THE COURT OF APPEAL

Neutral Citation Number: [2015] IECA 216

[2015/90]

[2015/160]

The President
Birmingham J.
Hogan J.

BETWEEN

DANIEL McDONNELL

RESPONDENT

AND

THE GOVERNOR OF WHEATFIELD PRISON

APPELLANT

JUDGMENT of the Court delivered on 31st July 2015

Introduction
1. In two judgments that are the subject of these appeals, the High Court gave urgent, careful consideration to the conditions in which Mr. Daniel McDonnell is serving a life sentence in Wheatfield Prison: see *McDonnell v. Governor of Wheatfield Prison* [2015] IEHC 112, [2015] 2 I.L.R.M. 38. He has been the subject of successive orders to keep him separate from other prisoners who may pose a threat to him. The High Court accepted that he was in danger and needed protection but held that the resulting restrictions which had been imposed by the prison authorities were unnecessarily oppressive and breached his constitutional rights. The Court granted injunctions intended to alleviate the most isolating and potentially injurious features of the regime. The Governor appeals on a number of grounds, including that the applicant had not established any continuing breach of his constitutional rights, having regard to the Prison Rules and the Constitution and relevant case law, and that it was not appropriate for the trial judge, Cregan J., to exercise his discretion to grant a mandatory injunction in the circumstances of the case.

Background
2. 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 began to serve his sentence in Mountjoy Prison. The prison authorities in Mountjoy became aware of a threat to his safety in that prison and he was transferred to Wheatfield Prison. The Governor of that prison was still very concerned that Mr. McDonnell was at risk and he made a series of orders that he be kept separate from other prisoners. Since his arrival in Wheatfield 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 the murder victim.

3. Under r. 63 of the Prison Rules 2007, a prisoner may be kept separate from other prisoners who are reasonably likely to cause harm to him. This may happen because the prisoner requests it or when the Governor considers it necessary. In this case, the Governor of Wheatfield Prison considers it necessary for Mr. McDonnell to be kept separate from almost all of the other prisoners under his control. The evidence presented to the High Court was that Mr. McDonnell is the prisoner who is most at risk within the entire prison system. Because of the extreme danger that Mr. McDonnell is in, extreme measures have had to be taken by the authorities to ensure his safety. He is detained in a cell on the most secure wing in the prison where other potentially endangered prisoners (include persons who testified for the prosecution against their former associates) are housed. Even on this specially protected landing, the prisoners do not associate among themselves, again for reasons of prisoner safety. They have different reasons for being housed in that location.

4. Mr. McDonnell's situation is worsened by two factors. One is his status at basic level as a prisoner because of disciplinary issues. This means that he is not entitled to certain privileges. The other factor is that he fell out with the only two prisoners with whom he might be able to associate and they have said that they do not want to associate with him.

5. It is clear on any view of the evidence that the applicant is in difficult, isolated protective custody that is very hard for a young man to cope with or to consider might be his fate for a long time to come. The details of his custody were in dispute to some degree and one of the issues raised in these appeals is whether the High Court judge was able or entitled to attempt resolution of conflicting affidavit testimony. Having said that, whichever version of the details of Mr. McDonnell's custody one were to accept, the situation in which he finds himself is, indeed, deeply troubling for any observer to contemplate and extremely onerous for the unfortunate prisoner himself.

6. Some reference to the evidence in the High Court will illustrate the background to these judicial review applications that are the subject of the present appeals. The most comprehensive and direct evidence was tendered by Governor Kavanagh of Wheatfield Prison. The trial judge set it out very fully in his judgment of 20th March 2015. It is perhaps regrettable that this comprehensive exposition of the situation and of the position of the Governor was not before the Court in the first application. That may account for some of the issues that have given rise to controversy.

Procedural History

The First Set of Proceedings
7. In judicial review proceedings [2014 No. 636 J.R.], Cregan J. found that the circumstances of solitary confinement imposed on the applicant amounted to a violation of his constitutional rights. He came to this conclusion based solely on affidavit evidence. The

evidence for the applicant was in the affidavit of his solicitor, Ms. Deborah Cody. The replying affidavit was by Mr. Sean O'Reilly, Assistant Governor of Wheatfield Prison.

8. The judgment in the first application cites, and the judge accepts, Ms. Cody's affidavit as follows:-

> "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".

9. 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. The judge quotes from the first of two reports: –

> "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".

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".

10. 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 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 and that on a number of occasions he declined to attend school lessons. In addition. Mr. O'Reilly noted that the applicant had also declined to see the prison psychiatric team on a number of recent occasions.

11. Not all of the prisoners on west 2 wing can or want to mix with each other and there are at present four different groupings which must be accommodated separately for exercise for one hour at a time.

12. 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 with improved behaviour he would move to "standard" regime which means that he would get further privileges including access to the gym on Wednesday, Friday and Sunday. The respondent was of the view that the applicant is partially responsible for his own situation.

13. The High Court granted an order of *certiorari* quashing the Governor's direction in respect of Mr. McDonnell made on 31st January 2015 under r. 63 of the Prison Rules 2007 and the Court went on to make a series of declarations as follows:

> (i) The applicant has a constitutional right to bodily integrity and psychological integrity.
>
> (ii) The respondent has breached the applicant's constitutional rights including his right to bodily integrity and psychological integrity.
>
> (iii) The breach of the applicant's constitutional rights including his right to bodily integrity and psychological integrity is neither necessary nor proportionate to the perceived risk to his person.

The Second Set of Proceedings

14. In the proceedings that followed which are [2015 No. 87 J.R.], Cregan J. gave leave on 20th February 2015 to the applicant to apply for judicial review in order to seek injunctions and other reliefs. In these proceedings the Governor of Wheatfield Prison gave oral evidence in addition to affidavit evidence.

15. Cregan J. described the evidence that the Governor gave, detailing the conditions of Mr McDonnell's detention and the background to his orders for him to be kept separate, as being lengthy and helpful.

16. Governor Kavanagh gave oral evidence on two occasions, separated by a two-week adjournment to allow him to consider what steps could be taken to ameliorate the applicant's conditions. He described for the Court the exact conditions on the West 2 landing in which the applicant is currently imprisoned. It is a secure area and there are not many such secure units as this within the prison system. 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 cells while that is happening.

17. There are ten ordinary cells on this landing. All but two of the other prisoners on the landing were reasonably likely to cause significant harm to the applicant. The applicant is in one cell. Prisoner 2 is also in the r. 63 detention for his own protection because there is, the Governor believes, a serious threat to his life also. Prisoner 2 has, indeed, 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. The prisoner in cell number 3 (Prisoner 3) does not wish to associate with the applicant, but he does not pose a threat to him.

18. 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. Mr. Kavanagh said that prison officers cannot always see where a threat might come from against a particular prisoner because the family or connections of the victim might arrange for other prisoners to assault the applicant. He said 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 Mr. McDonnell to be in the whole prison system is in Wheatfield on the West 2 Wing.

19. Having heard the detailed evidence of Governor Kavanagh, the trial judge declared that he was satisfied "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 situation on the landing is fluid and new prisoners come and go on a regular basis. The judge said that "it is clear that this is a difficult situation to manage".

20. Governor Kavanagh stated that if the applicant and another prisoner could associate together, he would immediately arrange for this. . He also stated that he and his colleagues monitor the situation every day.

21. The Governor said that education services are provided within the prison system on a contract basis 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.

22. 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. This, however, is not always possible given the animosity between certain prisoners.

23. Governor Kavanagh stated that the psychological services are a part of the Irish Prison Service but they are independent of him and he cannot direct them as to what to do. The prison psychologists have lengthy waiting lists to see various prisoners in 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.

24. Governor Kavanagh indicated that there are approximately eight prisoners in Wheatfield who are currently being detained in solitary confinement. His 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 associated with such confinement. However, resources are limited.

25. Mr. Kavanagh accepted that the applicant's conditions of detention were regrettable, but he believed that the applicant's life was in danger and he had a statutory obligation to keep the applicant safe and alive. 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.

26. Governor Kavanagh's evidence was that nothing had changed since the date of the first judgment on 17th February 2015. He was trying to ameliorate the applicant's position but that it was very difficult to do so in the current circumstances. 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. In response to a question in cross-examination as to whether the applicant would therefore remain in solitary confinement indefinitely, the Governor replied 'yes'.

27. 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

28. The hearing was adjourned for a period of two weeks. At the resumed hearing, Governor Kavanagh gave evidence that his concern about Mr. McDonnell's safety had not abated. He reiterated that the applicant was in significant danger in every prison in Ireland, including Wheatfield Prison. He said that 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 area. 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.

29. The Governor provided the Court with information about facilities and services that were available to Mr McDonnell. He could avail of the listener service between 8am and 8pm. Listeners are usually former prisoners who are prepared to listen to the concerns of current prisoners, but that is a finite resource and is resource intensive. The Governor said that if the applicant made a request during the day, he would do all in its power to accede to it. He did indicate, however, that this would have a knock-on effect on other prisoners. There was a religious sister who called to prisoners on a regular basis and the Governor had spoken to her. She was agreeable to call in to see the applicant on a regular basis.

30. The Governor testified 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. In addition, Dr. Sally Lenihan, the Head of the Central Mental Hospital Psychiatric In-Reach Team had also been contacted by Governor Kavanagh. She would have no problem in assessing the applicant.

However, the protocol was that the doctor in Wheatfield should first attend on the prisoner and file a request. Dr. Laszlo Suto, the prison general practitioner, 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 general practitioner 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. Governor Kavanagh had spoken separately to Prisoners 2 and 3 about associating with the applicant. Whilst both prisoners had initially 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 him. In cross-examination, Governor Kavanagh accepted that most prisoners do not get to decide whom they associate with and whom they do not.

32. Governor Kavanagh 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 doing things such as cleaning duties, exercise, taking a phone call, having a professional visit, having a doctor's visit and with the visiting nun. He had, however, declined to attend the school within the prison

33. 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, among 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 this facility available for the applicant.

34. Governor Kavanagh, however, indicated that the applicant's position had not changed much over the previous 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 also the medical and listener services.

35. The Governor indicated that he had spoken to the Director of Operations about transferring the applicant to another prison. The response was that this was "out of the question" as the West 2 landing was the safest place for the applicant in the whole prison service. The judge noted that the applicant himself did not wish to be transferred to another prison outside Dublin as he receives family visits in Dublin prisons.

36. The Court delivered judgment on 20th March 2015, and on 24th March 2015, the Court made orders as follows:-

> i) 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).
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> ii) The respondent to permit the applicant to have two family visits per week of approximately one hour each.

The judge came to the following conclusions between the two cases:

> 1. Mr. McDonnell had been detained in solitary confinement for at least 11 months at the time of the first judgment on 17th February 2015.
>
> 2. His detention in such manner amounted to a clear and sustained violation of his constitutional right to bodily and psychological integrity.
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> 3. Such a breach was unlawful and neither necessary nor proportionate to the perceived threat to his person.
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> 4. The confinement was also not in accordance with law because the orders prescribing it were not in compliance with r. 63 of the prison rules.
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> 5. Mr. McDonnell's mental health was beginning to be affected by the conditions.
>
> 6. The Governor had not alleviated the conditions following the declaration made by the Court in February 2015 when the Court gave its judgment on the second application on 20th March 2015.
>
> 7. The High Court was obliged to vindicate Mr. McDonnell's constitutional rights and to that end was entitled [or required] to prescribe what was necessary to achieve that purpose by giving specific directions as to his prison regime.
>
> 8. The measures necessary to vindicate Mr. McDonnell's rights included social interaction by association with two other prisoners whose own constitutional rights to choose not to associate with Mr. McDonnell had to yield priority to his needs.

Appellant's Submissions

37. Mr Seamus Woulfe S.C. for the Governor of the prison set out three points in respect of the first appeal, i.e., the first set of proceedings. Primarily he contended that the Governor's operation of Rule 63 did not amount to a disproportionate interference with the constitutional rights of the applicant. The Governor has a wide discretion in the manner in which a prison is run but it was accepted a prisoner has constitutional rights. There must be balance. Exercising that balance is a matter for the Governor: see *Foy v Governor of Cloverhill Prison* [2010] IEHC 529.

38. It was implicit in the findings of the High Court that the prisoner could interact or associate with other prisoners on the landing or participate in structured activities. That finding disregarded the affidavit evidence before the trial judge (the entire case was decided on affidavit evidence). In particular emphasis was laid on the evidence of Mr. Sean O'Reilly the assistant Governor of Wheatfield Prison. According to him the extent to which a prisoner can associate and participate depends on the relationship between prisoners. In this case, there had been a falling out between the prisoner and two groups within the prison. The prisoner could not associate in the west 2 landing because of this dispute. That averment was not disputed. The trial judge was not in a position to make a finding that was not in line with the above averments where Mr. McDonnell did not serve notice to cross examine or dispute the affidavit in

any way. The Court was referred to the O'Donnell case in this regard – *O'Donnell v. Bank of Ireland* (Supreme Court, Unreported, 25th February 2015). The Courts cannot resolve affidavit evidence where there was no notice to cross examine and this issue went to the heart of the controversy and the trial judge disregarded the only evidence before him on that point. It was simply not open to the trial judge to determine matters by rejecting evidence when he only had testimony by way of sworn affidavit of the Governor or the prison staff. In other words, the judge was not legally permitted to reject such evidence in the absence of any contradictory material. Moreover, even if there had been contradictory material, it is questionable as to how he could have done that without having each side tested by cross-examination.

39. The Governor submitted that the trial judge's approach was in stark contrast to the correct approach adopted by Kearns P. in *Rock v. The Governor of Arbour Hill Prison* [2015] IEHC 45 where he stated:-

> *"While the applicant denies now having made this admission, no request to cross-examine Chief Officer Roche was made to this Court, and thus a clear conflict of fact remains unresolved in circumstances where the burden of proof falls upon the applicant."*

40. The situation changed between the first and the second set of proceedings regarding the two prisoners with whom Mr. McDonnell could not associate. There was evidence given in the second set of proceedings before Cregan J. upon which it was open for him to make findings of fact different to those of the first set of proceedings. For instance, the picture portrayed was not one of 23-hour lockup, the applicant had been in a position to do work as a cleaner but had been disciplined after he was involved in an incident with one of the two prisoners with whom the Court has directed he must associate. The Governor contended that, by the time of the second set of proceedings, the applicant was spending 2- 3 hours out of his cell every day and there was meaningful social interaction.

41. The trial judge's finding was that he should be able to associate with the two prisoners. The difficulty with that is it runs contrary to the *Foy* case. The Governor was convinced it was not appropriate to allow Mr. McDonnell to associate with the two prisoners in question where they had stated reasons why they did not wish to associate with him. How could it be said that the governor's decision not to allow interaction flies in the face of fundamental reason and common sense?

42. Secondly, it was submitted that the trial judge erred in determining that the r. 63 direction failed to comply with Statutory Instrument 252 of 2007 and was therefore unlawful on its face. Rule 63(3)(e) of the Prison Rules 2007 provides that the Governor shall make and keep a record of any direction given under this Rule and in particular, *inter alia*, the date and time when the separation ceased. Mr. McDonnell never sought to challenge the validity of the r. 63 direction on this ground, and no leave was obtained which included this ground, and the trial judge was incorrect in ruling that this ground came within some general aspect of the pleadings. Having made this ruling, the trial judge erred in law in equating the written record of the r. 63 direction, as required by r. 63(3), with the actual direction itself which may be an oral direction.

43. Thirdly, it was submitted that the High Court judge was not entitled to find that the r. 63 direction was unlawful on the basis that there was no evidence that the Governor himself had made a decision that he considered it necessary that Mr. McDonnell should be kept separate from the other prisoners. The issue was never pleaded by Mr. McDonnell and no leave to apply for judicial review was ever granted on this ground. The Governor was never given an opportunity to address this issue in the course of the High Court hearing, whether by supplemental affidavit or indeed reference to the Prison Rules permitting delegation or otherwise. Indeed, whilst the three affidavits in the case were sworn by an Assistant Governor, he averred on each occasion that he was authorised to do so by the Governor. Furthermore he averred that the Governor did consider it necessary that Mr. McDonnell be kept separate from other prisoners who were reasonably likely to cause significant harm to the Respondent and made a direction pursuant to Rule 63(3). This averment was not objected to by Mr. McDonnell at the hearing on the basis of being hearsay or otherwise, nor contraverted by him as regards the Governor having considered the matter.

44. In respect of the second set of proceedings a further three points were advanced. Firstly, it was submitted the trial judge erred in law in his finding that there was an ongoing breach of Mr. McDonnell's constitutional rights. The trial judge erred in law erred in law and/or in fact by finding that he continued to be held in solitary confinement from 20th February 2015 and was therefore in solitary confinement for a period of twelve months, even where he has committed no breach of prisoner discipline. Furthermore the High Court judge erred in placing reliance upon the provisions of s. 13(7) of the Prisons Act 2007 in circumstances where those provisions were not material to the circumstances of the present case.

45. Secondly, it was submitted that the trial judge erred in law and/or in fact in the manner in which he exercised his discretion to grant an injunction and the injunction made amounted to the micro-management of the prison which is not permitted by law. It was unworkable to force the two prisoners with whom Mr. McDonnell could associate to do so and it gave the governor an impossible task in weighing in the balance the two prisoner's own rights and the enforced right of Mr. McDonnell to associate with them.

46. Thirdly, the trial judge erred in law by making an order that affects the constitutional rights of two named prisoners who are not parties to the proceedings.

Respondent's Submissions

47. Mr. Bernard Condon S.C. submitted on behalf of Mr. McDonnell that the High Court judge adopted the correct legal test by applying the proportionality test which was first set out in the prison context by McKechnie J. in *Holland v. Governor of Portlaoise Prison* [2004] 2 I.R. 573. The factual findings of the trial judge should not be displaced, it was contended. It was submitted a central dispute between the parties was the amount of out-of-cell hours which Mr. McDonnell enjoyed. The affidavit evidence confirmed the position Mr. McDonnell had always maintained i.e. that he was on 23-hour lockup. It was submitted he was entitled to take the view that it was better to point out internal consistencies in the Assistant Governor's affidavit rather than to seek to cross examine him and furthermore cross-examination was unnecessary on this point.

48. According to Mr. Condon S.C. r. 63 does not provide a wide discretion to the Governor. When the Governor invokes r. 63, the test of necessity applies. A prisoner who is subject to the rule need only be kept separate from other prisoners who are reasonably likely to cause significant harm to him or her "*insofar as is practicable and subject to the maintenance of good order and safe and secure custody*". There is a mandatory requirement contained in r. 63(3) compelling a Governor to keep a detailed record of any direction given under r. 63 including the date and time when the separation ceases. It was submitted that the trial judge was correct in law in finding that the failure to record an end date on the r. 63 directions was a substantive, not a technical breach, and that it was absolutely essential that this date was stated clearly on the face of the direction. It was submitted that review and monitoring provisions can be read into r. 63 in the same was as they were read into r. 62 by the High Court in *Killeen v. Governor of Portlaoise Prison* [2014] IEHC 77, and a prisoner subject to r. 63 provisions ought to be entitled to the same or greater review and monitoring provisions than a prisoner who is subject to r. 62.

49. In respect of the second set of proceedings, it was submitted that it was clear from the evidence before the High Court that the Governor failed, refused or neglected to take appropriate steps to ameliorate the conditions of solitary confinement. The trial judge carefully considered the question of Mr. McDonnell's ability to mix with other prisoners and noted there was evidence to show he was beginning to suffer from depression and that he received antipsychotic medication based on psychiatric treatment in the prison.

50. It was submitted that there was ample evidence to justify the trial judge's findings there was an ongoing breach of the applicant's constitutional rights to bodily and psychological integrity in circumstances where the conditions had "*not changed to any appreciable extent*" since the judgment was delivered in the first set of proceedings.

Submissions of the Human Rights and Equality Commission
51. The ICHR agreed with the findings of the trial judge that the imposition of solitary confinement is an exceptional measure, even when used to protect vulnerable prisoners and that when used for any period exceeding three or four weeks, must be subject to intensive review and management to ensure such conditions come to an end as soon as possible. The Commission also submitted that the judge correctly recognised the dangers of prolonged segregation on the mental health of the detainee.

52. There is a need for rigorous monitoring procedures to review ongoing periods of solitary confinement and intensive management of segregated prisoners to ensure such conditions do not continue indefinitely. If segregation is to be used as a management tool, it must be justified. There was no justification present in this case. Rule 63 imposes a duty on the prison services to see if there is a reasonable fear for the safety of the vulnerable prisoner when mixing with other inmates. The Governor gave evidence that he had his concerns, but the ICHR argued that Mr. McDonnell can associate with prisoners who are unconnected with the relevant criminal gangs even though the Governor does not share that view.

53. The ICHR while accepting due deference must be given to the Governor to carry out his duties in managing a prison that discretion is not absolute. There is a heavy onus on the prison authorities to justify why solitary confinement is necessary and whether there are other measures that could carry out the objective of protecting the prisoner without the risk to his mental health.

The Law
54. There was little controversy about the legal principles, the issue as so often being the application of the principles to the particular circumstances of the case.

55. The trial judge sought guidance in all the relevant authorities.

56. In *The State (Richardson) v. The Governor of Mountjoy Prison* [1980] I.L.R.M. 82, Barrington J. said that there "*is no iron curtain between the Constitution and the prisons in this Republic . . .*" A convicted prisoner retains his constitutional rights insofar as they "*do not depend on the continuance of his personal liberty….*" Costello J, *Murray v. Ireland* [1985] I.R. 532.

57. In *Devoy v. Governor of Portlaoise Prison* [2009] IEHC 288, Edwards J. referred to the Prison Rules and cited r. 75(2) (iii) which 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".

58. Bodily integrity includes psychological integrity. 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 Supreme Court included among the retained rights the right to personal autonomy and bodily integrity. Of relevance to these cases, he said:

> "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."

59. It is clear that the Prison Rules must be interpreted in a manner which best reflects fundamental constitutional principles. In *Heaney v. Ireland* [1994] 3 I.R. 593 Costello J. said:

> *"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 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."*

60. *In Holland v. Governor of Portlaoise Prison* [2004] 2 I.R. 573 McKechnie J, then of the High Court, held that any infringement or restriction in the exercise of the constitutional right of a prisoner must be no more than is necessary for the protection of the relevant public or private interest. The Court confirmed the application of proportionality. Accordingly, the governing principle is that the greater the interference with a person's rights, the more substantial must be the justification.

61. On the alleged breach of Mr. McDonnell's constitutional rights, the trial judge relied upon a series of recent judgments. In *Devoy* Edwards J. said that "humane treatment and respect for the human dignity of a prisoner required 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".

62. In *Connolly v. the Governor of Wheatfield Prison* [2013] IEHC 334 Hogan J., then in the High Court, considered the detention of a prisoner in a 23-hour lockup regime pursuant to r. 63 of the Prison Rules 2007. This was at his own request and had persisted for some two and a half months. The judge rejected the application for release under Article 40.4.2 of the Constitution. Cregan J. felt that this case was of particular relevance, a point that is confirmed by the extensive citations of passages from *Connolly* in the judgment. Cregan J. did consider, however, that there were distinguishing features which, perhaps, explained the different result.

63. First, the regime which was at issue in *Connolly* was in place at the prisoner's request in response to his concern for his own safety and, second, the period was two and a half months as opposed to eleven months in the present case. Those features may not

be a sufficient basis for applying dicta from the judgment but rejecting the decision in *Connolly* as a helpful precedent. The reason why a r. 63 order is put in place is to protect a prisoner from danger; the mode whereby the threat is identified is an incidental detail and not a differentiating circumstance. As to the timescale, Hogan J. in his judgment contemplated significant periods of months.

64. In his judgment in *Connolly*, Hogan J. adopted a careful, measured approach, reflecting reluctance on the part of the Court to interfere in the province of the Executive branch of government, while at the same time being conscious of the danger to the prisoner's constitutional rights of lengthy or indefinite periods of separation. Another important consideration was the Court's acceptance in *Connolly* that prison management is a difficult, sensitive and potentially dangerous undertaking. That has obvious implications for the methodology of supervision by the courts, although not, of course, for the principle. This Court does not have to express any view of the decision for the purpose of this judgment because, when properly analysed, it does not provide a precedent for the decisions under review..

65. The judgments in *Kinsella v. Governor of Mountjoy Prison* [2011] IEHC 235, [2012] 1 I.R. 467 and Connolly do not support intervention in the manner adopted by the High Court in this case and are of questionable precedential value for the general legal conclusions reached by the trial judge. In Connolly, Hogan J. distinguished *Kinsella* by reference to the quite different factual context, as in the latter case the applicant was being detained in a padded cell in a prison basement with almost no facilities. This distinction applies equally to this case. Connolly is factually close enough to justify precedential authority, but in its dicta and its result that judgment did not go nearly as far as Cregan J. did in the present case.

66. It must be recalled that in *Connolly* Hogan J. refused to grant any relief.; Secondly, separation of powers was recognised as applying; thirdly, the judgment envisaged a protracted period of separation, admittedly as an exceptional measure, before the Court would be entitled to intervene.

67. In *Walsh v. Governor of the Midlands Prison* [2012] IEHC 229 Charleton J. warned that continual review by the courts of the ordinary day to day decisions of prison authorities carries a significant danger. Intervention should be restricted to truly exceptional cases, the decision in *Kinsella* being a case in point.

68. Regulation 63 the Prison Rules 2007 is as follows:

> "Protection of vulnerable prisoners
>
> 63. (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.

Discussion/Conclusions

The Facts

69. The judge in the High Court reached his principal conclusions on the basis of the affidavits in the first application. One of the complaints made by counsel for the Governor is that the Court was not in a position to choose between disputed facts in the rival affidavits. However, the more significant point is that the Court did not in the first case have authoritative specifics about the prisoner's conditions and the policy of the authorities. That changed in the second case when the Governor gave evidence at length and in detail over two days of evidence that were two weeks apart.

70. The judge was appreciative of the information thus given to the Court. Had it been available earlier, the Court would have been in possession of a more accurate picture of all the circumstances, but it is impossible to say what, if any, difference it might have made. The different procedure adopted in the second application highlights a difficulty that a court is faced with when trying to come to conclusions on affidavits alone when the facts are disputed. The same problem may arise when the information before the court is incomplete. In these cases, the facts were ultimately established by the Governor's oral testimony as accepted by the judge.

71. There is no doubt that the conditions which Mr. McDonnell is experiencing under the r. 63 regime are restrictive and difficult for him. The Governor freely acknowledged that. But is it quite accurate to define the regime as solitary confinement? That description is usually employed to describe a form of extreme punishment by which the prisoner is deliberately excluded from human contact. Under the Prisons Act, a prisoner may not be subjected to it for more than three consecutive days.

72. The situation in fact is that Mr. McDonnell is in protective isolation from persons who may kill or injure him. The prison authorities are quite willing to have him communicate and socialise with the two other persons who are not a threat. He can receive visits from social, religious and medical personnel. He may meet his family members. He had periods of work as a cleaner on the wing in company with the other two prisoners. His advisers come to the prison. Restrictions operate only because of immediate and practical considerations or under the general prison scheme of rewards for co-operative inmates. These impositions are temporary and provisional and are to a significant degree dependent on the behaviour of Mr. McDonnell himself. As to the future, the Governor

expressed determination to ameliorate these difficulties, but he is not in a position to guarantee the extent to which he may be successful.

73. Another factual issue on which the evidence before the High Court was unsatisfactory concerns Mr. McDonnell's mental health. The first judgment records the opinion of the psychologist who was engaged by the applicant's solicitors. The grounding affidavit suggested that Mr. McDonnell had been deprived of access to a psychiatrist. He was, however, subsequently examined by such a specialist, but Mr. McDonnell has not consented to the release of the psychiatric records. That is his right, but it does lead to a consequence that the Court is not in possession of the relevant information. The Court did have the psychologist's reports, which pointed out the dangers of prolonged isolation in the long-term, but Mr. Glanville did not, however, diagnose mental illness.

74. The applicant's solicitor supplied information about his receiving anti-psychotic medication, but that can only have been based on what she had been told. An up to date assessment would be required to inform the Court about Mr. McDonnell's mental condition and also to give an opinion about the cause of any psychiatric illness. As Hogan J. pointed out in *Kinsella*, is legitimate to deduce that conditions of isolation are deleterious to mental health. As a general proposition, that is entirely unobjectionable. The Court, in these cases, went further, however, in finding that Mr. McDonnell's mental health had actually begun to deteriorate and in ascribing that development to the conditions of his detention.

Rule 63

75. The Court turns now to the legal issues. The judge concluded in his first judgment that the r. 63 orders were unlawful because of failures in compliance with the procedural requirements. The interpretation of r. 63 was not an issue in the second application because, as the judge noted, the orders that followed the first judgment contained a terminal date and the Governor signed them himself. The trial judge's interpretation of the rule formed a significant part of the rationale of the first judgment and decision and it is therefore of some importance to consider the question.

76. The trial judge held that Regulation 63(3)(e), which requires that the Governor keep a record of the date and time when the separation ceases, meant that the date had to be specified in advance. Since no date had been specified in the orders made by the Governor in this case, that meant that the order was invalid for that reason alone. I do not believe that is correct; my understanding of the rule and the purpose of the rule is that it is important that a record be kept. Since a direction under Regulation 63 is made not as a punishment but for the protection of the prisoner, it is obvious, one would think, that in some circumstances at least, it will not be possible for the Governor to know when the separation is going to terminate. Therefore, this is a requirement to keep a record of something that has happened in the past.

77. Regulation 63 has nothing to do with punishment; this is a measure of protection for vulnerable prisoners. It is an authorisation to the Governor to keep a particular prisoner separate from other prisoners who represented a danger to him. The Regulation envisages a situation where there is danger from some number of other prisoners. The Governor has to keep a record under r. (3) of the details including the date and time when the separation ceases – sub-rule (e).

78. In my view, it is also not correct to interpret r. 63 as requiring that an order be signed by the Governor himself and that it is invalid if done by his deputy. Such a requirement is not in the rule and does not appear to be consistent with its purpose. It is important to recognise that this rule is very different from r. 62, which deals with solitary confinement as a punishment. Rule 63 is not concerned with solitary confinement but with separation in the interest of the prisoner's safety. As it happens in this case, the problem for the prison authorities is that Mr. McDonnell is vulnerable to attack from almost all of the prison population. That is the reason why he is subject to such extreme measures.

79. Any order under Rule 63 arises in exceptional circumstances. The possibility that a different threat or a different level of threat may arise for consideration or some new circumstance that the authorities did not anticipate and which necessitates another Rule 63 separation order cannot be overlooked.

Solitary Confinement and Punishment

80. The Governor submits that the trial judge's finding that Mr. McDonnell has been in solitary confinement for 11 months is not justified by the evidence. There have, for example, been periods when he was doing cleaning work among other things. There has been no period when he was continuously in his cell for a day or for more than a day. Mr. McDonnell has had other visitors and there was a meeting with his father.

81. The present regime has not been imposed as a punishment, which is in contrast with solitary confinement as provided for in s. 13 of the Prisons Act 2007. The prison authorities are very keen to ameliorate the conditions in which Mr. McDonnell is being detained; the Governor said in evidence that he would arrange for social interaction between Mr. McDonnell and another prisoner who did not pose a threat to him in the morning if that could be achieved. There is no official desire to keep him in such confinement for any longer than is necessary. There are visitors who can come to see prisoners and who are available to call on Mr. McDonnell if he is willing to receive them.

82. Fourthly, the question whether Mr. McDonnell can or cannot associate with Mr. Hall or the other possible prisoner on the same wing is a matter for the prison authorities, as the Governor maintains, and not for the Court to decide. That does not seem an unreasonable proposition. Family visits are available and there is no difficulty about arranging them.

83. The conditions in which Mr. McDonnell is being detained are entirely to ensure his own safety. There is no other motive and punishment is nowhere in the thinking of the authorities. Even though it may be considered to have gone on for a long time or even too long a time, and even if it is substantially less oppressive or unpleasant than the trial judge found, the fact is, nevertheless, that these circumstances are very difficult and stressful and unpleasant for Mr. McDonnell. They also put considerable stress on the Prison Service, but in the context this is, not the most important consideration. The authorities recognise that this is extremely harsh for Mr. McDonnell. They do, however, consider that this is a temporary expedient until such time as they can devise a means whereby he can have access to better facilities and arrangements as long as his safety can be reasonably assured in the new arrangements. The prison authorities are not willing to jeopardise the safety of a prisoner on the chance that it might all work out right.

84. Therefore, although the conditions are severe and not acceptable in the long term, they are a temporary exigency in light of the particular and very unusual circumstances of real threat that exist in regard to Mr. McDonnell. The Governor and his staff are anxious to do ameliorate these conditions as soon as they can. Obviously, it would be very helpful if Mr. McDonnell himself cooperated, but even without his co-operation the prison authorities are still under an obligation to try to make life as comfortable as possible for him. Certainly they are obliged to do everything they can to remove any features that operate to endanger his mental health.

85. The Governor is justified in complaining that the trial judge accepted evidence which was hearsay and not soundly based

whatever about whether it was true or not, as to the psychiatric medication that Mr. McDonnell may have been prescribed by a psychiatrist. The fact that the prisoner himself withholds consent to revelation of his medical information in this regard makes it impossible to know what the true situation is. But it also makes it impossible for the Court to take it without further analysis or questioning that it is correct.

86. The prison had no intention of imposing a regime on Mr. McDonnell that was in any way liable to be an infraction of Irish law or Article 3 of the ECHR. There is no question of punishment involved. The prison is trying to ensure that he is kept safe from injury from other prisoners. It is also concerned that he should have as many facilities as possible consistent with his protection from exposure to danger.

87. It is not suggested, nor would it be reasonable that it would be constitutionally permissible to keep a prisoner indefinitely in solitary confinement. A high level of threat or some extreme circumstances may justify severely restrictive conditions of detention on a temporary basis. Justification is a function of the level of threat to life or safety measured against the severity of the temporary conditions. Ultimately, that judgment is one for the Court but a substantial margin of appreciation has to be allowed to the Governor and his staff.

88. Rule 63 exists to enable the Governor to ensure protection by separating a prisoner who is perceived to be in danger – obviously, the judge of that perception is the Governor and his staff. The rule does not require an end date but the matter has to be kept under review. It may be that the Governor decides to fix a date for the end of the r. 63 separation, but he may have to extend the period or begin another period depending on the circumstances with regard to the safety of the prisoner. So, one way of doing it is to fix a specific period and then to make sure that at the end of the period there is consideration of a further period or of some other measure in light of circumstances. Equally, an order under r. 63 may be made without having a specific end date and the general intention, as I understand the rule, is that it is not limited for a particular period. The obvious point is that the danger may not have dissipated at the end of any specific period that the Governor fixes. Another disadvantage of picking a specific date for the ending of the period is that the danger may have gone prior to that date.

89. A prisoner may not legitimately create the conditions in which it is impossible for him to enjoy normal facilities. A prison, like any other institution or organisation, requires cooperation all round for it to operate successfully. A prisoner who repeatedly breaches discipline and is subject to successive punishments cannot complain that he is being subjected to an unpleasant regime on an indefinite basis because he has nobody to blame but himself. Similarly, a person in the community who is a serial offender in committing crimes one after the other cannot complain that he ends up in prison.

90. A prisoner who is subject to a Rule 63 separation regime is also under an obligation to cooperate with the prison authorities who are trying to alleviate the conditions of his incarceration generally, and specifically, of his separated incarceration. If it is the case that Mr. McDonnell has realistically only two prisoners with whom he can associate, and if it is the case that he alienated those or attacked them or otherwise gave them cause to shun him, he can scarcely blame the prison authorities for that situation. There is an obligation on the prisoner to cooperate in making his own life comfortable.

Separation of Powers

91. It must also be said that a mandatory and specific order of this kind cannot easily be aligned with the separation of powers and the Government's function as the Executive authority. The Prison Governor is part of the Executive. As Hogan J. remarked in *Connolly*:

> "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."

92. As part of the executive function of the State, the Governor manages the prison and decides what is necessary for prisoner safety. The Court cannot and interfere in routine management and a *fortiori* cannot micromanage the prison by specifying a particular regime for a prisoner save in the most exceptional of circumstances, :see, e.g., by analogy the comments of Hardiman J. in *TD v. Minister for Education* [2001] 4 I.R. 287. The judgment in this case, represents an interference with the executive function.

93. The High Court made very specific orders as to how Mr. McDonnell is to be treated, detailing the hours during the working week when he is to be out of his cell and directing that he be allowed family visits as specified. Those orders cannot be upheld, in our view, because they go much too far in interfering in the internal management of the prison, and not only that, but in doing so in a manner that is specific and detailed to an inappropriate degree. Save in exceptional and unusual cases, questions of the arrangements to be made for particular prisoners have to be left to the management of the prison.

94. A mandatory injunction will only be granted when the Court is in a position to enforce it, which means that the Court has to be able to determine that the order has been breached by the person to whom it is directed. The Court cannot dictate to the governor of the prison how the institution is to be managed. The orders in this case did just that. It seems to the Court that the High Court judge's orders represent intervention rather than supervision. The judge, in prescribing detailed provisions to be made for the prisoner, has understandably and with the best of intentions intervened in operational decisions that must be made in the prison. That is not the function of the Court, unless imperatively necessary to safeguard fundamental constitutional rights. The approach should be at the level of legal principle.

95. It is generally incompatible with the constitutional structure of separation of powers for the Court to impose on the Governor specific requirements as to the management of a particular prisoner. The powers available to the Courts for supervisory jurisdiction by way of judicial review or Article 40 operate at a different and indeed more radical level.

The Grievance Procedure under the Prison Rules 2007

96. The Prison Rules include a series of provisions whereby a prisoner may bring a complaint to the attention of the authorities, including the Director General of the Prison Service, the Governor, the visiting committee and the Minister. They are as follows: –

> "55. (1) The Governor shall, as soon as is practicable, meet with a prisoner where the prisoner so requests.

(2) Where at a meeting to which this Rule applies, the prisoner makes a complaint to or request of the Governor, or brings to the Governor's attention any other matter relating to the prisoner in respect of which a decision by the Governor is warranted, the Governor shall, upon making a decision in relation to any such complaint, request or matter, notify the prisoner as soon as is practicable thereafter.

(3) The Governor shall record the date and time on which a meeting under this Rule took place, the name of the prisoner concerned, the nature of any request, complaint or matter brought to the Governor's attention during the meeting and the decision (if any) of the Governor in relation thereto. Prisoner's request to meet with visiting committee

56. Where a prisoner makes a request to meet with the visiting committee or a member of the visiting committee the Governor shall forward the request without undue delay to the visiting committee or the member concerned, as may be appropriate.

Prisoner's meeting with officer of Minister

57. (1) A prisoner may make a request, in writing, to the Governor to meet with an officer of the Minister (other than the Governor, a prison officer or any other person working in the prison) and the Governor shall, upon receipt of such request, forward the request without undue delay to the Director General.

(2) An officer of the Minister, designated by the Director General, shall, as soon as is practicable, visit the prisoner and hear any request or complaint which the prisoner may wish to make.

(3) Subject to the requirements of security, good order and the government of the prison, a meeting between a prisoner and an officer of the Minister attending the prison pursuant to this Rule shall take place within the view, and except where the prisoner or officer of the Minister requests otherwise, out of the hearing of a prison officer.

(4) Where at a meeting to which this Rule applies the prisoner makes a complaint to or request of the officer of the Minister concerned, or brings to his or her attention any other matter relating to the prisoner in respect of which a course of action by the Governor is warranted, or appeals against any decision made by the Governor, the officer of the Minister may -

(a) make a recommendation to the Governor, or

(b) recommend to the prisoner that he or she make the complaint or request to the Governor or bring the matter to the attention of the Governor, and the officer may, before making a recommendation under this paragraph, seek the views of the Governor in relation to the request, complaint or other matter, as the case may be.

(5) Where the Governor fails or refuses to give full effect to a recommendation of an officer of the Minister under paragraph (4) (a) the Director General may give a direction to the Governor in relation to the complaint, request or other matter concerned and the Governor shall comply with the direction.

(6) The Governor shall record -

(a) the prisoner's name,

(b) the date on which a request under this Rule was made,

(c) the date on which it was forwarded under this Rule,

(d) the date on which a meeting under this Rule took place,

(e) a recommendation made or direction given under this Rule, and

(f) any action taken or decision made by him or her pursuant to such a recommendation or direction."

97. It is apparent from this scheme that a prisoner who feels aggrieved about his treatment in the prison has a number of avenues of complaint. Obviously, that administrative process is subject to supervision of the courts by way of judicial review. The advantage that it offers is of examination of the issue raised by the prisoner by persons and in circumstances of knowledge of prison life and also the capacity to specify means of dealing with the complaint. Expert knowledge of prison life and the capacity to give specific directions highlight the distinction between this form of investigation and the process of judicial review that is available in the Courts. This mode of proceeding does, of course, exclude access to the courts for the purpose of indicating constitutional or legal rights but the scheme provided by the Prison Rules affords reassurance that the prison authorities, the Director General and the Minister all have responsibilities in regard to complaints, which obviously includes the conditions in which prisoners are detained and their human rights.

Conclusions

98. It is for prison authorities to decide what measures are necessary for the safety of prisoners. That includes r. 63 orders. It is not for the High Court to second-guess decisions of fact in that regard, but they are subject to review as administrative decisions in accordance with the principles set out in a series of cases, including *Holland, Walsh, Kinsella* and *Connolly*.

99. A prisoner has a remedy in the courts under Article 40 if his conditions are unlawful, which includes torture or inhuman or degrading treatment, but obviously that only arises in extreme circumstances.

100. A high level of threat or some extreme circumstances may justify severely restrictive conditions of detention on a temporary basis. Justification is a function of the level of threat to life or safety measured against the severity of the temporary conditions. Ultimately, that judgment is one for the Court but a wide margin of appreciation has to be allowed to the Governor and his staff.

101. There is a grievance procedure available to a prisoner under the Prisons Act 2007 which is itself subject to judicial review.

102. A prisoner is obliged to cooperate with the management of the prison in protecting his own safety, health and welfare during his detention. He cannot, by his wilful disruption or breach of discipline or refusal to obey rules or to cooperate, contrive to bring about a situation in which his conditions are unpleasant or worse, and nevertheless obtain relief from the courts.

103. It is impossible for a Court to lay down rules that are absolute or universal; exceptional or unanticipated circumstances require bespoke solutions that may not sit comfortably with established precedent.

104. This Court is satisfied that the trial judge fell into error in making the declarations and orders in these cases; in holding that there was a continuing breach of Mr. McDonnell's constitutional right to bodily integrity because of the conditions of his detention, having regard to all the circumstances; that there was an obligation on the Court to remedy the breach as far as possible and that the Court was in a position to do so by granting an injunction specifying minimum facilities for association with two other prisoners.

105. In particular, the declaration that Mr. McDonnell was being kept in solitary confinement in breach of his constitutional rights did not reflect a sufficient or correct analysis of the complex issues in the case because:-

a. The nature of the threat to Mr. McDonnell is grave;

b. The only purpose of the conditions is protection;

c. These arrangements are temporary;

d. The authorities wish to alleviate conditions as much as they can and as soon as possible;

e. The situation is reviewed constantly;

f. The actual conditions, although harsh, are not intolerable;

g. Mr. McDonnell does have contact with other persons besides prison officers, for example, listeners and family, as well as legal advisers, medical personnel, psychology and psychiatry services;

h. Opportunities for prisoner social contact on this wing are limited because of the circumstances consigning them to that location;

i. Part of the problem is in the control of Mr. McDonnell himself, which is not a matter of blame but recognition of a fact, because of

i. his own status

ii. his relationship with the other two suitable fellow occupants of the wing;

j. There is no element of punishment;

k. The Governor accepts that the situation is difficult and harsh and is endeavouring to improve conditions.

106. The High Court did not have accurate, up to date evidence of the prisoner's mental health because he had exercised his entitlement to withhold it. In the absence of that information, the Court was not justified in deducing an incipient deterioration of Mr. McDonnell's mental condition by reason of the conditions of detention.

107. The decision on the conditions of Mr. McDonnell's detention relates to the time of his application and the evidence that was before the High Court. His circumstances may change for better or worse or they may continue for a long time. It may be considered that in either of those situations, there has been a sufficient alteration of his conditions of detention to warrant an application to change them. He may decide or be advised in the future to utilise the grievance procedure or to make application to the court. The Court's judgment on these applications does not in any way inhibit the applicant's rights in that regard.

108. The appeals will be allowed and the orders of the High Court will accordingly be set aside.