

HIGH COURT
JUDICIAL REVIEW

[2015 No. 87 JR]

BETWEEN**DANIEL MCDONNELL****APPLICANT****AND****THE GOVERNOR OF WHEATFIELD PRISON (NO. 2)****RESPONDENT****JUDGMENT of Mr Justice CREGAN delivered on the 20th day of March, 2015****Introduction:**

1. This is an application brought by the Applicant pursuant to a previous judgment of mine, in *McDonnell v The Governor of Wheatfield Prison* Record No. 2014/ 636 JR (delivered on the 17th February, 2015). In that case I held:

- (1) That the Applicant had a constitutional right to bodily and psychological integrity.
- (2) That there had been a breach of these constitutional rights.
- (3) That such a breach was unlawful and neither necessary nor proportionate to the perceived threat to his person.

2. Subsequently, the same Applicant brought an application for further reliefs. The reliefs sought in this set of proceedings, as set out in the Statement of Grounds, dated 20th February, 2015, are for:

- (i) An injunction restraining the Respondent from further breaching the Applicant's constitutional rights to bodily and psychological integrity.
- (ii) An injunction directing the Respondent to vindicate the Applicant's constitutional rights to bodily integrity and psychological integrity when managing the conditions of the Applicant's detention.

Summary of Affidavit evidence:**Applicant's Affidavit**

3. In the affidavit of Ms Deborah Cody, sworn on the 20th February, 2015, for and on behalf of the Applicant, it is deposed that:

- (1) The Applicant has remained on 23 hour lock - up and there have been no changes to his condition of detention since the judgment was delivered.
- (2) The Applicant's requests to associate with two other prisoners were declined by Governor Kavanagh.
- (3) The Applicant has been attending the gym in East 2 on his own three times a week since the week of the 9th February - however, he would prefer it if he could go to the gym with other prisoners.
- (4) The Applicant believes there are no issues between himself and another named prisoner and in that regard points to the fact that they were both brought down to the visiting area together one Tuesday and there was no tension or disagreement between them.
- (5) The Applicant gave his solicitors express instructions that he wanted his solicitors to make any applications to the High Court they considered appropriate to vindicate his rights.

Respondent's Affidavit

4. In the affidavit of Patrick Kavanagh, Governor of Wheatfield Place of Detention, sworn on the 26th February, 2015, it is averred that:

- (1) The Applicant is currently detained under rule 63 pursuant to a decision made by the Governor that the Applicant be kept separate from other prisoners who are reasonably likely to cause him significant harm.
- (2) The prisoner is being detained on the West 2 landing. (West 2 is a secure area to which other prisoners in the general population do not have access).
- (3) The Governor is of the belief that all of the other prisoners on West 2 are reasonably likely to cause significant harm to the Applicant.
- (4) Five prisoners have remained on West 2 for longer than is normal; three, (including the Applicant) are there due to a serious threat to their lives.
- (5) Although the Applicant states he can mix with certain prisoners, the Governor does not deem it safe for him to associate with any of them at this time.

(6) The Applicant was transferred to Wheatfield Place of Detention from Mountjoy prison in February 2014 for safety reasons.

(7) Upon his arrival in Wheatfield, the Applicant was originally associating with two other prisoners; however, the Applicant fell out with these in June 2014 and did not then associate with other prisoners. Due to the fluid nature of the population on West 2 and the serious threat against Daniel McDonnell, he has been unable to associate with other prisoners on the landing.

(8) The Applicant has, in total, 89 disciplinary reports, the most serious of which are assaults on staff and prisoners, attempted assaults on staff and prisoners and threats to staff.

Oral Evidence of the Respondent

5. Governor Kavanagh gave oral evidence in relation to this matter. Mr. Kavanagh joined the Irish Prison Service in 1989 and has 26 years experience in the Prison Service. He spent 19 years in Mountjoy Prison and various times in other prisons. He spent three years as Governor of Loughan House Prison. Three years ago he was appointed as one of the governors in Wheatfield and he is now the operational governor in Wheatfield. He gave evidence about the exact conditions on the West 2 landing in which the Applicant is currently imprisoned.

6. There are ten ordinary cells on this landing. At paragraph 10 of his replying affidavit, Mr. Kavanagh had stated that all the other prisoners on the West 2 landing were reasonably likely to cause significant harm to the Applicant. Mr. Kavanagh gave evidence to expand upon this averment. The position in relation to the ten cells is as follows

(1) The Applicant is in one cell.

(2) Prisoner 2 is in another cell. This prisoner is also in the r. 63 detention for his own protection because there is, the Governor believes, a serious threat to his life also. Indeed he has already been the subject of one assault. There are issues between the Applicant and prisoner 2 and they apparently have fallen out. The Applicant believes however that he could associate with this prisoner. This prisoner does not pose a threat to the Applicant.

(3) The prisoner in cell number 3 (prisoner 3) does not wish to associate with the Applicant. However, he does not pose a threat to the Applicant.

(4) The prisoner in the fourth cell is a prisoner with mental health issues and a propensity for violence. He has committed numerous assaults on staff and prisoners. He has also made a specific threat against the Applicant. Therefore the Respondent is of the view that it would not be in the Applicant's interest or safety to associate with this prisoner.

(5) The prisoner in cell 5 is also a volatile and violent and dangerous prisoner. There are numerous incidents within the prison where he has assaulted other prisoners or prison officers. Again the Respondent has fears for the Applicant's safety if he associates with this prisoner.

(6) The prisoner in the sixth cell is a prisoner who has 65 offences for assaults on staff and other prisoners. He has a propensity to violence. In the Governor's view it is not safe to risk the Applicant in his company. The Applicant has indicated a wish to associate with this prisoner but the Respondent is of the view that it is not safe to risk the Applicant in this prisoner's company.

(7) The above are all the longer term prisoners in West 2 under r.62 or r.63. In addition, in the seventh cell, there is a prisoner awaiting a bed in the Central Mental Hospital and the Respondent is of the view that it would not be appropriate for the Applicant to associate with him.

(8) In the eighth cell there is a prisoner from Portlaoise who is the subject of a disciplinary procedure within Portlaoise Prison and who has been sent to Wheatfield. However either of these prisoners could be removed from West 2 Wing at any stage.

(9) In relation to the eighth cell there is one person who is there on r.62 – for disciplinary offences and the Governor is of the view that this person also is not an appropriate person with whom the Applicant could associate.

(10) Cells 9 and 10 – prisoners in these cells have assaulted prison officers and the Respondent is of the view that it would be dangerous for the Applicant to associate with these prisoners also.

7. Again and again Governor Kavanagh stated emphatically that the Applicant was at serious risk in Wheatfield Prison of suffering harm to his life or his health by virtue of attacks from other prisoners. Moreover Mr. Kavanagh stated that, based on his long experience in prisons, it is his view that prison officers and governors cannot always see where a threat might come from against a particular prisoner. Thus, whilst he is aware that there is a serious risk to the life of the Applicant from persons associated with the family and associates of the victim, the threat does not only come from those associates who are apparently in prison. These associates might use other prisoners to carry out their wishes to assault the Applicant. I am satisfied therefore, based on the evidence which I have heard, that there is a real risk to the life and/or health of the Applicant from many of the other prisoners in the West 2 landing, (with the exception of prisoners 2 and 3). However the Governor did also state that the situation in the West 2 landing is fluid and new prisoners come and go on a regular basis.

8. Mr. Kavanagh also gave evidence that the West 2 landing is a secure area and there are not many such secure units as this within the prison system.

9. He also gave evidence that many of the prisoners within the West 2 landing cannot associate with each other because of difficulties between them. This requires considerable organisation on the part of the prison officers on this landing. Thus, if one prisoner is being taken to make or receive a phone call or to exercise in the yard, it is often the case that all the other prisoners have to be locked back in their cell whilst these prisoners are being taken out of the landing.

10. Indeed Mr. Kavanagh gave evidence that the Applicant is in danger in every prison in Ireland by virtue of the crime he committed and the fact that associates of the victim of that crime have threatened to harm him. In the Governor's view the safest place for him

to be, in the Prison Service, is in Wheatfield in the West 2 Wing.

11. Importantly Governor Kavanagh also stated that, if the Applicant and another prisoner could associate together, he would arrange that in the morning. He also stated that he and his colleagues monitor the situation every day.

12. Various options to improve the Applicant's situation were put to the Respondent in examination in chief, in cross - examination and also in questions from the Court. It is clear that this is a difficult situation to manage.

13. In relation to education, the Governor indicated that the education services are contracted into the prisons and the City of Dublin Education and Training Board is in a position to allocate only a limited amount of resources to Wheatfield. These resources must be used for the benefit of all the prisoners. While the Governor would wish to have normal classes with as many prisoners attending as possible, this is simply not possible given the often violent incidents that arise between prisoners from time to time. As a result many of the classes have to be taken on a one to one basis which clearly reduces the amount of time spent on education and therefore the efficacy of this resource.

14. Likewise Mr. Kavanagh gave evidence that if prison officers could bring three or four groups to the gym together that would permit these prisoners to associate together and also would be a better use of resources. However this is not always possible given the animosity between certain prisoners.

15. In relation to the psychology services, Governor Kavanagh stated that the psychological services are also independent of him but certainly are a part of the Irish Prison Service. He does not have any authority to direct them as to what to do. In addition, the prison psychologists have lengthy waiting lists to see various prisoners within Wheatfield. Moreover the Applicant has been disengaged from these psychological services for some time. However he did indicate that the prison psychologist would certainly engage with the Applicant.

16. Governor Kavanagh indicated that there are approximately eight prisoners in Wheatfield who are currently being detained in solitary confinement.

17. Mr. Kavanagh also gave evidence that - looking at the bigger picture - major efforts have been made to improve the situation of prisoners who are in solitary confinement. A little over a year ago the Director General of the Prison Service initiated a process to try to improve the situation. At that time there were approximately 230 people in solitary confinement throughout various prisons in the state. The Director General set up a high level group of prison governors, including Mr. Kavanagh, to reduce the numbers of prisoners in solitary confinement. This process has been very successful and has reduced the figures of prisoners held in solitary confinement by 80% in the first three months. This group meets monthly or every two months. Mr. Kavanagh's evidence was that all the prison governors are actively trying to reduce the number of prisoners in solitary confinement as they are acutely aware of the issues. However resources are limited.

18. In cross - examination, Mr. Kavanagh accepted that the Applicant's conditions of detention were regrettable but he stated that he believed that the Applicant's life was in danger and he had a statutory obligation to keep the Applicant safe and alive.

19. Governor Kavanagh gave evidence that he was of the view that his options were very limited. He said the circumstances had not changed since the date of the judgment such that he could safely let the Applicant associate with anyone without fear for his safety.

20. Governor Kavanagh's evidence was that nothing had changed since the date of my first judgment. He indicated that he was trying to ameliorate the Applicant's position but that it was very difficult to do so in the current circumstances.

21. Mr. Kavanagh also indicated that, as things currently stood, he envisaged the Applicant remaining on solitary confinement for many more years. His view was that there may be a time when the risk to the Applicant decreases but that it was too early in the Applicant's term of imprisonment to say when that might be.

22. In response to a question in cross - examination as to what is going to change in the Applicant's condition the Governor stated that he could not answer that question. In response to a question in cross - examination as to whether the Applicant would therefore remain in solitary confinement indefinitely the Governor replied yes.

23. The Governor was asked whether highly trusted prisoners could associate with the Applicant. The Governor's evidence was that they could but this would always carry the caveat that they could cause harm to the Applicant because they in turn could be coerced into doing so by other prisoners who had a grievance against the Applicant.

Adjourned hearing

24. The hearing was adjourned for a period of two weeks to allow Governor Kavanagh to consider what steps could be taken to ameliorate the Applicant's conditions. At the resumed hearing, Governor Kavanagh gave evidence on the following matters:-

(i) The applicant's current safety status

25. Governor Kavanagh indicated that he was still extremely concerned about the Applicant's current safety status. He reiterated that the Applicant was in significant danger in every prison in Ireland, including Wheatfield Prison. He also gave evidence that, in fact, the Applicant was attacked two days earlier on the West 2 landing in an entirely opportunistic attack by another prisoner on the same landing who just happened to be passing the Applicant. The prison officer in charge of the other prisoner was not aware that the Applicant was on the landing as he was leading the assailant through the landing. The Applicant was punched and suffered a black eye. The Applicant had done nothing at the time in question to provoke the attack. The Governor emphasised he did not know where the danger to the Applicant might come from on any given occasion.

(ii) Listeners

26. The Governor indicated that the Applicant could avail of the listener's service between 8am and 8pm. Listeners are usually former prisoners who are prepared to listen to the concerns of current prisoners. It is, however, a finite resource and is resource intensive. However, the Governor indicated that if the Applicant made a request during the day that the Respondent would accede to the request or would certainly do all in its power to accede to this request. He did indicate, however, that this would have a knock - on effect on other prisoners.

27. The Governor also indicated that there was a religious sister who called into prisoners on a regular basis and the Governor had spoken to her. She indicated that she would call in to see the Applicant on a regular basis.

(iii) Transfer to other prisons

28. The Governor indicated that he had spoken to the Director of Operations about transferring the Applicant to another prison. He indicated that the response was that this was "out of the question" as the West 2 landing was the safest position for the Applicant to be in, in the prison service. (I note, moreover, that the Applicant himself does not wish to be transferred to another prison outside Dublin as he receives family visits in Dublin prisons).

(iv) Psychological services

29. The Governor also indicated that Dr. Ruth Kevlin, a Senior Psychologist, visited the Applicant with a colleague. The Applicant has agreed to engage with the psychological services of the prison.

30. In addition, Dr. Sally Lenihan, the Head of the Central Mental Hospital Psychiatric In-reach Team had also been contacted by Governor Kavanagh. She had indicated that she would have no problem in assessing the Applicant. However, the protocol was that the GP in Wheatfield should first attend on the prisoner and file a request. Dr. Laszlo Suto, the Prison GP, subsequently attended on the Applicant and filed the necessary report to trigger the psychiatric in-reach programme. In one of his attendances, the Applicant informed Dr. Suto that he felt depressed. This was the first occasion on which he had told the GP that he was beginning to suffer from depression. As a result, Dr. Suto made contact with the psychiatric services and Dr. Sally Lenihan attended on the Applicant in Wheatfield Prison. Dr. Lenihan subsequently indicated that the Applicant had given permission to her to inform the Governor that she had met with the Applicant but the Applicant had not given any consent to Dr. Lenihan to inform Governor Kavanagh about his medical condition. The Governor said he would obviously respect this on grounds of medical confidentiality.

31. However, it appears from the affidavit of Deborah Cody, the Applicant's solicitor, sworn on behalf of the Applicant that the Applicant was administered anti - psychotic medication. Thus, there is evidence before the court that the Applicant is beginning to suffer from depression and that he has been administered anti - psychotic medication.

(v) Other prisoners

32. Governor Kavanagh also indicated that he had spoken to two specific prisoners, prisoners 2 and 3, about associating with the Applicant. The Governor indicated he had spoken to both separately. Whilst initially both prisoners had indicated that they might be prepared to associate with the Applicant - reluctantly - subsequently, both prisoners wrote to the Governor on that same day stating that they did not wish to mix with the Applicant.

(vi) Time out of cell

33. Governor Kavanagh also gave evidence about time sheets which had been kept in respect of the Applicant for the last two weeks. He gave detailed evidence of the time spent out of the cell by the Applicant in particular, for the last seven days. His evidence was although he had not averaged it out precisely, the Applicant was spending approximately two and a half hours per day out of his cell. Thus, for example:-

(a) On 5th March, 2015, the Applicant had spent two hours and twenty minutes out of his cell on cleaning duties, exercise and taking a phone call.

(b) On 6th March, 2015, the Applicant had spent two hours and twenty minutes out of his cell on cleaning duties, exercise yard, a professional visit and on a phone call.

(c) On 7th March, 2015, the Applicant had spent three hours out of his cell on cleaning duties, exercise and having a doctor's visit.

(d) On 8th March, 2015, the Applicant had spent two hours and fifty minutes out of his cell including an hour in the gym, an hour in the exercise yard, fifty minutes at the barbers and twenty minutes with a visit.

(e) On 9th March, 2015, the Applicant had spent two hours and twenty minutes out of his cell on cleaning duties, exercise yard and with the visiting nun. He had, however, declined school.

(f) On 10th March, 2015, the Applicant had spent three hours and thirty five minutes out of his cell. This included a visit from the GP, a family visit, cleaning duties, exercise yard, visit with the psychological staff *etc.* However, the Applicant was also assaulted on this day.

34. Governor Kavanagh, however, indicated that the Applicant's position had not changed much over the last two weeks. He did state, however, that going forward; every effort would be made to get the Applicant out of his cell as much as possible. He also indicated that psychological and psychiatric services were available to him and that the medical and listener services were available to him.

(vii) The Applicant's list of persons he could associate with

35. In an affidavit of Ms. Deborah Cody, the Applicant's solicitor, Ms. Cody set out a list of persons the Applicant said he could associate with. However, Governor Kavanagh indicated that the Applicant may not know all these prisoners well or, in particular, their contacts with other prisoners. The Governor reiterated that he could never be sure where any danger to the Applicant could come from and reiterated that the Applicant was in "grave danger". Given that the Applicant has stated in some of his forms that he does not believe that there is a danger to him from the prison population and given the emphatic evidence of the Governor, it is clear that the Applicant is not the best judge of the danger to his own safety from within the prison. I am not satisfied therefore that the list of persons which the Applicant has named are persons who could safely associate with the Applicant.

(viii) The family room

36. The Governor also gave evidence that there is a family room available to prisoners to meet with other members of their family. It is a more informal room and if the Applicant wished to use that, then the Governor agreed he could seek to organise that. However, it is only available for four hours each day, seven days a week and it is allocated among all prisoners and particularly all prisoners serving a life sentence. Moreover, it does require an allocation of staff and the Governor indicated that he often has staff shortages or resource difficulties. However, he indicated that he would make that available for the Applicant.

37. In cross - examination, Governor Kavanagh accepted that most prisoners do not get to decide whom they associate with and whom they do not.

38. The Governor stated that if he were to make a list of the top ten most vulnerable prisoners in the Irish Prison Service, the Applicant would be number one on the list at the moment.

39. It is clear from the affidavit evidence that after my judgment (delivered on 17th February, 2015), in which I held that the Applicant's constitutional rights to bodily and psychological integrity had been breached and that such a breach was unlawful, the Respondent moved to cure one legal defect in his detention under rule 63. Thus, the Applicant was again detained under rule 63 on 24th February, 2015, with an end date of 23rd March, 2015. This document is also signed by the Governor. Thus, two elements of the unlawfulness of the regime which had been identified in my earlier judgment have now been cured. It is, however, clear from the evidence of Governor Kavanagh that he intends to keep the Applicant in solitary confinement for the foreseeable future.

Submissions on behalf of the Respondent

40. The first argument of the Respondent is that it has not been established that the Respondent is continuing to breach the Applicant's constitutional rights. As part of this argument, the Respondent submits that the burden of proof is on the Applicant to prove that his constitutional rights are being infringed and that the Applicant has not established that in this second case.

41. As part of that submission, the Respondent submitted that my conclusions in my earlier judgment were that the Applicant's constitutional rights were being infringed "in the light of the affidavit evidence and legal submissions filed before the Court". It was submitted that one of the elements of my first judgment was that there was no evidence that other prisoners in the West Wing would cause the Applicant harm. It was further submitted that I have now heard a lot more evidence in the second case, that other prisoners, both in the general prison population, and on the West Wing, would cause harm to the Applicant. As a result, it is submitted that the Applicant has not established a continuing breach of his constitutional rights. It is submitted that the Applicant's current conditions are designed to vindicate firstly, his right to life – which is the most important right guaranteed to a prisoner – and secondly, his right to bodily integrity.

42. Whilst I accept that there has been considerably more evidence adduced in the second case than in the first case, and whilst Governor Kavanagh's evidence has been helpful to me in giving me an overview of the real problems faced by the prison authorities in managing a prisoner such as the Applicant, I do not agree with the central submission that there is no ongoing breach of the Applicant's constitutional rights. The Governor is still keeping the Applicant separate from all other prisoners even those who are not likely to cause harm to the Applicant. Whilst I have certainly heard evidence that there are other prisoners on the West 2 landing who might cause harm to the Applicant – which evidence I did not have in the first case – nevertheless, it is also clear that there are other prisoners on the West 2 landing who, on the Governor's own evidence, would not be regarded as persons who would cause a threat or cause harm to the Applicant.

43. Moreover, I am particularly concerned by the fact that s. 13(7) of the Prison Act expressly provides that a sanction of indeterminate duration for prison discipline is prohibited and more particularly, s. 13(1)(c) of the Act provides that one of the sanctions is "confinement in a cell for a period not exceeding three days". Thus, the Legislature intended that prisoners should not be kept in solitary confinement for a period of longer than three days for a breach of prison discipline. In the present case, the Applicant has now been held in solitary confinement for a period of twelve months even where he has committed no breach of prison discipline.

44. Moreover, the evidence is that the Applicant is beginning to suffer from depression and that he has received anti - psychotic medication based on a psychiatric assessment. In those circumstances, given that his conditions of detention have not changed in any meaningful manner, I am of the view that there is a continuing breach of his constitutional rights to bodily and psychological integrity.

45. The second submission made by the Respondent is that an injunction is always a discretionary remedy and in this case, the court should be cautious about granting an injunction because of the particular difficulties about the operation of a prison. I was referred to *Prison Law* by Rogan at para. 914, in which the learned author states as follows:-

"The question of how far the courts will intervene in prison administration is also at issue when it comes to the remedies a court may direct. Mandamus is a difficult remedy to obtain in a prison context, but may be given in an appropriate case. MacMenamin J in Mulligan interpreted the decision of The State (Richardson) v. Governor of Mountjoy Prison [1980] ILRM 82 as recognising that in an appropriate case a court:-

'has jurisdiction to actually direct improvements in prison conditions where warranted to vindicate a constitutional right, and where the vindication of such right is not constrained by boundaries such as practicability. Thus, for example, were it to be established that there was an ongoing and serious threat to a prisoner applicant's health, the vindication of that constitutional right could warrant a court in intervening by way of mandamus. The protection and vindication of that right might then have to be balanced against other constitutional provisions.'"

46. Counsel for the Respondent also placed some reliance on the passage at p. 308 of Rogan which stated as follows:-

"In Devoy v. The Governor of Portlaoise Prison [2009] IEHC 288, Edwards J. also discussed the discretionary nature of remedies in judicial review proceedings. There the right of a prisoner to association was at issue. The prison authorities had argued that the reason for the use of separation in the case had been fears for the safety of others should association be granted. Edwards J. held that the Governor had not acted in accordance with the requirements of rule 62 of the Prison Rules. A declaration to that effect was granted. However, the court refused to grant certiorari in order to quash the decision. Edwards J. held:-

'Although in most circumstances an applicant for judicial review who has established that a decision which he has sought to impugn was unlawful will be entitled ex debito justitiae to an order of certiorari, it would be wholly inappropriate to grant this relief to this particular applicant in the circumstances of this case. The State and its agencies have a duty to protect life. This Court, although part of the judicial arm of government, is nonetheless an agency of the State and is equally bound by that duty.'"

47. However, the facts in *Devoy* are different to the facts in this case. Indeed, on p. 85 of his decision, Edwards J. stated:-

"The Court is against the applicant in his contention that his regime of detention amounts to isolation and that by virtue of the restrictions that have been imposed on his ability to associate that his detention is inhumane and contrary to his human dignity. The evidence does not bear out his contention that he is in isolation. Moreover, though there are significant restrictions on his ability to associate with other prisoners, he can associate and is associating with the other prisoner in his unit. Moreover, he regularly sees his teacher, his fitness instructor, his chaplain, the Governor, the Chief Officer, the medical officer and has visits from approved family members. He is not being deprived of human society, he has significant out of cell time, he has entertainment, exercise, facilities for self improvement and his physical conditions of detention are very good. The Court is completely satisfied that there is no evidence to justify his contention that his

regime of detention is inhumane and contrary to his human dignity."

48. By contrast, in the present case, it is accepted that the Applicant is in solitary confinement, the Applicant is not associating with any other prisoners in his unit and he does not have significant out of cell time. Moreover, there is evidence that the prolonged and ongoing conditions of solitary confinement are beginning to have an effect on the mental and psychological health of the Applicant.

49. The Applicant clearly has a constitutional right to bodily integrity and clearly a constitutional right to life. Conversely, the prison authorities have a duty to protect the life of the prisoner and indeed, to protect the health of the prisoner. However, in subjecting the Applicant, (even for his own protection) to disproportionate conditions which are causing him mental health problems, the Respondent is infringing the constitutional rights of the Applicant to mental and psychological integrity.

50. On balance, therefore, I am not persuaded by the Respondent's argument that I should exercise my discretion not to grant an injunction in this case.

51. Finally, counsel for the Respondent relied on the decision of O'Malley J. in *Dundon v. Governor of Cloverhill Prison* where she stated at para. 80 of her judgment:-

"For the avoidance of doubt it should be made clear that the courts have no role in the micro-management of these issues."

52. Counsel stated that the Court should not grant any injunction which would involve the Court becoming involved in the micro-management of prisons. I agree with that principle and have borne it in mind in the nature of the injunction which I intend to grant.

Outline Submissions on Behalf of the Applicant

53. Counsel for the Applicant submitted that there was clearly an ongoing infringement of the Applicant's constitutional rights in that his conditions of solitary confinement had not materially changed since my judgment in the first case. He also indicated that the evidence of the Governor was unconvincing, that there had been no attempt at creative thinking to resolve the problem, and that, in effect, the Respondent was asking this Court to appeal its earlier judgment.

54. He also submitted that it was clear that there were two other prisoners on the landing of the West 2 Wing who are not a physical threat to the Applicant and the fact that these prisoners did not wish to associate with the Applicant was not a matter for them. In his submission, these prisoners could not have a veto on whom they associated with nor could they have a veto on any decision as to whether the Applicant should be permitted to associate with them.

55. He submitted that the requirement for the injunction was necessary given that there was a continuing breach of the Applicant's constitutional rights. If no injunction were granted then there would be no vindication or protection of the Applicant's constitutional rights and in effect, they would be worthless. In his submission, to find that there was a breach of constitutional rights but that there was no remedy for such a breach would be a wholly untenable position for the courts to adopt. He also submitted - as he had submitted in the first case - that if these conditions of detention persisted, the Applicant would end up having serious mental, psychological and psychiatric problems. In his view, this submission was now being borne out by the facts, in that the Applicant was now being treated for depression and had been prescribed anti - psychotic drugs after a psychiatric evaluation. He also submitted that some creative thinking on the part of the prison authorities might be able to resolve this problem, for example, certain prisoners could be invited into the West 2 Wing and be given certain remission or other benefits; that certain persons could be asked to associate with the Applicant during his sessions at the gym or in the yard, and they could be searched before joining the Applicant and supervised by guards to ensure that he does not come to any harm.

Assessment

56. Having considered all the affidavit evidence in this matter - and indeed the lengthy and helpful oral evidence by Governor Kavanagh and the legal submissions, I am of the view that an injunction must be granted for the following reasons:-

(i) The Applicant is being held in solitary confinement now for a period of twelve months. I found in my earlier judgment that that is a clear breach of his constitutional rights to bodily and psychological integrity.

(ii) Moreover, given that his conditions of solitary confinement have not changed to any appreciable extent, it is clear that there is an ongoing breach of the Applicant's constitutional rights.

(iii) It cannot be the case that where there is a clear finding of a breach of constitutional rights that there can be no remedy for such a breach. To allow such a conclusion would be to render constitutional rights entirely nugatory. That, in my view, is an untenable position.

(iv) There is now uncontroverted evidence before the Court that the Applicant is beginning to suffer from depression and has been prescribed anti - psychotic medication following a psychiatric assessment. Thus there is evidence that the Applicant's mental health is beginning to be affected by his conditions.

(v) Under the Prisons Act, the maximum amount of time a prisoner should be detained in solitary confinement is three days - for a breach of prison discipline. Here, there is no breach of prison discipline and yet the Applicant is detained for a period of twelve months in solitary confinement.

(vi) Whilst I accept the Governor's evidence that there is a real and significant danger to the life and health of the Applicant from the general prison population in Wheatfield, and whilst I accept his evidence that he is at risk of harm in every prison in the State and, whilst I also accept his evidence that the safest place for the Applicant is in the West Wing of Wheatfield, this makes it all the more imperative that the Applicant's conditions of detention are ameliorated within the West Wing of Wheatfield Prison.

57. The problem is that the Applicant is being detained in conditions of solitary confinement. The solution to this problem is therefore to ameliorate his condition of solitary confinement and to ensure that he has social interaction. The Applicant, through his counsel, accepted that social interaction of approximately two hours per day would meet the situation.

58. I am of the view, therefore, that an appropriate injunction in this case is to direct the Respondent to ensure that the Applicant has, on average, two hours of social interaction each day for at least five days a week. I do not believe that such an order would trespass on the Respondent's role and duty to manage the prison. Such an injunction would not involve the Court in managing, let

alone micro-managing, the Prison Service.

59. In my view, an injunction that the Respondent should afford the Applicant approximately two hours per day on average (for five days a week) of social interaction is a measured and proportionate response to the difficulties which the Applicant finds himself in.

60. There is evidence that there are at least two prisoners on the West 2 Wing who do not pose a threat to the life or health of the Applicant. I note that these prisoners do not wish to associate with the Applicant. However, they have no right to decide with whom they associate in prison. The Applicant's constitutional rights of psychological and mental integrity must be weighed in the balance against the wishes of these two prisoners not to associate with the Applicant. In my view, when they are weighed in the balance, the constitutional rights of the Applicant must take priority. I am of the view, therefore, that the Applicant should be allowed to associate with these two named prisoners on a regular basis. I also note that this should not require any great resources from the prison authorities. They simply have to unlock the Applicant's cell door and allow him to associate with the other two prisoners.

61. As part of this injunction, I would also direct that the Applicant be permitted two family visits of one hour per week each, (which time can be included in the two hours per day outlined above).

62. Beyond this, it is a matter for the prison authorities as to how they structure the two hours social interaction each day. This is in addition to the one hour exercise which the Applicant has on every given day. It therefore, means that the Applicant should be out of his cell for a period of, at least, three hours per day on average for at least five days per week.

63. This social interaction could take place in a number of ways. It could be to permit him to associate with the other two prisoners; it could be to permit him to participate in conversations with the listeners; it could be to permit him to participate in conversations with the visiting religious sister; it could be family visits; it could be an education class once a week or with the two other prisoners; it could be interactions with the psychiatric, psychological or medical services; it could be social interactions with other prisoners during his sessions in the gym; or it could be with other prisoners whilst he is engaged on his cleaning duties. These are all matters for the Governor to consider.

Conclusion

64. As the facts of this case have established, the Applicant in this case is, at present, according to Governor Kavanagh, the most vulnerable prisoner within the Irish prison system. In these circumstances - and given that the Governor also stated that his conditions are set to continue for several years - it is clear that exceptional measures will have to be taken to ensure this prisoner's constitutional rights are vindicated.

65. I note that the Governor accepted that he could arrange the following matters:-

- (i) access to the listening service between 8am and 8pm;
- (ii) a daily visit from the nun, (where possible);
- (iii) education classes - one hour per week;
- (iv) access to psychological services; and
- (v) access to psychiatric services.

66. I would, therefore, conclude that the Applicant is entitled to an injunction:-

- (i) Directing the Respondent to allow the Applicant approximately two hours (on average) per day (for five days per week) of social interaction, so that the prisoner is out of the cell for approximately three hours per day (on average for five days a week).
- (ii) Directing the Respondent to permit the applicant to have two family visits per week of approximately one hour each.