

**THE HIGH COURT**

**[2013 No. 5 SSP]**

**IN THE MATTER OF AN INQUIRY PURSUANT TO  
ARTICLE 40.4.2 OF THE CONSTITUTION**

**BETWEEN/**

**SAMUEL CONNOLLY**

**APPLICANT**

**AND**

**GOVERNOR OF WHEATFIELD PRISON**

**RESPONDENT**

**JUDGMENT of Mr. Justice Hogan delivered on the 16th day of July, 2013**

1. Is the detention of the applicant under conditions of what amounts to solitary confinement for all but one hour in the course of a day such a manifest contravention of the State's duty to protect the person under Article 40.3.2 of the Constitution such as would entitle him to immediate release? That, in essence, is the question posed in the course of these Article 40.4.2 proceedings. The issue arises in the following way:

2. This applicant, Mr. Connolly, is currently serving a sentence of seven years' imprisonment (with the final two years suspended) following his conviction in June 2010 for causing serious harm under s. 4(1) of the Non-Fatal Offences against the Person Act 1997 ("the 1997 Act"). The applicant was also convicted of offences of assault causing harm contrary to s. 3 of the 1997 Act and another count of assault contrary to s. 2 of the 1997 Act. These latter two sentences were directed to run concurrently with the principal offence.

3. These sentences were back-dated in their operation to March, 2010 in order to take into account time spent in custody. As matters stand, Mr. Connolly is currently scheduled for release in December, 2013.

4. Mr. Connolly is homosexual and is HIV positive. He also suffers from epilepsy. On 24th September, 2011, while then detained in Mountjoy Prison, Mr. Connolly maintains that he was the victim of a violent rape by a cellmate who used a makeshift knife for this purpose. The attacker – who Mr. Connolly has named – then slashed Mr. Connolly and warned him against making any complaint in respect of it. Although the Director of Public Prosecutions decided in September, 2012 not to press charges in respect of this incident, there has been no suggestion at all that this event did not occur in the manner described by Mr. Connolly. I propose, therefore, to proceed on the basis that Mr. Connolly was raped in the manner alleged.

5. Following this incident, an investigation was commenced by the prison authorities but that investigation has not yet been concluded. Mr Connolly was transferred to Wheatfield Prison in February, 2012. A month later he was transferred to the Training Unit in Mountjoy Prison. Following an incident with another prisoner, disciplinary action was taken against him and he was then returned in February, 2013 to the closed prison regime in Wheatfield Prison. For the first two months he shared a cell with another prisoner of his acquaintance.

6. His own personal experiences since this sexual violation have made him wary of sharing a cell. At his request, therefore, he was moved to a single occupancy cell at the end of April, 2013.

7. On his return to Wheatfield, the applicant sought protection from the general prison population as he feared that he would be subjected to homophobic victimisation. The respondent took the view that his safety was not threatened if he were placed within the general prison community. As Mr. Anthony Hickey, as an assistant principal with the Irish Prison Service has explained in an affidavit sworn on 19th June, 2013, Mr. Connolly:

"is currently being held in Unit 2G, which is a unit that has a 23 hour lock-up regime. As [previously] averred, the applicant is on this unit at his own request and has requested protection from other prisoners. He is housed in a single cell due to an alleged incident in Mountjoy Prison. Management has reviewed the prisoner's lock up status monthly. However, the applicant refuses to come off lock-up. He is on standard regime and he presents no management issues."

It is clear from the records supplied that Mr. Connolly is currently being detained pursuant to Rule 63 of the Prison Rules 2007 which provide:-

"63.(1) A prisoner may, either at his or her own request or when the Governor considers it necessary, in so far as is practicable and subject to the maintenance of good order and safe and secure custody, be kept separate from other prisoners who are reasonably likely to cause significant harm to him or her.

(2) A prisoner to whom paragraph (1) applies may participate with other prisoners of the same category in authorised structured activity if the Governor considers that such participation in authorised structured activity is reasonably likely to be beneficial to the welfare of the prisoner concerned, and such activity shall be supervised in such manner as the Governor directs.

(3) The Governor shall make and keep in the manner prescribed by the Director General, a record of any direction

given under this Rule and in particular

(a) the names of each prisoner to whom this rule applies,

(b) the date and time of commencement of his or her separation,

(c) the grounds upon which each prisoner is deemed vulnerable,

(d) the views, if any, of the prisoner,

(e) the date and time when the separation ceases.”

8. It is equally clear from these documents that Mr. Connolly has opted for this regime (known as the “restricted regime”) because of his own personal concerns for his own safety. Rule 63 of the 2007 Rules requires that the circumstances of persons who are subjected to this regime must be reviewed regularly and that the reasons for its application to any given prisoner must be documented.

9. Thus, for example, for the week of 28th April, 2013, Mr. Connolly completed the form saying that while he had stayed off the restricted regime in the previous week, he was again now opting for the restricted regime on the basis that he was being threatened when placed in the general prison population. It is important, however, to state that the restricted regime is not being imposed on Mr. Connolly as a form of punishment and the Governor would, I think, be happy to see the applicant integrated into the general prison population. Yet perhaps not surprisingly, in view of the earlier rape and assault, Mr. Connolly feels nervous and distinctly uneasy if left without any particular protection regime.

10. In the course of the restricted regime, the applicant remains in a 23 hour lock-up. His cell contains a bed, a counter, a place for storing clothes, a television, a toilet and a sink. He receives all his meals in a cell and he is brought outside the cell for one hour during the day. He has ready access to reading material and, indeed, he spends most of his day reading. During the hour when he is not on lock up he cleans out his cell and has access to the yard with other prisoners from his landing with whom he has a good relationship. He is not, however, able to participate in any training or recreational activities.

#### **Kinsella v. Governor of Mountjoy Prison**

11. In this respect, therefore, the present case is very different from the underlying facts disclosed in *Kinsella v. Governor of Mountjoy Prison* [2011] IEHC 235, [2012] 1 I.R.467. In that case I summarised the applicant’s conditions thus ([2012] 1 I.R. 467, 469-470) :

“...it is not in dispute but that he was brought to the basement section of the prison and placed in an observation cell. This cell is entirely padded and it contains nothing beyond a mattress. It is approximately three metres by three metres and there is a small window providing some natural light in the cell. There is, however, a shutter on the window and there is a dispute as to whether the shutter is presently working. Mr. Kinsella maintains he was provided with no reading material and that he has no access to a radio or a television. The sanitation facilities - if this is really the correct term in the circumstances - simply consists of a cardboard box.

Nor is it disputed but that Mr. Kinsella has spent virtually all of the last eleven days confined to this padded cell, although he has been afforded the opportunity to make one short telephone call of six minutes duration every day. While Deputy Governor Joyce agreed in evidence that Mr. Kinsella should have been allowed one hour’s recreational exercise and an opportunity to shower, he was not in a position (given that he was absent on official business over the last few days) to controvert the applicant’s evidence that these facilities had not actually been afforded to him. Even if Mr. Kinsella were to have been allowed one hour’s recreation, this would have only marginally ameliorated these conditions. The Deputy Governor did not otherwise dispute the applicant’s account of the cell conditions and he very fairly accepted that the present state of affairs was unsatisfactory. These padded cells are designed as a temporary exigency for disturbed prisoners who need to be protected from self-harm or who pose an immediate threat to other prisoners. It is acknowledged that Mr. Kinsella does not come within either category of prisoners.

It is clear that the prison authorities are wholly motivated by a desire to protect Mr. Kinsella from harm and that they bear him no ill-will. The real problem is the shortage of single cells within the prison system given that, unfortunately, Mr. Kinsella is not the only prisoner who needs to be protected in this fashion. I further accept Deputy Governor Joyce’s evidence to the effect that the prison authorities have regularly and consistently sought alternative accommodation in other prisons for Mr. Kinsella, bearing these real constraints in mind.”

12. Counsel for Mr. Connolly, Mr. O’Higgins S.C., readily accepts that the conditions under which his client are detained are significantly superior to those disclosed in *Kinsella*. Mr. Connolly has, for example, a proper bed, in cell sanitation, some access to natural light and he has access to a television and to reading material. Unlike the situation in *Kinsella*, however, Mr. Connolly is likely to be detained in circumstances of something approaching solitary confinement for several months.

#### **Article 40.3.2 and the protection of the person**

13. It is against this general background that the question of whether Mr. Connolly’s entitlement to the protection of the person in Article 40.3.2 of the Constitution has been violated must be assessed. Article 40.3.2 obliges the State by its laws:

“to protect as best it may from unjust attack and, in the case of injustice done, to vindicate the life, person, good name and property rights of every citizen.”

14. Here it must also be recalled that the Preamble to the Constitution seeks to ensure that the “dignity and freedom of the individual may be assured.” While prisoners in the position of Mr. Connolly have lost their freedom following a trial and sentence in due course of law, they are still entitled to be treated by the State in a manner by which their essential dignity as human beings may be assured. The obligation to ensure that the dignity of the individual is maintained and the guarantees in respect of the protection of the person upheld is, perhaps, even in more acute in the case of those who are vulnerable, marginalised and stigmatised.

15. While due and realistic recognition must accordingly be accorded by the judicial branch to the difficulties inherent in the running of a complex prison system and the detention of individuals, many of whom are difficult and even dangerous, for its part the judicial branch must nevertheless exercise a supervisory function to ensure that the essence of these core constitutional values and rights – the dignity of the individual and the protection of the person – are not compromised: see, e.g., *Creighton v. Ireland* [2010] IESC 50,

per Fennelly J.

16. The obligation to treat all with dignity appropriate to the human condition is not dispensed with simply because those who claim that the essence of their human dignity has been compromised happen to be prisoners. That, in essence, is the basis for the decision of Barrington J. in *The State (Richardson) v. Governor of Mountjoy Prison* [1980] I.L.R.M. 82 where the judge found that the presence of human excrement in the basin in which prisoners were expected to wash and clean their teeth. Barrington J. found that the applicant's "rights under the Constitution and the law [had] been violated": [1980] I.L.R.M. 82, 93. This would, I think, now be classified as a case where the substance of the applicant's right to the protection of the person in Article 40.3.2 had been violated, certainly as read in conjunction the Preamble's guarantee in respect of the protection of the dignity of the individual. What could be more undignified – indeed, degrading – than the obligation to wash in the presence of the human excrement?

17. For even though prisoners may have strayed from the path of righteousness and even though – as with the case of Mr. Connolly – they may have severely and wantonly injured other persons, the protection of the dignity of all is still a vital constitutional desideratum. This is because the Constitution commits the State to the protection of these standards since it presupposes the existence of a civilised and humane society, committed to democracy and the rule of law and the safeguarding of fundamental rights. Anyone who doubts these fundamental precepts need only look at the Preamble, Article 5, Article 15, Article 34, Article 38 and the Fundamental Rights provisions generally.

18. All of us are, of course, sadly aware of the great failures of the past and the present where these rights seemed and seem like hollow platitudes. But this is not quite the point, since it is by upholding these values and rights that we can all aspire to the better realisation of the promise which these noble provisions of the Constitution hold out for us as a society.

19. In *Kinsella* I held that the essence of these constitutional rights had been compromised in that case given the conditions of the applicant's custody ([2012] 1 I.R. 467, 470-472):

"So far as the present application is concerned, it is the State's duty to protect and vindicate the person of Mr. Kinsella which is principally engaged here, although I do not overlook the fact that the applicant's present conditions of confinement also arise, in part, at least, from the State's duty to protect his right to life and, perhaps, the life of other persons as well. Yet it is undeniable that detention in a padded cell of this kind involves a form of sensory deprivation in that the prisoner is denied the opportunity of any meaningful interaction with his human faculties of sight, sound and speech – an interaction that is vital if the integrity of the human personality is to be maintained. I use the term "a form of sensory deprivation" advisedly, because it is only fair to say that confinement in such conditions as Mr. Kinsella has had to experience is nonetheless very far removed from the "five techniques" of sensory deprivation – such as intentionally subjecting the prisoner to constant "white" noise, sleep deprivation and the hooding of prisoners – condemned by the European Court of Human Rights in *Ireland v. United Kingdom* (1978) 2 EHRR 25 as inhuman and degrading treatment and, hence, a breach of Article 3 ECHR.

By solemnly committing the State to protecting the person, Article 40.3.2 protects not simply the integrity of the human body, but also the integrity of the human mind and personality. Counsel for the Governor, Mr. McDermott, observed in argument that no expert evidence had been led by the applicant with regard to the psychological harm which he might suffer. That is true, but it must be recalled that this application is one which of necessity was made as a matter of considerable urgency, so that the possibility of commissioning such an expert report within the short time period was probably not a realistic possibility. Moreover, one does not need to be a psychologist to envisage the mental anguish which would be entailed by a more or less permanent lock-up under such conditions for an eleven day period. Nor, for that matter, does one need to be a psychiatrist to recognise that extended detention over weeks under such conditions could expose the prisoner to the risk of psychiatric disturbance.

While making all due allowances for the exigencies of prison life and the difficult and unenviable task of the prison service in making complex arrangements for a wide variety of different prisoners with different needs and who often must be protected from one another, it is nonetheless impossible to avoid the conclusion that a situation where a prisoner has been detained continuously in a padded cell with merely a mattress and a cardboard box for eleven days compromises the essence and substance of this constitutional guarantee, irrespective of the crimes he has committed or the offences with which he is charged. This is not to suggest that such a cell might never be used. Clearly somewhat different considerations may well arise in the case of disturbed prisoners or where other prisoners need to be accommodated on a temporary emergency basis for perhaps a day or two. But detention in such conditions for well over a week fails to meet the minimum standards of confinement pre-supposed by the constitutional guarantee in relation to the protection of the person contained in Article 40.3.2. I accordingly find that the conditions under which Mr. Kinsella have been detained constitute a violation of his constitutional right to the protection of the person and that the State has failed to vindicate that right in the manner required by Article 40.3.2 of the Constitution."

#### **Application of the *Kinsella* principle to the present case**

20. Can the same be said here? The conditions under which the applicant is held are not perfect, but they are, of course, immeasurably better than those disclosed in *Kinsella*. In this particular context, the essence of the obligation in Article 40.3.2 to protect the person is to ensure that the integrity of the personality of every detained person is upheld. As I observed in *Kinsella*, this in turn means that every detained person must be permitted some meaningful interaction with his human faculties of sight, sound and speech, as such an interaction is vital if the integrity of the human personality is to be maintained. The presence of a television in the cell and access to reading material helps to ensure that the detained person has regular interaction with his faculties of sight and sound, even if the risk of psychological anguish and psychiatric disturbance must undoubtedly increase if prisoners are held under such conditions over a very long period of time.

21. It should also be noted that the circumstances of each prisoner on this restricted regime are regularly monitored by the respondent on a monthly basis and this regime has not been imposed as a punishment in this case. Indeed, so far as the present case is concerned, the respondents maintain that his safety within the general prison population is not threatened and that they have only acceded to the restricted regime at Mr. Connolly's express request in writing.

22. Yet the locking up of prisoners under such circumstances for very long periods of time – which I would rather measure in terms of an extended period of months – must be regarded as an exceptional measure, which might, in some instances, at least, compromise the substance of the detainee's right to the protection of the person and the safeguarding of his human dignity. Certainly, the

indefinite detention of a prisoner under such circumstances for periods of years would undoubtedly violate the guarantee to protect the person in Article 40.3.2, since it would be hard to see how the integrity of the detainee's personality – the very essence of the guarantee of the protection of the person and preservation of the human dignity of the prisoner – could be preserved under such circumstances.

23. In view of the acute difficulties involved in prison management, the judicial branch can but rarely be prescriptive in terms of specific conditions of prison conditions, not least given that this is ultimately the responsibility of the executive branch. In these circumstances, it would be generally inappropriate to lay down any *ex ante* rules regarding solitary confinement. In this regard, the supervisory function which the Constitution ascribes to the courts must therefore often be confined in the first instance to prompting, guiding and warning the executive branch lest these precious values of human dignity (in the Preamble) and the protection of the person (in Article 40.3.2) might inadvertently be jeopardised in any given case. Even as in cases such as *Richardson* and *Kinsella*, where a specific finding of constitutional violation is called for, absent compelling circumstances, it will generally be appropriate as an initial step to give the executive branch (and, by extension, the prison service) an opportunity to remedy this breach in early course.

24. In these circumstances, it is sufficient to say that the placing of prisoners in solitary confinement (or, as here, something approaching solitary confinement) must generally be regarded as an exceptional measure which requires monitoring and regular review by the prison authorities. As illustrated by *Kinsella*, complete sensory deprivation – such as, as happened in that case, by placing the prisoner in a padded cell with no access to any facilities whatsoever or to any natural light – will generally be held to compromise the essence of the prisoner's Article 40.3.2 rights if this were to continue beyond a matter of days.

25. As we have already noted, the applicant's own personal conditions are immeasurably better than those of the applicant in *Kinsella*. In that respect, he has not suffered anything like the almost complete sensory deprivation which was a feature of the latter case. It is also clear that Mr. Connolly's case is kept under regular review and that the prison authorities are anxious that he would leave the present restricted regime and re-enter the general prison population. It is also clear from the extensive clinical notes that the professional psychologists attached to the various prisons have shown him considerable care and attention and seem totally devoted to his welfare.

### **Conclusions**

26. In these circumstances, it cannot presently be said that the circumstances of Mr. Connolly's present detention violate the substance of the guarantees of Article 40.3.2 to protect the person, even if he is denied effective access to human contact for 23 out of 24 hours. Mr. Connolly has, however, now been so detained – even if it has been at his own request – under these conditions for the best part of three months. Doubtless the longer Mr. Connolly is so detained the more carefully and intensely his case will be considered and reviewed by the prison authorities who, it may be assumed, will be on guard for signs of psychological or psychiatric distress.

27. Yet if Mr. Connolly's detention under these conditions were to continue indefinitely for an extended period of months with no sign of variation, the point might very well come in which the substance of these constitutional guarantees would quickly be compromised and violated. It would, however, be premature just yet to anticipate what might yet materialise at some future time or in some future case.

28. Nevertheless in these present circumstances and based on the particular facts of the present application, I must find that the applicant is detained in accordance with law for the purposes of Article 40.4.2 and I must accordingly refuse the application for his release.