THE HIGH COURT

Record No. 2017/45JR

BETWEEN/

ZACHARY PURCELL

APPLICANT

- AND -

THE GOVERNOR OF MOUNTJOY PRISON

AND

THE IRISH PRISON SERVICE

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENTS

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 31st day of May 2018

1. In these judicial review proceedings, the applicant, Mr. Zachary Purcell, has challenged the validity of one aspect of what is described as the "protected regime" which is in operation for certain classes of vulnerable prisoners in Mountjoy Prison. The protection regime is provided in Rule 63 of the Prison Rules 2007 (S.I. No. 252 of 2007) and it envisages that:

> "…a prisoner may, either at his or her own request or when the Governor considers it necessary, in so far as 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. While the system of protected prisoners is not a new phenomenon within the Irish prison regime, it is clear that the proliferation of gang culture among the prison population has presented formidable new challenges for prison management. Many prisoners self-describe themselves as part of a particular gang or faction and, almost by definition, they find themselves vulnerable to attack from rival gang members. It would, in addition, be unrealistic not to acknowledge that protected prisoners may themselves pose a risk to other prisoners.

3. The present challenge is to what is described as a system of screened visits for protected prisoners at Mountjoy Prison, the net effect of which is effectively to preclude any physical contact at all between the prisoner and members of his family. I would not wish to minimise the impact of a system of screened visits because a meeting which takes place between a perspex screen is simply not the same as a one in which the prisoner can come face to face with members of his or her family or other visitors. At the same time the security concerns which have prompted the prison authorities to maintain such a system for protected prisoners are very real. As Governor Harris explained in an affidavit sworn by him on the 20th October 2017:

> "The first reason was safety amongst protected prisoners. Prison visits posed a particular problem because of the physical limitations of the Mountjoy complex. Whilst with yard exercise and other exercises, protected prisoners could be kept apart from other groups of protected prisoners, this was not the case (due to building limitations) with prison visits. With prison visits, protected visitors from different colour groups were seated in the same visiting area. These rooms could accommodate 12 visitors with two boxed visiting areas at the end of each room for solicitor/client consultations. These boxed visiting areas were used on certain occasions for unscreened prison visits i.e. where protected prisoners would meet visitors.
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> I found that prior to the introduction of screened visits that there was a real risk of violence within the unscreened visiting area of the prison. This was because of the various factions and gangs in conflict on the outside of the prison and the real risk of violence to a prisoner or visitor in the unscreened visiting area. Because the visiting room contained various prisoners from all groups of protected prisoners and not just, for example, the group of which the applicant was a member, there was a real danger of serious violence occurring in this area. The perpetrator of this violence could be a visitor to a protected prisoner or amongst protected prisoners. The threat of violence amongst protected prisoners in the visitor room setting is much more magnified than amongst the general prison population, because of the very nature of persons who opt to become protected prisoners, i.e., people who feel their safety is at issue.
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> The second reason for introducing screened visits concerned reducing contraband into the prison. A deliberate tactic used to import contraband into the prison was to pressurise weaker individuals within a protected prisoner group by members of that group to bring contraband into the prison. This occurred by such prisoners requesting a box visit in the unscreened seating area (*i.e.* the two boxed areas used for solicitor/client consultations). Such unscreened visits were allowed in cases of a special occasion, *e.g.*, a daughter's birthday etc. This channel of bringing contraband into the prison was too significant not to blindly ignore. Of course, contraband enters the prison in other ways but this channel was particularly pronounced and distinguishable in relative terms from the amount of drugs/contraband coming into prison via visits to the general prison population. Given the nature of the activity, it was inherently difficult to find those organising such but I am of the view that the applicant was involved in pressurising weaker individuals with his group to bring contraband into the prison."

4. The present proceedings were commenced in January 2017. Mr. Purcell had, in fact, been convicted of burglary in December 2015 and he was then sentenced to a term of three years imprisonment. He immediately sought status as a protected prisoner and this request was granted by the Prison Governor. The applicant was released from custody in February 2018.

5. Although there is no question but that the applicant was subject to the practice of screened visits – so that he had certainly *locus standi* to commence the present proceedings – the question which now arises is whether the present proceedings have been rendered moot by reason of a series of events which I will now describe.

6. The first of these was that the applicant was released in February of this year. The second development is that the practice of screened visits has changed very significantly in the meantime. The new system of screened visits never actually applied to this applicant. As Governor Harris has explained:

> "In June 2017, most protected prisoners moved from Mountjoy West to the A Wing of the original prison. This was made possible after the many years of upgrades to A Wing including the retrofitting of in-cell toilets. Some protected prisoners, who are particularly vulnerable, are now placed on B Basement. Notwithstanding the physical limitations of the Mountjoy prison campus, I am trying as Governor to introduce a "green zone" for protected prisoners to enable them to participate in prison activities to a greater extent. With the move to a new wing, I have re-introduced unscreened visits for protected prisoners in the A Wing (which includes the applicant) but not for those particularly vulnerable protected prisoners in B Basement. This policy will be kept under review. If the twin concerns re-surface regarding safety in the visit area or contraband (via vulnerable prisoners) then I may be forced to re-introduce screened visits for all protected prisoners."

7. To my mind, this latter development is far and away the most significant one so far as the issue of mootness is concerned. After all, the principal relief sought by the applicant was an order of *certiorari* quashing the decision of the Prison Governor "to permit only screened visits to the applicant as a 'protected prisoner'." But this challenge was to a policy and practice which, to all intents and purposes, no longer exists. It should also be noted that this particular challenge was not – and could not have been – advanced on some *ex facie* basis where the challenge was to the validity of the policy as a thing in itself. Rather the proceedings were highly fact specific, because the challenge was in essence to the proportionality of the policy and whether this interference with the family rights of the applicant prisoner was capable of objective justification.

8. Viewed thus, the conclusion that the present proceedings are moot is virtually inescapable. Critically, the sub-stratum of facts upon which the challenge rests or, at least, might rest has all but completely disappeared. I do not overlook the fact that there are some protected prisoners who are still confined to screened visits, but Mr. Purcell was not one of them. The factual circumstances by reference to which such prisoners are confined to screened visits are, moreover, entirely different to that to which Mr. Purcell had been subjected. This new policy applies to particularly vulnerable protected prisoners – as distinct from protected prisoners *simpliciter*. The screening which was the subject of the complaint in the these proceedings all took place in the Mountjoy West part of the prison complex and applied generally to the protected prisoner population. This particular policy has been discontinued and the new policy applies now only to a more limited class of protected prisoner who are based in the B Basement.

9. It follows, therefore, that any challenge to the policy now existing would really have to be based on the particular facts and circumstances of a prisoner held in B Basement who was subject to it. As I have already noted, the applicant is not one such person and to permit him to advance such a challenge would be tantamount to allowing him to advance not only a entirely new case, but in doing so to assert a *jus tertii* on behalf of such a prisoner. As Henchy J. stated in *Cahill v. Sutton* [1980] I.R. 269, 283:

> "While a cogent theoretical argument might be made for allowing any citizen, regardless of personal interest or injury, to bring proceedings to have a particular statutory provision declared unconstitutional, there are countervailing considerations which make such an approach generally undesirable and not in the public interest. To allow one litigant to present and argue what is essentially another person's case would not be conducive to the administration of justice as a general rule. Without concrete personal circumstances pointing to a wrong suffered or threatened, a case tends to lack the force and urgency of reality. There is also the risk that the person whose case has been put forward unsuccessfully by another may be left with the grievance that his claim was wrongly or inadequately presented."

10. One might also add that to allow such a challenge at this point without the benefit of evidence in relation to how the new policy actually operates in practice by reference to the specific facts and circumstances of a prisoner actually affected by it would mean that this court would be required to pronounce upon the validity of the policy by reference to a purely speculative or hypothetical set of facts. It is, of course, true that the courts are sometimes prepared to determine the underlying issue even where the case is moot. This, moreover, reflects the fact that the mootness doctrine is simply a rule of practice which may be relaxed as the occasion appropriately presents itself.

11. As the Court of Appeal pointed out in *McDonagh v. Governor of Mountjoy Prison* [2015] IECA 71:

> "The fact, however, that a particular appeal is moot is not necessarily the end of the matter. The rule in relation to mootness is simply a rule of practice designed to conserve the exercise of the judicial power to its proper sphere of application. In recent years the Supreme Court has stressed that this general rule must yield on occasion to the greater imperative of resolving issues which, while moot, are apt to recur or where there are other compelling reasons why such an appeal should be entertained."

12. These contemporary developments are well illustrated by the Supreme Court's decision in *Farrell v. Governor of St. Patrick's Institution* [2014] IESC 30, [2014] 1 I.R. 699. In that case the applicant sought and obtained an order ex parte from the High Court (Birmingham J.) granting leave to apply for judicial review in respect of a pending trial. A stay was also granted restraining any further prosecution of that offence in the District Court. The District Judge nonetheless subsequently remanded the applicant in custody for a short period of a few days.

13. An application was then made to me sitting as a judge of the High Court under Article 40.4.2. By the time the application was ultimately heard the stay had long since expired. I took the view that although the matter was now moot, given the shortness of the time period in question, the legality of that detention might otherwise escape effective judicial oversight and review, it was appropriate that the merits of the case should be addressed. I then held that the remand in custody which had been made by the District Court judge was inconsistent with the earlier stay which had been granted by Birmingham J. and made a declaration to that effect.

14. A majority of the Supreme Court held that the respondent's appeal from my decision was now moot by reason of the effluxion of

time, but the Court unanimously took the view that even if this were so, it should nonetheless proceed to hear the appeal. The Court then proceeded to hold that I had been incorrect in granting the declaration which I had. So far as the mootness issue was concerned, Denham C.J. pointed out ([2014] 1 I.R. 699, 708-709) :

"The reasons why I would hear this moot appeal include the following:-

> (i) the decision to grant a stay was made on an *ex parte* application, and the appellant had no opportunity to address the issue, or terms, of a stay;
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> (ii) the decision has an effect on criminal proceedings which are of real and reasonable concern to the appellant;
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> (iii) such an issue arises in circumstances which would escape review if the Court did not exercise a discretion to hear the appeal;
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> (iv) the decision potentially affects many criminal cases in the District Court;
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> (v) the decision has a systemic relevance to cases before the courts, where an application for judicial review has been granted."

15. For my part, I do not think that, subject to one exception, any of these considerations apply here. No decision has been taken by the High Court (or any other court) which affects the parties or any criminal proceedings or any other pending criminal cases. Nor could it be said that the issue would escape review if the Court did not exercise a jurisdiction to hear an otherwise moot case, because such cases can be brought by a prisoner presently affected by the new screening regime. As I have already stated, the circumstances of the new regime are rather different from the now discontinued regime to which the applicant was subject and which is under challenge here.

16. I agree that the question of the validity of the screening practice is one which has (or, at least, may have) a wider systemic importance. But one still comes back to the fact that the old system of which the applicant complained is no more and to make a determination as to whether it was lawful by reference to these historical facts would serve little useful purpose and would confer no practical advantage on the applicant.

Conclusions

17. In my judgment, the present proceedings have been rendered moot by reason especially of the significant changes effected in relation to screened visits by the Prison Governor in June 2017 and the discontinuation of the particular practice of screened visits of which the applicant had complained. In these circumstances it would in effect be pointless for this Court to pronounce on the validity of the now discontinued practice. Since the applicant can obtain no practical benefit from any judicial determination on this point, it would, I think, be consistent with the proper administration of justice that I should decline to do so.

18. In arriving at this conclusion I do not overlook the fact that a slightly different version of the screening policy has been introduced for those prisoners who have been transferred to the Basement B. But the applicant was never one such prisoner so that it would be inappropriate for me to entertain what would amount to a *jus tertii*-style claim brought by the applicant on behalf of these prisoners.

19. In conclusion, therefore, I conclude that the present proceedings have been rendered moot and it would not now be appropriate for me in the circumstances to pronounce upon the substantive issues regarding the validity of the screening programme raised by the applicant.