THE HIGH COURT
JUDICIAL REVIEW

[2015 No. 228JR]

BETWEEN

MARK NASH

APPLICANT

AND

THE CHIEF EXECUTIVE OF THE IRISH PRISON SERVICES, THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

GOVERNOR OF MOUNTJOY PRISON
AND GOVERNOR OF ARBOUR HILL PRISON

NOTICE PARTIES

JUDGMENT of Kearns P. delivered on the 4th day of August, 2015

In these judicial review proceedings the applicant, who is serving life sentences for multiple murders, originally sought an order of *certiorari* quashing the decision of the Irish Prison Service communicated to the applicant's solicitor by letter dated 30th April, 2015 to refuse the applicant's request that he be transferred from Mountjoy Prison to Arbour Hill Prison. When the matter came before this Court on successive dates from 24th July, 2015 the applicant had by then been transferred to the Midlands Prison to serve his sentences. In these circumstances, amendments to the grounds upon which leave had been granted were permitted as on the one hand the complaints about the nature of his detention in Mountjoy had become moot and on the other the applicant's preference and request for transfer to Arbour Hill still continued. Following his transfer to the Midlands prison on 6th May, 2015, it is agreed the applicant became significantly suicidal. In these altered circumstances the respondents elected to conduct a further review and consideration of the transfer request. The further review undertaken by the Prison Service culminated in a decision on 29th July, 2015, supported by a 14 page statement of reasons, to maintain the refusal of the applicant's request for the particular transfer sought. In these unusual circumstances it is in reality this more recent decision which the applicant seeks to have quashed. While mandatory relief directing the applicant's transfer to Arbour Hill has not been sought, the application, for all practical purposes, is to that effect and purpose as a declaration is sought in these proceedings to the effect that the applicant's detention "at a prison other than Arbour Hill Prison…is unlawful".

BACKGROUND
The applicant herein has been detained in the custody of the Irish Prison Service since being arrested in August, 1997 in relation to the murders of Mr. Karl Doyle and Ms. Catherine Doyle in Ballintubber, Co. Roscommon. The applicant was convicted of these offences in October, 1998 and received a life sentence on each of the two counts of murder. He has been detained at Arbour Hill Prison for the vast majority of time since that date.

In October 2009 the applicant was charged with a further two counts of murder in respect of the deaths of Ms. Sylvia Shields and Ms. Mary Callanan ("the Grangegorman murders") which occurred in March 1997. The applicant's trial in respect of these charges came before the Central Criminal Court in January 2015. The applicant was convicted on 20th April, 2015 and was sentenced to an additional two life sentences. Throughout the trial the applicant continued to be detained at Arbour Hill Prison.

Following his conviction in April 2015 the applicant was not returned to Arbour Hill Prison and was instead committed initially to Mountjoy Prison. This is apparently the typical destination for recently convicted prisoners who undergo a period of assessment at Mountjoy before being lodged elsewhere in the prison system. However, the applicant continued to be detained at Mountjoy for longer than he had anticipated and he lodged an internal complaint in relation to his detention in Mountjoy on 23rd April, 2015.

On 21st April, 2015 the applicant's solicitor wrote to the Director of Operations of the Irish Prison Service, Mr. Martin Smith, stating that the applicant had established himself as part of the prison community at Arbour Hill but had now learned he was to be transferred to the Midlands Prison. The applicant's solicitor stated that no reason had been provided for this change in prison arrangements and that there was no credible basis for the contention that the applicant was "in nature a different prisoner" than he was prior to his conviction in April 2015. Detailed reasons for the transfer were requested and it was indicated that the transfer was likely to cause the applicant serious emotional harm.

A further letter was sent to Mr. Smith by the applicant's solicitor on 22nd April, 2015 stating that the applicant was in fear of his life at Mountjoy Prison and was being held on a '24 hour lock-up" basis. Mr. Smith responded to this letter on the same date and indicated that the applicant had been transferred to Mountjoy in accordance with the order of the court and that no decision had yet been made in relation to the applicant's long term arrangements.

In his complaint form of 23rd April the applicant sets out that while detained at Arbour Hill he was better placed to maintain a relationship with his partner of eight years, that he felt safe and secure there and did not have to *'look over [his] shoulder all day'*, and that he had access to education services and was able to attend the gym on a daily basis. Arbour Hill provides an internal 'open security' regime with which the applicant was familiar and comfortable. The applicant contends that he had become a productive inmate at Arbour Hill over a period of almost seventeen years. His letter of complaint states that while at Mountjoy he was held in 23 hour a day 'lock up' and that he had serious concerns for his safety.

By letter dated 29th April, 2015 the applicant's solicitor again wrote to Mr. Smith seeking clarity on the proposed arrangements regarding the applicant's detention and requesting that he be transferred back to Arbour hill Prison without delay.

On 30th April, 2015 Mr. Keith Lynn of the Irish Prison Service Operations Directorate wrote to the applicant's solicitor stating that the applicant "*is not detained in the basement of Mountjoy Prison on 24 hour lock-up as claimed. Mr. Nash is located in the Medical unit of Mountjoy prison as he has requested protection in Mountjoy Prison and he is also subject to special observations for medical reasons*."

This letter goes on to state:–

> *"Mr. Nash will not be returned to a low security prison such as Arbour Hill for the foreseeable future for a number of reasons. The security setting for someone just convicted of a double murder is completely inappropriate. Secondly there is very little in the way of rehabilitative options that the services in Arbour hill can offer him as Arbour Hill's services are geared towards the treatment of sex offenders. Having been convicted of such serious crimes Mr. Nash has a significant road ahead of him in his efforts to rehabilitate himself and reduce his risk to society. As such he will need engagement*

with the relevant services which are available in medium security prisons for persons convicted of murder. Mr. Nash's behaviour in custody would also give some rise for concern having served sanctions for breach of prison discipline three times in 2014 for drug related breaches. Mr. Nash's return to a low security environment will only be considered in the context of Parole Board reviews and recommendations regarding his progress to rehabilitate himself and reduce his risk of reoffending."

Following further correspondence between the applicant's solicitor and the Irish Prison Service, the applicant was granted leave to bring the present proceedings by Moriarty J. on 6th May, 2015. Obviously the relevant court papers for that purpose had been prepared prior to the date of making the leave application. As later became apparent, the applicant's various complaints about conditions in Mountjoy Prison had by then just become redundant or moot as he was on that very day transferred to the Midlands Prison.

In an affidavit of Ms. Dolores Courtney, Assistant Principal Officer in the Irish Prison Service, filed in response to the applicant's affidavit and dated 2nd June, 2015, she states that the applicant was no longer being detained at Mountjoy Prison as he was transferred to the Midlands Prison on 6th May, 2015 in order to be accommodated with prisoners of a similar profile. Ms. Courtney submits that there is no reason for the applicant to feel he needs protection at the Midlands Prison. She states that it is the function of the Minister for Justice and Equality and the first named respondents in these proceedings to manage the prisons in the State and to determine where prisoners should be accommodated. At no stage was any promise, assurance, or indication given by or on behalf of the respondents to the applicant that he would return to serve the further two life sentences in Arbour Hill Prison.

Ms. Courtney goes on to state that when the applicant was committed to Mountjoy Prison on 20th April, 2015 he expressed his wish not to associate with the general prison population but did not specify any particular threat or any particular prisoner or group of prisoners that gave rise to a threat. The Governors of Mountjoy and Arbour Hill Prisons were not in possession of any information or intelligence to suggest that the applicant was under any general threat from any specific prisoner. She states that the Governor of Mountjoy Prison received no medical recommendation or advice regarding the applicant, although Mr. Enda Kelly, Campus Nurse Manager at Mountjoy Prison, did indicate that the applicant was experiencing an 'adjustment reaction' to his new circumstances.

It is averred by Ms. Courtney that there are only a dozen or so places at Arbour Hill for non-sex offenders and that these are for medical, protection, or security reasons. The applicant, despite being interviewed by a Governor and a Chief Officer, could not state where any threats to his safety or security were coming from. Ms. Courtney sets out the number of visits the applicant had already received from his partner whilst at the Midlands Prison and details his level of engagement with the mental health services at the Midlands Prison. Following an incident of self harm on 19th May, 2015 it was recommended by a psychiatrist and the prison doctor that the applicant could be returned to an ordinary cell.

On arrival in the Midlands Prison, the applicant resisted efforts to move him to E or G landings, informing prison staff that he felt under threat, and was initially placed on Unit C1. On being interviewed by the Governor, the applicant did not name any specific persons, but having sought protection, was placed on Rule 63 protection and kept under regular review. After the self-harm incident on 19th May, he was placed in a Safety Observation Cell and marked off Rule 63 protection. Following clearance to be moved from the Safety Observation Cell, he was moved to Cell 15 on E3 and is now in normal circulation on E3 landing. Ms Courtney deposes that he has his own cell, toilet, sink and shower. Prisoners on E3 are employed in the staff canteen, horticulture, laundry, computer shop and school. 25 of the prisoners there are younger than the applicant, 20 are older. The applicant has made request for employment in the computer shop. He has visiting entitlements and enjoys enhanced regime status which permits access to a range of activities.

In the affidavit of Mr. Liam Dowling, Governor of Arbour Hill Prison, he states that during his time in Arbour Hill the applicant did not require any special arrangements or protection. He states that in recent years the applicant availed of very few services in the prison and that his last engagement with the Probation Service was on 27th April, 2011. Mr. Dowling states that the applicant's attendance at the education services of Arbour Hill has been sporadic, particularly since 2010, although he did become very proficient at mirror etching which earned him remuneration in prison. He strenuously opposes any return of the applicant to Arbour Hill on the basis that, following his more recent convictions, he is no longer suitable for Arbour Hill Prison. He had recommended that the applicant be held in a more secure environment. Both internally and externally, the level of security is less in Arbour Hill than in the Midlands Prison.

In the applicant's affidavit of 15th June, 2015 he sets out the conditions of his current detention in the Midlands Prison. He avers that he is alone in his cell for almost twenty-three hours a day and is "in a state of constant high alert" on the rare occasions he leaves his cell. He states that a typical day in the Midlands Prison bears no resemblance to his days in Arbour Hill where he was able to work, attend the gym, cook, avail of the education services, and receive regular visits from his girlfriend. He says that he now lives with a constant fear of attack and thoughts of suicide.

The applicant sets out the nature of the perceived threats to his safety, which in part, he says, emanate from connections of the Doyles, albeit that those convictions occurred 17 years ago. He expresses fear of Mr. Christy Griffin who is also detained in the Midlands Prison. He says he is under further threat due to "demonisation" of him following his conviction for the 'Grangegorman murders'. The applicant contends that in all the circumstances, and in particular having regard to the risk to his life and the emotional harm he is suffering, there is no logical or rational basis to justify detaining him in the Midlands Prison rather than at Arbour Hill where he had an unblemished record. He denies having applied for work in the computer shop. He also asserts that he lost his enhanced prisoner status around the time Ms. Courtney swore her affidavit. He accepts however that this was restored following intervention by his solicitor. He believes strongly that the motivation for his transfer to the Midlands Prison is punitive in nature.

In the affidavit dated 24th June, 2015 of Mr. Keith Lynn, Assistant Principal Officer in the Irish Prison Service, and the person who it is accepted between the parties made the final decision in relation to the applicant's transfer, he states that the applicant has been unable to identify any specific threat to his safety. The relevant prison authorities have no record of any complaint made by the applicant regarding a named prisoner who the applicant now claims to be in fear of. He states that there was one instance where the applicant was verbally abused by another prisoner while on C1 landing, but that there was no physical risk to his safety. The deponent says that he was advised that the applicant had been in a scuffle with another prisoner, Declan Burke, while in Arbour Hill. While Burke was now also in the Midlands Prison, he was moved off E Wing on 9th June, 2015 for reasons unrelated to the applicant. Mr. Lynn also contends in his first affidavit that "*there are no such documents in existence in relation to the alleged threat to the applicant's life*."

Mr. Lynn further states that the Prison Service had no medical recommendation before it that the applicant should be sent back to Arbour Hill and that in-reach mental health services are available to prisoners at the Midlands Prison. A new full time Consultant Psychiatrist was appointed in March, 2015 to lead the in-reach service which is supported by two full time Community Psychiatric Nurses in the Midlands Prison. All prisoners are medically assessed on admission, and this process includes a mental health assessment which can be developed as an individual care plan. Where clinically indicated, a prisoner is referred to the forensic psychiatric

services. Importantly, he states that the release of any medical information requires the consent of the applicant.

A short affidavit from Governor Murphy from Mountjoy states that at no stage did he state or imply that he would support or recommend the applicant for transfer to Arbour Hill.

In an affidavit filed on 14th July, 2015, the applicant's solicitor states that a number of people have expressed concern to him about the applicant's condition, appearance, and mental health since his transfer to the Midlands Prison. He avers that the applicant unsuccessfully attempted to take his own life on 19th May, 2015 and that an independent psychiatrist's report indicates that the applicant is at a very high risk of suicide. Mr. MacGuill states that the applicant has lost several stone in weight and is a "*fragile and depressed shadow of himself*."

By ruling dated 26th June, 2015 the High Court (Barrett J.) ordered the discovery of various documentation and records concerning the decision of the respondents not to return the applicant to Arbour Hill and concerning the applicant's conditions of detention. An affidavit of discovery exhibiting such documents was filed by Mr. Lynn on 21st July, 2015.

When the matter came before this Court on 24th July, 2015 counsel for the applicant indicated that additional medical records were to be made available by the respondents on that date. These included medical notes and records which Mr. Lynn had not seen at the time of the first decision. Counsel for the respondent told the Court that a psychiatrist's report had been obtained by the applicant which indicated that he was a high suicide risk and that the applicant had been admitted to hospital on the previous evening as a result of apparently having not eaten for a number of weeks. In light of those matters, the respondents decided to reconsider the applicant's application for a transfer.

The matter came before the Court again on 28th July and counsel for the applicant requested that the reasons for the second determination be supplied to the applicant in advance of the matter next coming before the Court. Subsequently, on 29th July, 2015 counsel for the applicant told the Court that moments before the matter was due to commence the applicant's solicitor had received a copy of the second determination via email, consisting of a 14 page document, refusing the applicant's request for a transfer. The matter was adjourned to the following day to allow the applicant to consider the second decision.

THE SECOND DECISION

The second decision, dated 29th July, 2015, sets out the history of the applicant's detention at Arbour Hill and transfer to Mountjoy following his further convictions in April, 2015. The decision states that while the applicant, on 20th April, expressed a wish not to associate with the general prison population at Mountjoy and to be placed on protection, he did not specify any particular threat or prisoner or group of prisoners that gave rise to a threat. The Governors of Arbour Hill and Mountjoy Prisons had no information or intelligence to suggest that the applicant was under any general or specific threat. Similarly, while the applicant requested protection upon his transfer to the Midlands Prison, he did not specify any particular threat.

The decision states that the applicant was involved in an incident at the Midlands Prison where he and his partner were verbally abused while using a shared phone line. However, at no stage was there any risk to the applicant's physical safety and the other prisoner concerned was separated from him by two locked gates. The applicant is now on a different landing at the Midlands Prison where there is no prospect of him having to interact with this other prisoner.

The second decision also considers the concerns regarding the applicant's mental health as set out in a report of an independent psychiatrist, Dr. Brenda Wright, of 4th June. The report states that the applicant presents a high risk of suicide and this risk occurs in the context of an adjustment order. If it is confirmed that the applicant will not be returning to Arbour Hill his risk of suicide will rise from high to very high. In this regard, the second decision refers to the affidavit of Governor Robbins of the Midlands Prison dated 20th July, 2015 which sets out the nature of the mental health services available to the applicant and the ongoing monitoring and risk assessment procedure.

Reliance is also placed upon the affidavit of Governor Dowling of 8th June, 2015 which highlights his objections to the applicant returning to Arbour Hill Prison on the basis of security considerations. The decision states that there is no reason to question Governor Dowling's judgment in this regard as he is an experienced Governor who has been in charge of Arbour Hill for some time.

The decision expresses a concern on the part of the respondents that if the applicant's transfer is approved this could have serious implications for the management of the prison system and could possibly lead to further hunger strikes by other prisoners to achieve their aims. Ultimately, the applicant's request for a transfer was refused on the following three grounds:–

(i) public interest

(ii) security considerations

(iii) the applicant's needs and the risk to his life can be best managed in the Midlands Prison.

As previously indicated, the Court allowed appropriate amendments to be made to the applicant's judicial review papers to permit the applicant challenge the further decision and clearly in that context the statement of opposition must be taken as being grounded on the reasons elaborated in the 14 page document summarised above.

At the hearing the Court permitted the filing of further affidavit material, being an affidavit sworn by the applicant's solicitor, which makes particular reference to certain discovered documents said to be supportive of the applicant's contention that he is undergoing threats to his life and safety in the Midlands Prison. On the second day of the hearing the Court was also informed that the applicant had been discharged from hospital, one must assume because his treatment there had at least for the present time reduced his risk of death from starvation.

THE PROCEEDINGS

These judicial review proceedings were launched against a background where the applicant was detained in Mountjoy Prison following his conviction on the 20th April, 2015 for the "Grangegorman murders" pursuant to order of the Central Criminal Court made on the same date. It is common case that, from that time, the applicant has been significantly depressed and it is accepted by the respondents that he is a genuine suicide risk.

His request for a transfer from Mountjoy Prison to Arbour Hill Prison having been refused, the applicant was transferred to the Midlands Prison on the 6th May, 2015 where he is currently accommodated in a single occupancy cell on E3 Landing.

Accordingly, the first issue which the Court had to address in this case was an application on the part of the applicant to amend the grounds upon which relief was sought. The decision originally challenged in the proceedings was that made on the 30th April, 2015 while the applicant was still in Mountjoy and challenged certain aspects of his detention there. His transfer to the Midlands Prison occurred in early May and, after an elaborate process of discovery, as directed by order of the High Court (Barrett J.) made on the 26th day of June, 2015 and the development of the applicant's suicidal state, which is agreed to be serious, the respondents intimated to the Court some days before the hearing that it would reconsider afresh the applicant's request, make a decision and furnish detailed reasons for any decision arrived at. That decision was made on the 29th July, 2015, shortly before the hearing was about to take place, and a detailed account of the reasons for refusing the applicant's request were furnished to the applicant's advisors in a 14 page document prepared by Mr. Keith Lynn, Assistant Principal Officer of the Operations Directorate in the Irish Prison Service.

Nothing turns on the fact that Mr. Lynn made a recommendation which was accepted by the Director General of the Irish Prison Service, Mr. Michael Donnellan. This is not a case where it is suggested, nor was leave granted, in respect of any supposed irregularity in the decision-making process in the sense of an impermissible delegation of the power to make the decision in question.

Reference has already been made to the detailed nature of the reasons which are encapsulated in the final paragraph of the recent decision which states:-

> *"I recommend that his transfer to Arbour Hill is refused on the grounds of public interest and security considerations and that his needs and the risk to his life can be best managed in the Midlands Prison."*

LEGAL PRINCIPLES AS APPLICABLE IN THE INSTANT CASE

The terms of s.17(3) of the Criminal Justice Administration Act 1914, as adapted by s.11 of the Adaptation of Enactments Act 1922 provides:-

> *"Prisoners shall be committed to such prisons as the (Minister for Justice and Equality) may from time to time direct; and may on the like direction be removed therefrom during the term of their imprisonment to any other prison."*

It must be acknowledged that the function of the Executive in this sphere is self-evidently an important and integral aspect of the Executive function. Prisoners cannot expect or demand bespoke arrangements for where they serve their sentences, nor would it be appropriate for the courts to adopt the role of micro-managing criminal detention arrangements. Commonsense and practicality strongly suggest that the courts should interfere with such matters as little as possible. Nonetheless, while decisions about prisoner safety are primarily a matter for prison authorities, they are not immune from judicial scrutiny.

While the applicant has placed considerable reliance on the decision of the Supreme Court in *Meadows v. Minister for Justice, Equality and Law Reform* [2010] 2 I.R. 701 to argue that the respondent's decision was not proportionate on the facts of this case, the application of that test is not a free standing test but one which in this case must be applied in a context where due regard must be given to the separation of powers and the vital exercise by the Executive of its discretionary powers in the area of the management of the prisons in this jurisdiction. Mr. Hartnett argued that a balancing test must be brought to bear on the evaluation of the respondent's decision in this case which on the one hand identifies and recognises the considerations elaborated above, but also affords appropriate recognition of those provisions of the Constitution, notably those contained in Article 40 thereof, whereby the State guarantees by its laws to defend and vindicate the personal rights of its citizens and to vindicate the life of every citizen. Reference was made to a useful passage in the judgment of Baker J. in *Governor of X Prison v. P. McD.* [2015] IEHC 259 (31st March, 2015) in which she states at para. 94:-

> *"94. The sentence of imprisonment lawfully imposed upon Mr. McD has of course deprived him of his right to personal liberty, but it is not suggested, and cannot be suggested as a matter of law, that he has thereby lost all of his constitutional rights including the right of personal autonomy, and the right of bodily integrity. The law was very clearly and forcibly stated by Fennelly J. in Creighton v. Ireland & Ors. [2012] IESC 50:-*
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> > *'Nonetheless, the prisoner may continue to exercise rights "which do not depend on the continuance of his personal liberty …" I would say that among these rights is the right to personal autonomy and bodily integrity. Thus, it is common case that the state owes a duty to take reasonable care of the safety of prisoners detained in its prisons for the service of sentences lawfully imposed on them by the courts. This does not amount, however, to a guarantee that a prisoner will not be injured …'*
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> *95. Edwards J. expressed the view, in Devoy v. Governor of Portlaoise Prison & Ors. [2009] IEHC 288, that a prisoner might have 'residual constitutional rights', including the right to be 'treated humanely and with human dignity.'*
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> *96. A person has under the Constitution certain fundamental rights including the right to life, the right to personal autonomy, the right to bodily integrity, and the right to self-determination, the right to live one's life as one wishes provided those wishes do not impact upon or harm others, and provided no conflict arises between that individual right and the interests of society."*

So, the Court accepts that a balancing exercise, as argued for by Mr. Hartnett for the applicant, is appropriate. In this regard, however, it is essential to identify the critical public interest against which the facts of a particular case must be measured. It is nothing less than the ability of the Prison Service to function effectively. That being so, a great deal must be put in the scales to outweigh that societal interest. Accordingly, the Executive must be afforded an extensive measure of appreciation in what is an extremely difficult area. In *Dempsey v. Minister for Justice* [1994] 1 ILRM 401, Morris J. (at p.405) described the discretion which the Minister enjoys in respect of prisoner transfers in the following manner:-

> *"The transfer of prisoners from one prison to another is a statutory discretionary power performed by the Minister. In the exercise of this power she has very wide discretion. This discretion is conferred in the broadest possible terms."*

The courts should therefore intervene with the exercise of this particular power in only the gravest of cases. Any suggestion that prisoners can or should be detained in the prison of their own choosing, or avail of hunger strike or suicide threats to secure their own objectives, would create chaos in prisons and fatally compromise the proper administration of our prison system. Were one prisoner to succeed in those kind of circumstances it could readily be conceived that others would rapidly adopt similar tactics. Those in charge of or serving in prisons would be transformed into captives of those lawfully sentenced following conviction for crimes - in some instances such as the present case - of the utmost gravity.

In *Connolly v. Governor of Wheatfield Prison* [2013] IEHC 334, Hogan J., then in the High Court, emphasised that:-

> *"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."*

Under the heading "Separation of Powers" in its judgment delivered on 31st July, 2015, the Court of Appeal in *McDonnell v. Governor of Wheatfield Prison* said (at para 92):-

> *"As part of the executive function of the State, the Governor manages the prison and decides what is necessary for prisoner safety. The Court cannot and (should not) interfere in routine management and a fortiori cannot micromanage the prison by specifying a particular regime for a prisoner save in the most exceptional of circumstances."*

In *Walsh v. Governor of the Midlands Prison* [2012] IEHC 229, Charleton J. also warned that continual review by the courts of the ordinary day to day decisions of prison authorities carries a significant danger. He was of the view that intervention should be restricted to truly exceptional cases.

Having regard to these expressions of legal principle, the Court is satisfied that the relevant threshold which an applicant who has been refused a transfer must establish in an application of this nature is that elaborated by Finlay J. in *Murray v. Ireland* [1991] I.L.R.M. 465 which is that the courts should refrain from intervention in the exercise of an Executive power of the sort under consideration here unless it is established that the discretion available to the respondents in the particular case was exercised in a "*capricious, arbitrary or unjust way*". The full statement by Finlay J. (at p.473) is in the following terms:-

> *"The exercise of these powers of the executive is of course subject to supervision by the courts which will intervene only if it can be established that they are being exercised in a manner which is in breach of the constitutional obligation of the executive not to exercise them in a capricious, arbitrary or unjust way.*
>
> *It is not, however, in my view, permissible for the court to intervene merely on the grounds that it would, having regard to the practical considerations arising with regard to the running of prisons or the security of the detention of prisoners, have reached a different conclusion on the appropriateness of special arrangements for association or of temporary release."*

The application of this test does not mean that the Court should ask itself if it would have reached a different decision on the same material, but to inquire if the decision maker acted as no reasonable decision-maker would have acted by reason of having followed a course which was "*capricious, arbitrary or unjust*".

For precisely that reason, it is the view of this Court that threats of suicide should not be capable of being invoked by a prisoner as a reason which *per se* provide an appropriate basis for a transfer from one place of detention to another, unless the suicidal condition has been brought about as a direct result of violence, actual or apprehended, which places the prisoner at significant risk and which cannot otherwise be dealt with. Clearly, any such apprehension must be based on objective considerations and not the subjective apprehensions or feelings of a prisoner, given that life in a prison environment frequently and inescapably will provide for instances where prisoners may be at loggerheads with each other for all sorts of reasons and feel endangered for that reason. Unrealistic worries or exaggerated over-reaction to remarks, looks, gestures, minor scuffles or abuse could never constitute an adequate basis for treating a threat of suicide, as a basis for compelling the prison authorities to transfer a prisoner from one prison to another, and still less to a prison of his choosing.

Despite being a suicide risk, there is no suggestion that the applicant lacks mental capacity to make his own decision as to whether or not he wishes to end his life by starvation. He has now been discharged from hospital and, while remaining depressed, may have abandoned his suicidal intentions. But even if this is but an interruption of a situation which remains an ongoing risk, the principle remains the same. In her recent decision in *Governor of X Prison v. P. McD* [2015] IEHC 259, Baker J. addressed the whole issue of prisoner autonomy, pointing out the prisoner's own responsibility in this regard when stating (at para 106):-

> *"The decision of the Supreme Court in Fleming v Ireland [2013] IESC 19 must be seen in the context of the already established jurisprudence that an adult person with full cognitive capacity is entitled to refuse medical treatment, even if that refusal is likely to lead to that person's death. Thus it seems to me that while it could not be said that a person has a right to commit suicide, it can be said that he has a right to freely elect to refuse food, provided his choice is full, free and informed and he does not require assistance to achieve that end, and it is rather the case that he has refused such assistance. The distinction is between a positive right to directly end one's life, and to make choices which have the indirect effect that death follows. The latter is constitutionally recognised as flowing from the autonomy of the self."*

Later at paras 129 – 130, Baker J stated:-

> *"I am satisfied that Mr. McD has freely made a choice to continue his hunger strike and to refuse treatment should he become incapacitated as a result and fall into a coma. I am also satisfied that the State may properly respect the personal autonomy and right of self-determination of Mr. McD by giving effect to his stated wish and direction not to be treated. I consider he has fully and freely expressed a decision that treatment not be afforded to him."*

Thus, suicidal ideation can not be a trigger for a transfer, unless the particular place of detention lacks appropriate medical services to address that issue, which clearly does not arise in the Midlands Prison which has a range of psychiatric, in-reach programmes and services available to those serving their sentences there. A great deal more must first be shown.

Thus, against a backdrop where in the instant case it was alleged that the applicant has been rendered suicidal as a result of specific threats made to him in the Midlands Prison, the Court , subject to the reservations outlined above, must examine the nature and extent of such threats and to consider whether or not they were causative of his condition, whether they were adequately taken into account by Mr. Lynn and Mr. Donnellan in reaching their two distinct decisions in this case, and whether they can be only ameliorated by a transfer to Arbour Hill Prison.

The Court permitted the extensive cross-examination of Mr. Keith Lynn who effectively had responsibility for both decisions made to the same effect in this case. While the cross-examination of deponents is not a normal feature of judicial review applications, the gravity of the applicant's medical condition and the asserted threats to his physical safety from other prisoners, convinced the Court that it should adopt this course.

Mr. Lynn made clear that the volume of material in this case was enormous and accepted that perhaps more specific detail should have been provided at the time he swore his affidavit. He confirmed that, at the time of the original decision, he had not received all the documentation (some of which only emerged following discovery in this case, which included medical records confidential to the applicant), including, in particular, notations in electronic format, indicating in one instance that the Governor of Mountjoy Prison felt the applicant might be a suitable case for transfer to Arbour Hill Prison. Further, he had not seen the applicant's medical records contained in the "All Notes" memos, some of which did refer to threats to which the applicant believed he was being subjected, although he maintained he was aware in general terms of those apprehensions and had alluded to them in his affidavit.

He was cross-examined further to the effect that no real "security considerations" could arise for the applicant in Arbour Hill Prison, that there had never been a known instance of a prisoner escaping from that prison. Accepting that to be the case, Mr. Lynn was emphatic that the gravity of the applicant's crimes provided a proper and legitimate basis for his detention in his high security setting in the Midlands Prison, rather than in Arbour Hill, which is regarded as a "medium security" prison.

This Court, in a very short period of time, has had to read through a significant volume of papers, including documentation emerging on discovery and ultimately, in the events which have transpired, must make its decision by reference now to the decision arrived at on the 29th July.

Ultimately, the Court's evaluation must, in this case, focus on the alleged threats to the applicant's life in the prison where he is presently located. In this regard, the Court has had an opportunity of reading all the relevant material and of hearing the evidence of Mr. Lynn tendered in cross-examination on this aspect of the case.

Only one of these 'threats' has caused the Court any real concern. In the discovered material, and commencing with an internal memo from Chief Officer McQuinn to the Governor on 14th May, reference is made to an incident between the applicant and a notorious prisoner, W.D., at a time when the applicant, because of his refusal to go to E or G Landings, was on C1. The applicant was on the phone to his girlfriend when W.D. picked up another phone at the far end of C1 which gave him access to the applicant's call. While there were two locked gates between them, there ensued an exchange of threats in which W.D. threatened he would "get" the applicant and "kill him". W.D. also appears to have threatened the applicant's partner. A further report of this incident records that the applicant gave as good as he got, shouting at W.D. "If I get hold of you you prick I'll tear your heart out, you have my word on that".

On 15th May, another record was furnished to the Governor by Chief Buckley in which it is recorded that the applicant alleged he was being intimidated by two other prisoners whose names have been redacted who threatened him from outside his door. The applicant alleged that they mentioned his daughter by name and what they would do to her. The applicant for his part is recorded as saying he would "cut the eyes out of his tormentors".

However, by 19th May the applicant had been transferred to a different part of the prison and there is no evidence of further specific threats nor of any incident of physical harm inflicted on the applicant. This move, as *per* the memo of 19th May entered by Mark Joynt, also took account of the 'self-harm' incident which occurred on 18th May when the applicant attempted to cut his own throat with a 'shiv' stowed away from his time in Arbour Hill.

Mr. Lynn was cross-examined on the basis that no adequate consideration had been given to these matters which had escaped detailed consideration in his affidavit sworn on the 24th June. Mr. Lynn accepted he had not seen the applicant's medical records or these memos at the time of the first decision, but asserted, this Court believes correctly, that he had taken into account the incident involving W.D. in his affidavit at para 19 thereof, in which he deposed:-

> *"I say the applicant refers to an incident where he claimed that he and his family were threatened. An issue did arise with a prisoner on C1 landing where a prisoner verbally abused the applicant. The prisoner was locked in his cell and was not free to associate with the applicant and there was no physical risk to his safety. This occurred at a time when the applicant had refused to move from this area as he was citing an alleged unsubstantiated threat from another prisoner on G wing."*

In relation to any other threats, those in which the names of Christy Griffin and Declan Burke have been mentioned, they are nowhere in the vicinity of the applicant or in a position to directly injure him. The applicant was further reported to be in fear of prisoner Kinsella but he, like Griffin, is in a different part of the prison and again in this instance no evidence of any specific threat was forthcoming. The only source for any concern in respect of these individuals came from the applicant himself and his stated apprehensions are totally uncorroborated.

At the outset the Court is of the view that the evidence of threats is somewhat vague and non-specific in the sense that it comes across strongly that the applicant's apprehension are based more on subjective than objective considerations. Not one of the prisoners named by him is in a position to harm him in the Midlands Prison because they are kept separate from him. Only one complaint is corroborated.

Further the Court is not satisfied that the level and extent of threats, not one of which has resulted in any harm to the applicant, has been shown to be causative of his present mental state which appears to be attributable far more to his adjustment disorder following his recent convictions for the Grangegorman murders.

The Court has no reason to second-guess the Prison Governor or intervene to alter his assessment on the issue of threats, their gravity, specificity and /or remediation in this case. The Court is satisfied that due regard was had to the one potentially serious incident and that the applicant is now detained elsewhere. While Mr. Lynn may not have had every specific detail of the particular incident, he had a sufficient awareness to make his decision. The applicant is now on E Landing and removed from any possibility of being accessed by W.D. or indeed by any of the other prisoners about whom he has expressed concerns. In relation to apprehended threats from the 'Doyle connections', these have not materialised at any time over the 17 years since his conviction for those murders. They were as likely to have materialised in Arbour Hill as his present place of detention. Indeed the papers indicate that the applicant was in fact attacked in Arbour Hill by Declan Burke. If threats exist to the applicant, they are likely to follow him should he be returned to Arbour Hill.

Mr. Lynn accepts he did not see every piece of medical evidence, some of which he says formed part of the applicant's confidential records. Emphasis was placed on the supposed recommendation of Dr. Mohan that there be a transfer to Arbour Hill, but Dr. Mohan's entry in "All Notes" of 30th April records no such recommendation, despite the applicant's assertion that Dr. Mohan was of that view. Other "All Notes" entries by Psychiatric Nurse Peter McCrarren around that time indicate only that the applicant should be followed up by the in-reach psychiatric service at the Midlands Prison.

On this whole aspect of the case, Mr. Barron for the respondents pointed out that the medical evidence in the case indicated that the applicant had expressed suicidal ideation even while in Arbour Hill and there was no evidence before the court that any risk of suicide, to the extent that the Court might have regard to it as a factor in the case, would abate if the applicant went to Arbour Hill or any other prison. Besides, as already noted, the medical evidence shows that an 'adjustment disorder' arising from the recent convictions was a major factor in the applicant's currently depressed state and the applicant's own doctor, Dr. Wright, acknowledged this fact and had said it might take up to 6 months for the 'stressor elements" to subside.

Insofar as security reasons are invoked as a relevant consideration going to the respondent's decision, the Court again sees no basis for intervention. If experienced Prison administrators believe a prisoner is an increased 'flight risk' because all hope of securing release is now gone by virtue of his further life sentences imposed this year, by reference to what criteria could any court interfere with this assessment? It is common case that Arbour Hill is a 'medium security level' prison whereas the Midlands is 'high security'. The respondents feel that this categorisation is appropriate for this prisoner who now stands convicted of four murders and the Court sees no reason to question or even enter into some form of inquiry into that issue.

Nor is the Court unduly concerned by the existence of an electronic entry in the discovered records suggesting that Governor Murphy of Mountjoy was not opposed to a transfer of the applicant to Arbour Hill. His affidavit makes plain he passed on no such recommendation and it goes without saying that it was not for him to make any such determination in this case.

In conclusion, whatever about the adequacy of the consideration given at the earlier stages of this process to all of these matters, the Court is not now, in terms of the relief still being sought, obliged to express a concluded view as to whether the "imperfections" surrounding the first decision were such as to warrant any intervention by the Court in circumstances where, even if the applicant had made out his case, the Court could have done no more than send the matter back for further consideration. At this juncture, in seeking the same relief, the matter has been fully re-examined and re-evaluated by the decision-maker. It is that decision, i.e., that of the 29th July, which is now under attack in the altered circumstances which have come about since this application was originally launched.

The Court is satisfied that full and adequate consideration of all relevant material has now taken place and that no material fact has been left out of consideration or not taken into account. Full and comprehensive reasons have been furnished by the respondents for the decision communicated to the applicant's legal advisors on the 29th July, 2015. In particular, the Court is satisfied that nothing in the material placed before the Court suggests that the applicant is in any real or imminent danger to his safety or his life from other prisoners in his present place of confinement within the Midlands Prison.

For these various reasons, the Court will refuse the relief sought in this application. As no prisoner should be deprived of all hope of achieving personal goals within his custodial framework, the Court should state in conclusion that this decision does not preclude a further application in the applicant's case for a transfer back to Arbour Hill Prison in circumstances where his level of co-operation with the prison regime improves and is maintained over time. Co-operation, rather than threats of suicide, are likely to be of greater assistance to the applicant in this regard.