

THE HIGH COURT

[2014 1629SS]

IN THE MATTER OF AN APPLICATION PURSUANT TO ARTICLE 40 OF THE CONSTITUTION

Between:

OLIVER BURKE

APPLICANT

and

THE GOVERNOR OF CLOVERHILL PRISON

RESPONDENT

Judgment of Mr. Justice Max Barrett delivered on the 10th day of October, 2014.

1. This application under Article 40.4 of the Constitution concerns Mr. Burke, a prisoner: who is being held in Cloverhill Prison; who, prior to and at the time of the hearing of this matter, was suspected by the prison authorities of having swallowed some form of contraband; and who appeared to his solicitor to be visibly and quickly deteriorating in circumstances where the conditions in which Mr. Burke was being detained were perceived by the solicitor to be actively deleterious to Mr. Burke's health. The fact that the application was brought out-of-term on a Saturday when the courts were generally closed points to the urgency that the prisoner's case was perceived by his advisors to present.

Basis of application

2. A question that arises, not least from the recent decision of the Supreme Court in *Ryan v. Governor of Midlands Prison* [2014] IESC 54, with which decision the court is required to comply, is whether this was an appropriate case in which to bring an application under Article 40.4 of the Constitution or whether some other form of application ought to have been brought. This is an issue that the court must consider as a matter of prudence, whether or not it is raised by the parties before it, given that it concerns the court's own jurisdiction to hear the proceedings and indeed its obligation to conform with Supreme Court strictures in this regard. In *Ryan*, Denham C.J. states, at para. 18 of her judgment, that:

"[T]he general principle of law is that if an order of a Court does not show an invalidity on its face, in particular if it is an order in relation to post conviction detention, then the route of the constitutional and immediate remedy of habeas corpus is not appropriate. An appropriate remedy may be an appeal, or an application for leave to seek judicial review. In such circumstances the remedy of Article 40.4.2 arises only if there has been an absence of jurisdiction, a fundamental denial of justice, or a fundamental flaw."

3. It might perhaps be queried whether something of a 'catch-22' arises from the above quoted text. The Supreme Court acknowledges that certain deficiencies may so taint detention pursuant to an ostensibly valid detention order as to require immediate prisoner release pursuant to Article 40, yet identifies a general principle pursuant to which, in circumstances where an ostensibly valid detention order is presented to the court, it would appear generally inappropriate to make further enquiry under Article 40 as to whether any such deficiencies aforesaid as may have been argued to present do in fact arise. If the court proceeds further at this point and finds that any such deficiencies do in fact arise then prisoner release will follow, but if it proceeds and finds that no such deficiencies arise it would appear that the court will then have acted in breach of the general principle identified by the Supreme Court. Be that as it may, Mr. Burke's case comes within a category of application which the Supreme Court appears implicitly to indicate in *Ryan* as one which may legitimately be the subject of an Article 40 enquiry. At para. 22 of her judgment in *Ryan*, Denham C.J. indicates that

"[T]his [the Ryan case] is not a case such as Richardson v. Governor of Mountjoy Prison [1980] J.L.R.M 82 where there was an issue of a prisoner suffering ill treatment. See also Cahill v. Governor of Military Barracks [1980] I.L.R.M 191."

Thus the Chief Justice seems implicitly to acknowledge that if the *Ryan* case had raised issues of prisoner ill-treatment, such as arose in *Richardson* or *Cahill*, it would have been an appropriate case in which to seek or grant relief under Article 40, either because it came within one of the exceptional circumstances referred to in the first-mentioned quote above or because cases of ill-treatment comprise their own exceptional category, or both.

4. The *Richardson* case was concerned with the practice of 'slopping out' in Mountjoy Prison. The *Cahill* case was concerned with rigorous prisoner conditions in the Curragh Camp around a period of prisoner unrest. It is of course only in the most exceptional circumstances that a court would accede to an Article 40 application that relates to conditions of confinement; this is because the operation and management of prisons is largely a matter for the Executive, subject to the Constitution and the law. That said, the courts have, since at least the time of the *Richardson* decision, shown themselves willing to accede to Article 40 applications where it appears that prison authorities are causing or doing nothing to rectify conditions of detention that present a serious danger to a prisoner's life or health. This traditional willingness to accede to Article 40 applications in such instances appears to receive the implicit sanction of the Supreme Court in *Ryan*.

5. In the present case, Mr. Burke and his advisors raised an arguable case that his initially lawful detention had become unlawful because he had been suffering deliberate ill-treatment that was actively worsening his health in circumstances where his health seemed already to be imperilled because of his alleged ingestion of contraband. It was therefore a case that seemed to fall somewhere along the spectrum of cases represented by the *Richardson* and *Cahill* cases and which the Supreme Court appears implicitly to acknowledge in *Ryan* may legitimately be the subject of Article 40 proceedings. Thus this Court has proceeded to enquire into the lawfulness of Mr. Burke's detention.

Facts

6. Mr. Burke was remanded in custody to Cloverhill Prison on 23rd September last. On arrival at the prison his initial screening included metal detection checks that revealed he had ingested some form of contraband. Mr. Burke denied that this was so. In light of what the metal detection checks had revealed, the relevant prison staff were not inclined to believe him. So, instead of being placed with the general prison population, Mr. Burke was placed on a landing of Cloverhill Prison that is designated for prisoners suspected of concealing drugs or who are at risk of suicide. Prisoners on this landing are, it seems, typically observed by a prison guard once every 15 minutes. The rationale behind placing Mr. Burke on this landing appears to have been fourfold: (1) to keep a watchful eye on him given that he appeared to have swallowed some unknown substance; (2) the fact that having ingested contraband, if he had ingested contraband, he appeared not to be immune from doing acts that that could occasion self-harm; (3) a desire to detain him for such a time until nature took its course or the authorities were otherwise satisfied that he did not have contraband concealed about him; and (4) in the event that whatever he had swallowed, if he had swallowed anything, contained drugs or other illicit contraband, that Mr. Burke should be prevented from distributing same among the general prison population.

7. On 23rd September, as part of the prison admission process, Mr. Burke, who apparently suffers from a drug addiction problem, met with a nurse who arranged for him to receive repeated dosages of methadone. On 26th September, Mr. Burke was seen by a prison doctor who, with Mr. Burke's consent, conducted a physical check of Mr. Burke's stomach region and was unable to feel any contraband secreted there. On the same day, Mr. Burke's solicitor visited with her client, was clearly alarmed by his physical state and assisted Mr. Burke to bring the instant proceedings. At the time of the hearings, the prison authorities continued to believe that Mr. Burke had ingested some form of contraband. Mr. Burke, for his part, had offered to undertake an X-ray screening to prove the contrary and his counsel appeared to consider it inappropriate that the prison authorities had not yet facilitated such screening to definitively establish the truth of matters and thereafter take such steps as were appropriate. In the affidavit evidence that accompanied Mr. Burke's application it was urged that there had been general ill-treatment of Mr. Burke, in that: during the screening process he had been required to take off all his clothes; the television set in his cell had been left on night-and-day during his stay; he was being denied bed linen and kept in state of perpetual cold; and he had been denied all access to fresh air. However, the principal concern of Mr. Burke's advisors appeared to be that his custody and treatment was such that if he had ingested some contraband, not enough was being done to assist him, indeed that the manner of his detention was actively harmful to his health and had become unlawful through a combination of this last fact and the alleged unwillingness of the prison authorities to rectify matters.

8. The court finds nothing in the facts before it to suggest that Mr. Burke is or has been held or treated in such a manner as to render his continuing detention unlawful. Specifically, the court finds as follows:

- the manner whereby Mr Burke was screened when he entered prison has nothing to do with his continuing health following the suspected ingestion of contraband, it entailed all due consideration for Mr. Burke's modesty and in no sense can be construed as ill-treatment. In truth it was this screening process that unearthed the fact that Mr. Burke may have swallowed some contraband and saw the commencement of a sequence of events that had as their object and effect the protection of Mr. Burke, and also other prisoners at Cloverhill, from the ill consequences of his suspected actions;

- the fact that the television was on night and day in Mr. Burke's cell has little or nothing to do with his continuing health following the suspected ingestion of contraband. Moreover, it became apparent during the proceedings that this issue could have been resolved through the simple expedient of Mr. Burke requesting that the television be turned off. He could not turn it off himself because the television was hung at a height where it could not be used as an instrument of self-harm. Nor could Mr. Burke be given the remote control as it could be fashioned into an offensive weapon and/or used to harm himself. It appeared from Mr. Burke's own evidence that he had not requested that the television be turned off. It was left on because Mr. Burke appeared to want this and to the extent that it is suggested that the prison authorities or staff have, deliberately or otherwise, ill-treated Mr. Burke by refusing to turn off the television when requested to do so, this suggestion, the court is satisfied, is not correct;

- the fact that Mr. Burke was denied bed-sheets and so seems always to have been cold has little or nothing to do with his continuing health following the suspected ingestion of contraband. Mr. Burke was being kept in an area of Cloverhill Prison where vulnerable prisoners are accommodated. As bed-sheets can be used as a method of strangulation or suffocation, Mr. Burke was provided instead with at least two 'refectory blankets' that can safely be provided to those who may be a risk to themselves. Mr. Burke, if he felt cold, could have received another such blanket had he asked. To the extent that it is suggested that the prison authorities or staff have, deliberately or otherwise, ill-treated Mr. Burke by keeping him in a state of perpetual coldness through their refusing him adequate bed-clothing, this suggestion, the court is satisfied, is not correct;

- following his admission to prison, Mr. Burke was initially denied outdoor access because he was under watch for the various reasons outlined above. Sometime prior to the instant proceedings this regime was relaxed and Mr. Burke was allowed outdoors. To the extent that it is suggested that the prison authorities or staff have, deliberately or otherwise, ill-treated Mr. Burke by refusing him access to the open air or that the lightening of his exercise regime had anything to do with the commencement of the instant proceedings, this suggestion, the court is satisfied, is not correct.

9. In his appearance and his performance in the witness-box, Mr. Burke did not impress the court as someone who was suffering from the serious ill-health or maltreatment that a reading of the affidavit evidence alone suggested him to be suffering. Nor did he strike the court as an individual who would shrink from asking that a television be turned off or an extra blanket provided if that is what he required. In his evidence, Mr. Burke continued to deny that he had ingested any contraband. However, for the time being, the prison authorities continued to want to keep him under close watch for the entirely legitimate reasons referred to above. It was clear from the cogent and professional evidence provided by Mr. Woods, the Assistant Governor at Cloverhill Prison, and from the other evidence before the court, that there has been no ill-treatment of Mr. Burke in any way during his time at Cloverhill Prison and that there is nothing in the manner of his detention that would in any way render unlawful the continuation of same.

Conclusion

10. For the reasons stated above, the court is satisfied that Mr. Burke is being detained in accordance with the law