his offence. On a number of the direction statements the applicant has stated that he wishes to mix with the general population and/ or that he does not believe that there is any threat to his life.

The affidavit evidence on behalf of the Applicant

15. The applicant's conditions of detention in Wheatfield Prison under these r.63 directions are extremely restricted. He is, in effect, in solitary confinement. He has been on "23 hour lockup" for almost a year. He is effectively isolated from all other prisoners within the prison not just those prisoners who are considered likely to cause harm to him. He is obviously not free to associate with the general prison population. However in addition to that, he is unable to associate with other prisoners on the West 2 wing of Wheatfield Prison – a wing which contains many prisoners who are placed on that wing pursuant to r.63 directions or r.62 directions. Approximately one hour a day he is allowed to take exercise in the yard in the presence of prison officers but not in the presence of any other prisoners. He plays football on his own. His requests to associate with other prisoners have been rejected and/ or are, according to the applicant, ignored by the respondent. In addition (until the commencement of this case,) he has also been unable to go to the prison gym three times a week as he would like to do.

16. In addition the applicant complained that he has been denied access to structured activities.

17. The applicant would like access to the psychiatric and psychological medical staff attached to Wheatfield Prison and/or access to a "listener" at Wheatfield Prison – a person with whom prisoners can discuss their problems.

18. Based on affidavit evidence filed in this case, it appears that there are about seventeen cells in the West 2 area of Wheatfield Prison comprising eleven full-time cells and six padded cells. There are four prisoners (including the applicant) on his particular landing. The applicant believes that he is the only prisoner on his landing subject to "23 hour lockup. " The applicant cannot mix or associate with the other prisoners on his landing.

19. It appears that the applicant has a poor disciplinary record within Wheatfield Prison and he has incurred a large number of P 19's which are part of the disciplinary regime of the prison. At present he is on the "Basic Regime" which means that he has not earned any additional privileges for good behaviour. It appears that the applicant has been on this "Basic Regime" since he arrived at Wheatfield Prison – although he was apparently once on the "Standard Regime" for a period of seven days. However the applicant states that the only apparent difference between the "Basic Regime" and the "Standard Regime" is that he was taken to the basic gym in the prison once for an hour on his own.

20. The applicant occupies a single cell on the West 2 wing. It is approximately eight feet by twelve feet in size. He has in- cell sanitation facilities – a toilet, sink and shower. He also has a bed and television in his cell.

21. In addition the applicant receives one visit per week from family members of approximately 30 minutes duration. In addition he is allowed three phone calls per week which are six minutes in duration.

22. The applicant is of the view that the main reason he has discipline issues in prison is because he is finding it very difficult to cope with being locked up for 23 hours a day. The applicant's evidence is that at this stage he feels that the prolonged use of the 23 hour lockup is seriously compromising his general health and well-being and he is finding it difficult to cope with this restricted regime.

23. The applicant's evidence is that he is frustrated by the lack of physical and mental stimulation in his daily regime and he finds the complete lack of personal interaction with other prisoners very difficult. Moreover the applicant, despite his repeated requests, is not participating in any authorised structured activities such as work, vocational training education or any other programmes intended to rehabilitate prisoners in Wheatfield Prison. The respondent has stated in evidence that on many occasions the applicant has refused to participate in such authorised structured activities. The applicant has expressly stated that he wishes to be involved in these activities now and into the future.

24. The applicant's evidence is that he has noticed that the restricted regime is beginning to affect his mental health and that in an effort to try to protect his mental health he has requested access to a psychiatrist and a listener but the prison authorities have not taken any steps on foot of these requests.

25. It appears that the applicant was also subjected to previous bouts of solitary confinement in St. Patrick's Institution (from February 2012 until October 2012.) Moreover in November 2013 he was moved to Cloverhill Prison where he was subjected to r.63 conditions until the conclusion of his trial in January 2014.

26. Thus it appears that in addition to the eleven months in solitary confinement in Wheatfield, the applicant has also endured lengthy

periods of solitary confinement in St. Patrick's Institution, and Cloverhill.

27. The applicant's solicitors arranged for a psychologist - Mr. Glanville - to visit the applicant and to prepare a report on his behalf setting out how his current mode of imprisonment has affected him. In his first report Mr. Glanville outlines an extensive literature on the psychological and psychiatric effects of solitary confinement and isolation which generally describes the effects of prolonged (usually defined as fifteen continuous days or more) solitary confinement/isolation. Some of the consequences of solitary confinement are anxiety disorders, depression, anger, cognitive disturbances, perceptual disturbances (including hallucinations), paranoid disorders, psychosis and suicidal intent. Mr. Glanville in his report also outlined the general view that a significant proportion of prisoners who are psychologically or emotionally damaged by solitary confinement may never recover and that the suicide rate amongst such prisoners is very significantly higher than that of other prisoners.

28. Moreover Mr. Glanville stated that the applicant's anxiety levels "were elevated to a level suggestive of a clinical disorder" and his "scores on scales measuring depressive symptomatology were also significantly raised". Mr. Glanville was of the view that "there must be considerable concern for his psychological and emotional well-being arising from the circumstances under which he is currently detained". He also attributed "boredom and the absence of constructive stimulation" as likely factors in many of the applicant's disciplinary problems in prison.

29. In Mr. Glanville's report he states as follows in his Summary and Opinion:

> *"I am unable to identify the presence of any clear psychotic symptoms. However given those of anxiety, agitation, depression, suicidal ideation and anger/aggression which Daniel is reported to be experiencing or exhibiting, there must be considerable concern for his psychological and emotional well-being arising from the circumstances under which he is currently detained, particularly in the event that his appeal is unsuccessful. Indeed it is remarkable that he has managed to cope so well to date with such a prolonged period of isolation".*

30. In his second report Mr. Glanville states as follows

> *"It seems clear from Daniel's disciplinary record in custody that he has adopted an oppositional and defiant stance in relation to a substantial number of the prison officers with whom he is in contact and the prison regime generally. In my opinion it is likely that boredom and the absence of constructive stimulation are likely to have been factors in the origins of many of these altercations. If he were being held in a less restrictive and more stimulating environment I think that the level of anger and aggression which he has so frequently displayed would be significantly reduced".*
>
> *"In my opinion if Daniel continues to be held under the present regime of isolation/solitary confinement with minimal stimulation, the likelihood is that these outbursts of anger and aggression would become more frequent and more violent with a consequent risk to both himself and others. Over the course of a 'life sentence' this is likely to have a very damaging effect on his personality development, his mental health and the prospects of his successful resettlement in the community whenever he is released from custody".*

31. Thus there is unchallenged evidence before the court to suggest that the applicant (who is a man of 20 years of age serving a life sentence) is suffering from, or is likely to suffer from, psychological damage arising from the eleven months which he has spent in solitary confinement in prison.

32. The applicant's solicitor, (Ms Deborah Cody of Fahy Bambury McGeever Solicitors) stated in an affidavit that she believes that *"at this stage the prison authorities have demonstrated a deliberate and conscious disregard for the applicant's general well-being. His repeated requests for assistance in the form of access to education and training as well as access to a psychiatrist/psychologist and a listener have been effectively ignored".*

33. She also says at para.26 of her first affidavit

> *"Also I do not think that the prison authorities have taken any steps to monitor the applicant's circumstances for signs of physical, psychological or psychiatric distress. For example, although the applicant is on 23 hour lockup for an extended period he has not been receiving any regular visits from the prison doctor to review his general condition".*

34. Moreover the applicant's solicitor stated in her affidavit that, despite having corresponded with the prison authorities on the applicant's behalf, she is not aware of whether the prison authorities have considered any less restrictive alternatives to the 23 hour lockup which could be used in his case and she is not aware if the authorities have given any consideration to improving his position in any way (e.g. by allowing him to participate in authorised structured activities with other prisoners who are also subject to restricted regimes).

35. In para.31 of her affidavit Ms Deborah Cody states that *"the applicant has instructed me that the prospect of remaining on a r.63 direction for a further indefinite period fills him with a sense of hopelessness". She also states that "the applicant instructs that the prospect of serving a life sentence on 23 hour lockup is very difficult to take. He does not want to be substantially deprived of the society of other people for an indefinite period. He does not want to sit in a prison cell for 23 hours a day without having any activities to occupy his body and mind. He does not want his mental health further deteriorated whilst in custody and to have his requests for professional help continue to fall on deaf ears"*.

The Respondent's affidavits

36. It appears that the position of the respondent is that he intends to keep the applicant in continuing solitary confinement for his own protection. In a letter dated 1st October, 2014 (from Sean O'Reilly the assistant governor of Wheatfield Prison to the applicant's solicitor) Mr. O'Reilly states as follows

> *"Dear Sir/Madam*
>
> *In relation to a request from your client and yourself that he should be granted free association I wish to advise you of the following.*
>
> *A review was conducted into your client's status and it has been determined that there is a viable and substantive threat to your client if he was permitted to have free association due to the nature of his crime and the connections of his victim that are within the prison system.*

As a result of this review your client will be remaining on r.63 for his own protection.

Your client has been at a level of access to services and the governor would hope to continue to expand this as he is very aware of the age and the length of the sentence that your client is doing.

The governor must take into account the threat level to your client when making any decision.

Regards"

37. It is clear therefore that the respondent is of the view that, due to the continuing threat to the safety of the applicant, he must continue to keep him in solitary confinement under r.63 directions.

38. In his replying affidavit, Mr. Sean O'Reilly, Assistant Governor of Wheatfield stated that the prison authorities were in possession of confidential information that the applicant was, and continues to be, at significant risk of being seriously harmed from other inmates and that there were a large number of inmates in Wheatfield who had connections to the grouping to which the deceased person Miss Melanie McCarthy McNamara was connected and related. Mr. O'Reilly also gave evidence that the applicant was a troublesome prisoner, that he had on one occasion attacked another prisoner on the West 2 landing, that he declined the offer to be brought out for exercise on many dates over a six month period, that on a number of occasions he declined to attend school lessons, etc. In addition Mr. O'Reilly noted that the applicant had also declined to see the prison psychiatric team on a number of occasions recently.

39. However in reply, the applicant stated that he had resolved his difficulties with this other prisoner, that he usually wanted to exercise one hour per day, that (in relation to the prison psychologist), by the time the respondent had organised these attendances with the psychiatric team, he had already been visited by the psychologist arranged for him by his own solicitors and because of that he did not feel the need to engage with a prison- organised psychiatric team at that stage. However he also stated that this should not be taken as an unwillingness on his part to engage with such services now or in the future.

40. It is also important to put this issue of solitary confinement in context. Mr. Sean O'Reilly in his affidavit stated that the average prisoner spends approximately seven to eight hours per day out of his cell. By contrast a prisoner who is on r.63 spends somewhere between two to six hours per day out of his cell. The amount of time depends on whether a prisoner's status has been enhanced, whether he is attending gym class or other activities and/or whether he has a job (for example as a cleaner).

41. It appears to be an agreed fact that the applicant is either on 22 or 23 hour lockup per day. Thus he has between one and two hours a day when he is out of his cell. Of this time one hour is given to exercise in the yard. Therefore there can be certain days on which the applicant might have no further time out of his cell where he can engage in meaningful association with other persons.

42. The respondent also states

"However in the currency of the said direction under r.63 the applicant continues to be offered all the services and authorised structured activities available in the prison to other prisoners under r.63 and it is noted that the applicant has recently re-engaged with educational and other services."

43. However it appears that these educational services amount to at most one hour per week.

44. Mr. O'Reilly also states

"Accordingly in those circumstances the respondent sees no reason if the applicant continues to engage with the prison services as to why he should not be capable of being in the same position as other prisoners detained under r.63 such as Keith Hall and work his way up to an enhanced level regime and spend up to five or six hours out of his cell each day.

Mr. O'Reilly also states that 'at any given time there is usually a minimum of five to six prisoners detained under r. 63'.

45. Another problem for the respondent is that there are thirteen prisoners on West 2 landing in Wheatfield. Of these, six are on r.63 directions. However not all of these prisoners can or want to mix with each other and there are apparently four different groupings which must be accommodated separately for exercise for one hour at a time. Apparently, the current position with the applicant, is that he has fallen out with some other prisoners with whom he used to mix.

46. The respondent also indicated that the prison operates a system of incentivised regimes which adds to the ability of the respondent to maintain good order within the prison. Within the scheme there are three levels – "basic," "standard" and "enhanced." The applicant is on the "basic" level at the moment but the respondent stated that he would move to "standard" regime which means that he would get further privileges including access to the gym on Wednesday, Friday and Sunday.

47. Thus the respondent was of the view that the applicant is partially responsible for his own situation.

48. However, the applicant, in a replying affidavit, said that he was anxious to begin to associate with other prisoners again. Indeed the applicant has said that he is willing to associate with all prisoners on the West 2 landing.

49. Moreover the applicant has suggested that consideration be given to allowing him to attend group education sessions once again.

50. In addition the applicant states that he would like to attend as many educational classes as possible and he would also like to work as a cleaner in the prison and to take part in group activities and work activities. He also states that he would be interested in participating in the kitchen and cookery classes and also to learn woodwork and other metalwork skills.

PRISON RULES – (S.I. 252/2007)

51. The relevant prison rules in this application are Regulations 63. However, Regulation 62 is also set out below as the two are sometimes considered together in other cases:

62. ***"Removal of prisoner from structured activity or association on grounds of order***

(1) Subject to Rule 32 (Exercise) a prisoner shall not, for such period as is specified in a direction under this paragraph, be permitted to -

(a) engage in authorised structured activities generally or particular authorised structured activities,

(b) participate in communal recreation,

(c) associate with other prisoners,

where the Governor so directs.

(2) The Governor shall not give a direction under paragraph (1) unless information has been supplied to the Governor, or the prisoner's behaviour has been such as to cause the Governor to believe, upon reasonable grounds, that to permit the prisoner to so engage, participate or associate would result in there being a significant threat to the maintenance of good order or safe or secure custody.

(3) A period specified in a direction under paragraph (1) shall not continue for longer than is necessary to ensure the maintenance of good order or safe or secure custody

(4) Where the direction under paragraph (1) is still in force, the Governor shall review not less than once in every seven days a direction under paragraph (1) for the purposes of determining whether, having regard to all the circumstances, the direction might be revoked.

(5) A prisoner in respect of whom a direction under this Rule is given shall be informed in writing of the reasons therefor either before the direction is given or immediately upon its being given, and shall further be informed of the outcome of any review as soon as may be after the Governor has made a decision in relation thereto.

(6) The Governor shall make and keep a record of -

(a) any direction given under this Rule,

(b) the period in respect of which the direction remains in force,

(c) the grounds upon which the direction is given,

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

(e) the decision made in relation to any review under paragraph (4).

(7) The Governor shall, as soon as may be after giving a direction under paragraph (1) (c), inform the prison doctor, and the prison doctor shall, as soon as may be, visit the prisoner and, thereafter, keep under regular review, and keep the Governor advised of, any medical condition of the prisoner relevant to the direction.

(8) The Governor shall, as soon as may be after giving a direction under paragraph (1) (c), inform a chaplain of the religious denomination, if any, to which the prisoner belongs of such a direction and a chaplain may, subject to any restrictions under a local order, visit the prisoner at any time.

(9) The Governor shall, as soon as may be, submit a report to the Director General including the views of the prisoner, if any, explaining the need for the continued removal of the prisoner from structured activity or association under this Rule on grounds of order where the period of such removal will exceed 21 days under paragraph (4). Thereafter, any continuation of the extension of the period of removal must be authorised, in writing, by the Director General.

Regulation 63

(63) ***Protection of vulnerable prisoners***

(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"

DEFINITION OF SOLITARY CONFINEMENT- THE INTERNATIONAL CONTEXT
52. Solitary confinement is not defined either in the Prisons Act 2007 or in the Prison Rules (S.I. No. 252/ 2007).

(I) The Istanbul Statement

53. In a document entitled "The Istanbul Statement on the Use and Effects of Solitary Confinement" (adopted on 9th December, 2007 at the International Psychological Trauma Symposium, Istanbul, an international symposium of psychologists) the following definition of solitary confinement is given;

> *"Solitary confinement is the physical isolation of individuals who are confined to their cells for 22 to 24 hours a day. In many jurisdictions prisoners are allowed out of their cells for one hour of solitary exercise. Meaningful contact with other people is typically reduced to a minimum. The reduction in stimuli is not only quantitative but also qualitative. The available stimuli and the occasional social contacts are seldom freely chosen, are generally monotonous and are often not empathetic."*

54. The Istanbul statement also deals with the effects of solitary confinement as follows:

> **The effects of solitary confinement**
> *It has been convincingly documented on numerous occasions that solitary confinement may cause serious psychological and sometimes physiological ill effects. Research suggests that between one third and as many as 90 per cent of prisoners experience adverse symptoms in solitary confinement. A long list of symptoms ranging from insomnia and confusion to hallucinations and psychosis has been documented. Negative health effects can occur after only a few days in solitary confinement and the health risks rise with each additional day spent in such conditions.*
>
> > *Individuals may react to solitary confinement differently. Still, a significant number of individuals will experience serious health problems regardless of the specific conditions, regardless of time and place and regardless of pre-existing personal factors. The central harmful feature of solitary confinement is that it reduces meaningful social contact to a level of social and psychological stimulus that many will experience as insufficient to sustain health and well-being.*

(II) Report of the Special Rapporteur of the UN
55. In the interim report of the Special Rapporteur of the UN Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment prepared for the United Nations General Assembly on 5th August, 2011 (submitted pursuant to General Assembly Resolution 65/205/), the Special Rapporteur drew the attention of the General Assembly to his assessment that solitary confinement can amount to cruel, inhuman or degrading treatment or punishment or even torture. The report highlights a number of general principles to help to guide States to re-evaluate and minimise its use and in certain cases to abolish the practice of solitary confinement. The report is of the view that "the practice should be used only in very exceptional circumstances, as a last resort, for as short a time as possible." It also emphasises "the need for minimum procedural safeguards, internal and external, to ensure that all persons deprived of their liberty are treated with humanity and respect for the inherent dignity of the human person."

56. At page 8 of the report under the heading "definition of solitary confinement" the report refers to the Istanbul Statement declarations and states as follows:

> *"There is no universally agreed upon definition of solitary confinement. The Istanbul Statement on the Use and Effects of Solitary Confinement defines solitary confinement as the physical isolation of individuals who are confined to their cells for 22 to 24 hours a day. In many jurisdictions, prisoners held in solitary confinement are allowed out of their cells for one hour of solitary exercise a day. Meaningful contact with other people is typically reduced to a minimum. The reduction in stimuli is not only quantitative but also qualitative. The available stimuli and the occasional social contacts are seldom freely chosen, generally monotonous, and are often not empathetic."*

57. The Rapporteur also notes that solitary confinement is also known as "segregation", "isolation", "separation", "cellular", "lockdown", "Supermax" "the hole" or "Secure Housing Unit (SHU)" but all these terms can involve different factors. For the purpose of this report the Special Rapporteur defined solitary confinement as the physical and social isolation of individuals who are confined to their cells for 22 to 24 hours a day. Of particular concern to the Special Rapporteur was "prolonged solitary confinement" which he defined as any period of solitary confinement in excess of fifteen days. He concluded that fifteen days is the limit between "solitary confinement" and "prolonged solitary confinement" because at that point, according to the literature surveyed, some of the harmful psychological effects of isolation can become irreversible.

58. The Special Rapporteur then considered the legal framework within which this issue occurs.

59. The Special Rapporteur reviewed the decisions of the European Court of Human Rights on solitary confinement. He stated;

> *"34. In its evaluation of cases of solitary confinement, the European Court of Human Rights considers the rationale given by the State for the imposition of social and physical isolation. The Court has found violations of Article 3 of the European Convention on Human Rights where States do not provide a security- based justification for the use of solitary confinement. In circumstances of prolonged solitary confinement, the court has held that the justification for solitary confinement must be explained to the individual and the justification must be "increasingly detailed and compelling" as time goes on. See AB v. Russia application number 1439/06 European Court of Human Rights, para. 108 (2010).*
>
> *35. Through its jurisprudence, the European Court of Human Rights emphasizes that certain procedural safeguards must be in place during the imposition of solitary confinement, for example, monitoring a prisoner's physical well-being, particularly where the individual is not in good health and having access to judicial review.*
>
> *36. The level of isolation imposed on an individual is essential to the European Court of Human Rights' assessment of whether instances of physical and mental isolation constitute torture or cruel, inhuman or degrading treatment or punishment. A prolonged absolute prohibition of visits from individuals from outside the prison causes suffering "clearly exceeding the unavoidable level inherent in detention". See Onoufriou v. Cyprus European Court of Human Rights, (2010) para. 80. However, where the individual can receive visitors and write letters, have access to television, books and*

newspapers and regular contact with prison staff or visit with clergy or lawyers on a regular basis, isolation is "partial", and the minimum threshold of severity — which the European Court of Human Rights considers necessary to find a violation of article 3 of the European Convention on Human Rights — is not met. Nevertheless, the Court has emphasized that solitary confinement, even where the isolation is only partial, cannot be imposed on a prisoner indefinitely. (Ramírez Sanchez v. France European Court of Human Rights (2006) para. 145).

60. The Rapporteur also states at para. 58

"When a State fails to uphold the Standard Minimum Rules for the Treatment of Prisoners during a short period of time of solitary confinement, there may be some debate on whether the adverse effects amount to cruel, inhuman or degrading treatment or punishment or torture. However, the longer the duration of solitary confinement or the greater the uncertainty regarding the length of time, the greater the risk of serious and irreparable harm to the inmate that may constitute cruel, inhuman or degrading treatment or punishment or even torture. (Emphasis added).

61. The report also deals with the effects of solitary confinement as follows

Psychological and physiological effects of solitary confinement

62. Negative health effects can occur after only a few days in solitary confinement, and the health risks rise with each additional day spent in such conditions. Experts who have examined the impact of solitary confinement have found three common elements that are inherently present in solitary confinement — social isolation, minimal environmental stimulation and "minimal opportunity for social interaction". Research further shows that solitary confinement appears to cause "psychotic disturbances," a syndrome that has been described as "prison psychoses". Symptoms can include anxiety, depression, anger, cognitive disturbances, perceptual distortions, paranoia and psychosis and self-harm.

63. Some individuals experience discrete symptoms while others experience a

"severe exacerbation of a previously existing mental condition or the appearance of a mental illness where none had been observed before". Still, a significant number of individuals will experience serious health problems regardless of the specific conditions, regardless of time and place, and regardless of pre-existing personal factors.

62. In his conclusions and recommendations the Special Rapporteur states as follows

"The Special Rapporteur stresses that solitary confinement is a harsh measure which may cause serious psychological and physiological adverse effects on individuals regardless of their specific conditions. He finds solitary confinement to be contrary to one of the essential aims of the penitentiary system, which is to rehabilitate offenders and facilitate their reintegration into society. The Special Rapporteur defines prolonged solitary confinement as any period of solitary confinement in excess of 15 days."

63. At para. 87 he recommends that

87. Indefinite solitary confinement should be abolished.

At para. 88 he recommends

88. It is clear that short-term solitary confinement can amount to torture or cruel, inhuman or degrading treatment or punishment; it can, however, be a legitimate device in other circumstances, provided that adequate safeguards are in place. In the opinion of the Special Rapporteur, prolonged solitary confinement, in excess of 15 days, should be subject to an absolute prohibition.

89. The Special Rapporteur reiterates that solitary confinement should be used only in very exceptional circumstances, as a last resort, for as short a time as possible. He emphasizes that when solitary confinement is used in exceptional circumstances, minimum procedural safeguards must be followed. These safeguards reduce the chances that the use of solitary confinement will be arbitrary or excessive, as in the case of prolonged or indefinite confinement… Minimum procedural safeguards should be interpreted in a manner that provides the greatest possible protection of the rights of detained individuals."

64. At para. 93 the Rapporteur recommends as follows

"All assessments and decisions taken with respect to the imposition of solitary confinement must be clearly documented and readily available to the detained persons and their legal counsel. This includes the identity and title of the authority imposing solitary confinement, the source of his or her legal attributes to impose it, a statement of underlying justification for its imposition, its duration, the reasons for which solitary confinement is determined to be appropriate in accordance with the detained person's mental and physical health, the reasons for which solitary confinement is determined to be proportional to the infraction, reports from regular review of the justification for solitary confinement, and medical assessments of the detained person's mental and physical health."

Census of restricted regime prisoners

65. The Irish Prison Service statistics unit commenced the collation of a quarterly census of restricted regime prisoners. The most recent census survey was carried out on 1st July, 2014. The results of the July 2014 census shows that the number of persons on a restricted regime for protection reasons (r.63) was 232 of which 224 were there at their own request. The number of prisoners on 22 and 23 hour lockup was 42. (However the census also noted that since the commencement of the census in July 2013, number of prisoners on 22/23 hour lockup has decreased by 169 or 80% from 211 to 42).

66. The key statistics are as follows:

- 253 prisoners in total were subject to a restricted regime.

- 232 (5.7% of the prison population 4,003) were prisoners on protection (r.63) of which 224 were there at their own request.

- 14 prisoners restricted on grounds of r.62.

- 5 prisoners restricted due to discipline (r.67 part 3 of the Prisons Act 2007).

THE PLAINTIFF'S CONSTITUTIONAL RIGHTS AS A PRISONER

67. It is now a well- established principle of constitutional law that convicted prisoners still retain many constitutional rights.

68. The status of prisoners' rights has been addressed in a number of cases including *The State (Richardson) v. The Governor of Mountjoy Prison* [1980] ILRM 82. In this case the Court held that although a convicted person undergoes a recognised form of punishment which involves the loss of liberty, the prisoner retains constitutional rights such as the right to life, the free profession and practice of religion and the right of access to the courts. The Court also held that the prison rules must be interpreted in a manner consistent with a prisoner's constitutional rights whilst allowing the prison authorities a wide area of discretion in the administration of prisons. In that case Barrington J. referring to a passage of Corwin's Constitution of the United States of America stated as follows:

> *"Since the 1972 edition of Corwin's [Constitution of the United States of America] was published, the American Federal Supreme Court has again addressed itself to the problem of a prisoner's status, in the case of Wolff v. McDonnell (1974) 418 US 539. In that case White J., at page 555 delivering the majority opinion of the court and referring to the status of a convicted prisoner, said*
>
> > *'But though his rights may be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protection when he is imprisoned for crime. There is no iron curtain between the Constitution and the prisoners of this country'*
>
> *There is no iron curtain between the constitution and the prisons in this Republic either. The right of access to the courts has been accepted as one of the unspecified rights guaranteed by Article 40.3 of the Constitution, and this right is available to prisoners as well as to other rights: see Macauley v. Minister for Posts and Telegraphs [1966] I.R. 345."*

69. One of a prisoner's constitutional rights is a right to bodily integrity. In *The State (C) v. Frawley* [1976] IR 365 Finlay P. stated:

> *"The right of bodily integrity as an unspecified constitutional right is clearly established by the decision of the Supreme Court in Ryan v. The Attorney General [1965] IR 294 by which I am bound and which I accept. Even though it was there laid down in the context of a challenge to the constitutional validity of a statute of the Oireachtas which, it was alleged, forced an individual to use water containing an additive hazardous to health, I see no reason why the principle should not also operate to prevent an act or omission of the Executive which, without justification, would expose the health of a person to risk or danger.*
>
> *When the Executive, in exercise of what I take to be its constitutional right and duty, imprisons an individual in pursuance of a lawful warrant of a court, then it seems to me to be a logical extension of the principle laid down in Ryan's case that it may not, without justification or necessity, expose the health of that person to risk or danger. To state, as Mr. McEntee submits, that the Executive has a duty to protect the health of persons held in custody as well as is reasonably possible in all the circumstances of the case seems to me no more than to state in a positive manner the negative proposition which I have above accepted. Therefore I am satisfied that such a proposition is sound in law."*

70. Finlay P. also stated in that decision

> *"However it is not the function of the Court to recommend to the Executive what is desirable or to fix the priorities of its health and welfare policy. The function of the Court is confined to identifying and, if necessary, enforcing the legal and constitutional duties of the Executive."*

71. In *Creighton v. Ireland, The Attorney General, Minister for Justice and the Governor of Wheatfield Prison* 2010 IESC 50, Fennelly J. in delivering the judgment of the Court stated *inter alia* as follows (at para.4):

> *"A sentence of imprisonment deprives a person of his right to personal liberty. Costello J explained in Murray v Ireland [1985] I.R. 532 at 542 that "[w]hen the State lawfully exercises its power to deprive a citizen of his constitutional right to liberty many consequences result, including the deprivation of liberty to exercise many other constitutionally protected rights, which prisoners must accept." Nonetheless, the prisoner may continue to exercise rights "which do not depend on the continuance of his personal liberty…." I would say that among these rights is the right to personal autonomy and bodily integrity. Thus, it is common case that the State owes a duty to take reasonable care of the safety of prisoners detained in its prisons for the service of sentences lawfully imposed on them by the courts. This does not amount, however, to a guarantee that a prisoner will not be injured. (See Muldoon v Ireland [1988] I.L.R.M. 367 approved by this Court in Bates v Minister for Justice and others [1998]). Prisons may, as an inevitable consequence of the character of persons detained, be dangerous places. Prisoners are entitled to expect that the authorities will take reasonable care to protect them from attack by fellow prisoners. What is reasonable will, as always, depend on the circumstances. As the cases recognise, prison authorities may have to tread a delicate line between the achievement of the objective of protecting the safety of prisoners and the risks of adopting unduly repressive and inhumane measures."* [Emphasis added]

THE PRISON RULES MUST BE INTERPRETED IN A MANNER CONSISTENT WITH THE CONSTITUTION- THE TEST OF PROPORTIONALITY

72. In *Holland v. Governor of Portlaoise Prison* [2004] 2 I.R. 573 the High Court held that the prison rules must be construed and applied in a manner which respected and vindicated the constitutional rights of the prisoner and which upheld the principles of natural justice. The Court also held that any infringement or restriction in the exercise of the constitutional right of a prisoner must be not more than was necessary for the protection of the interest or objective which grounded the justification for such interference or restriction in the first place. The Court also held that a test of proportionality was applied when considering constitutional rights.

73. The issue in that case was that the applicant sought access to members of the media by way of correspondence and visits in the

hope of encouraging them to investigate what he alleged was a miscarriage of justice. The respondent refused to permit any such communication. In considering this issue McKechnie J. stated at page 594 of his Judgment:

> *"Given that the right in issue [in this case] was constitutionally based, [it can, I think, be taken that] 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… In addition, the limitation should be no more than what is necessary or essential and must be proportionate to the lawful objective which it is designed to achieve. That a test of proportionality, where relevant, is now applied when considering constitutional rights is beyond doubt. In Heaney v. Ireland [1994] 3 I.R. 593 at page 6 or 7 Costello J. describes this principle as follows:*
>
> > *'In considering whether a restriction on the exercise of rights is permitted by the Constitution, the courts in this country and elsewhere have found it helpful to apply the test of proportionality, a test which contains the notions of minimal restraint on the exercise of protected rights and of the exigencies of the common good in a democratic society. This is a test frequently adopted by the European Court of Human Rights… Therefore, in my opinion, it is quite appropriate to consider in this case whether the aforesaid policy of the policy of the Prison Service and the operation of rr. 59 and 63, as these have been applied to the applicant are proportionate to the objectives of the respondent, namely the maintenance of security and good order." (Emphasis added).*

74. Later in his judgment McKechnie J. in assessing the balance to be struck on the interference with prisoners rights stated as follows (at page 600):

> *"6. the interference on restriction:-*
>
> > *(i) Must be rationally connected to the said objective and must not be arbitrary, unfair or based on irrational considerations*
> >
> > *(ii) Must be necessary or essential in order to achieve the legitimate aim to which it is addressed;*
> >
> > *(iii) Must be not more extensive than the minimum required to achieve its intended aim, and*
> >
> > *(iv) Must otherwise be proportionate to that objective." (Emphasis added).*

75. In *Devoy v. Governor of Portlaoise Prison* [2009] IEHC 288 Edwards J., in an extensive review of the authorities, on the application of constitutional rights to prisoners stated as follows at page 83:

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

IS THERE A BREACH OF THE APPLICANT'S CONSTITUTIONAL RIGHTS?

76. Given that the applicant has a constitutional right to bodily integrity and psychological integrity, the next issue which arises is whether there has been a breach of these constitutional rights, as a result of the actions of the Respondent. In assessing this issue, I have had regard to recent decisions of the High Court set out below.

77. In *Devoy* Edwards J. stated:

> *"That said, there is no question but that we have moved on from the days of routine solitary confinement and the types of regimes described so vividly by the leading penologist Michael Ignatieff in his book entitled "A Just Measure of Pain – The Penitentiary in the Industrial Revolution 1750 - 1850". Because man is a social animal the Court recognises that the humane treatment, and respect for the human dignity, of a prisoner requires that he or she should not be totally or substantially deprived of the society of fellow humans for anything other than relatively brief and clearly defined periods. To that extent a prisoner, such as the applicant, may be entitled to a degree of freedom of association as an aspect of his constitutional right to humane treatment and human dignity. The Prison Rules expressly recognise this. The combined effect of Rules 27 and 62 is to reflect what Counsel for the respondents fairly described as a "presumption" in favour of a prisoner being allowed to have a degree of association subject to the good order of the prison.*
>
> *Moreover, even in the absence of specific expert evidence on the question, it is easy to appreciate as a matter of common sense that total or substantial isolation from the society of one's fellow man, may over time amount to a form of sensory deprivation and be inhumane and abusive of the prisoner's psychological welfare and constitute a breach of his right to bodily integrity. Again recognition of this is reflected in the Prisons Act 2007, and the Prison Rules. Although the disciplinary provisions of the code allow (inter alia) for solitary confinement as a penalty for breach of discipline such a penalty can only be applied "for a period not exceeding 3 days". Moreover, among the penalties expressly outlawed are penalties consisting of any form of sensory deprivation, penalties of indeterminate duration and penalties which amount to cruel, inhumane or degrading treatment."*

78. In *Kinsella v. The Governor of Mountjoy Prison* [2012] 1 I.R. 467 Hogan J. (in refusing an application for *habeas corpus* under Article 40.4 of the Constitution) held that the State was obliged pursuant to Article 40.3.2 of the Constitution not merely to protect the integrity of the human body of a citizen but also the integrity of their mind and personality.

79. In that case the applicant was serving a prison sentence for theft while awaiting trial on an indictment for murder. However concerns for the applicant's safety, coupled with a shortage of single cells in the prison resulted in the applicant being detained in a small padded cell for eleven days. Having been confined in this cell for eleven days the applicant applied for his release pursuant to Article 40.4.2 of the Constitution contending that his detention had become unlawful by reason of the prison conditions which he was required to endure.

80. In that case Hogan J. held

(1) That the State was obliged pursuant to Article 40.3.2 of the Constitution not merely to protect the integrity of the human body of a citizen but also the integrity of their mind and personality.

(2) That although the detention of the applicant in an observation cell for such a continuous period amounted to a breach of his constitutional rights it could not be said that the breach was so serious as to vitiate the lawfulness of his detention.

(3) That the release of sentenced prisoners pursuant to Article 40.4.2 could only be ordered in exceptional cases.

81. In the course of his judgment Hogan J. stated the following (at para. 8 of his judgment):

"8. So far as the present application is concerned, it is the State's duty to protect and vindicate the person of the applicant which is principally engaged here, although I do not overlook the fact that the applicant's present conditions of confinement also arise, in part, at least, from the State's duty to protect his right to life and, perhaps, the life of other persons as well. Yet it is undeniable that detention in a padded cell of this kind involves a form of sensory deprivation in that the prisoner is denied the opportunity of any meaningful interaction with his human faculties of sight, sound and speech – an interaction that is vital if the integrity of the human personality is to be maintained. I use the term "a form of sensory deprivation" advisedly, because it is only fair to say that confinement in such conditions as the applicant has had to experience is none the less very far removed from the "five techniques" of sensory deprivation – such as intentionally subjecting the prisoner to constant "white" noise, sleep deprivation and the hooding of prisoners – condemned by the European Court of Human Rights in Ireland v. The United Kingdom (App. No. 5310/71) (1979-80) 2 E.H.R.R. 25 as inhuman and degrading treatment and hence a breach of Article 3 of the European Convention on Human Rights 1950.

9. By solemnly committing the State to protecting the person, Article 40.3.2 of the Constitution of Ireland 1937 protects not simply the integrity of the human body, but also the integrity of the human mind and personality. Counsel for the respondent observed in argument that no expert evidence had been led by the applicant with regard to the psychological harm which he might suffer. That is true, but it must be recalled that this application is one which of necessity was made as a matter of considerable urgency so that the possibility of commissioning such an expert report, within the short time period, was probably not a realistic possibility. Moreover, one does not need to be a psychologist to envisage the mental anguish which would be entailed by a more or less permanent lockup under such conditions for an eleven day period. Nor, for that matter, does one need to be a psychiatrist to recognise that extended detention over weeks under such conditions could expose the prisoner to the risk of psychiatric disturbance.

10. While making all due allowances for the exigencies of prison life and the difficult and unenviable task of the Prison Service in making complex arrangements for a wide variety of different prisoners with different needs and who often must be protected from one another, it is nonetheless impossible to avoid the conclusion that a situation where a prisoner has been detained continuously in a padded cell with merely a mattress and a cardboard box, for eleven days compromises the essence and substance of this constitutional guarantee, irrespective of the crimes he has committed or the offences with which he is charged. This is not to suggest that such a cell might never be used. Clearly somewhat different considerations may well arise in the case of disturbed prisoners or where other prisoners need to be accommodated on a temporary emergency basis for perhaps a day or two. But detention in such conditions for well over a week fails to meet the minimum standards of confinement presupposed by the constitutional guarantee in relation to the protection of the person contained in Article 40.3.2 of the Constitution of Ireland, 1937. I accordingly find that the conditions under which the Applicant has been detained constitute a violation of his constitutional right to the protection of the person and that the State has failed to vindicate that right in the manner required by Article 40.3.2 of the Constitution."

82. Moreover, in *Connolly v. the Governor of Wheatfield Prison* [2013] IEHC 334 the High Court (Hogan J.) considered the question of whether the detention of the applicant under conditions of what amounted to solitary confinement for all but one hour in the course of a day (for a period of two and a half months) was such a manifest contravention of the State's duty to protect the person under Article 40.3.2 of the Constitution such as would entitle him to immediate release under a habeas corpus application.

83. In that case the applicant was serving a sentence of seven years imprisonment (with the final two years suspended) following his conviction in June 2010 for causing serious harm and of offences of assault causing harm. The sentences were back- dated to March 2010 in order to take into account time spent in custody. As of the date of judgment (16th July 2013) the applicant was scheduled for release in December 2013. On 24th September, 2011, while detained in Mountjoy Prison the applicant maintained he was the victim of a violent rape by a cell mate. In addition the attacker then slashed the applicant with a knife and warned him against making any complaint in respect of it. Hogan J. noted that, although the DPP decided not to press charges in respect of the incident, there was no suggestion at all that the event did not occur in the manner described by the applicant and the Court therefore proceeded on the basis that the applicant was raped in the manner alleged. Following the incident, the applicant was transferred to Wheatfield Prison in February 2012. However, because his own personal experiences made him wary of sharing a cell, he was moved to a single occupancy cell at the end of April 2013. The applicant sought protection from the general prison population as he feared he would be subjected to homophobic victimisation. The respondent prison governor took the view that his safety was not threatened if he were placed within the general prison community. However, at his own request, Mr. Connolly was detained in a 23 hour lockup regime pursuant to r.63 of the Prison Rules 2007.

84. Therefore in the Connolly case the applicant was in a 23 hour lockup or solitary confinement at his own request because of his own personal concerns for his own safety. This distinguishes that case from the present case where the applicant in the present case is subject to a s.63 lockup against his wishes and based on the view of the Governor that he is a vulnerable prisoner. Moreover in Connolly, the applicant was only in solitary confinement for a period of two and a half months as opposed to eleven months in the present case.

85. In his judgment Hogan J. considered the Article 40.3.2 and the protection of the person and stated as follows:

"13. It is against this general background that the question of whether Mr. Connolly's entitlement to the protection of the person in Article 40.3.2 of the Constitution has been violated and must be assessed. Article 40.3.2 obliges the State by its laws: 'to protect as best it may from unjust attack and, in the case of injustice done, to vindicate the life, person, good name and property rights of every citizen.'

14. Here it must also be recalled 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 more acute in the case of those who are vulnerable, marginalised and stigmatised.

15. 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 Creighton v. Ireland [2010] IESC 50 per Fennelly J.

16. The obligation to treat all with dignity appropriate to the human condition is not dispensed with simply because those who claim that the essence of their human dignity has been compromised happen to be prisoners. That, in essence, is the basis for the decision of Barrington J. in The State (Richardson) v. Governor of Mountjoy Prison [1980] ILRM 82 where the judge found that the presence of human excrement in the basin in which prisoners were expected to wash and clean their teeth. Barrington J. found that the applicants 'rights under the Constitution and the law had been violated'. This would, I think, now be classified as a case where the substance of the applicant's right to the protection of the person in Article 40.3.2 had been violated certainly as read in conjunction [with] the Preamble's guarantees in respect of the protection of the dignity of the individual. What could be more undignified- indeed, degrading- than the obligation to wash in the presence of human excrement?

17. For even though prisoners may have strayed from the path of righteousness and even though – as with the case of Mr. Connolly – they may have severely and wantonly injured other persons, the protection of the dignity of all is still a vital constitutional desideratum. This is because the Constitution commits the State to the protection of these standards since it presupposes the existence of a civilised and humane society, committed to democracy and the rule of law and the safeguarding of fundamental rights. Anyone who doubts these fundamental precepts need only look at the preamble, Article 5, Article 15, Article 34, Article 38 and the Fundamental Rights provisions generally.

18. All of us are, of course sadly aware of the great failures of the past and the present where these rights seemed and seem like hollow platitudes. But this is not quite the point, since it is by upholding these values and rights that we can all aspire to the better realisation of the promise which these noble provisions of the Constitution hold out for us as a society.

86. Under the heading "Application of the *Kinsella* principle to the present case" Hogan J. stated as follows in para. 20 of his judgment:

"Can the same be said here? The conditions under which the applicant is held are not perfect but they are of course immeasurably better than those disclosed in Kinsella. In this particular context, the essence of the obligation in Article 40.3.2 to protect the person is to ensure that the integrity of the personality of every detained person is upheld. As I observed in Kinsella, this in turn means that every detained person must be permitted some meaningful interaction with his human faculties of sight, sound and speech, as such an interaction is vital if the integrity of the human personality is to be maintained. The presence of a television in the cell and access to reading material helps to ensure that the detained person has regular interaction with his faculties of sight and sound, even if the risk of psychological anguish and psychiatric disturbance must undoubtedly increase if prisoners are held under such conditions over a very long period of time."

87. Hogan J. went on to say as follows (at para. 22:)

"22. Yet the locking up of prisoners under such circumstances for very long periods of time – which I would rather measure in terms of an extended period of months – must be regarded as an exceptional measure, which might in some instances, at least, compromise the substance of the detainee's right to the protection of the person and the safeguarding of his human dignity. Certainly, the indefinite detention of a prisoner under such circumstances for periods of years would undoubtedly violate the guarantee to protect the person in Article 40.3.2, since it would be hard to see how the integrity of the detainee's personality – the very essence of the guarantee of the protection of the person and preservation of the human dignity of the prisoner – could be preserved under such circumstances. (Emphasis added).

23. In view of the acute difficulties involved in prison management, the judicial branch can but rarely be prescriptive in terms of specific conditions of prison conditions, not least given that this is ultimately the responsibility of the Executive branch. In these circumstances, it would be generally inappropriate to lay down any ex ante rules regarding solitary confinement. In this regard, the supervisory function which the Constitution ascribes to the courts must therefore often be confined, in the first instance, to prompting, guiding and warning the Executive branch lest these precious values of human dignity (in the Preamble) and the protection of the person (in Article 40.3.2) might inadvertently be jeopardised in any given case. Even as in cases such as Richardson and Kinsella, where a specific finding of constitutional violation is called for, absent compelling circumstances, it will generally be appropriate as an initial step to give the Executive branch (and, by extension, the Prison Service) an opportunity to remedy this breach in early course. (Emphasis added).

24. In these circumstances, it is sufficient to say that the placing of prisoners in solitary confinement (or, as here, something approaching solitary confinement) must generally be regarded as an exceptional measure which requires monitoring and regular review by the prison authorities. As illustrated by Kinsella, complete sensory deprivation – such as, has happened in that case, by placing the prisoner in a padded cell with no access to any facilities whatsoever or to any natural light – will generally be held to compromise the essence of the prisoner's Article 40.3.2 rights if this were to continue beyond a matter of days. (Emphasis Added).

25. As we have already noted, the applicant's own personal conditions are immeasurably better than those of the applicant in Kinsella. In that respect, he has not suffered anything like the almost complete sensory deprivation which was a feature of the latter case. It is also clear that Mr. Connolly's case is kept under regular review and that the prison authorities are anxious that he would leave the prison's restricted regime and re-enter the general prison population. It is also clear from the extensive clinical notes that the professional psychologists attached to the various prisons have shown him considerable care and attention and seem totally devoted to his welfare."

88. Hogan J. concluded that it could not "presently" be said that the circumstances of Mr. Connolly's detention violated the substance of the guarantees of Article 40.3.2 to protect the person yet he noted that if Mr. Connolly's detention under these conditions were to continue indefinitely for an extended period of months with no sign of variation the point might very well come when the substance of these constitutional guarantees would quickly be compromised and violated.

89. The respondent sought to rely on *Foy v. Governor of Cloverhill* [2010] IEHC 529 where the Court dealt with family rights in the context of screened visits. Charleton J. stated as follows *"the fact of imprisonment, of necessity, curtails the exercise of the rights guaranteed to the family under Article 41 of the Constitution. One of the entitlements of a married couple is to beget children. Imprisonment, however, undermines that right, since conjugal visits are not provided for in the Prison Rules, and since the passage of time will lead to aging and increased infertility. Nonetheless this restriction, or even destruction, of a fundamental family right can be lawful within the context of a harmonious interpretation of the Constitution;"* (Murray v. Ireland [1985] I.R. 532).

90. However in my view that decision deals with an entirely different point and is not intended to deal with issues such as arise in the present case.

91. The respondents also place some reliance on another decision of Charleton J. – *Walsh v. Governor of the Midlands Prison* [2012] IEHC 229 in which Charleton J. warned that continual review by the courts of the ordinary day to day decision of prison authorities carries a significant danger. Whilst I accept that this is so, nevertheless the Courts must be vigilant in ensuring that the constitutional rights of prisoners are not infringed or if they have to be infringed that they are only infringed in a necessary and proportionate manner.

92. It is of course a commendable fact that the respondent is acting to protect the physical health and safety of the applicant by holding him under r.63. However where a prison governor seeks to protect the physical health of a prisoner he cannot then subject that prisoner to a regime of solitary confinement which could significantly affect his mental health. It is clear - based on the evidence, based on international experience and based on common sense - that where a prisoner is kept in solitary confinement for a protracted period of time – and in particular in this case over 11 months – that there is a real and substantial risk that his mental health will be seriously affected. Indeed counsel for the applicant submitted that although the applicant had not reached a psychotic stage as yet, there was a grave risk that he would do so.

93. Fundamentally a prisoner who has committed certain crimes and is therefore imprisoned has many of his constitutional rights of necessity reduced. However his right to humane treatment within a prison must always be regarded as an important constitutional right which is not abrogated by the fact that he is a prisoner. The right to humane treatment is of necessity one which will depend on the facts of each case. Clearly however the fact that a prisoner can be detained in solitary confinement for over a period of almost a year cannot be regarded as humane treatment.

Conclusion
94. Thus in *Kinsella*, the applicant was subjected to solitary confinement for a period of eleven days in a padded cell and the Court held that such treatment was a violation of his constitutional rights; in *Connolly* the applicant was imprisoned in solitary confinement for a period of two and a half months (in cell conditions which were much better than those in *Kinsella* and also at his own request for his own protection) and the Court held said that such measures were to be "exceptional" and were to be regularly monitored and reviewed. In the present case the applicant has been in solitary confinement for a period of over eleven months by direction of the prison authorities and not at his own request.

95. In my view, keeping the applicant in conditions of solitary confinement for a period of over eleven months is clearly a breach of his constitutional right to bodily and psychological integrity. It is also a breach of his constitutional right to humane treatment. It follows inexorably from the decisions in Kinsella and Connollly. Indeed given the express statements by Hogan J., it is difficult to see on what basis the respondent has sought to justify detaining the applicant in solitary confinement for a period of over eleven months. It is clear that the longer a person is held in solitary confinement against his will - (even for his own protection) the greater the risk of damage being caused. This is such a clear and sustained violation of the applicant's constitutional rights that it requires a clear and sustained response by the prison authorities to adopt a more proportionate response, to improve his situation and to take immediate steps to allow the applicant access to more social interaction with other prisoners (if only on his own landing), to partake in structured activities, to have access to a gym and to have regular access to the psychological services in the prison.

96. I accordingly find that the conditions under which the applicant has been detained constitute a violation of his constitutional rights and that the State has failed to vindicate that right in the manner required in Article 40.3.2 of the Constitution.

IS THE BREACH OF CONSTITUTIONAL RIGHTS LAWFUL?

(I) The end- date of Regulation 63 directives
97. Regulation 63 (3) (e), of the prison rules provides that *"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*

> *(e) the date and time when the separation ceases."*

98. In the present case, the Regulation 63 direction, under which the applicant is currently detained in solitary confinement, does not state the date and time when the separation ceases. On that ground alone therefore the current direction fails to comply with the statutory instrument and is therefore unlawful on its face.

99. The respondent sought to argue that this was a mere technical breach. However in my view this submission is unfounded, particularly on the facts of the present case. The applicant has been detained in solitary confinement for almost a year. This has simply been renewed every three or four weeks and on every occasion (except one), the date and time when the separation was due to end has not been recorded on the Regulation 63 direction. If there is no end date, the Regulation 63 direction is a direction that the prisoner be kept in solitary confinement indefinitely - without being informed when that period of solitary confinement ceases. That is a substantive, not a technical breach. It is absolutely essential - particularly when a prisoner is being kept in solitary confinement against his will, that the date on which that r.63 direction ceases is stated clearly on the face of the direction.

100. Counsel for the respondent referred to various cases where he submitted that the breaches were mere technical breaches. However in my view those cases are entirely different to the factual circumstances under review in this case. (See *De Roiste v Minister for Defence* [2001] 1 IR 190, *In Re Stephen Hunter* [1989] NIJB 86, *Rock v Governor of Arbour Hill* [Unreported Kearns P, 6th February 2015]). I would therefore conclude that the breaches are not technical but substantive and on that ground alone the current r.63 direction is unlawful.

101. The previous r.63 directions under which the applicant has been kept separate from other prisoners have also been exhibited with the affidavit evidence. I have reviewed each of them. As counsel for the Irish Human Rights and Equality Commission submitted in her legal submission, almost every direction under which the applicant has been detained in solitary confinement fails to note on the face of the direction the date and time when the separation ceases. They also were therefore unlawful on their face.

(II) Involvement of the Governor
102. A second issue which has arisen in this case is that under r.63 a prisoner may only be kept separate from other prisoners who are reasonably likely to cause significant harm to him either at his own request "or when the Governor considers it necessary". Likewise it is clear from r. 63 (2) that a prisoner may participate with other prisoners of the same category if the Governor considers that such participation is reasonably likely to be beneficial and such activity shall be supervised in such manner as the Governor directs. Likewise r. 63 (2) provides that the Governor shall make and keep in the manner prescribed by the Director General a record of any direction given under this rule.

103. However there is nothing in any of the affidavit evidence before the Court which establishes that the Governor of Wheatfield Prison has addressed his mind to any of the r.63 directions which were made in the case of this prisoner. The affidavits in this matter are all sworn by the assistant governor; all the r.63 directions are signed by another official in the prison. I would therefore find on the evidence that in relation to the current r. 63 direction, there is no evidence that the Governor has made a decision that he considers it necessary that a prisoner should be kept separate from other prisoners. On that basis also I find that the current direction under r.63 is unlawful.

104. However both of the above defects can clearly be remedied by the making of a fresh r.63 direction in which the Governor himself makes the direction and the date and time on which the separation ceases is stated on the face of the order. These proceedings however are addressed to a much more fundamental issue - namely whether it is constitutionally permissible or proportionate that the applicant should be kept in solitary confinement for a period of eleven months for his own protection.

IS THE BREACH OF CONSTITUTIONAL RIGHTS NECESSARY AND/ OR PROPORTIONATE?
105. It is clear from the above review of the authorities that any infringement of a prisoner's constitutional rights must be necessary and proportionate. (See *Holland, Heavey, Devoy*).

106. In the light of the affidavit evidence and legal submissions filed before the court I am of the view that the actions of the respondent in keeping the applicant in what amounts to solitary confinement for a period of eleven months are not only an infringement of his constitutional rights to bodily and psychological integrity but are also entirely disproportionate to the perceived risk to the applicant. I say this for a number of reasons:

> (1) R.63 provides that a Governor may, where he considers it necessary, keep a prisoner separate from other prisoners "who are reasonably likely to cause significant harm to him". This does not permit the Governor to keep a prisoner separate from all other prisoners even those who are not likely to cause harm to the applicant. To remove a prisoner from the general prison population for his own protection is reasonable; to prevent him from associating with all prisoners on his own landing and in his own wing (where there is no evidence they are likely to cause harm to him) is utterly disproportionate to the objective- i.e. to keep the prisoner safe.
>
> (2) Moreover it is also not proportionate to refuse the prisoner access to a reasonable amount of participation with other prisoners of the same category in authorised structured activity that the applicant may wish to attend. It appears that the respondent has denied the applicant reasonable access to authorised structured activity with other prisoners. This is also disproportionate to the objective, i.e. the protection of the applicant.
>
> (3) Sections 11 to 16 of the Prisons Act 2007 set out the statutory sections dealing with prison discipline. S.13 of the Act sets out the sanctions available to a governor for breach of prison discipline. Section 13 (1) (c) provides that one of the sanctions is "confinement in a cell…for a period not exceeding three days". Moreover s.13 (7) expressly provides that the following sanctions for breach of a prison discipline are prohibited

"(j) a sanction of indeterminate duration;"

Thus it is clear that the Oireachtas clearly intended that solitary confinement could only be used as a sanction for breach of prison discipline and then only for a finite period and indeed for only a period of three days.

A *fortiori,* the Legislature could not have intended that the prison authorities could impose a regime of solitary confinement on any prisoner for a period in excess of eleven months where he has committed no breach of prison rules. Such a regime is utterly disproportionate to the statutory scheme envisaged and indeed utterly disproportionate to the objective being sought namely to protect the prisoner from certain other prisoners who might harm him.

(4) There is a duty on the prison authorities to protect the health of prisoners. In circumstances where there is a positive duty on the State to take appropriate steps to protect the health of a prisoner, then it follows that the prison authorities should not take any steps which would have the effect of harming the health of a prisoner – even if it is for his own protection. Whilst there might be exceptional circumstances in which the prison authorities may have to confine a prisoner to solitary confinement for his own protection, that must be limited to extreme cases and every effort must be made at the first available opportunity to improve the prisoners situation in this regard.

Whether r.63 includes a provision for review
107. One of the issues which arose in this case is whether r.63 requires that the governor should monitor and review such r.63 directions at regular intervals. In this regard the applicant submitted that r.62 contains an express review provision at r.62 (4). However the applicant submitted that the absence of any express provision relating to a review in r.63 does not automatically relieve a Governor of the duty to review such a direction.

108. In my view such a submission is correct for the following reasons

> (1) Regulation 63 (3) (e) provides that the Governor shall make and keep a record of any direction given under this rule and in particular the date and time when the separation ceases. The fact that it is a specific statutory requirement that the cessation date of a direction is required when making a direction order means such directions must be of a limited duration. Thus when the direction expires it automatically becomes subject to a review.

(2) When a r.63 direction is made (and in particular when that results in a prisoner being kept in solitary confinement for a significant period of time e.g. three or four weeks) then in my view such a solitary confinement becomes a "prolonged solitary confinement". In order to ensure the proper protection of a prisoner's constitutional rights there would need to be a review when a prisoner moves from a situation of solitary confinement to one of "prolonged solitary confinement". The question of when a prolonged solitary confinement might arise may depend on the circumstances of the case. However in my view a period of three or four weeks would certainly constitute prolonged solitary confinement.

(3) As is stated in *Killeen v. Governor of Portlaoise Prison* [2014] IEHC 77 Hedigan J. noted (at para. 6.9) that r.62 did not expressly provide for a review where the director general exercised his powers to segregate a prisoner but he held that the rules

> *"must be read in a constitutional manner and therefore it seems to me that some form of review analogous to that provided by r.62(4) must be read into r.62(9) so as to render lawful any authorisation given thereunder. It seems to me that the director general ought to review any removal ordered under this rule at least once every three months or upon request by the prisoner or his legal advisers providing such requests are not made vexatiously. Such review ought to be carefully recorded and should comply mutatis mutandis with the provisions set out in r.62 (6), (7) and (8). The director general should give the prisoner or his legal advisors the opportunity to consider the grounds advanced for further removal prior to authorising any continuation of their removal. The prisoner or his legal advisor should be notified promptly by the director general of his decision together with the reasons therefore. Full, detailed records of this process should be accurately kept so as to assist the court in any further application in considering the lawfulness of continuing segregation."*

The European Convention on Human Rights

109. In the present case, counsel for the applicant has not sought to argue that the continued solitary confinement of the applicant amounts to torture, or cruel, inhuman, or degrading treatment. In my view counsel was correct to do so. It is clear that the motivation of the prison authorities is to seek to protect the prisoner from coming to further harm in the prison. Therefore the only question which arises is whether keeping the applicant in solitary confinement continuously is a necessary and/or a proportionate response to the threat to his safety.

110. I have considered the submissions and the case law relied on by the applicant in relation to the cases of the European Court of Human Rights in respect of Article 3 of the European Convention of Human Rights. However, in the light of my conclusions in relation to the breach of his Irish constitutional rights, and in the light of the substantial overlap between the jurisprudence of the Irish courts and the European Court of Human Rights, I do not believe it is necessary for me to elaborate on this further.

Correspondence with solicitors

111. In addition the applicant has also sought an order of mandamus compelling the respondent to furnish the information sought in his solicitor's correspondence. Whilst I accept that the applicant's solicitors complain about the failure of the respondent to reply at all or to reply in a proper and full manner to their correspondence, nevertheless I am of the view that many of the issues which they raised in their correspondence have now been dealt with in replying affidavits and in legal submissions before the court.

112. I also note the applicant's solicitors complaint that at a time when they were corresponding with the respondent the respondent made a number of additional r.63 orders without informing the applicants solicitors in advance of these new orders and giving the applicant an opportunity to made meaningful submissions in respect of them.

113. There is considerable merit in the applicant's complaints in this regard and it is important to note that where there are solicitors corresponding with the prison authorities, it is important that the prison authorities respond to such correspondence as best they can and on the basis of their own legal advice. In this regard I note the words of Hedigan J. in *Killeen* in which he noted at para. 6.9 of his decision

> *"The director general should give the prisoner or his legal advisers the opportunity to consider the grounds advanced for further removal prior to authorising any continuation of their removal. The prisoner or his legal adviser should be notified promptly by the director general of his decision together with the reasons therefore."*

CONCLUSIONS

114. I would therefore conclude as follows:

(1) The applicant has been convicted of murder and he has been given a mandatory life sentence (although he has appealed this conviction and he is currently awaiting his appeal to the Court of Appeal.) However as a prisoner he nevertheless retains certain constitutional rights. (See *State (Richardson) v. Governor of Mountjoy Prison*).

(2) Among these rights is the right to bodily integrity (*Ryan v. The Attorney General; State (C) v. Frawley*) and indeed the right to psychological and/or mental integrity (*Kinsella v. Governor of Mountjoy Prison; Connolly v. Governor of Wheatfield Prison*).

(3) The applicant has been detained for at least eleven months – but almost certainly longer – in solitary confinement. (Although the regime is described as "22 or 23 hour lockup" it is to all intents and purposes solitary confinement.)

(4) The applicant has been detained in solitary confinement pursuant to an r.63 direction made by the governor of the prison because there is a credible threat to the safety of the applicant according to the governor. However the applicant does not accept that there is such a threat to his person and it is the case that he has been detained in solitary confinement against his will. He has not requested it.

(5) The Prison Rules must be interpreted and applied in a manner consistent with the Constitution and the constitutional rights of prisoners. Moreover any infringement or restriction of such constitutional rights must be proportionate. (see *Holland v. Governor of Portlaoise Prison; Heaney v. Ireland*).

(6) It is a strict requirement of regulation 63 (3) (e) that the end date for such directions be stated on their face. In almost every r.63 direction made in respect of the applicant in this case, stretching back over a period of eleven months,

no such end- date has been stated on any of the directions (with one exception). On that ground alone the r.63 directions are unlawful on their face. Thus the latest r.63 direction dated 14th January, 2015 has no end date and on that ground alone it is unlawful on its face.

(7) Moreover r.63 requires that the Governor of the prison must make such a direction. There is no evidence before the Court that the Governor in this case has made such a direction. On that basis alone also the current r.63 direction is unlawful.

(8) The fact that the applicant has been kept in solitary confinement for a period of eleven months is a clear and sustained violation of his constitutional right to bodily and psychological integrity.

(9) It is clear beyond doubt that if these conditions were to continue there is a real and substantial risk to the mental and psychological health of the applicant. Indeed there is evidence before the court that the applicant's psychological and mental health is beginning to suffer.

(10) It is also a principle of constitutional interpretation that any steps taken to infringe the constitutional rights of persons must be proportionate to the objective being pursued by the person seeking to infringe such a right. See *Holland; Devoy; Killeen*.

(11) The r.63 directions are justified by the governor on the basis of the applicant's own protection. Whilst I accept that this may be the intention, the keeping of a prisoner in solitary confinement for over eleven months is wholly disproportionate to the risk to the applicant. There are many other steps which could be taken to protect the applicant from harm whilst at the same time not keeping him in solitary confinement.

(12) Under the Prison Rules no prisoner can be punished with solitary confinement for more than three days by the governor. In this case the prisoner has been kept in solitary confinement for a period of over eleven months against his will – not as a punishment - but ostensibly for his own protection. In my view such treatment of the prisoner whilst not intended to be a punishment quite clearly has an effect similar to a punishment. It is a *de facto* punishment if not a *de jure* one.

(13) Whilst I am acutely conscious of the difficulties which arise in running a prison, the courts must be vigilant to ensure that the constitutional rights of all prisoners are protected. Prisoners are citizens of the Republic, and after making due allowances for the necessary infringement of their constitutional rights, (which must follow because of the crimes which they have committed,) they are nevertheless entitled to the full protection of the constitutional rights which remain to them.

(14) It is clear from the international perspective, the European perspective and the Irish constitutional perspective, that solitary confinement can cause significant mental and psychological harm to prisoners. It is only to be used in exceptional circumstances and then – most critically - for a limited period of time. Indeed the UN study describes solitary confinement in excess of fifteen days as "prolonged solitary confinement". Whilst one could take issue with a period of fifteen days and whilst it is impossible at this point to lay down precise periods, I would have thought that any period of solitary confinement longer than three or four weeks is certainly "prolonged solitary confinement". After this period of time there should be an intensive review of such cases and more intensive management of such prisoners to ensure that such conditions can come to an end at the earliest possible time.

(15) In the circumstances I would conclude

(1) That the applicant has a constitutional right to bodily and psychological integrity.

(2) That there has been a breach of these constitutional rights.

(3) That such a breach is unlawful and neither necessary nor proportionate to the perceived threat to his person.