Neutral Citation Number: [2010] IEHC 269

THE HIGH COURT

2004 636 JR

BETWEEN/

SEAN MULLIGAN

APPLICANT

AND

THE GOVERNOR OF PORTLAOISE PRISON, MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM, THE IRISH PRISON SERVICE, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice John MacMenamin delivered the 14th day of July, 2010.

1. On 29th July, 2001, the applicant was arrested and charged with membership of the Real IRA. He was convicted in the Special Criminal Court of that offence on 20th December, 2002, and was sentenced to a period of five years imprisonment, back-dated to the date of his arrest and subsequent detention. The applicant was ultimately released on 27th April, 2005. He served his sentence on the E Wing in Portlaoise Prison.

2. In 2004 the applicant was appointed as a spokesman for the Real IRA group of prisoners. An issue arose as to whether a fellow prisoner should have been extended compassionate leave so as to attend the funeral of a family member. The group considered that there had been a breach of an understanding with the authorities on such questions and engaged in a campaign of protest.

3. As a result of this campaign, on 20th May, 2004, the applicant was subjected to disciplinary proceedings. It was determined that he was to lose a series of privileges, be placed in closed confinement for 28 days, and be denied phone calls or visits, save for legal visits. The applicant claimed that, during this period, he was confined in his cell for a total of 22 hours a day, and denied free association with other prisoners. He asserted that these conditions were particularly onerous on him by reason of a pre-existing susceptibility to colorectal medical complaints described later.

4. These judicial review proceedings were originally initiated by the applicant on 26th July, 2004. The "close confinement" issue was resolved without a full hearing in 2005.

5. The remaining and central issue now, is the applicant's contention that the absence of in-cell sanitation, alleged unhygienic conditions and the necessity to engage in "slopping-out procedures" gave rise to a violation of his constitutional or ECHR rights. He says the prison regimen caused or rendered symptomatic his pre-existing susceptibility to colorectal complaints. He seeks declarations that the respondents' breaches of duty give rise to remedies by way of declaration and damages.

The general headings of the case

6. The case falls for consideration in two ways. First, the applicant seeks a declaration that his detention was a violation of rights under Article 40.3.1 of the Constitution of Ireland, including his personal right to bodily integrity, his right not to have his health placed at risk, and his right not to be subjected to torture, inhuman or degrading treatment or punishment.

7 The applicant claims alternatively that the prison conditions gave rise to violations of his Article 3 and Article 8 rights under the European Convention on Human Rights (ECHR) engaging respectively, questions of inhuman and degrading treatment, and the right to private life.

8. The fact that the applicant had no in-cell sanitation is not in dispute. But as will be explained, an assessment of the issues necessitates an analysis, not only of this one fact, but also the overall conditions to which the applicant was exposed during his term of detention.

Background

9. The main time framework of this case is between 24th July, 2001 and 27th April, 2005. The case does not concern subsequent events. But prior to 2001, a number of international and domestic expert reports called into question prison accommodation and standards in Ireland, in particular, in the context of overcrowding. The lack of in-cell sanitation and the practice of "slopping-out" were also criticised. As far back as 1993, the European Committee for the Prevention of Torture, Inhuman and Degrading Treatment or Punishment (CPT) was sharply critical of these procedures in Irish prisons. These same concerns were repeated in later reports from that organisation. On repeated occasions from 1997 to 2003, the Visiting Committee to Portlaoise Prison drew attention to the issue. In the year 2000, the Committee drew attention to assurances that were given by the Prison Service that remedial construction work would be carried out: they observed that the failure by the Prison Service to carry out works in accordance with assurances given was "totally unacceptable". The deep concern and frustration of the Committee at the lack of progress is repeated in a number of

contemporaneous reports.

10. In the 1990's various committees formed under the aegis of the respondents, accepted the need for in-cell sanitation in prison accommodation. One such committee formed by the Department of Justice noted that the installation of in-cell sanitation in all places of detention was planned to be completed by 1999.

11. Organisations such as the CPT investigated prison conditions in many European States. A number of such cases were brought before the European Court of Human Rights ("ECHR") in Strasbourg. Case histories there involved conditions which could only be described as being near to sub-human. The Strasbourg jurisprudence, considered later in this judgment, outlines the circumstances in which such detention and conditions have been held to constitute violations of Articles 3 and 8 ECHR.

12. United States courts have had to consider whether prison conditions constituted cruel and unusual punishment prohibited under the Eighth Amendment. United States jurisprudence has involved a consideration of an "objective" component (was there a sufficiently serious deprivation of rights); and a subjective element (was the deprivation brought about in wanton disregard of the inmate's rights). The purpose of such criteria were to measure the impugned conditions of confinement against "the evolving standards of decency that mark the progress of a maturing society" (*Rhodes v. Chapman* 452 U.S. 337 (1981). To show deliberate indifference, the subjective aspect of the Eighth Amendment test, plaintiffs must also show that the officials had actual knowledge of impending harm which was easily preventable (*DesRosiers v. Moran* 949 F. 2d. 15, 19 (1st Cir. 1991).

13. As will be seen many of the same themes resonate through cases brought under our Constitution, the ECHR and the United States Constitution. The jurisprudence often considers both the "specific" issues referable to an individual and those more generally referring to a group or class of prisoners.

Features of the claim

14. As a preface, it is useful first to identify a number of features of this case prior to outlining the evidence.

(i) It is necessary to emphasise that the matter in question here is a purely legal question. The constitutional and legal tests are defined by legal authority. The rights in question are legal and constitutional rights also as defined and identified in established case law. It is self-evident that the practice of slopping-out was unpleasant, caused resentment among many prisoners; and was seen by many people as repugnant by today's standards.

(ii) The applicant's case is both "general" and "specific"; he seeks to impugn aspects of the general prison regime and also refers to their alleged particular physical and psychological consequences upon him.

(iii) This is a single, *inter-partes* claim; not a form of class action. Such a concept is not recognised in Irish law.

(iv) The causes of action upon which the applicant relies in the first part of the judgment are alleged constitutional "wrongs" having a "vertical" effect, that is, in the context of an action by a citizen against state authorities. The judgment will therefore consider the applicability of defences available under the general law of torts.

(v) The applicant's pre-existing medical history is relevant. He received colorectal treatment for an anal fissure condition as far back as 1988. His disposition to haemorrhoidal symptoms dated as far back as the 1970s. Indeed these medical issues continued to trouble him even after he left prison in 2005, and ultimately necessitated yet further treatment.

(vi) The constitutional and legal issues in question are closely connected to the values of privacy and dignity. The applicant here was in the relatively privileged situation of at all times having a cell to himself, as did all the other Real IRA prisoners on the E2 landing.

(vii) The sanitation, hygiene and ventilation in Portlaoise Prison are also the main focus of the claim. In fact, the applicant favourably contrasted other aspects of the prison regime to that which had obtained in Portlaoise Prison when he served a previous sentence from 25th June, 1977 to 6th November, 1984 for a variety of paramilitary offences, including shooting with intent to murder.

(viii) By its very nature, imprisonment must give rise to a deprivation of certain rights. But any attenuation of rights must be proportionate; the diminution must not fall below the standards of reasonable human dignity and what is to be expected in a mature society. Insofar as practicable, a prison authority must vindicate the individual rights and dignity of each prisoner. As a citizen, a prisoner is entitled to protection of his right to bodily integrity, an unenumerated right established under Article 40.3 the Constitution. He or she is entitled not to have their health placed at risk. As a matter of general principle he or she must be protected against inhuman or degrading treatment.

(ix) Consideration of the material evidence is largely confined to the period prior to, and during the applicant's period in Portlaoise Prison. To reiterate; subsequent events do not have a direct bearing on the issues the Court must decide.

The nature of the constitutional wrong alleged

15. As a further point of reference it is useful briefly to consider the nature of the constitutional wrong alleged by the applicant. It is that the inhuman and degrading treatment he alleges constituted an actionable wrong or tort under the Constitution. (See *Meskell v. C.I.E.* [1973] I.R. 121; *Kearney v. Minister for Justice* [1986] I.R. 116; *McHugh v. Commissioner of An Garda Síochána* [1986] I.R. 228; and *Kennedy v. Ireland* [1987] I.R. 587)

16. A number of the rights asserted here are identified and found only within the parameters of the Constitution. Privacy is one example. On the other hand, certain of the rights may be seen as being "sub-constitutional" *i.e.* such rights (or their correlative duties) while embodying constitutional values, may also be expressed within the framework of the common law, or under Statute. The issues of this case predate the introduction of the Prisons Act 2007 and the inception of the office of Inspector of Prisons.

17. Clearly the respondents owed the applicant a duty of care under the law of tort during detention. The right of bodily integrity is extensively protected in the law of torts also. Prison authorities must not act negligently or in breach of duty to a prisoner or cause him injury by negligence. However there may also be infringements of constitutional rights, not regulated by law, and for which no

protection exists other than within the boundaries of the Constitution. Then, as found in *Meskell*, a right of action and remedy is to be found within the Constitution itself.

The interaction of the Constitution with Statute and common law

18. This case aptly illustrates the manner in which these categories of case may interact and overlap. What arises here is not simply a free standing "*Kennedy v. Ireland*" privacy right, or the unenumerated right of bodily integrity. Such rights were found to be capable *only* of constitutional remedy. The claim here has many attributes of a personal injuries claim in the law of torts; specifically, for example, an employee suing an employer for work conditions allegedly exposing him to injury including the re-occurrence of a pre-existing back condition. The facts here require that the rights asserted be considered not *a priori*, or in the abstract. Such an approach might give rise to a strict or absolute liability which might render injustice. The questions here arise in concrete form. Insofar as the rights are manifested "constitutionally" *and* in a "tort" context, defences in the law of torts such as *volenti non fit injuria*, foreseeability and contributory negligence may arise.

19. In *Hanrahan v. Merck Sharpe and Dohme* [1988] I.L.R.M. 629, Henchy J. clearly envisaged that a defendant in a "horizontal" *inter partes* constitutional tort claim should be entitled to a "tort" defence. He pointed out:

> "In many torts, for example, negligence, defamation, trespass to person or property, a plaintiff may give evidence of what he claims to be a constitutional right, but he may fail in the action because of what is usually a matter of onus of proof or *because of some other legal or technical defence*." (at p.6.36)

By analogy, a "vertical" action against the State in *McDonnell v. Ireland* [1998] 1 I.R. 134, the question of time limitations arose, albeit in the context of a wrong not specifically identified under the Statute of Limitations 1957.

20. In *McDonnell*, the plaintiff claimed that he had been dismissed from his employment and suffered loss under legislation held subsequently to be constitutionally invalid. He had not been reinstated. This claim was rejected on the basis that it had been defeated by the Statute of Limitations 1957.

21. Keane J. observed that for a variety of reasons damage which at first sight might seem to have been wrongfully inflicted may not be properly remediable in tort. He observed that even where so remediable, the proceedings may still require to be brought within the constraints of a different form of action.

22. He held that the finding in *Meskell* to the effect that constitutional rights carried with them their own entitlement to a remedy for enforcement was consistent with their being protected "by a new form of action in tort". But then he added that this should be "*Provided of course, the form of action thus fashioned sufficiently protected that constitutional right in question*" (at p. 158 of the report). Keane J.'s view was supported by O'Flaherty J. and Hamilton C.J.

23. Barrington J. (at p. 148 of the report) did not dissent from the outcome but adopted a different approach. He did not think it necessary to decide whether *all* breaches of constitutional rights were torts within the meaning of the Statute of Limitations. But one passage from his judgment is particularly relevant reflecting as it does the views of the Court as a whole on the question of the parameters of such a constitutional claim:

> "There is no doubt that constitutional rights do not need recognition by the legislature or by common law to be effective. If necessary the courts will define them and fashion a remedy for their breach. There may also be cases where the fact that a tort is also a breach of constitutional right may be a reason for rewarding exemplary or punitive damages.
>
> *But at the same time constitutional rights should not be regarded as wild cards which can be played at any time to defeat all existing rules. If the general law provides an adequate cause of action to vindicate a constitutional right it appears to me that the injured party cannot ask the court to devise a new and different cause of action. Thus the Constitution guarantees the citizen a right to his or her good name but the cause of action to defend his or her good name is the action for defamation. The injured party, it appears to me, has to accept the action for defamation* ***with all its incidents*** *including the time limit* ***within which*** *the action must be commence."* (Emphasis added)

24. On the facts, the bringing of this action as a "constitutional tort" must also carry with it other incidents of tort law such as *volenti non fit injuria*, foreseeability and contributory negligence. A citizen may not "precipitate" a cause of action for a wrong involving aspects of a duty of care without a defendant being able to rely on the defences that might normally arise with regard to the imputation of such duty. A framework or range of tort concepts must come into the balance here. (See *W. v. Ireland (No. 2)* [1997] 2 I.R. 141; McMahon and Binchy, *Law of Torts* 3rd Ed (2000) para 4-25; Binchy, *Constitutioal Remedies in the Law of Torts Essays in Honour of Brian Walsh* (O'Reilly Ed.) (Dublin, 1992)

The evidence

25. I move then to consider the circumstances of the applicant's detention and thereafter to assess what were the duties that arose therefrom, both under the Constitution and as an issue under ECHR.

26. Throughout his five year term the applicant was imprisoned in cell No. 38 on the second landing of E Block in Portlaoise Prison (hereinafter "E2"). This Block contained prisoners who belonged to various factions of paramilitary organisations. The "E2" landing was occupied by Real IRA members who had been convicted of various offences. When the applicant arrived in Portlaoise Prison in 2001 there were 16 or 17 prisoners sharing that landing. The number gradually increased until it was necessary to deploy a number of further cells in the previously vacant E3 landing above.

27. On admission to prison, a number of questions were put to the applicant with regard to his medical condition and history. He made no mention of any relevant pre-existing medical problem, nor, specifically, to the prior medical conditions described earlier. His medical records disclosed that he made complaints to the doctor with regard to haemorrhoids on one occasion only, the 16th October, 2001, two and a half months after he was detained and placed in custody.

Accommodation and furnishing

28. The applicant was the sole occupant of his cell. This is an important feature of the case. The cell measured 10 feet by 8 feet. By comparison to some other accommodation described in the national and international jurisprudence it was relatively well furnished. It contained a bed, a bedside locker (essentially a steel filing cabinet), an armchair, a second plastic chair, a number of shelving units made of medium dense fibre, a desktop computer, a television set and VDR machine, a reading light, an electric fan, a radiator, and a window. There was a spy hole placed in the cell door measuring 1.25 sq. inches.

Ventilation
29. But cell ventilation was primitive. At the top of the window there was an opening five inches wide, intended to provide ventilation. The applicant stuffed this gap with clothes and newspapers in order to prevent drafts coming into the cell. Many other prisoners did the same thing to improve air flow. One of the glass panes in the window had been taken out to add ventilation.

30. There were two aluminium sliding sections in the aperture which could be slid open and shut to control ventilation. The aperture and the missing window pane were the only means of ventilation in the cell.

31. The applicant's complaint was that the ventilation in this cell was inadequate. In itself it gave rise to situations where, on occasion, the cell was either too hot or too cold. This problem could be particularly acute in the context of the absence of in-cell sanitation.

Sanitary facilities
32. The landing was adequately provided with four toilets and one urinal for day time use. Two shower units were available. Each prisoner was provided with a chamber pot for night use, more were available if needed. These pots measured 9 inches in diameter, 6 inches in depth and with a base diameter of 7 inches. The pot had a handle projecting 5.5 inches over the lid and had a capacity of 3.5 litres. This was fixed with a lid. The device was made of heavy plastic. The applicant said he had to defecate in the pot on average three to four times a week. He accepted that the lid mitigated the smell which emanated from it. He said that the odour problem was particularly acute when, on two occasions, he suffered from a stomach bug or diarrhoea.

33. The applicant described defecation as being often extremely painful. He described the process of using the pot in the cell as being awkward. It was necessary to squat and to endeavour not to defecate on the floor, or on the pot itself. The longer he engaged in defecation, the greater the risk that he was exposed either to stomach cramps or diarrhoea. He stated this problem was aggravated if one were to defecate and urinate simultaneously. He said this inherently awkward process was aggravated by his own condition; his embarrassment was increased if he accidentally knocked over the pot. He described the physical and psychological effects on him of using this pot. He felt humiliated as a result of the process. Because of his particular medical problem he found it particularly degrading. The issue became magnified in his own mind to the extent where it "got in on him".

34. As will be explained later, a particular feature in Article 3 and Article 8 ECHR decisions elsewhere on the absence of in-cell sanitation *coupled* with other features such as multiple cell occupancy arises. Such profound invasion of privacy or incursions into human dignity does not arise here because of the single cell arrangement.

Toilet facilities
35. There were toilets available on the landing for day time use. The applicant had access to these at any time when he was out of his cell and on the landing. It was not contended these were inadequate in number. However, the applicant felt a degree of pressure on him in using these when it came close to lock up time. This enhanced his feeling of apprehension.

No running water or adequate ventilation in cells
36. The hygiene facilities were below standard. The applicant's cell did not have running water. He was provided with a small plastic dish of static water for hand washing purposes. There was no storage facility for fresh water in the cell. Once this dish of water had been used, there was no other water available for washing during lock-up period during the nights. Toilet paper was brought into the cells by the prisoners themselves and thrown into the pot after use.

Slopping-out procedure
37. Each morning prisoners who had used the chamber pots would engage in the archaic process of slopping-out. There were two sluice rooms at either end of the landing. There was natural ventilation over each sluice which was relatively effective. However were such sluices now to be installed it would be necessary to ensure full mechanical ventilation to accord with building regulations.

38. On his way to the sluice the applicant had to pass five other cells. He said that prisoners on the landing above could look down on him and that he was exposed to the gaze of other prisoners and prison staff.

39. But the evidence did not establish that E landing was ever overcrowded. There was no real evidence that there was a rush to use the sluice. Prisoners were not subject to a time constraint for slopping-out. They could choose any point in the day for this. All prisoners did not have to slop-out on any one day. I accept the evidence of Chief Prisoner Officer Connolly who testified that he had never noted a queue forming in the E 2 landing sluice area during many years in the prison. It was not established that time-constraints such as meal times created additional problems at the sluice. This was not a situation where each prisoner had a short period of time available to use the sluice.

The sluice
40. Soap, disinfectant and bleach was provided at each sluice. The evidence established that the sluice was in fact both clean and in good order. There was a substantial quantity of bleach provided as disinfectant which was made up and ready for use. There was clear evidence that the prisoners sought to maintain high hygiene standards. The facilities provided were used for that specific

purpose, and no other.

41. However, a consultant microbiologist, Ms. Ann Storey, testified that the use of a sluice of this nature could, potentially, give rise to health risks. Such risks could derive from defecation *via* the faecal-oral route, when diseases were passed from faeces to the mouth by contaminated hands, food, or water.

42. The applicant complained that when emptying the chamber pot some splashing might occur. He said human waste matter might strike his hands, arms, chest or face. At the time he would normally be wearing a pair of shorts and tee-shirt. After using the sluice or the toilets, prisoners had access to a number of sinks so as to wash their hands. At the north end of the landing there were two stainless sinks for hot and cold water outside each of the sluice rooms. These, too, were provided with bleach, disinfectant and hand soap. Two further sinks were available at the south end of the landing. Two further sinks were in the servery area but used for washing utensils only. I accept the evidence that the only way to minimise the risk of such disease is to reduce the possibility of such contact. Such contact may be prevented by the provision of adequate washing facilities; but, clearly, in-cell sanitation would better achieve the objective.

43. I must conclude that the ventilation, sanitation and hygiene regime fell significantly below the standard one would expect at the time.

The medical and psychological evidence concerning the applicant
44. I turn then to deal with the medical and psychological evidence. This is to be seen in the context of the plaintiff's case that the conditions caused a recurrence of his prior medical condition and had a depressive effect on him.

a) The medical evidence
45. Professor Tom Gorey testified on behalf of the applicant, Mr. Richard Stephens on behalf of the respondents. Both are eminent consultant surgeons with a particular expertise in colorectal disease. Professor Gorey had a particular advantage because he examined the applicant on 28th April, 2005, the date of his release. He carried out a rectal examination and a proctoscopy on that day. He concluded that the applicant at that time had first degree haemorrhoids and a residual posterior anal fissure. I accept this evidence.

46. The case made by the applicant was that he felt himself under significant time pressure when using the toilet facilities when out of the cell. He says that this created a sense of straining and pressure on defecation. He said that this was exacerbated by anxiety at the possibility of having to use the chamber pot at night time, while in his cell.

47. I accept, too, Professor Gorey's evidence, that in 20% to 30% of all cases, "straining" or anxiety are responsible as a cause of haemorrhoids. The same factors are said to be causative of 70% of cases of anal fissure. However the witness emphasised that these were not causative factors in themselves, but rather factors which gave rise to exacerbation or promotion of a condition to which a patient might already be prone. I regard this caveat as a particularly important piece of evidence as will be explained.

48. The evidence established that the conditions with which the applicant presented were not that unusual; and that perhaps 30% to 50% of the population suffered from bleeding from haemorrhoids at some stage in their lives.

49. Professor Gorey concluded that a regime of detention in a cell over a 12 hour period would as a matter of probability render symptomatic a haemorrhoid or anal fissure condition. He noted that a history of forcible emptying of the bowel as given by the applicant, pointed to a susceptibility to abnormal straining on defecation. He indicated that, if presented with such symptoms, he would have prescribed a high fibre diet of fluids and unrestricted access to toilet facilities whenever necessary as being an appropriate manner in which a competent doctor would recommend that the condition be treated.

50. I do not consider that there was a substantial differentiation between the evidence of Professor Gorey and Mr. Stevens. What is important however, are the contingencies on which this evidence was based. As outside prison: successful treatment is contingent on a patient presenting for treatment, and describing his symptoms fully and in a timely fashion.

b) Psychological and psychiatric evidence
51. The Court also heard evidence from Dr. Brian McClean, a Clinical Psychologist, and Dr. Harry Kennedy, Clinical Psychiatrist.

52. Dr. McClean examined the applicant on the 24th March, 2005 while he was still serving his sentence. He concluded that the applicant had experienced mild and brief episodes of anxiety relating to perceived humiliation and invasion of privacy arising from his complaints. He did not consider these symptoms were clinically significant. He found no evidence of phobia or any generalised anxiety disorder.

53. Dr. McClean's evidence established that the applicant's anxiety had generally been mild although it had escalated to being moderate during the 28-day period of close confinement. He described the applicant's concerns in relation to the issue of in-cell sanitation as being one of mild indignation and clear logical analysis.

54. Professor Harry Kennedy, Clinical Psychiatrist, testified to similar effect. He had the advantage of exploring the applicant's psychiatric history. He established the applicant had been treated both in 1997 and 1999 for some form of depression. His conclusion was the applicant's response to having to slop-out was mild, but significant. Professor Kennedy testified for the petitioner in *Napier v. The Scottish Ministers* 2004, Scots C.S. 100, [2004] SCLR 558; [2005] 1 S.C. 229 referred to below. Both witnesses commented on the applicant's stoical and non-complaining personality.

Other aspects of the overall regime in the prison

Day to day routine; leisure and education; recreations
55. A description of conditions must be balanced by an overall assessment of the day to day routine and the educational and leisure facilities.

56. On a typical day the cells were unlocked at 8.30 a.m. After breakfast, prisoners on the E2 landing might participate in either educational or recreational facilities. There was a range of classes available. They were permitted to use the laundry, exercise, take a

shower, or go to the gym. At 12.45 p.m., prisoners had the option either of having lunch in a communal area on the landing, or taking lunch to their cell. If they went to their cells they were locked there until approximately 2.00 p.m. when they were released again until 4.00 p.m. In this afternoon period, prisoners were again able to engage in the same activities as in the morning. At 4.00 p.m. prisoners could then take tea either communally or in their cells. From 5.15 p.m. prisoners had access to the same range of facilities as earlier in the day; they might attend night classes, watch television or play pool.

57. In summary, therefore, a prisoner on the E2 landing serving a sentence for paramilitary offences could, if he so chose, spend the entire day outside his cell between 8.30 a.m. in the morning and 8.25 p.m. in the evening.

58. Prisoners had the option to go to the exercise yard on each day. However this right must be seen as being subject to a very significant proviso. It is clear that prisoners from other landings, perhaps as a form of protest, habitually threw human waste human matter in newspapers down into the exercise yard. This was a problem which the prison officers had to address on an ongoing basis. There was no suggestion that prisoners on E 2 landing engaged in this process.

59. There was a prison tuck shop. This allowed the prisoners to place orders in a book. A prison officer brought such ordered items to the landing and gave it to the prisoner.

60. There was a kitchen on the landing where prisoners engaged in cooking and cookery classes. Prisoners were allowed to cook themselves in the kitchen area provided, using ingredients which they had purchased in the tuck shop. The prison kitchen itself, in fact, obtained a "Q mark" for its food.

Education
61. The educational facilities were wide ranging. The applicant commenced an arts degree through the Open University in the United Kingdom. He attended classes in the educational centre on a regular basis. He studied Irish, History, Home Economics, Art and French. He enrolled in the National Education Centre in Dublin City University where he studied on the undergraduate programme in Arts. They had access to various forms of arts and crafts vocational training.

Prisoner – staff relations
62. Overall the relationship between the prison staff and the prisoners during the sentence in question was relatively good. The applicant's testimony was that this relationship was substantially better than that which had existed during his earlier term of imprisonment. The evidence did not in any way establish that there was an inhuman rigour in the implementation of the regime. For example, the applicant himself testified that there was no hard and fast time for getting up in the morning. Prisoners were permitted to lie on in bed if they wished to do so. By way of contrast to other prisons, there was no "lights out" regime. Thus if a prisoner wished to read on he was permitted to do so.

63. The applicant stated he had no complaint whatever against the prison staff or as to the manner in which they conducted themselves during the period of his sentence. There was no evidence that any prison officer or official passed any remark or made any comment with regard to the "slopping-out" procedure.

64. In this aspect the situation was different from the "impoverished" or poor general regime described in some of the international jurisprudence outlined later.

The respondents' duty to the applicant
65. It is now necessary to analyse certain "tort" aspects of the claim. The Court must consider first the plaintiff's own subjective circumstances. He had a significant prior medical history of haemorrhoids and anal fissures. It will be recollected that the applicant was placed in Portlaoise on 29th July, 2001. On 16th October, 2001, the applicant made one single complaint with regard to haemorrhoids. In evidence, he did not recollect having made this complaint at all. There were no other such complaints for the entire period of his detention.

66. This evidence is to be seen in the context of a number of other fairly trivial medical complaints which the applicant did make while imprisoned. At various times he complained of a sore shoulder, a sore throat, sore gums and an ache in one of his arms. There is no record of any complaint which might be directly connected to the sanitation or hygiene conditions.

67. Remarkably the records do not show any other complaint as to the physical (or psychological) complaints which lie at the centre of this case.

68. The applicant claimed he had spoken to a medical orderly about his haemorrhoid condition. He said he asked that creams be ordered to deal with this condition. There was no record of this. Nonetheless, I accept Professor Gorey's evidence.

69. However, the lack of complaint raises serious questions as to the extent to which the respondents could be "fixed with", or on "notice" of the applicant's prior history. The onus was on him to apprise the prison medical authorities. The applicant is clearly an intelligent man. He suffered from no disability in describing his symptoms in Court. He never told the prison doctor about his pre-existing condition.

70. I find the applicant did not raise complaints with the Governor or any other prison officer about this condition either. He indicated that he would have been embarrassed to speak to the Governor. However, this does not explain why the applicant made no complaint to the medical authorities. If he was prepared to seek treatment on 16th October, 2001, it is surprising that he did not do so on other occasions. I must conclude the respondents were never adequately apprised as to his prior condition.

Prisoner complaints regarding in-cell sanitation
71. As described, from early 2003 to early 2004, the applicant was spokesman on behalf of the Real IRA prisoners. He indicated that, at his first meeting with the Governor, he raised subject of in-cell sanitation. His evidence was that the Governor indicated that

action was in progress and that the prison authorities hoped to resolve the situation. The applicant testified that the matter had been raised again subsequently, although he could not recollect with whom, and on what occasion.

72. These recollections must be seen in the context of the prison records. Complaints were, for various reasons, meticulously documented. Their accuracy and admissibility as evidence was not seriously in issues. A sole entry recorded a complaint by the applicant about the sanitation situation. This complaint was made on 20th June, 2003.

73. It is true that the applicant was not the spokesman for other periods during his term of imprisonment. However, no other former prisoner was called to testify. Very many other grievances were aired and recorded. There was never any formal protest to the authorities or the Prison Visiting Committee. That Committee had, of course, repeatedly voiced its concerns, as described earlier.

The respondents' knowledge of the sanitation issue

74. The prison authorities were, however, aware of the sanitation problem. The concerns of organisations and the Visiting Committee were well understood. Very senior officials in the Prison Service undertook in the year 2000 that the sanitation situation in E Block would be addressed. The undertaking was given to Republican prisoners then in E Block. The failure in compliance may be partly explicable in the light of what followed. The Prison Service was well aware of the CPT, and other criticisms going back into the previous decade.

Efforts to address the sanitation question in E block

75. Mr. Brian Purcell is the present Director of the Irish Prison Service. His evidence established that, in pursuance of the Prison Service's concern the engineering consultants, Clifton Scannell Emerson Associates, surveyed E Block in the year 2000. This was an extensive undertaking and entailed an assessment of the practicability of installing in-cell sanitation in the whole block. The consultant engineers concluded that, due to fundamental structural issues such a project would have cost between ten to fourteen million euros. It might have necessitated giving over vacant possession of the entire block to building contractors for the duration of an extensive refurbishment contract. This of course, must be seen in the context of the fact that E Block was a uniquely high security facility. To give effect to the consultant engineer's report hypothetically might have necessitated the relocation of the high security offenders during the construction period. But there was no other such facility then available.

76. I accept Mr. Purcell's testimony that this was seen as not being an economic proposition and, that in fact, there was nowhere else within the State prison system where such high security prisoners could safely be accommodated. It was not established that there was such alternative accommodation actually available within the time frame of this case. A further possible inhibition on the re-development project was the fact that at one point Laois County Council expressed a desire to declare the entire prison as a listed building. This, too, had the effect of placing any projected works further back in the overall priorities. Ultimately the result was that, quite simply, the project was not carried out incrementally, and the authorities were not prepared even to countenance the removal of such high security prisoners to any lesser security facility for an entire refurbishment. However, I am not convinced the respondents ever examined thoroughly the possibility of providing an automatic visual unlock facility. Other possible remedies are considered later in the judgment.

77. One is left with a picture of the issues in question sometimes being the focus of attention, but then gradually slipping down the order of priorities as some new issue arose – often the priority of accommodation of other categories of prisoners. Addressing prison accommodation had many of the aspects of trying to reach an ever receding horizon.

Prioritisation

78. In fact the evidence from the Prison Service witnesses showed they considered that the provision of the other "positive" facilities in E Block rendered the situation a lower priority than providing accommodation elsewhere. Mr. Purcell testified that the Service provided the new kitchen facilities, ordinary educational facilities, crafts, music, access to third-level education, gym facilities, table tennis and snooker. All cells in that block in Portlaoise Prison had televisions. If appropriate to their educational course some prisoners had computers in their cells. While valid, it nonetheless begs the question as to whether this frequently criticised aspect of incarceration in E block would have ever reached the top of the priority list.

Prison renovation and construction from 1994 onwards

<u>In-cell sanitation in other facilities</u>

79. The respondent's position as to E Block must in fairness be seen in the context of work carried out elsewhere on prison construction prior to, and during the relevant period of the applicant's incarceration.

80. Mr. Michael Rigney, Director of Estates Management and Information Communication Technology in the Prison Service, testified that, for example, in 1994, just 40% of the 2,138 prisoners in the State had access to in-cell sanitation. By way of contrast, in 2005 of the 3,205 prisoners then held, 74% had access to such sanitation. His evidence must, of course, be seen in the context of the fact that very many prisoners within the prison system did not enjoy the facility of single cells or the extent of privacy which the applicant enjoyed. Clearly even this increase in numbers had necessary consequences in the allocation and prioritisation of State revenues. While all this was true, the E block situation remained unaddressed.

<u>Prison construction</u>

81. That evidence established that from the late 1990s onwards, the Prison Service engaged in an extensive prison construction programme. Castlerea Prison was completed in 1998 providing 152 new cells, all with in-cell sanitation. In the same year the new wing in Limerick Prison was completed which added another 50 cells to the stock. By 1999 Cloverhill Prison had been completed. This provided 194 cells all with sanitation. In the year 2000 the Midlands Prison which had been constructed on the same campus as Portlaoise Prison provided an additional 440 cells, later increased to 500.

82. Within the boundary of the Portlaoise Prison Campus there were also extensive construction works. Mr. Purcell pointed out that two new blocks were added to Portlaoise Prison in the period up to 2004. None of these, however, would have been suitable for the accommodation of Republican prisoners, with their particular high security requirements.

83. Prior to a consideration of the evidence in light of the authorities I should deal briefly with the issue of close confinement imposed as a punishment on the applicant and other prisoners.

The close confinement period of 28 days

84. It is not in dispute that between 20th May and 17th June, 2004, a "disciplinary punishment" was imposed, arising from the dispute with the prison authorities described earlier. The disciplinary sanction imposed on the applicant originally formed part of these judicial review proceedings; but in 2005 was struck out with costs to the applicant, and the issue is to that extent *res judicata*.

85. However it appears that during this confined regime prisoners were locked in their cell for a period of 22 hours a day. On E 2 landing this necessarily involved being confined without a toilet or running water as there were no such facilities. Instead a facility was put in place whereby prisoners could ring a bell and seek to be unlocked in order to use a toilet.

86. The applicant testified that prisoners were unlocked two or three times a day in groups of two at a time to empty the contents of their chamber pots. However, the availability of this facility depended on a number of circumstances, such as whether other prisoners were out of their cells at any given time. The evidence was that it was not a "given" that such a request would be granted immediately. The applicant said these requests would typically be only of use in order to empty the chamber pot and, he said, it was not possible to synchronise the granting of a request with one's personal needs. He explained it would be necessary to use the pot all the time in the cell because the time of requirement to use the toilet facilities and the time of release did not necessarily coincide.

87. There was no possibility of using any request system at night time during this period of close confinement. In fact during this period, prisoners were locked up for the night one hour earlier than usual at 7.30 p.m. rather than 8.30 p.m. There is no evidence that the applicant took any step to inform the authorities of his prior condition at this period.

88. I now move to consider the judicial authorities under the Constitution and to analyse the evidence in the light of such authorities. Many, but not all of the decisions arise in the context of Article 40.4 inquiring as to the legality of detention. As will be seen such analysis results in a conclusion that the applicant is seeking to make "new law". No prior decision of our courts found that any rights violation was such as to render an applicant's detention illegal. It is necessary to assess why this is so.

The constitutional claim - A prisoner's right to bodily integrity and not to have his health placed at risk or danger

89. In *The State (C.) v. Frawley* [1976] I.R. 365 Finlay P. stated at p. 372 of the report:

> "The right to bodily integrity as an unspecified constitutional right is clearly established by the decision of the Supreme Court in *Ryan v. The Attorney General* … Even though it was there laid down in the context of a challenge to the constitutional validity of a Statute of the Oireachtas which, it was alleged, forced an individual to use water containing an additive hazardous to health, I see no reason why the principle should not also operate to prevent an act or omission of the Executive which, without justification, would expose the health of a person to risk or danger."

The then President continued:

> "When the Executive, in exercise of what I take to be its constitutional right and duty, imprisons an individual in pursuance of a lawful warrant of a court, then it seems to me to be a logical extension of the principle laid down in *Ryan's Case* that it may not, without justification or necessity, expose the health of that person to risk or danger."

I am satisfied, therefore, that that a prisoner enjoys a *right* of bodily integrity and a right not to have his health exposed to risk or danger.

90. However, as Finlay P. pointed out in *The State (C)* the *duty* which devolves upon the State is not an absolute. It is not the function of the courts to recommend to the Executive what is desirable or to fix the priorities of its health and welfare policy. The function of the courts is confined to identifying, and if necessary enforcing, the legal and constitutional duties of the Executive. This conscious limitation of rights is found in many of the decisions. The two identified constitutional rights of bodily integrity and health protection in *C* must, ultimately, be subject to a limitation of practicability.

91. There also arises a further balancing ingredient in assessing a third identified constitutional right established in *C* and later cases – the "negative" right not to be exposed to inhuman or degrading treatment. For a violation of that third protection it would be necessary to establish an "evil purpose". In *C* Finlay P. went on to say at p. 374:

> "The question which has given me the most trouble in this case is whether the conditions under which the prosecutor has been and is detained in prison constitute a failure to protect him from torture or from inhuman or degrading treatment or punishment - thus making his detention unlawful. Notwithstanding the harshness of the privations which he has undergone and, to a lesser extent, continues to suffer, I have finally come to the conclusion that those conditions do not constitute such a failure.
>
> I am quite satisfied that the purpose and intention of the restrictions and privations surrounding the prosecutor's detention are neither punitive nor malicious ….
>
> *I must construe the entire concept of torture, inhuman and degrading treatment and punishment as being not only evil in its consequences but evil in its purpose as well. It is most commonly inspired by revenge, retaliation, the creation of fear or improper interrogation.* It is to me inconceivable to associate it with the necessary discharge of a duty to prevent self injury or self destruction."

92. The influence then of the recent ECHR decision of *Ireland v. United Kingdom* [1978] 2 EHRR 25 Is clearly discernible in this thinking. This passage, and others, recognises that a prisoner has a constitutional right to be protected against torture or inhuman and degrading treatment. This right is to be read as being additional to the right of bodily integrity and protection against health

endangerment. The prosecutor in *C* was a person who suffered from a sociopathic personality disturbance. He was extremely aggressive. He made repeated attempts to escape from his places of detention, including hazardous climbing feats and had a record of swallowing metal objects which had to be removed from his stomach by surgery. Thus, for most of the period of his imprisonment he was kept in solitary confinement and when not so confined he was usually handcuffed for some period. He was deprived of most of the equipment of an ordinary prisoner such as cutlery, a bed with metal springs and a transistor radio.

93. The restrictions on him were both significant, but intent was absent. To the contrary, the authorities' intention was to protect the prisoner. Finlay P. held that the detention was lawful. This finding, of course, does not derogate from the constitutional rights to which a prisoner is entitled, but rather demonstrated the limitation of such rights by considerations of practicality, the common good or protection of the prisoner himself. The rights in question are not absolute rights.

Rights to be considered objectively: *McDonagh v. Frawley*

94. As was pointed out by O'Higgins C.J. in *The State (McDonagh) v. Frawley* [1978] I.R. 131 at p. 135 many of a prisoner's "normal constitutional rights are abrogated or suspended" during the period of imprisonment. A prisoner "must accept prison discipline and accommodate himself to the reasonable organisation of prison life as laid down in the prison regulations. He cannot demand the medical treatment he thinks he should get, but will be given such medical treatment as the medical officer of the prison thinks appropriate".

***The State (Richardson) v. Governor of Mountjoy*: overcrowding, insanitary conditions, and slopping-out**

95. The constitutional rights of prisoners was further considered in *The State (Susan Richardson) v. The Governor of Mountjoy Prison* [1980] I.L.R.M. 82. There were certain resemblances between the facts in *Richardson* and the instant case.

96. The prosecutrix was a convicted prisoner who applied for an inquiry under Article 40.4 of the Constitution into the conditions relating to toilet facilities in the women's section of Mountjoy Prison. She alleged the prison authorities had failed to have proper regard to her rights to health, privacy and human dignity. Evidence was given that each morning women prisoners, whose number averaged 16, engaged in a slopping-out procedure. The prisoners used a cold water tap over the sink to rinse the chamber pot, clean it with steel wool and then empty the water into the toilet bowl. However the prosecutrix claimed that due to pressure of time to finish slopping-out before breakfast, some prisoners emptied chamber pots into the sink in which they were to wash themselves and that she had seen the remains of human waste in the sink. She had made a verbal, though not a written, complaint to the prison officers and members of the Visiting Committee regarding these conditions. She also complained that the toilet doors consisted of opaque glass and could not be locked from the inside. In evidence, the prison medical officer stated that he would be concerned if each prisoner had to undergo the slopping-out procedure in an average of two minutes and were human waste to be poured into the sink.

97. Barrington J. held that only in the most exceptional circumstances would a court accede to an application by a convicted prisoner for an inquiry under Article 40.4 of the Constitution where this related to conditions of confinement. He observed that such exceptional circumstances would exist if the authorities intended to do nothing, or were unable to rectify the conditions of detention which were a serious danger to a prisoner's life or health. He held that a convicted person undergoes a recognised form of punishment while in prison, one of the incidents of which, in addition to the loss of personal liberty, is that the prisoner must submit to, and is entitled to, the protection of the applicable Prison Rules; but the prisoner retains some constitutional rights. He found that while a prisoner had a constitutional right to privacy, this was circumscribed and limited by the institutional environment in which a prisoner must live, and that the requirements of security would justify the construction of toilet doors in such a way that they could not be locked from the inside. Finally, he held that, as a prisoner, the prosecutrix was not in a position to take the steps necessary to protect her health; therefore, the State was obliged to take such steps; that the 1947 Prison Rules recognised the link between hygiene and health; that the slopping-out process made it inherently probable that human waste would appear in the toilet sink; that this procedure failed to respect the prosecutrix's health; and that she would be entitled to relief by way of *mandamus*; but since the authorities were willing to alter the regime the necessity for making an order did not arise.

98. Barrington J. quoted with approval the dictum of White J. in the United States Supreme Court of *Wolff v. McDonnell* [1974] 418 U.S. 539 that there is no "iron curtain between the Constitution and the prisoners of this country". The judge specifically criticised the way that the slopping-out procedure was implemented as unhygienic and a health hazard. He noted that there was no technical problem to putting the hygiene issues right. He drew attention to the fact that those practices had continued for at least nine years. Insofar as a prisoner had a right to privacy, he held that such a right was circumscribed and limited by the institutional environment in which a prisoner must live and by considerations of security and good order. Relying on the dicta of Finlay P. in *The State (C.) v. Frawley*, he re-emphasised that there is an obligation on the State to protect the health of a prisoner. The evidence established that the Governor had taken steps to remedy the complaints when they were brought to his attention.

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

Brennan v. Governor of Portlaoise Prison

100. The principles identified in *Richardson* were also adopted and applied by Budd J. in *Brennan v. The Governor of Portlaoise Prison* [1999] 1 I.L.R.M. 190, where that judge specifically found, again in the context of an Article 40 enquiry, that to render detention illegal, an applicant must show that the conditions under which he is held constitute inhuman or degrading treatment or conditions which seriously endanger his life or health, and that the authorities were unwilling or unable to rectify such conditions. I interpret both *Richardson* and *Brennan* also as identifying and approving the prisoners' right to be protected against inhuman and degrading treatment as well as the other identified rights.

Reasonableness and practicality

101. As demonstrated by the authorities already cited, the rights enjoyed by a prisoner are not unrestricted. The limitation on rights was explained in *Murray v. Ireland* [1985] I.R. 532, where Costello J. specifically held that a restriction on prisoners' constitutional rights (in that case to beget children), was a reasonable consequence of the State's power to imprison and was constitutionally permissible. He held the State, as guardian of the common good, was empowered by the Constitution to restrict rights in certain circumstances. The rights which may be exercised by a prisoner are those which do not depend on the continuation of his liberty, and which are compatible with the reasonable requirements of the Prison Service or which do not impose unreasonable demands on it.

102. He observed at p. 542:

> "When the State lawfully exercises its power to deprive a citizen of his constitutional right to liberty many consequences result, including the deprivation of liberty to exercise many other constitutionally protected rights, which prisoners must accept. Those rights which may be exercised by a prisoner are those: (a) which do not depend on the continuance of his personal liberty (so a prisoner cannot exercise his constitutional right to earn a livelihood) or (b) which are compatible with the reasonable requirements of the place in which he is imprisoned, or to put it in another way, do not impose unreasonable demands on it. This accords with a view expressed by the American Supreme Court in *Wolff v. McDonnell* [1973] 418 U.S. 539 …"

However he continued:

> "I do not think that the plaintiffs' claim, that they be permitted to leave prison from time to time to exercise their right to beget children, is a valid one as it is clearly incompatible with the restriction on their liberty, which is constitutionally permitted by their imprisonment. What remains then to consider is the claim to exercise his right in prison and the practical consequences involved in it. For if the plaintiffs' right to beget children cannot now be exercised without putting unreasonable demands on the prison service, the restriction on its exercise cannot be constitutionally invalid as it is a reasonable consequence of the lawful exercise of the power of the State to imprison them."

In Murray, therefore, Costello J. held that assertion and reliance on constitutional right may be limited constitutionally; such rights must be dependent upon limitation flowing from imprisonment, practicality, and a requirement not to impose unreasonable demands on the Prison Service.

***Holland v. Governor of Portlaoise Prison*: restriction on rights must be proportionate**

103. More recently, in *Holland v. Governor of Portlaoise Prison* [2004] 2 I.R. 573 the applicant sought to quash a decision of the respondent prohibiting him from obtaining access to members of the media by way of correspondence in the hope of interesting and encouraging them to investigate an alleged miscarriage of justice concerning himself.

104. McKechnie J. pointed out that Prisons Rules must be construed and applied in such a manner as respected and vindicated the constitutional rights of a prisoner and which upheld the principles of natural justice. He held that by virtue of a sentence of imprisonment being imposed, and on being served by a prisoner, that person for the duration of his sentence had to suffer not only interference with the exercise of his constitutional right to liberty but to suffer such other restrictions on constitutional rights as were necessary in order to accommodate the serving of that sentence. Subject to this however, he held that all other rights should be capable of exercise by him in the context of his incarceration. Given that the right then in issue, (free communication) was constitutionally based, he concluded that any permissible abolition, even for a limited period, or any interference, restriction or modification on the right in question should be construed, with the onus of proof being on him who asserted any such curtailment. Importantly, McKechnie J. also observed at p. 594:

> "One can, of course, add that several other rights also continued to be enjoyed by such a person, including the right to life, to bodily integrity, the negative right not to be tortured or to suffer any inhuman or degrading treatment …. the right, as Barrington J. said in the *The State (Richardson) v. Governor of Mountjoy Prison* [1980] I.L.R.M. 82 to practice one's religion and the right to natural and constitutional justice. This enumeration is indicative only and is not in any way exhaustive."

It will be seen again, therefore, that the protection against inhuman and degrading treatment or torture is defined or interpreted in that judgment as being a "negative right" but capable of separate recognition under the Constitution.

Identification and analysis of the rights

105. Clearly then the rights asserted by the applicant in this case cannot be absolute. Having analysed the wide range of facts in the case, I am not satisfied that the established norms of tort law are adequate fairly and justly to address the range of issues which arise. The tort of negligence in itself, for example, would not be sufficient to encompass the issues in question nor would any other nominate tort.

106. The questions which arise in this case are not simply "tort" concepts they go further into the realm of rights only protected under the Constitution such as those identified. "Slopping-out" is not encompassed in the law of tort, nor are inadequate ventilation or substandard hygiene conditions.

107. Primarily the applicant's case is reliant on asserting constitutional rights in tort form – but, as a corollary, the defendant is entitled to assert that no such rights have been violated, that such rights are limited, or where appropriate, to rely on defences arising in the law of torts. On the facts of this case, I consider that the invocation of the alleged violation of constitutional rights must entail other incidents; the defences in tort law such as causation, consent and foreseeability. There are, too, other "tort" aspects to this claim; the applicant seeks a redress (including damages) for an alleged past wrong (involving injuries), not the vindication or protection of a right in being (see *McDonnell v. Ireland* Keane J. at p. 159).

108. The following unenumerated constitutional rights arise: (i) protection against inhuman or degrading treatment; (ii) the right to protect life and health from serious endangerment; (iii) the right to privacy; (iv) and bodily integrity. These are considered below sequentially but as numbered here. To this general identification I would add:

(a) The right to bodily integrity necessitates that the Executive should protect the right to health of persons held in custody as well as is reasonably possible in all the circumstances (*The State (C) v. Frawley*);

(b) There is also a right, be it framed negatively or positively not to be exposed to inhuman or degrading treatment. Here a material consideration in determining the constitutional status of the matter complained of is the purpose and intention of the restriction and privations; in particular whether they are punitive, malicious or whether they are evil in purpose (*The State (C) v. Frawley*);

(c) A further relevant consideration is whether there is evidence that State authorities are taking advantage of detention to violate constitutional rights or to subject the applicant to inhuman or degrading treatment (*The State (Richardson) v. Governor of Mountjoy Prison*);

(d) The conditions of detention must not be such as to seriously endanger a prisoner's life or health (*Richardson*);

(e) If the conditions of detention are potentially life or health threatening, a court should ask whether there is evidence that the authorities are for some legitimate reason unable to rectify the conditions (*Richardson*);

(f) There is a right of privacy subject to limitations imposed by detention;

(g) A court must enquire the extent to which considerations of security, including the protection of prisoners themselves, requires a limitation of their rights (*Richardson*);

(h) A court should enquire as to the extent of complaints made by a prisoner or other prisoners (*Richardson*);

(i) A court must assess the extent to which the vindication of a claimed right would be practical (*Murray v. Ireland*);

(j) A court must establish the extent of the burden which might be placed on the authorities in the vindication of the right claimed; whether the burden is in all the circumstances proportionate to the right asserted in the overall context of the prisoner's conditions of detention (*Murray*);

(k) There is a right of freedom to communicate; the limitation of which is subject to the principle of proportionality as must all such limitations on a constitutional right. Other constitutional rights may also arise in the future (*Holland*);

(l) A court must establish the extent to which, on the facts of this case the nature of the constitutional wrong asserted necessitates the application of other principles applicable to the law of torts (*McDonnell*).

Application of the legal tests to the evidence

109. I have considered these tests both individually and cumulatively enquiring whether the existence of even one, or some, of the "negative" aspects of the detention are such as to weigh the overall balance in the applicant's favour as against the admitted positive factors. The measure must be proportionate. In this process it is here necessary in consideration of each alleged wrong, to balance the "positive" against the "negative" aspects of the detention. In other circumstances one set of acts alone might be sufficient to constitute a finding that a prisoner's constitutional right had been violated. This is not such a case, however. What is striking in the instant case is the relatively low level of contemporaneous complaints regarding issues now so closely analysed in this hearing. The tests must be objective. In considering these it will be recollected that the Court is considering this applicant during his period of incarceration; the rights cannot be recalibrated *ex post facto* because the remedies now sought are a declaration and damages. The rights and the limitations on those rights must be as defined and limited in the decided authorities. I return then to the numeration of the four rights identified earlier.

(i) Protection against inhuman or degrading treatment

110. There was no evidence that the purpose and intention of the restrictions and privations were punitive, malicious or were evil in purpose. Still less was there evidence that the authorities were in any way "taking advantage" of the applicant's detention to violate his constitutional rights or to subject him to inhuman or degrading treatment. The general regime was not criticised significantly. The contrary is true. There was no evidence of inhuman treatment of him by prison staff. There was no evidence of degradation in the sense of humiliation. There was however, evidence that the facilities fell significantly below the standards to be expected as regards ventilation, hygiene and slopping-out itself. These are considered in more detail below. What is at issue is not simply the fact that these fall below standard, but the extent of this falling below acceptability measured objectively, whether it is counter balanced. On the basis of the evidence regarding the regime as a whole I find that the negative aspects are outweighed on this test. Moreover the essential ingredients of malice, evil purpose, taking advantage, demeaning or humiliating conduct, are all absent. I am unable to find therefore there was a violation of the applicant's negative right to be protected against inhuman or degrading treatment.

(ii) Serious endangerment of life or health

111. The evidence does not establish that the conditions of detention *per se*, while clearly demeaning was such as to seriously endanger the applicant's life or health. The prison authorities provided certain facilities intended to protect health and in order to maintain standards of hygiene. In some, but not all aspects, the practices adopted were not dissimilar to those which might have been found in institutional locations three or more decades ago. I would emphasise, therefore, that the absence of a negative finding on the balance, is not to be seen as a positive finding that all aspects of the prison regime complied with *all* standards. The negative issues fall significantly below what was to be found in other prisons in the same period of 2000 to 2005.

112. Such findings must be seen in another context. Clearly, from 1995 if not before, the Prison Service itself recognised the necessity to provide proper in-cell sanitation in E Wing. A number of problems obstructed this project. The first was the engineering consultants report and the costs; the second the remarkable action of the local authority in seeking to declare the entire prison campus as a preserved site. But there was, too, a want of focus on *this* issue.

113. But the situation which applied in E Wing of Portlaoise Prison was not comparable to that which arose in *Richardson's* case. Here, there was no evidence of hazardous overcrowding. There were between sixteen and seventeen prisoners on E landing. They were under no time constraint. It was not suggested that the prisoners were misapplying the sanitary facilities provided. There is no evidence of insanitary practices by the prisoners such as would give rise to a risk of health. Insofar as applicable, the facilities were such as would, within their limitations, permit each prisoner to carry out this procedure in a manner which would not put his health at risk.

Adverse findings on hygiene, ventilation and slopping-out
114. It is beyond doubt that certain of the hygiene facilities were primitive and substandard. Specifically, prisoners in their cells should have had clean water and adequate facilities to wash their hands after using a chamber pot on each and every occasion. The absence of wash hand basins in the cell prevented even this elementary step.

115. The cell ventilation was substandard and exposed prisoners to odours when the chamber pots were used. Slopping-out was perceived as demeaning, archaic and humiliating; part of a bygone age. To many, including the Visiting Committee, these aspects of incarceration were unacceptable in this century.

116. However, is this sufficient to tilt the balance as a *legal* question? The Court can only decide on *legal* issues. The overall finding, despite the substandard aspects, must be that there was no serious threat to life or health. One must look too, to causation. There was no evidence that the "negative" factors adversely affected the applicant's health other than inducing the re-onset of his condition. He did not complain of any other type of risk or infection to the prison doctor.

(iii) The right to privacy
117. The applicant found using the pot deeply humiliating. It undoubtedly had a depressive effect. But each prisoner had a private cell. Absent evidence of overcrowding or "doubling up" in cells I am unable to find that the use of the chamber pot in the cell actually violated the applicant's rights of privacy or human dignity to a degree to give rise to a cause of action. While in many aspects objectionable I cannot find the slopping-out process was substantially invasive of these rights. The degree of invasion was limited to the transfer of the pots to the sluices. I am not convinced that this engages a privacy right to the degree necessary to give rise to a cause of action. The prisoners on E 2 landing enjoyed a level of privacy not available to many other prisoners.

(iv) The right to bodily integrity
118. On the basis of Professor Gorey's evidence I am prepared to accept that the conditions of imprisonment caused a re-occurrence of the applicant's complaints. His health and wellbeing were affected.

119. The applicant did not apprise the prison authorities of his medical history. He did not tell them his susceptibility gave rise even to a potential problem. The fact that he had one occurrence of haemorrhoids on 16th October, 2001, did not constitute sufficient "notice" to the respondents. Indeed, the applicant appears not to have recollected this incident. The applicant took no step to otherwise alleviate his own individual situation; whether by apprising the Prison Governor, or the medical authorities of his condition; by seeking special arrangements to be unlocked at night, or by seeking a transfer to another prison facility. Some of these were possible options, in the case of an individual prisoner. Some were actually adopted in the case of other prisoners who made known their problems to the prison medical authorities.

120. Some other potential "remedial" measures which were proposed at the hearing are noteworthy in that none of them were proposed at the time and are *post hoc*. I cannot now accept the proposition advanced at the hearing in 2010 that chemical toilets were a viable proposition. There is some evidence that the chemical compounds contained in them could have posed a safety hazard. The proposition that "individual" arrangements could have been made for the applicant is reliant on a chain of evidence which is broken. Remedial measures (of whatever type) were not adopted simply because the "special" impact of the conditions on the applicant (which I am prepared to accept) were not foreseeable. Individual arrangements to release the applicant from his cell must be seen in the context of security arrangements as a whole in Portlaoise Prison. Such matters must always be a consideration though they cannot provide an "all purpose" excuse for inaction. An automatic unlocking system was surely a viable and less costly option. No individual arrangements were requested. The point becomes hypothetical therefore.

121. It is difficult to avoid the conclusion that the right of bodily integrity which is sought to be asserted here and the duty sought to be imposed on the respondents was very specifically framed to the particular circumstances of the applicant in his role both as spokesman and member of a political group. He was not an "ordinary" prisoner, who might well have acted very differently.

122. Ultimately, one must conclude that the evidence in fact established that the only likely method in which the general situation in this particular block could be remedied would be by a total evacuation by the prisoners and extensive reconstruction. This was postponed more than once. But the applicant did not avail of any effective method of remediation of his own issues. The right to bodily integrity must be subject to the defences in tort of foreseeability. Even accepting that the conditions caused the applicant's condition, as I do, this does not establish the applicant's case. The respondents did not know or could not reasonably have known as to the applicant's prior medical history. He was under a duty to inform them and put them on notice. He consented to a situation not otherwise reasonably foreseeable. I do not consider the respondents can be held to have committed a constitutional wrong or violation of bodily integrity on these facts. Even if they had, I must conclude they have established a clear and total defence. Seen generally I conclude that the complaints, while real, were not sufficient to satisfy the criteria necessary to constitute causes of action.

Separation of powers
123. A striking feature of the case was the logic of one interpretation of the applicant's argument. Ultimately on the evidence, it could only be that E Block should have been shut down or demolished and replaced with an entirely new facility. Such broad ordering and allocation of public resources is in general a matter for the Executive.

124. The principle that a court should be slow to become involved in this issue is well established (*O'Reilly v. Limerick Corporation* [1989] ILRM 181). (See also *Sinnott v. Minister for Education* [2001] 2 I.R. 545 and *T.D. v Minister for Education* [2001] 4 I.R. 259.

125. I must find, therefore, that the applicant's constitutional claims fail. The issue of remedies does not then arise.

The claim under the European Convention on Human Rights Act 2003.

126. The parties have agreed that only in circumstances where the constitutional claim fails is it necessary for this court to proceed to a consideration of the second aspect of the applicant's claim, that is, the alleged violations of Article 3 and Article 8 of the European Convention on Human Rights. It is claimed that there have been violations of Article 3 (prohibition on torture or inhuman or degrading treatment), and/or Article 8 (private life) ECHR.

127. By way of preface, however, it is necessary to point out that with regard to Article 3 claims, in all cases where there has been held to be a violation of which this Court should take notice, the ECHR has been presented not only with specific allegations but with a range of combined or multiple complaints about prison conditions. In no case has the practice of "slopping-out" or the absence of in-cell sanitation, been found, *per se*, to be a violation of Convention rights. While the terms of Article 3 are absolute there is a high threshold. The actual text is not couched in terms recognised in the common law but refers to factual circumstances. The threshold of seriousness is part of the substantive right rather than a procedural pre-condition. The complaint must attain a minimum level of severity if it is to constitute a violation (*Ireland v. U.K.* [1979] 80 L.E.H.R.R. 25.)

128. What follows therefore is an analysis of the jurisprudence in accordance with s. 3 of the European Convention on Human Rights Act 2003. It is necessary to analyse whether the relevant organ of the State, *viz*. the respondents, have performed their function in accordance with this State's obligations under the Convention by reference to the standards identified in the established jurisprudence and not by some form of impermissible "direct" application of the ECHR. Here again it will be seen the applicant seeks to make new law. It is necessary to survey a number of authorities briefly to identify the ingredients of an Article 3 infringement.

***Bakhmutsky v. Russia* – For violation of Article 3 Rights the applicant must show a minimum level of severity, dignity and undermining of the issues of, cumulative effects and specific allegations**

129. Even though this and a number of other authorities *post* date the events in question, the ECHR principles have not altered. The ingredients necessary for an Article 3 violation were described most recently in *Bakhmutsky v. Russia*, (Application No. 36932/02, 25th June, 2009,) where the ECtHR observed at para. 88:

> "The Court reiterates that Article 3 of the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the circumstances and the victim's behaviour . . . However, to fall under Article 3 of the Convention, ill-treatment must attain a minimum level of severity. The assessment of this minimum level of severity depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim… When a person is held in detention, the State must ensure he is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured …When assessing conditions of detention one must consider their cumulative effects as well as the applicant's specific allegations … The duration of detention is also a relevant factor."

***DeLazarus v. United Kingdom* - a single cell reduce the impact of lack of in-cell sanitation**

130. In *DeLazarus v. United Kingdom* (Application No. 17525/90, 16th February, 1993,) the applicant challenged his conditions of detention as being contrary to Article 3 on the basis of his segregation from other prisoners, together with the general conditions in Wandsworth Prison involving overcrowding, a lack of activity and want of in-cell sanitation.

131. The European Commission on Human Rights dismissed the complaint as manifestly un-founded. This was so even though the Commission accepted that the conditions in the prison had been found by the CPT and the domestic inspection authorities as involving each of these aspects and were extremely unsatisfactory and in urgent need of improvement. However, the Commission specifically noted that the applicant could not complain of overcrowding because he was held in a single cell. More directly the Commission noted that: "this fact must have reduced the difficulties created by the lack of integral sanitation in the cell".

***N.H. v. United Kingdom* – Punishment cell with no toilet or running water – slopping-out three times a day**

132. In *N.H. v. United Kingdom* (Application No. 21447/93, 30th June, 1993,) the applicant had been segregated into a punishment cell which contained no toilet or running water and in which he had to slop-out three times a day at which time he had to clean his cleaning utensils and collect drinking and washing water. The Commission again found the application to be inadmissible concluding that the facts did not reach the minimum level of severity required for an Article 3 violation.

***Valasinas v. Lithuania* – Absence of privacy, balanced by other factors**

133. More recently in *Valasinas v. Lithuania* (Application No. 44558/98, 24th July, 2001,) the ECtHR concluded that no violation of Article 3 existed in respect of the detention conditions of an applicant, whose complaints included the absence of partitions between toilets and the absence of free toilet paper.

134. The Court examined other aspects of his detention including the wide freedom of movement for the prisoner during the day and recreational facilities including television, library books, a recreation yard, listening to music and attending concerts and cinema screenings.

135. This case again demonstrates that the Court will look to the totality of the conditions of detention and that although some aspect of the regime may be sub-optimal, other facets of the prison regime may introduce a balancing element resulting in a situation where the conditions overall do not attain the minimum level of severity for Article 3.

***Peers v. Greece* – Article 3 violation found – no in-cell sanitation, shared cell room, prison regime**

136. By way of contrast in *Peers v. Greece* (Application No. 28524/95, 19th April, 2001,) the Court held that there was a violation of Article 3 in circumstances where the applicant had to share a cell and engage in toileting in the presence of another person. This is to be seen in conjunction with several other problems regarding the conditions of detention, including inadequate lighting and ventilation

and inadequate supplies of toilet paper and toiletries. In *Peers* the applicant had been detained in a segregation unit in a small cell with one window in the roof which did not open and which was so dirty no light could pass through it. There was an Asian-type toilet in the cell with no screen or curtain separating the toilet from the cell. There was one shower in the unit which contained nine cells with up to three prisoners in each. There was no sink in the cell.

137. The overall conditions in *Peers* fell very much below those which arose in the instant case Portlaoise Prison. *Peers* involved a denial of sheets, pillows, toilet paper, toiletries, privacy in using the toilet, shared cell and absence of communication with prison staff. That decision case is simply not comparable to the instant case.

***Nurmagomodoff v. Russia* – Poor sanitation but comparable to conditions in rural Russia**

138. In *Nurmagomodoff v. Russia* (Application No. 30138/02,16th September, 2004,) the ECtHR declared inadmissible those parts of the applicant's complaint relating to Article 3, wherein he had complained about the frequent failures of the water supply system in the prison, a lack of sewage system, an antiquated toilet and insufficient shower facilities. The Court observed that it was to be noted that the conditions described were no different from the sanitation facilities in many rural areas of Russia "where villagers carry drinking water in buckets from water-pumps and have toilets in outhouses with sumps". The ECHR concluded that the situation was not so unsatisfactory as to amount to a breach of Article 3.

***Novoselov v. Russia* – Overcrowding violation found**

139. In *Novoselov v. Russia* [2007] 44 E.H.R.R. 11 a *post* 2005 case violation of Article 3 was found, but in conditions far more extreme than those obtaining in Portlaoise Prison between 2000 and 2005. The applicant had spent six months in detention in a cell measuring 42 sq. metres which accommodated up to 51 inmates, for whom there were provided 28 or 30 bunk beds. He was afforded less than 1 sq. metre of personal space and shared a sleeping space with other inmates taking turns with them to get a rest. Apart from one hour of daily exercise the applicant was confined to his cell for 23 hours a day. In those specific circumstances the extreme lack of space was seen by the court as weighing heavily as an aspect to be taken into account for establishing whether the detention conditions were degrading.

The Georgian cases: very low hygiene standards, shared cells

140. The conditions which gave rise to an adverse finding in two other *post* 2005 cases were far more extreme than those found here. In *Ramishvili & Kokhreidze v. Georgia* (Application No. 1704/06, 27th January, 2009,) the toilet consisted of a narrow pipe in a corner. The applicant had refused to use this facility because of the conditions in the cell. The cell was infested with cockroaches and rats occasionally ran through it. The cell space for the prisoner was also insufficient and he had to share a bed with another prisoner.

***Orchowski v. Poland* – overcrowding, insufficient space**

141. In the most recent decision of the ECtHR, *Orchowski v. Poland* (Application No. 17885/04, 22nd October, 2009) the Court found a violation of Article 3, but again emphasising the central importance of personal space afforded to a detainee in considering Article 3.

***Rainen v. Finland* - Objective balancing of all conditions cumulatively**

142. While it might be argued that the Court must assess the impact of the prison conditions upon an applicant, in particular, this factor must be placed in an objective balance, counterweighted by other relevant factors such as the other conditions of detention. So therefore in *Rainen v. Finland* [1998] 26 E.H.R.R. 63 public handcuffing while being taken from prison to hospital affecting a prisoner's mental state did not attain the minimum level of severity required for a finding of an Article 3 breach, in the context of the overall standards of detention. I turn now to a number of authorities from neighbouring jurisdictions.

143. Illustrative Convention jurisprudence is not confined to Strasbourg decisions alone. The applicant places particular reliance on the following cases as being important persuasive authorities from Scotland and Northern Ireland. These arose under United Kingdom Human Rights legislation.

Napier v. The Scottish Ministers

144. In *Napier v. The Scottish Ministers* [2004] Scots C.S. 100 [2004] S.C.L.R. 558, [2005] 1 S.C. 229, the Court of Session held that a petitioner was exposed to conditions of detention which were in breach of Article 3 of the European Convention on Human Rights.

145. The petitioner was held for a period of 40 days and while on remand suffered a severe flaring up of an eczema condition which he attributed to the conditions of his detention. The petitioner relied on three principle features of these conditions characterised at para. 6 of the judgment as: "The triple vices of overcrowding, slopping-out and impoverished regime." Lord Bonomy observed at para 6:

> "While I should look at each one individually, in the final analysis they cannot be viewed in isolation, since each one has an impact on, and is affected by, the others. In addition, there were separate chapters of evidence in relation to other particular features of the conditions of detention, such as illumination and ventilation of the petitioner's cell. Each of the issues thus explored was relevant only in the context of the triple vices."

146. In *Napier* the petitioner was exposed to significant overcrowding – most prisoners were held two to a cell. In that cell there were double bunk beds but only one chair. The overcrowding had a significant impact on slopping-out. The evidence established that 15 to 20 prisoners would descend upon the ablutions area at the same time all with their urine bottles, chamber pots, utensils for washing and toiletries. Towels were permitted only in the morning but not at other times. In the judgment the process was described as being a "free for all". The prisoner spent 20 to 23 hours a day in his cell. The prisoner was constrained to use the chamber pot in the presence of cell mates. The Court found the practice of slopping-out to be chaotic because of the numbers involved and the pressure

of time. Blockages and overflows were not uncommon.

147. In that context Lord Bonomy then considered the risk of infection posed to the petitioner by reason of the eczema condition from which he suffered. This was manifest to any observer, and identified with blisters and yellow pus over a wide area of his face.

148. By way of contrast to the instant case, it was noted by a prison doctor within two days of the outbreak. A fax was sent by the petitioner's solicitor to the Governor of the prison two days later requesting a transfer. Lord Bonomy considered that the actual cause for the outbreak of eczema was the anxiety and stress caused by the circumstances of the detention.

He stated at para 76:

> "Of crucial importance to my determination in this case is the effect on the petitioner of the serious outbreak of eczema. It is important to my determination in three respects. Firstly, I have already determined that its resurgence and persistence were caused by the conditions of detention. Secondly, its very presence was a source of acute embarrassment and a feeling of humiliation to the petitioner which he described as causing him a degree of mental stress. Thirdly, the petitioner believed that his infected eczema was caused by the conditions of his detention, in particular slopping-out. His belief that the two were linked was entirely reasonable. He acted immediately to try to secure his transfer to better conditions …"

149. Other further circumstances of the petitioner's detention in *Napier* was an inability to get out into the fresh air or even walk around as a diversion; an inability on the part of the petitioner to resist constantly scratching himself and exacerbating his condition and the severe limitations on recreation and time spent outside of:

> "…the depressing, stuffy, smelly, gloomy atmosphere of the cell. Many features of the regime seemed designed to stamp a mark of inferiority on the petitioner. He and his cell mates had to make do with only one chair. He had to eat in the cell without getting a chance to wash first …"(at para. 77)

***Napier* contrasted with the applicant's case**

150. I find this decision of assistance, in fact, as illustrating many of the distinctions which arise. As has been pointed out by authoritative commentators in *Napier*, the personal effect on the petitioner had a particular bearing (see Hamilton and Kilkelly, "Human Rights in Irish Prisons" [2008] 2, Judicial Studies Institute Journal 58 – 74). The commentators correctly point out that in considering the application of the case law in an Irish context it is important to note that it was the *cumulative* effect of the conditions of *Napier* which resulted in success, not slopping-out alone. *Napier* must be seen then as a case where the absence of in-cell sanitation had a *particular* obvious and evident impact on the petitioner, rather than supporting the proposition that slopping-out *per se* is necessarily inhuman and degrading for the purposes of Article 3 in all places and all times. (See *R. (Wellington) v. Secretary of State for Home Department* [2009] 1 A.C. 335 where at para 27 of his speech, Lord Hoffman expressly reserved his position as to whether the absence of in-cell sanitation *per se* constituted a breach of Article 3 of ECHR.

151. Relevant too in *Napier* were Lord Bonomy's findings that the respondents could "easily" have installed integrated sanitation facilities and that it had not been suggested that the refurbishment in the detention area could not have been carried out at a significantly earlier date. Lord Bonomy commented at para 89 that: "the respondents took a deliberate decision not to address [the cell conditions] when they had both the resources and the capacity to do so." In my view this circumstance too is in contrast with the present case where the evidence on the issue of resources and prioritising of particular prisons did not demonstrate a policy tantamount to making a "deliberate decision to ignore the situation". *Napier* was of course decided by reference to the United Kingdom Human Rights Act 1998 different in form to the European Convention of Human Rights Act 2003. The distinctions from the instant case do not require repetition.

The Northern Ireland authorities

152. Two Northern Ireland authorities are also of assistance by way of illustration. Again the facts are very distinct from the instant case.

In *Re Karen Carson*

153. In *Re Karen Carson* [2005] N.I.Q.B. 80 Girvan J. found there had been no breach of the applicant's right under Article 3 or Article 8 arising out of conditions of detention and in particular of want of in-cell sanitation.

154. A critical feature of that decision was that the Northern Ireland High Court, having considered a number of ECtHR cases and the decision in *Napier*, found that there had been no breach of Article 3 in circumstances where the applicant occupied a cell on her own and: "…thus had a much higher degree of privacy than in the case of *Napier* or any of the other cases referred to". The overall regime in the prison was also significantly more liberal than that to be found in *Napier*. Girvan J. concluded that the fact that sanitation arrangements may not be ideal did not necessarily give rise to a finding that they are degrading. I would respectfully agree. The judge also found there to be no breach of Article 8. He observed at para. 18:

> "For the applicant to succeed in establishing that the Prison Service has breached her Article 8 rights it would have to be demonstrated that the *overall system in respect of the imprisonment was such that it could be said that the state had in fact in all the circumstances failed to have respect for her private and family life bearing in mind that she was a prisoner lawfully deprived of her liberty*. Looking at the circumstances objectively I cannot conclude that overall the circumstances of her imprisonment, including the lack of in-cell sanitation, bearing in mind the toileting and hygiene arrangements which were available to the prisoner pointed, in fact, on the face of it to a lack of respect for her private and family life…" (Emphasis added).

Martin v. Northern Ireland Prison Service

155. More recently, and post 2005 in *Martin v. Northern Ireland Prison Service*, [2006] N.I.Q.B. 1, the plaintiff claimed damages for

alleged breaches of Articles 3 and 8 of the Convention. Girvan J. distinguished *Napier* and held there had been no violation of Article 3, but again emphasised that in considering whether a person had been subjected to inhuman or degrading treatment one must consider the totality of circumstances.

156. In *Martin*, the plaintiff occupied a cell on his own; if he had to use a pot he would have done so in privacy. For a significant part of the day he was allowed out of his cell and had access to ordinary toileting and hand washing facilities. Finally there was an overnight unlock system which, while imperfectly administered on some occasions, in the main enabled most prisoners most of the time to have access to toilets overnight.

157. Girvan J. adopted a different view in relation to Article 8 and concluded that there had been a violation, in particular because of the hostile and uncaring attitude of staff and the Governor of the prison to the manner in which hygiene stipulations were observed and breaches investigated. There was strong evidence of an insensitive and uncaring regime; the authority's evidence was not reliable.

158. The Court made clear that it was not the lack of in-cell sanitation *per se* which violated Article 8 rights but rather the manner in which the practice was managed.

Girvan J. observed at para. 35:

> "The lack of in-cell sanitation does not of itself establish a lack of respect for the prisoner's privacy rights under article 8 as I sought to establish in *Re Karen Carson*. However, the absence of such a facility means that prisoners may have to excrete in circumstances which are in modern conditions somewhat humiliating and distasteful.
>
> If not properly managed and handled with care the practice has the potential to be significantly demeaning to a prisoner in an intimate aspect of his private life." (at para. 35)

159. On the totality of the evidence, therefore, Girvan J. was prepared to find that there had been a breach of Article 8. Again, I consider the facts of *Martin* very much distinct from the instant case. There is no evidence of a hostile or uncaring attitude on the part of prison staff or the authorities. The respondent's evidence was generally not unreliable; the positive aspects of the Portlaoise regime on balance outweighed the negative.

The relevant principles for Art 3 and/or Art 8 breach

160. From the range of ECHR authorities it will be seen that combined multiple and interconnected nexus of alleged violations concerned the establishment beyond a minimum degree of severity of factors such as:

(a) The size of the cell or the amount of personal space available to a prisoner;

(b) The sharing of cells by two or more prisoners;

(c) The sharing of the same bed by prisoners within a cell;

(d) Low standards of hygiene generally within a prison;

(e) The length of time spent in a cell on a daily basis;

(f) Availability of exercise facilities outside the cell;

(g) The unavailability of recreation and education in the prison generally;

(h) Poor arrangements for washing and toileting;

(i) Toileting which had to be done in the presence of others;

(j) Poor ventilation and lighting in the cell;

(k) The particular physical impact of the conditions of a prisoner;

(l) Inertia or indifference on the part of State authorities in responding to complaints or conditions;

(m) Whether the prisoner had to eat in a cell with his or another prisoner's waste products.

These issues must largely depend on all the circumstances of the case and the cumulative effect of the conditions of detention must be considered. In the successful cases there were found to be few if any counter balancing positive factors as to the prison regime.

Consideration

161. As will be seen from this brief survey of case law, each case very much depends on its own facts. In general, identified ingredients fall to be considered cumulatively. Only in highly unusual circumstances will one single factor be determinative as to whether there has been a breach of Article 3 or Article 8. Certainly there is no jurisprudence from the ECtHR, Northern Ireland, or Scots Courts which makes out the proposition that the absence of in-cell sanitation or "slopping-out" *per se* constitutes a violation of Article 3. This Court is not empowered to "directly apply" Convention provisions. To seek to create a "new" Convention right is not permissible. The Court must have regard only to established Strasbourg jurisprudence (*McD. v. L.,* [2009] I.E.S.C. 81, Supreme Court, December 2009). Where ECHR violations have been established it has been in circumstances quite distinct from the present proceedings. Violations have been established where there have been what can only be described as extreme conditions of deprivation including the "cumulative vices" of overcrowding, poor hygiene, lack of movement and poor exercise facilities, absent the "balancing factors" described earlier.

162. *Napier* is distinct from the instant case because of:

(a) The severe physical and mental effects which were evident to the authorities;

(b) *notice* was given to the authorities of these problems;

(c) the petitioner was constrained to use a chamber pot in the presence of other cell occupants; and

(d) the slopping-out process was found to be "chaotic";

(e) the overall regime was found to be poor.

163. These circumstances are very distinct from those established on the evidence.

164. Turning then to Article 8 (privacy) the applicant in the present proceedings did not have to share a cell at any stage. He did not make significant complaints as to the manner which the staff dealt with the sanitation issues on a day by day basis – to the contrary. He accepted that even during a punishment period the authorities, insofar as possible, accommodated requests to go to the toilet. He accepted that when necessary a second chamber pot would have been provided. However, there was an adequate supply of soap, disinfectant and bleach for use by all the prisoners, and he was able to purchase air fresheners from the prison tuck shop had he wished. Taking the issues individually and cumulatively I am unable to find there is a breach of Article 3 or in conjunction with Article 8 by reference to any established Strasbourg decision. There is thus no successful point of reference for the applicant. This aspect of the claim also fails and must be dismissed.

Decision

165. The case having failed on both aspects, it is unnecessary to consider what remedies would be applicable in the event of there having been a finding in the applicant's favour. The application must be declined.