[2019] IEHC 514

THE HIGH COURT

[2017 No. 708 JR]

BETWEEN

JASON PAGET

APPLICANT

AND

THE GOVERNOR OF THE MIDLANDS PRISON

AND THE DIRECTOR GENERAL OF THE IRISH PRISON SERVICE

RESPONDENTS

JUDGMENT of Mr. Justice MacGrath delivered on the 9th day of July, 2019.

1. The applicant, who at all relevant times was a prisoner in the Midlands Prison, seeks declarations that determinations made by the respondents pursuant to Rule 62 of the Prison Rules 2007 ("*the Rules*") to place him in segregation were made otherwise than in accordance with law, in breach of fair procedures and are unconstitutional. The determinations prohibited him from engaging in authorised structured activities and limited his participation in communal recreation and association with other prisoners. He seeks an order of *certiorari* quashing the determinations, the first notice of which issued on the 29th June, 2017, in respect of a restriction which commenced on the 28th June, 2017. The determinations were renewed on a number of occasions and continued up to the mid-September, 2017. The applicant's principal complaint is that in the notices that were served on him, adequate reasons were not given for the restrictions, as required by the provisions of Rule 62(5).

2. Rule 62(3) of the Prison (Amendment) Rules 2017 provides that:-

> *"(1) Subject to any restrictions imposed under and in accordance with Part 3 of the Prisons Act 2007 and Part 4 of these Rules, each prisoner shall be allowed to—*
>
> > *(a) subject to paragraph (1A), spend a minimum period of 2 hours out of his or her cell or room with an opportunity during that time for meaningful human contact, including, at the discretion of the Governor, contact with other prisoners,*
>
> *and*
>
> > *(b) subject to paragraph (a), spend as much time each day out of his or her cell or room as is practicable and, at the discretion of the Governor, to associate with other prisoners in the prison.*
>
> *(1A) A period of time spent by a prisoner out of his or her cell or room engaging in any activity authorised by these Rules which provides an opportunity for meaningful human contact shall count towards the period referred to in paragraph (1)(a)." and*
>
> > *(b) by the insertion of the following paragraph after paragraph (3):*
>
> *"(4) In this Rule, "meaningful human contact" means interaction between a prisoner and another person of sufficient proximity so as to allow both to communicate by way of conversation."."*

3. This rule amends Rule 27 which was in operation when the first of the notices under Rule 62 was served on the applicant.

4. Rule 62(2) provides:-

> *"The Governor shall not give a direction under paragraph (1) unless information has been supplied to the Governor, or the prisoner's behaviour has been such as to cause the Governor to believe, upon reasonable grounds, that to permit the prisoner to so engage, participate or associate would result in there being a significant threat to the maintenance of good order or safe or secure custody."*

5. Rule 62(5) provides:-

> *"A prisoner in respect of whom a direction under this Rule is given shall be informed in writing of the reasons therefor either before the direction is given or immediately upon its being given, and shall further be informed of the outcome of any review as soon as may be after the Governor has made a decision in relation thereto",*

6. Rule 62(9) applies where the restriction extends beyond 21 days. It provides:-

> *"The Governor shall, as soon as may be, submit a report to the Director General including the views of the prisoner, if any, explaining the need for the continued removal of the prisoner from structured activity or association under this Rule on grounds of order where the period of such removal will exceed 21 days under paragraph (4). Thereafter, any continuation of the extension of the period of removal must be authorised, in writing, by the Director General."*

7. The notices served on the applicant under Rule 62 are in standard form. There are a number of sections inviting completion regarding details of the period of and the reasons for the restriction/detention. Further sections invite the recording of the prisoner's comments and the signatures of the Governor and the prisoner. This form was designed to deal with notices issued under s. 62 and also s. 63 which concerns vulnerable prisoners who, at their own request, might wish to be kept separate from other prisoners. There is also a section entitled "Decision and reason" but nothing was inserted in this section.

8. The first notice served under Rule 62(5) on 29th June, 2017 was signed by the Governor. The applicant refused to sign it. The reasons expressed for his detention are as follows:-

> *"The prisoner's behaviour has been such as to cause me to believe that to permit him to engage in structured activity or participate in communal recreation would result in there being a significant threat to the maintenance of good order and safe custody.*
>
> *Based on this intelligence, it is necessary to place you on Rule 62 for a further 7 days. Subject to Operational and Legal considerations if you wish to engage in structured activities in Midlands, efforts will be made to, facilitate your request."*

The notice became operational on the 28th June, 2017 with review date being set for 29th June, 2017. A review took place and was signed off by the Governor. In the section "*Inmate's comments*" the words "*no comment*" are handwritten.

9. A further notice was served on the 6th July, 2017 (which again is the date of review by the Governor) with a commencement date of 28th June, 2017. The period of restriction was for seven days and the reasons for the detention are in precisely the same terms as those contained in the notice of the 29th June, 2017. Under the heading "*Inmate's comments*" the following appears in handwriting:- "*I want to see a governor or chief*". The applicant refused to sign. The next notice is dated 13th July, 2017 being the date of review by the Governor and once again the applicant refused to sign it. The notice is in identical terms to the previous notices and includes an almost word for word repetition of the reasons for detention. Under the heading "*Inmate's comments*" the following appears:- "*Wishes to see a governor, hasn't seen a governor in three weeks*".

10. Further notices were issued on the 20th July, 2017 and 27th July, 2017. Under the heading "*Reasons for detention*" precisely the same wording is used as in all previous notices. There are no inmate comments inserted in this notice and the applicant refused to sign it. In the notice of the 27th July, 2017, under the heading "*Inmate's comments*" the following appears in handwriting:- "*Can I see a governor to explain why I'm on Rule 62 as I haven't seen a governor since being placed on Rule 62.*" In passing it is to be noted that Mr. Ward B.L., counsel for the respondents, observed that this should not be taken as evidence that he was not seen and is evidence only of the applicant recording his wish to see a Governor.

11. As is apparent from the documents exhibited in a replying affidavit sworn on the 7th February, 2018, by Mr. Ultan Moran on behalf of the respondent, on 20th July, 2017 the Governor applied to the Director General for an extension of Rule 62(9) and further applications were made on 27th July, 2017, 10th August 2017, 17th August, 2017, 26th August 2017, 31st August 2017, and 7th September 2017. The court was informed that the applicant did not receive a copy of these completed application forms. I refer to these in more detail at para. 20 below.

12. Further notices were issued under Rule 62(5) on 10th August, 2017, 17th August, 2017, 24th August, 2017 and 31st August, 2017, each of which state that the matter was reviewed by the Governor. In each notice the reasons for detention are in identical terms to those stated in the previous notices. The applicant did not comment and he refused to sign these notices.

13. Finally, a notice dated the 15th September, 2017 is not only signed by the Governor but also by the applicant. This time the reason stated was:-

> *"We have confidential information from operational intelligence reports that to place you in the general population would be of a significant threat to the maintenance of good or safe or secure custody of Midlands Prison. Based on this intelligence, it is necessary to place you on r. 62 for a further seven days. Subject to operational and legal considerations if you wish to engage in structured activities in Midlands, efforts will be made to facilitate your request."*

14. Under the heading "Decision and reason" the following is stated:-

> *"Governor Moran interviewed prisoner #62612 Jason Paget. On review, it was decided to remove prisoner Paget from r. 62 to normalised association. Prisoner Paget has given Governor Moran an undertaking to be of good behaviour."*

15. On the same day, 15th September, 2017, Twomey J. granted the applicant leave to apply for a judicial review.

16. This application is grounded on the affidavit of Mr. Paget, sworn on the 24th August, 2017, in which he confirms the facts outlined in the statement of grounds and exhibits copies of documents which were served upon him. Mr. Paget was sentenced to a term of imprisonment of 15 years in 2011 with the final five years having been suspended.

17. The application is also supported by the affidavit of his solicitor, Mr. O'Connor sworn on the 7th September, 2017, in which he exhibits correspondence which predated the institution of the proceedings. He wrote to the respondents on the 6th August, 2017, seeking reasons why the applicant was "*placed in solitary confinement pursuant to Rule 62*" and also seeking the grounds upon which the determination pursuant to Rule 62 was made. He also sought information concerning such matters as prison doctor visits and the length of time for which it was intended to keep the applicant in what he described as solitary confinement. A response was not received to this letter. At the hearing of this application, a point was made that while the letter was entitled "*Re: Jason Paget*", a different person's name was mentioned in the body of the letter. Regardless, the respondents did not reply nor did they seek clarification of any issue arising. A reminder letter was sent on the 20th August, 2017.

18. Mr. Moran, who is a Governor III of the Midlands Prison, in his affidavit sworn in response to these proceedings, outlined the applicant's custody and disciplinary history. He describes how, upon his arrival at the prison, Mr. Paget was housed in 'E Division' where he remained for 19 months before being moved to the 'C Division'. Both divisions house prisoners who have convictions for sexual related offences. Mr. Moran describes the appellant as having been involved in in-fighting between factions within the prison and was found to be using illegal drugs. He was placed in C Division, a section that accommodates prisoners who have been found guilty of sex offences and who are disruptive. Mr. Moran avers that the applicant was then housed in 'A Division', which is used for prisoners who require to be segregated. The decision to remove him from C Division was made in the interests of the smooth running of the division.

19. Mr. Moran avers that the first direction was made under Rule 62(1) of the Rules on the 28th June, 2017 and the applicant was placed on a restricted regime. The direction remained in force until the 15th September, 2017 when the applicant returned to the general prison population. Mr. Moran states that during the period in respect of which the Rule 62 direction was in force, the respondents reviewed the direction at least once in every seven days as required by Rule 62(4) of the Rules. He describes 15 reviews which took place between June, 2017 and September, 2017. Regarding later directions, not the subject of the proceedings, reviews took place on the 4th January, 11th January, 18th January, and 25th January, 2018.

20. Mr. Moran also avers that the applicant was informed in writing as required by Rule 62(5) of the Rules and exhibits the various notices. Exhibited to his affidavit are a number of documents including the applications made under Rule 62(9) to which I have

previously referred. The first completed application, dated 20th July, 2017, records that *"based on intelligence, it is necessary to place on him on Rule 62 for a further 7 days".* In the next application it is stated:-

> *"Based on intelligence received, this prisoner is involved with the bullying and harassment of vulnerable prisoners. Based on this intelligence, it is necessary to place him on Rule 62 for a further 7 days."*

It seems clear, therefore, that this was the reason for the applicant's placement on the Rule 62 regime.

21. The applicant, who is described as a problem prisoner, was also the subject of a number of disciplinary procedures and had sanctions imposed on him. He was served with notices, known as P19 notices, informing him of the sanctions imposed for breaches of discipline, on a considerable number of occasions, some of which occurred since 14th June, 2017. He does not seek to challenge the P19 notices. The court was also informed that the applicant is no longer in detention.

22. The application is opposed by the respondents. Prior to the case being set down for hearing, the sole affidavit filed in support of the respondent's position was that of Mr. Moran, sworn on the 7th February, 2018. On the first hearing date, application was made by the respondent for an adjournment to facilitate the submission of further affidavits and this application was acceded to. Two further affidavits were sworn by Mr. Moran and by Mr. Micheál Hyland, an Assistant Chief Officer at the prison.

23. In his first supplemental affidavit sworn on the 9th November, 2018, Mr. Moran draws the court's attention to an email from Mr. Hyland to him dated 23rd August, 2017, with particular reference to the explanation offered to the applicant for his placement on a Rule 62 regime. The email records as follows:-

> *"Governor, Sir,*
>
> *inmate Jason Paget has ask (sic) me to convey to you his gratitude to you for taking the time to explain why he is presently on Rule 62. He acknowledges your explanation."*

24. Mr. Moran also exhibits an entry from the Prisoner Information Management System for the period form 7th June, 2017 to the 28th June, 2017, the period before the applicant was placed on the Rule 62 regime. This was completed by a Class Officer. It contains, *inter alia*, a recommendation regarding the privilege level on which the applicant should be (*'Basic'*), and specifies, as the reason for the recommendation, that *"Jason has been placed on rule 62 by the Governor because of bullying other prisoners. He also has recent P 19s and no longer meets requirements for the standard regime*". Mr. Moran states that the applicant was well aware of the reason for his having been placed on a Rule 62 regime and refers to the numerous reviews which took place at weekly intervals. He does not accept that the applicant was placed on a solitary confinement regime because no prisoner, irrespective of the regime or restrictions applying to him, is subject to being kept in his cell for more than 22 hours. Further, he is kept in a cell with another inmate and has access to medical treatment

25. Mr. Hyland avers that on the morning of the 23rd August, 2017 he was working as Assistant Chief Officer on the landing in block C2, where the applicant was detained. He remembers that an officer requested his presence at the applicant's cell. When he went to the cell, the applicant asked him to convey his thanks to Mr. Moran for taking the time to provide an explanation as to why he had been placed on a the regime. Mr. Hyland also avers that the applicant acknowledged the explanation that had been offered to him by the Governor. While he could not recall the precise words spoken by the applicant on that occasion, Mr. Hyland believes that they were consistent with those recited in his email referred to above, which was sent to the Governor. Mr. Hyland states that it is not particularly common for prisoners to take the time to thank Prison Service staff. In his experience comments are more likely to be critical and perhaps even abusive. For this reason, the applicant's comments stick out in his memory. No affidavit in reply has been submitted by the applicant to contest this, but Mr. McGrath S.C. on behalf of the applicant, draws the courts' attention to what he described as the inconsistency of this conversation with the contents of the Rule 62 notice of the 24th August, 2017 which the applicant refused to sign.

The Applicant's submissions

26. The applicant submits that the respondent has failed to comply with the provisions of Rule 62(5) and that no reasons have been given to him for the issuing of the directions. It is also submitted that the regime to which the applicant was subjected amounted to solitary confinement as he was locked in his cell for 23 hours a day without meaningful human interaction from the 28th June, 2017 until the 15th September, 2017; and that the imposition of this regime affected his enjoyment of his rights. It is submitted that there has been a breach of fair procedures. Reliance is placed on the decision of Edwards J. in *Devoy v. Governor of Portlaoise Prison* [2009] IEHC 288 where he stated:-

> *"…. in applying the Prison Rules the Governor must apply them in a manner which is respectful of and intended to vindicate the constitutional rights of the prisoner to the extent that they are not abrogated or suspended by the very fact of his being sentenced to a term of imprisonment. Among the residual constitutional rights of a prisoner which are not abrogated or suspended is the right to be treated humanely and with human dignity. The Prison Rules recognise this and indeed Rule 75 (2) (iii) requires the Governor 'to conduct himself or herself and perform his or her functions in such a manner as to respect the dignity and human rights of all prisoners.'."*

27. It is submitted by Mr. McGrath S.C. on behalf of the applicant, that the same wording is employed in the first and all subsequent directions up to the 15th September, 2017, that Rule 62(2) is not an empty formula to be slavishly recited or adopted when imposing what is submitted to be solitary confinement and that the rule must not be construed in isolation from the Constitutional rights of the prisoner. Further, he submits that the longer the regime is in place, the more important it is to provide reasons for the imposition of the regime. This is reflected in the framework of Rule 62, which provides that after a period of three weeks, application must be made by the Governor to the Director General for an extension under Rule 62(9) and also because of the requirement for regular reviews.

28. Reliance is also placed on *dicta* of Ní Raifeartaigh J. in S.*F. v. the Director of Oberstown Childrens' Detention Centre & Ors* [2017] IEHC 829, approving *dicta* of Donnelly J. in *Attorney General v. Damache* [2015] IEHC 339, that:-

> *"The decision to impose solitary confinement must be based on genuine grounds, both initially and on review. The decisions should be compelling and provide reasons. The reasons must be increasingly detailed and compelling as time goes on. There must be regular monitoring of the prisoner's physical and mental condition. A prisoner must have access to independent judicial review of the merits of and reasons for prolonged imposition of solitary confinement"*

29. It is contended that these observations reflect the decision of the European Court of Human Rights in *Onoufriou v. Cyprus* (Application no. 24407/04) where it was held that in order to avoid the risk of arbitrariness resulting from a decision to place a

prisoner in solitary confinement, the decision must be accompanied by procedural safeguards which guarantee the prisoners' welfare and the proportionality of the measure. Further, the court stated that the decision imposing solitary confinement must be based on genuine grounds and:-

> *"… the authorities' decisions should make it possible to establish that they have carried out an assessment of the situation that takes into account the prisoner's circumstances, situation and behaviour and must provide substantive reasons in their support. The statement of reasons should be increasingly detailed and compelling as time goes by."*

It is therefore submitted that Rule 62 gives form to the vindication to the applicants' Constitutional rights to fair procedures and must be read as requiring that reasons provided ought to be sufficient to enable the prisoner to understand why the notice has been issued and why he is considered a threat to the maintenance of good order or safety. At its simplest, the prisoner must know enough to meaningfully respond to the determination and to challenge it. If there is such a challenge, it is submitted that the reasons given should be sufficient for the court to determine whether there existed reasonable grounds to place him in solitary confinement. This reasoning applies not only to the initial direction but also to continued detention under the Rule.

30. It is further observed that the purported reasons given to the applicant, as outlined in the various notices, seen in conjunction with the silence with which the solicitors' requests were met, stand in stark contrast to the material before the court and counsel queries why, if the respondent believes what has now been stated, reasons were not provided to the applicant pursuant to Rule 62(5) at the relevant stages of his incarceration.

The Respondent's Submissions
31. The respondent contends that the applicants' submissions are misconceived because he has not been placed in solitary confinement. He was informed that if he wished to engage in structured activities he would be facilitated. It is submitted that the applicant has sought to define his restricted regime as solitary confinement because it permits him to avail of jurisprudence that should not be available to him in ordinary course. Solitary confinement is a different regime to the applicant's segregation. In *Onoufriou*, the applicant complained of lack of food, adequate clothing and access to toilet and shower facilities during his period of confinement. He also complained of absence of contact with the outside world and in particular communication with his family. The regime which the applicant was subjected to in this case, it is submitted, is far removed from the regime to which the applicant has been subjected in *Onoufriou*.

32. It is further submitted by Mr. Ward B.L., counsel for the respondents, that while the respondents must exercise powers in a way that does not violate fair procedures or compromise the applicant's rights, this does not extend to the provision of detailed reasons accounting for the basis of the application of Rule 62. There is an overriding obligation on the respondent to provide a safe and secure environment for all prisoners which may sometimes require the fettering of privileges of individual prisoners.

33. Reliance is placed on *McKevitt v. Minister for Justice* [2015] 1 I.R. 216, a decision which emphasised the principle of separation of powers under the Constitution in the context of a refusal of remission. Reliance is also placed on the decision in *Kelly v. Minister for Justice* [2017] IEHC 805, where Faherty J. held that insofar as the applicant challenged a decision refusing temporary release on the basis that certain factors were not weighed by the decision maker, where there is no automatic entitlement to temporary release, the test the applicant must meet is whether the refusal is capricious, arbitrary or unjust.

34. In *McDonnell v. Governor of Wheatfield Prison* [2015] IECA 216, Hogan J. stated:-

> *"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 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."*

It is therefore submitted that the test which the applicant must reach is to establish if the decision of the respondents was capricious, arbitrary or unjust. It is not sufficient simply to assert that it was procedurally incorrect or that there was some frailty in the administration of the written explanation. It is submitted that there is no evidence of a capricious. arbitrary or unjust decision. It is argued that the reasons provided were adequate and that to accede to the applicant's claim is to delve into an executive power which is to be exercised solely by the executive.

35. It is submitted that the reasons did not change and it cannot be reasonably suggested that the applicant's release from the regime was precipitated by these proceedings. Mr. Ward B.L. submits that the Governor had sufficient reasons as is required by the rules, and that this is borne out by the documents, including notices supplied to the applicant. It is also submitted that the applicant was provided with sufficient reasons and it is observed that the applicant does not purport to suggest the nature and extent of any further reason that ought to be stated.

36. Finally, it is submitted that as the applicant had been placed on the regime on the 30th June, 2017, which was reviewed on a weekly basis until it was lifted on the 15th September, 2017, the matter is now moot.

Decision
37. The starting point in the analysis of whether the Governor has exceeded his powers or in some way trammelled the rights of the applicant is a consideration of the particular power conferred on the Governor under Rule 62. When the Governor gives a direction under Rule 62(1) the prisoner is not permitted to engage in authorised structured activities generally or particular structured activities, participate in communal recreation or to associate with other prisoners. It is clear, however, that Rule 62(2) provides that the Governor may not give such a direction unless information has been supplied to him, or the prisoners' behaviour has been such as to cause him to believe, on reasonable grounds, that to permit the prisoner to so engage, participate or associate would result in there being a significant threat to the maintenance of good order, safety or secure custody. This is a direction which must be reviewed once every seven days in order to determine whether the direction ought to be revoked.

38. Rule 62(5) appears to me to be mandatory in its terms. It provides that:-

> "*A prisoner in respect of whom a direction under this Rule is given shall be informed in writing of the reasons therefor either before the direction is given or immediately upon its being given, and shall further be informed of the outcome of any review as soon as may be after the Governor has made a decision in relation thereto."* (emphasis added)

39. Rule 62(6) imposes an obligation on the Governor to maintain record of such directions, the grounds upon which the direction is given and the views of the prisoner. Further safeguards are put in place by the requirements of Rule 62(9), that the Governor submit reports to the Director General and where the period exceeds 21 days, to seek written authorisation.

40. There has been some considerable debate as to whether the applicant was subjected to a regime of solitary confinement or something equivalent thereto. I do not believe that it is necessary for me to determine this issue because whatever regime was in place, it is clear that Rule 62 applied to it and therefore a prisoner must be informed in writing of the reasons in accordance with the provisions of Rule 62(5).

41. It seems to me therefore, that the central issue that must be addressed is whether the Governor in adopting the format which he did, complied with his obligations under the rule. The respondent relies on the decision in *McKevitt v. Minister for Justice* [2015] 1 I.R. 2016. It must be borne in mind, however, that the court there was concerned with the exercise of a power of remission by the Minister (rather than the Governor), a power couched in discretionary terms. The rule in question stated:- "*The Minister may grant such greater remission of sentence…".* The applicant had made the argument that the use of the word "may" in Rule 59(2) , as opposed to "*shall*", meant that when the conditions precedent in that provision had been satisfied, the Minister was obliged to decide in his favour, as the discretion provided under the rule was very narrow. The Court of Appeal rejected this contention. The court considered the type of function which was being performed by the Minister when deciding whether to grant enhanced remission. Irvine J. observed:-

> *"It is clear that, given the relevant constitutional and legislative provisions, when the Minister embarks upon a consideration of any such application, she is exercising an executive rather than an administrative function. This is so because the power to remit any prison sentence emanates from Article 13.6 of the Constitution which provides as follows: –*
>
> > *'The right of pardon and the power to commute or remit punishment imposed by any court exercising criminal jurisdiction are hereby vested in the President, but such power of commutation or remission may also be conferred by law on other authorities.'"*

42. The court acknowledged that in enacting the Prisons Act, 2007, the legislature had conferred on the Minister the power to make rules providing for the remission of a portion of a prison sentence. Remission, if granted, brings to a premature end a sentence imposed by a court. Irvine J. noted that the exercise of the power by the Minister had very serious consequences not only for the prisoner but for the community at large and it carried with it a significant responsibility.

43. The issue raised by the applicant concerns compliance with the requirements of Rule 62(5). In my view, therefore, while the court must consider all the circumstances, including that applications have been made and granted under Rule 62(9), I do not believe that we are here concerned with an issue which touches, concerns or has implications for the separation of powers such as may arise in the context of the exercise of powers of remission and as addressed in *McKevitt*.

44. It is not contended by the respondent that the Governor does not have to provide reasons. The contention is that the reasons provided were adequate.

45. In *Killeen v. Governor of Portlaoise Prison* [2014] IEHC 77, Hedigan J. considered that the length of segregation of the applicants was such that the provisions of Rule 62(9) applied. He described as axiomatic that the courts cannot micromanage the individual prisoners or the prison generally, and that prison authorities have not only the right but the duty to manage the prison so as to secure its safety for all. He observed:-

> *"No provisions as required by Rule 62 (4), (5), (6), (7) or (8) applies to the situation contemplated by (9). This provision relates to where it may be considered necessary to maintain a more long - term form of segregation".*

Further, what he described as segregation may be required in certain circumstances. It must be for the prison authorities to determine when it should apply, nevertheless, he continued at para. 6.5:-

> *"When it does, such segregation should be kept under review. Rights are being curtailed and it is clear both from national and international jurisprudence that the principle of proportionality must be applied… Applying these principles to this case; the segregation has been for a protracted period. It has far exceeded the 21 days contemplated by rule 62(4) to (8). The prison authorities are now into a situation provided for in rule 62(9). The decision as to whether to segregate for a period longer than 21 days, must be one of prison management. Rule 62(9), however, is silent as to review of any ongoing segregation. This is in somewhat stark contrast to the detailed provisions provided at (4) to (8) in relation to short periods up to 7 days. The rules as noted above, must however be read in the light of the Constitution. This, as further noted above, requires good reason, minimum interference with rights and proportionality of the segregation. There must be available for lengthy periods, just as for short ones, a process of review. Judicial review of the merits and reasons for a prolonged period of isolation should be available".*

46. While the court should not involve itself in micromanaging a prison regime, the controversy in *Killeen* did not concern the adequacy of reasons provided in accordance with Rule 62(5), rather whether the segregation in question, in its terms and duration, was proportionate. It seems to me, that is a different issue. Nevertheless, it is of importance that Hedigan J. noted that judicial review of the merits and reasons for a prolonged period of isolation should be available.

47. Although in a different statutory context, the decision of Kelly J. in *Deerland Construction v. Aquaculture Licences Appeals Board* [2009] 1 I.R. 673 is of assistance. There, the court was required to consider the appeal procedures under the fisheries legislation. Section 40(8)(a) of the Fisheries Amendment Act 1997, provides:-

> *"A determination of an appeal under this section, (including an appeal to which section 52 refers) and the notification of that determination shall state the main reasons and considerations on which the determination is based."*

The notice party had held an aquaculture licence in respect of mussel beds in Wexford Harbour since 2001. The applicant was granted planning permission for a hotel in 2007. Part of the harbour contained land which was reclaimed for use in the development was also contained within the area governed by the licence. This licence conferred exclusive rights on the notice party which, in 2006, was granted a further aquaculture licence for that area by the Minister. The applicant appealed this decision. One week prior to the decision of the Appeals Board, the applicant applied to the Minister for a foreshore lease. The Minister did not respond to that application until after the decision of the Appeals Board and then did so by refusing to further process the application, given the decision of the Appeals Board. In an application for certiorari of that decision, the applicant submitted that the decision of the Appeals Board failed to give reasons and thus, there was a breach of constitutional justice and fair procedures. In granting the reliefs sought, Kelly J. held that there was a clear obligation on the Appeals Board by virtue of the provisions of s. 40(8)(a) of the Act of 1997, to state the main reasons and considerations on which a decision was based. A *pro forma* recitation of matters which were

contained in the decision did not amount to compliance with the obligation to state the reasons for such a decision. At para. 54 he stated:-

> *"There can be no doubt but that the notification of the determination failed to comply with this statutory obligation. The notification was in the form of a letter simply recording that the Board had made a final determination on the matter at its meeting on the 17th July, 2007, and enclosing the determination and the licence".*

Further, at para. 59, he stated:-

> *"I do not accept that a pro forma recitation of the matters which are contained in ALAB's (the Aquaculture Licence Appeals Board) decision amounts to a compliance with its statutory obligation to state its reasons for such decision*. The reference to it being satisfied that it was in the public interest to make the determination is a conclusion reached by it but no clue is given as to how such a conclusion was reached." (emphasis added)

48. Kelly J. observed that there was an abundance of case law indicating what must be done by a body, such as the first respondent in that case, if it is to satisfy its obligation of setting forth the reasons for its conclusions. These included enabling the courts to review it and to satisfy the person having recourse to the tribunal that it has directed its mind adequately to the issues before it: *O'Donoghue v. An Bord Pleanala* [1991] I.L.R.M. 750. Similar principles apply in the context of the planning code: *Mulholland v. An Bord Pleanala (No. 2)* [2005] IEHC 306. There is however no obligation to set out a discursive judgment in such circumstances: *Grealish v. An Bord Pleanala* [2006] IEHC 310.

49. In *Grealish*, O'Neill J. stated that in the context of the planning code, the legal obligation resting on the respondent to explain his decision was a very light one, one could say almost minimal, but it appears to be fundamental to the decisions, particularly in the planning area, that a sufficient reason must be advanced such as to enable the party to determine whether it has grounds upon which to challenge the decision and whether the decision maker has applied his or her mind to all relevant consideration.

50. It is clear that the Governor in this case is operating within a different statutory regime. It may be that for reasons of security or good order that any reasoning which is provided by the Governor might be, per O'Neill J. in *Grealish "almost minimal".* Further, one can envisage circumstances in which it would be inimical to security, safety and good order within the prison for the Governor to provide detailed reasons. But it seems to me that this does not obviate the requirement to provide some explanation as to why he concluded that the directions ought to issue. In my view, this is reflected in the mandatory nature of the wording of Rule 62(5).

51. In *Onoufriou*, the court referred to extracts from the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment Strasbourg, 5th April, 2008 ("*CPT*"). The CPT had concluded that there was a lacuna in the prison regulations as regards the guarantees to be afforded to those placed in solitary confinement. The court found that there was a lack of adequate justifications for the applicants detention in such confinement, uncertainty concerning its duration, failure to put in place a reliable system to record solitary confinement measures, and to ensure that the applicant was not confined beyond the authorised period. The applicant was not informed officially and in writing of the reasons for his solitary confinement or its expected duration. No formal record of the decision authorising the solitary confinement or any extension had been provided and the court also noted that the respondent Government had not made any submission regarding the manner in which the decision was made. The justification for the confinement provided for by the prison authorities following an ombudsman's investigation was that the applicant was placed in solitary confinement in order to ensure his own protection. The European Court of Human Rights did not consider that this reason could justify the applicant's detention in solitary confinement.

52. I must conclude that what the Governor has purported to do in the notices served under Rule 62(5) is not to provide a statement of reasons, rather it is to state in a formulaic way a conclusion at which he must arrive before he can exercise his powers under the Rules. To recite almost *pro forma*, the provisions of Rule 62(2) when providing a statement of reasons under Rule 62(5) is to state a conclusion and provides no reasonable or even minimal explanation as to why the conclusion was arrived at. In so doing, in my view, the Governor has failed to comply with the provisions of Rule 62(5).

53. Further, given the requirements of the rule that the reasons must be stated in writing, I am not satisfied that the facts deposed to and the email exhibited in the affidavits of Mr. Hyland or Mr. Moran, even if one could construe such evidence as informing that the applicant had been placed on the regime because of bullying, alters the position in so far as the requirements of Rule 62(5). Further, in so far as the continuation of the regime beyond a 21 day period is concerned, I do not believe that there is anything in Rule 62(9) which detracts from the requirements of Rule 62(5).

54. Regarding the detail of the reasons, it seems to me that in most cases this will be fulfilled by even the most minimal statement of reasons which can be understood as forming the basis for the conclusion reached. Each situation must of necessity be fact dependent.

Are the proceedings moot?

55. In *S.F.*, Ní Raifetaigh J. considered a challenge to the solitary confinement or separation of four young persons for a period of approximately three weeks after their involvement in a serious disturbance at Oberstown campus in August, 2016. As Ní Raifeartaigh J. observed, courts frequently deal with issues relating to the rights of adult prisoners in Irish prisons, but much rarer are the cases raising issues concerning the rights of non-adult detainees. Two of the applicants had left the detention school on the 30th September, 2016 and the 9th December, 2016.

56. It was therefore submitted that there was no longer any live controversy between the parties and that there was nothing exceptional in the cases to warrant the exercise of the court's discretion to hear the proceedings. In reply, it was submitted that damages were claimed and therefore the issue was not moot and in any event that if the matter were moot, the court should nevertheless exercise discretion to hear the case on the basis of the principles identified in *V. (P)(A minor) v. Courts Service* [2009] 4 I.R. 264. It was further submitted that the question of the regime under which children are held in Oberstown is a matter of fundamental importance and also that since children are detained there for relatively brief periods, the ability of the courts to consider the issue would likely be frustrated if a view were taken that the issue could only be considered on behalf of children detained in Oberstown at the date of the hearing. Ní Raifeartaigh J. stated at para. 94:-

> *"It seems to me that insofar as there is a claim for damages still in existence, the matter is not, strictly speaking moot. Further, in the event that I am wrong with regard to that finding, I would be disposed in any event to exercise discretion in any event on the basis that there is a matter of fundamental public interest in issue and that, by reason of the fact that periods of isolation/solitary confinement are likely to be relatively short, were the court not to hear the matter after the child had left the custodial institution, the matter might potentially evade the reach of judicial review*

notwithstanding that it would be likely to arise again in the future. The latter has been identified as a basis upon which the discretion can be exercised in favour of hearing a case which may technically be moot".

57. In my view, similar reasoning is applicable to the situation which pertains regarding directions made under Rule 62. It is clear that the directions must not continue for longer than is necessary to ensure the maintenance of good order or safe or secure custody. Further, the direction is one which must be reviewed not less than once in every seven days, for the purpose of considering its revocation. The directions, of necessity, are short lived.

58. In the circumstances, I am satisfied that the principles referred to by Ní Raifeartaigh J. apply in this case. Given the short duration of such directions, challenges to their legality might potentially evade the reach of judicial review notwithstanding that the issue might arise again in the future. In all the circumstances, insofar as it is necessary to do so, if the proceedings are otherwise moot (and in this context I note that the applicant has made a claim for damages) I propose to exercise the courts' discretion to hear and determine the matter.

59. I therefore conclude that the applicant must succeed to the extent that this court finds that the respondent has failed to comply with the requirements of Rule 62(5) and I will discuss the implications of this conclusion and the terms of the order to be made with counsel.

60. As regards damages, as in *S.F.,* where Ní Raifeartaigh J. was satisfied that there was no evidence of actual psychological harm made before the court, and where there were limited breaches of constitutional rights, the most appropriate approach to be followed was to award nominal damages. Whether and to the extent that it is appropriate to award damages in this case was not significantly advanced on affidavit or at hearing. It may be that *prima facie*, the finding and any orders which the court may make ought to be sufficient to vindicate the rights of the applicant. I will however, also hear the parties on this.