THE HIGH COURT

JUDICIAL REVIEW

[2017 No. 83 J.R.]

BETWEEN

WARREN DUMBRELL

APPLICANT

AND

THE GOVERNOR OF THE MIDLANDS PRISON

AND

THE IRISH PRISON SERVICE

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENTS

JUDGMENT of Ms. Justice O'Regan delivered on the 30th day of July, 2018

Issues

1. The applicant herein was afforded leave on the 6th February 2017 to maintain the within judicial review proceedings relative to the circumstances of his detention as a prisoner in the Midlands Prison. During the currency of these proceedings, namely on the 14th March 2018, the applicant was moved to Portlaoise Prison.

2. Although there are multiple headings of relief claimed the parties, during the course of the hearing, have agreed that the issue between them, given the circumstances of the sentence management of the applicant and the move to Portlaoise Prison, that at this time the effective relief being sought by the applicant is under para 5.3 of the statement of grounds namely:

> A declaration that the respondents have in multiple instances breached Rule 62 of the Prison Rules 2007 in dealing with the removal of the applicant from structured activity or association on grounds of order.

3. The sentence for which the applicant is currently incarcerated, following his conviction by the Central Criminal Court on the 22nd February 2011, has been backdated to November 2006. The reliefs sought in the within judicial review application potentially relate back to November 2006 but certainly appear to relate to a period from 2014 onwards.

4. The period of time therefore for which the judicial review proceedings relate is sufficiently lengthy so that it is difficult to determine a precise period of time for which Rule 62 might well have applied, however this task has been substantially eased by virtue of the defence proffered by the respondents to the declarations sought.

Mootness

5. In written submissions the respondents suggest that because the applicant has been moved to Portlaoise Prison the issues raised in his statement of grounds have become moot. At the hearing however, this point was not advanced as being a sufficient ground to resist the claim of the applicant.

6. The judgment of O'Malley J. of the 3rd December 2013 in *Dundon v. the Governor of Cloverhill Prison & Ors* [2013] IEHC 608 is instructive in relation to this issue. In that matter the applicant sought to challenge the regime imposed on him between the 18th April 2012 and the 7th September 2012 in that he sought a declaration that the regime was unlawful and breached Rule 62 of the Prison Rules 2007. The respondent had contended that the case was moot on the basis that Rule 62 was formally invoked prior to the date of hearing and because the applicant had been transferred to a different prison. The respondent also argued that on the merits the applicant's regime was at all times lawful. At para. 62 of the judgment, O'Malley J concluded that the issue was not moot in stating: -

> "62. The applicant in this case is still a prisoner and is still subject to the provisions of the Prison Rules in whichever institution he is detained. He has a real and ongoing interest in the manner in which they are applied to him. Having regard to the history of the case, it may be said that the possibility that he will again be subjected to restrictive conditions is not, to use the language of O'Brien v PIAB, so remote as to be purely hypothetical."

7. I am of the view having regard to the foregoing that the declaration sought is not moot.

Brief background

8. The applicant was born on the 23rd April 1974 and is serving a life sentence for murder following his conviction as aforesaid on the 22nd February 2011 backdated to November 2006. The statement of grounds herein at para. (e) (iii) acknowledges that the applicant has been a particularly challenging prisoner and has a poor disciplinary record. Thereafter it is argued that by reason of two reports, being a clinical psychologists' report of the 8th August 2014, and a prison review committee report of the 31st March 2014, to in or about mid-2014, the applicant had made positive changes by a reduction in violence and other challenging behaviour. The reports and indeed the statement of grounds records that the applicant was previously considered to be a most volatile and dangerous prisoner and over the years had accumulated some 42 P19's (Prison discipline charges).

9. The applicant has accumulated nine further P19 charges since the reports aforesaid. Although there is considerable controversy between the parties as to the circumstances of the applicants' incarceration, nevertheless it does appear common case that for a long number of years the applicant has been detained away from the mainstream prison population – the respondents would argue this arises because of the behaviour of the applicant. The respondents suggest in the affidavits furnished, that in fact a number of Rule 62 procedures were adopted in respect of the applicant over the years. In the affidavit of Ultan Moran, Governor of Midlands Prison,

of the 1st August 2017, the deponent states that the behaviour of the applicant has deteriorated and his personality has changed and that he was more intimidating and engaging in drug use, since, *inter alia*, May 2015 and certainly since the reports referred to in the statement of grounds. At para. 25, Mr. Moran states that this deterioration in behaviour has continued. At para. 20 of Mr. Moran's affidavit he says that prior to, *inter alia*, a conference convened on the 27th April 2015, on occasion, the applicant has been on either Rule 62 or Rule 63 detention for either his own safety or the safety of others. Mr. Moran goes on to say that it has not been deemed appropriate to place the applicant on Rule 62 or Rule 63 since August 2015 in all of the circumstances pertaining during this time. Given that at para. 25 Mr. Moran says that the deterioration of the behaviour of the applicant has continued, it is not clear why Rule 62 was invoked on some occasions but not others. Neither is it clear as to the difference in regime that might have applied to the applicant during the Rule 62 periods and the balance of the applicants' incarceration since August 2015.

10. At para. 28, Mr. Moran states that if the applicant were to move to the mainstream prison population this would negatively impact on his behaviour and access to contraband and potential altercations with prisoners and staff. These comments arose as a result of the statement of ground and affidavit of John Quinn solicitor on behalf of the applicant wherein it is complained that the applicant wishes to return to the mainstream prison population however in the events as aforesaid the possibility of returning to mainstream prison population was not the focus of the hearing but rather, as aforesaid, that in multiple instances there was a breach of the Prison Rules 2007 by failing to abide by Rule 62.

11. In the first affidavit of Mr. Moran sworn on the 1st August 2017, at para. 12 thereof, he denies that the applicant has been kept in isolation or segregation but rather it is suggested that the applicant freely associates with the prisoner who is in the cell next to him. The applicant is able to converse with other prisoners on the landing, although because of circumstances only two of same will converse with the applicant. It is suggested that the applicant and the prisoner in the cell beside him also have access to a pool table, a computer and classroom, and yoga and meditation room during unlocked periods. At para. 14 of the affidavit of the applicant of the 22nd January 2018 he states that there is no-one housed in the cell beside him and in the second affidavit of Mr. Moran of the 19th February 2018, at para. 12, it is accepted that at that time there was no-one in the cell next to the applicant because of preparation of closure of the C 1 left landing for renovation.

12. Although the applicant acknowledges he was entitled to request visits from other prisoners, the reality is accepted by the respondent that there are only two other prisoners who have visited the applicant on a weekly basis. It is not disputed that the applicant is locked in his cell for meal periods.

13. It is not disputed that the applicant is not engaged in work activity – the respondents state that the work activity programme is popular and effectively it is the behaviour of the applicant that precludes his joinder in this programme.

14. Since his move to Portlaoise Prison, the applicant has not had educational opportunities and this is not denied but rather explained on the basis that the education programme does not run through the summer months. The applicant counters that he has been in Portlaoise Prison since March 2018. The respondent also states in this regard that although the applicant has been afforded from time to time opportunities to involve himself in educational programmes, his attendance is erratic or poor.

Submissions

15. Rule 62 of the Prison Rules 2007 is entitled "Removal of prisoner from structured activity or association on grounds of order". The section provides as follows: -

> "62. (1) Subject to Rule 32 (Exercise) a prisoner shall not, for such period as is specified in a direction under this paragraph, be permitted to -
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> (a) engage in authorised structured activities generally or particular authorised structured activities,
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> (b) participate in communal recreation,
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> (c) associate with other prisoners,
>
> where the Governor so directs.
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> (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."

16. The rule goes on to provide for certain safeguards such as the review of the status of the prisoner, the maintenance of records in respect of the circumstances. It further provides for the taking of the views of the prisoner and maintaining a record in respect of such views.

17. The applicant argues that in the circumstances he has endured periods of substantial isolation. The applicant relies on three cases in support of his claim, namely *Devoy v. Governor of Portlaoise Prison* [2009] IEHC 288, *Dundon v. Governor of Cloverhill Prison* [2013] IEC 608, and *Killeen v. Governor of Portlaoise Prison* [2014] IEHC 77.

18. The applicant argues that if one reviews the facts of each of the three cases aforesaid, his position is at least comparable with each of the applicants' position in the three cases aforesaid if not worse. In *Devoy*, Edwards J. was satisfied that total or substantial isolation from the society of ones' fellow man may over time amount to a form of sensory deprivation and be inhumane and comprise a breach of a prisoners' right to bodily integrity. The court acknowledged that the prisoner did not have an expectation of confinement in any particular prison or in any particular wing of a prison. The court further acknowledged that the respondents had the widest possible discretion as to prisoners' placement from time to time within the prison system and issues ancillary thereto, including the question as to with whom he or she may have society. Edwards J. indicated on a number of occasions that there was no evidence before the court as to why Rule 62 could not have been invoked and in the circumstances a declaration was afforded that the decision to restrict the applicants' association other than in accordance with Rule 62 was unlawful.

19. In *Dundon*, similar type complaints of deprivation were made on behalf of the applicant, however prior to the matter coming before the court for hearing, Rule 62 was invoked. In that case the applicant had associations with only one other prisoner on a continuous

basis with some contact with one other man. He had no educational activity and the court found it highly relevant that he was placed on Rule 62 during the course of the proceedings although the court did not feel that the motivation for such a decision was material.

20. Para. 83 of the judgment of O'Malley J. in *Dundon* is particularly relevant as the parties in this matter contend for different understandings of the paragraph, which reads as follows: -

> "It seems to me that where a Governor maintains a high security unit of this nature, it is necessary to monitor the situation of prisoners in it. Where, as in this case, the numbers in the unit drop and a prisoner is not authorised to engage in education, work or training, it is incumbent on the Governor to consider either relaxing the regime to which the prisoner is subject or invoking Rule 62 if the conditions for such invocation exist. Assuming, from the way that this case ran, that the Governor was unwilling to do the former, I conclude that he should have made a formal decision in relation to the latter - on the evidence presented, he had grounds for so doing from at least the 9th May, 2013. This would have conferred upon the applicant the protection involved in regular review and notification and, if the situation continued for more than three weeks, the oversight of the Director of the Prison Service."

21. In *Killeen v. Governor of Portlaoise Prison*, three applicants were detained together in a segregated unit for more than a year. They were allowed to associate with each other for at least three hours per day and they had access to a yard and exercise equipment but they lacked educational facilities. By the time the matter came on for hearing before Hedigan J., Rule 62 had been invoked. Accordingly, the respondent would argue that the comments of Hedigan J. at 6.5 of his judgment should be considered *obiter*. Hedigan J. stated that segregation may be required in certain circumstances and it must be for the prison authorities to determine when although it should occur only in exceptional situations and when it does so it should be kept under review. At para 6.9 of his judgment, Hedigan J. interprets what was envisaged by Rule 62(9). Again, the respondent suggests that the comments in para. 6.9 are *obiter* although in my view they appear more on point given the fact that Rule 62 was invoked. Hedigan J. was of the view that the Director General ought to review any removal order under the Rule at least once every three months or upon request by the prisoner or his legal adviser, providing such requests are not made vexatiously.

22. The respondent in resisting the application of the applicant refers to the provisions of Rule 27 of the Prison Rules 2007 and indeed to the amendments made to that rule which came into operation on the 3rd July 2017. Rule 27(1) provides that each prisoner shall be allowed to spend as much time each day out of his or her cell or room as is practicable and at the discretion of the Governor to associate with other prisoners in the prison. The respondents also point to the duties of the Governor at Rule 75 and suggest that by virtue of a combination of Rule 27 and Rule 75, the Governor is obliged and in fact implements a sentencing management plan in respect of the within applicant tailored to his specific needs. The respondent argues that the position of the applicant varies and is reviewed generally by the Governor in discharge of his duties. It is argued that insofar as the applicant complains of unnatural confinement over an eleven-year period that this stems from the complexity of the challenges posed by the applicant and the threats made by him.

23. It is argued that Rule 62 is inappropriate in particular it is argued that it is an extreme measure and it is envisaged to apply only on a temporary basis whereas the behaviour issues posed by the instant applicant are more long-term.

24. The respondents refer to the Court of Appeal Judgment of *McDonnell v. Governor of Wheatfield Prison* [2015] IECA 216 where it was held that it is for the prison authorities to decide what measures are necessary for the safety of prisoners including invoking Rule 63. A high level of threat or extreme circumstances may justify severely restrictive conditions of detention on a temporary basis and that judgment is one for the court but a wide margin of appreciation has to be allowed to the Governor and his staff. A prisoner is obliged to cooperate with the management and cannot by his wilful disruption or breach of discipline or refusal to obey rules or cooperate contrive to bring about a situation in which his conditions are unpleasant or worse and nevertheless obtain relief from the courts. It is noted that in that matter the applicant complained that the regime under which he was being held was in breach of his constitutional rights and was disproportionate to the objective of protecting him from any threat within the general prison population and he complained that the conditions were impacting on his mental health.

25. The respondents argue that the judgment of Hedigan J. in *Killeen* is entirely *obiter*, and does not therefore advance the question posed in the within matter. Insofar as the matter of *Dundon* is concerned, the respondents argue that para. 83 of the judgment of O'Malley J. is such that it merely requires that consideration in certain circumstances must be given by the Governor to invoking Rule 62; thereafter should the Governor deem that Rule 62 is not in fact appropriate then a wide margin of discretion in accordance with *McDonnell*, should be afforded by the courts to this decision.

26. The respondents have indicated misgiving as to the correctness of the judgment of Edwards J. in *Devoy.* Specifics of these misgivings have not been developed. Nor has the respondent argued that the decision of Edwards J. is such that this Court should not follow same in accordance with the jurisprudence in respect of judicial comity such as In *Re: Worldport Ltd.* [2005] IEHC 189, *Irish Trust Bank Ltd. v. Central Bank of Ireland* [1976-7] ILRM 50, or the judgment of O'Donnell J. in *I.G. v. Refugee Applications Commissioner* [2018] IESC 25.

27. The applicant is not arguing that the circumstances which might prevail at any given point during the period of his incarceration were not sufficient to invoke Rule 62 but rather, it is argued by the applicant that he has effectively been removed from structured activity envisaged by Rule 62, without the Governor invoking Rule 62 so that the applicant is deprived of the enjoyment of the benefits which would inure to him if Rule 62 was invoked.

28. The respondents' arguments might be summarised as: -

> (i) When circumstances reach a particular tipping point, giving rise to the possible engagement of Rule 62, it is for the Governor to determine whether or not to invoke Rule 62 and he should be afforded a wide margin of discretion;
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> (ii) Para. 83 of the judgment in *Dundon* requires only that the Governor give consideration to invoking Rule 62 rather than requiring the Governor to invoke Rule 62 in certain circumstances;
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> (iii) Rule 62 is a short-term measure however the challenging behaviour on the part of the applicant is more long-term and therefore is not suitable to a regime under Rule 62;
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> (iv) It is the behaviour of the applicant which requires the particular bespoke sentence management now imposed on him therefore in accordance with *McDonnell* the applicant should not secure relief from this Court.

29. It is noteworthy that the respondents do not argue that the sentence management regime applied to the applicant, if intended to

be a short-term measure, would not amount to a proper invoking of Rule 62. In other words, it is not argued by the respondent that since August 2015 when the Governor determined that Rule 62 was no longer appropriate that the applicants' sentence management regime was not such as to come within the four corners of Rule 62(1).

Decision

30. I am satisfied in reading para. 83 of the judgment of O'Malley J. in total, she is not suggesting that it is for the Governor to consider and possibly discount invoking Rule 62 but rather that in a given set of circumstances Rule 62 should be invoked – the last sentence in para. 83 is consistent with this interpretation as opposed to the interpretation placed on the para. by the respondents.

31. Frequently, save where information is supplied to the Governor, the prisoners' behaviour will cause the requirement to invoke Rule 62. Therefore the argument that it is the prisoners' behaviour, in the instant circumstances which has resulted in the specific management sentencing regime currently is not in my view sufficient argument to suggest that Rule 62 does not apply at all to the applicant.

32. In *McDonnell*, the applicant had complained that the regime under which he was being held was in breach of his constitutional rights and disproportionate. In the instant circumstances the applicant is not arguing that it is not appropriate to implement a regime of confinement to the applicant but rather when such a regime is being implemented, it should be done so under Rule 62.

33. The margin of discretion afforded to the respondents is in respect of the suitable conditions or management regime to implement. Once the regime is such as to fulfil Rule 62(1)(a), (b) and (c) the provisions of Rule 62 must be applied.

34. In these circumstances I accept that the applicants' claim for the relief identified at para. 2 hereof from the courts should not be denied to him merely because of his behaviour which ultimately created the need for the prison to implement a tighter regime in managing the prisoner. This arising need/requirement to manage the prisoner by implementing this regime does not circumvent the fulfilment of Rule 62 (1)(a), (b) and (c). It also does not negate the first named respondent's obligations to comply with Rule 62 once fulfilment has occurred; any subsequent regime must be carried out in compliance with the rules set out under Rule 62.

35. There is nothing in Rule 62 which suggests that its application is confined to short term situations only and indeed specifically under Rule 62(3) it is provided that the period shall not continue for longer than is necessary to ensure the maintenance of good order or safe or secure custody. In the circumstances, I am of the view that the only temporal limit involved in Rule 62 is the period for which the rule is necessary to ensure maintenance of good order or safe or secure custody.

36. In the events, I am satisfied that it was not lawful for the Governor to foreclose on the application of Rule 62 in respect of the within applicant merely because his challenging behaviour was a long-term issue rather than of short-term duration.

37. The applicant has, for given periods during his incarceration, been maintained in substantial isolation and this status has continued, at times, since August 2015 in particular during the admitted period for which there was no-one in the cell next to the applicant. Indeed, the respondents do not appear to argue otherwise.

38. When the threshold has been reached so that there is fulfilment of the criteria/prisoner's status identified in Rule 62 (1) (a), (b) and (c), the first named respondent must implement the provisions contained in Rule 62 and such obligation cannot be avoided because the behaviour of the particular prisoner presents as a long term issue.

39. A declaration that the respondents have on occasion breached Rule 62 of the Prison Rules 2007 will be made.