Neutral Citation Number [2009] IEHC 288

THE HIGH COURT

2009 165 JR

BETWEEN

DEREK DEVOY

APPLICANT

AND

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

RESPONDENTS

Judgment of Mr. Justice John Edwards delivered on the 22nd day of June, 2009.

Background to the proceedings
The applicant in this matter is a prisoner who is currently serving two sentences at Portlaoise Prison. On 9th March, 2007 he was sentenced to seven years imprisonment at Dublin Circuit Criminal Court on a charge of being in suspicious possession of a firearm contrary to s. 27A of the Firearms Act, 1964 (as amended). The final two years of that sentence were suspended for a period of five years after his release date. This sentence was back dated to the 3rd May, 2006. Further, on the 6th of February, 2008 he was sentenced to seven years imprisonment at Dublin Circuit Criminal Court on a charge of being in possession of a firearm with intent to endanger life, contrary to s. 15(1) of the Firearms Act, 1925 as amended. This sentence was also back dated to the 3rd May, 2006.

Both warrants were issued to the Governor of Mountjoy Prison and consequently the applicant was lodged in Mountjoy Prison on 9th March, 2007.

On 20th January, 2009 the applicant was transferred without prior notice to Portlaise maximum security prison, purportedly on foot of a ministerial order. However, neither his clothes nor his personal effects were transferred with him to Portlaoise Prison. Upon his arrival at Portlaoise Prison he was placed in isolation in a cell in the segregation unit there. He contends that he is being denied access to education and leisure facilities, that his visiting entitlements have been restricted to non contact and screened visits and that he is being provided with extremely limited opportunities to avail of telephone facilities. He further states that he has not been charged with, never mind been convicted of, any breach of prison discipline such as might justify his isolation or a withdrawal of privileges. The applicant claims to have sought reasons as to why he has been transferred and is now being isolated in a segregation unit and denied privileges, and he claims that no satisfactory explanation has been given to him. In the circumstances he then instructed the firm of Fahy Bambery McGeever, Solicitors to take the matter up on his behalf.

The initial application seeking leave to apply for judicial review - pleadings, affidavits and procedural issues
According to an affidavit of a Mr. Declan Fahy, a solicitor in that firm, sworn on 11th February, 2009 the said firm of solicitors entered into correspondence with the Governor of Portlaoise Prison with a view to obtaining an explanation for the applicant's sudden transfer and for the change in the conditions of his detention. As no satisfactory explanation were forthcoming, an application was made to the Court on 16th February, 2009 for leave to apply by way of an application for judicial review for diverse reliefs as set out in Part D of a draft Statement Required to Ground an Application for Judicial Review prepared in accordance with Order. 84 of the Rules of the Superior Courts. The reliefs sought, as pleaded in Part D of that document, are in the following terms:-

> "1. An order of mandamus directing the first named respondent to remove the applicant from isolation and to effect his return to the ordinary prison population.
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> 2. An order of mandamus directing the first named respondent to provide the applicant with the grounds upon which a decision has been taken to detain him in isolation from other prisoners, to deny him access to education and leisure facilities, to restrict him to non-contact and screened visits and to limit his telephone usage.
>
> 3. An order of mandamus directing the second named respondent to provide the applicant with the grounds upon which a decision has been taken to detain him in isolation from other prisoners, to deny him access to education and leisure facilities, to restrict him to non-contact and screened visits and to limit his telephone usage.
>
> 4. An order of mandamus directing the third named respondent to provide the applicant with the grounds upon which a decision has been taken to detain him in isolation from other prisoners, to deny him access to education and leisure facilities, to restrict him to non-contact and screened visits and to limit his telephone usage.
>
> 5. An order of certiorari quashing the decision of the second named respondent to detain the applicant in isolation.
>
> 6. An order of certiorari quashing the decision of the third named respondent to detain the applicant in isolation.
>
> 7. A declaration that the decision to detain the applicant separately from other prisoners was made other than in accordance with the requirements of natural and constitutional justice.
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> 8. A declaration that the decision to detain the applicant separately from other prisoners was made other than in accordance with the Prison Rules 2007, as enacted in S.I. No. 252 of 2007.

9. A declaration that the failure to provide the applicant with any reasons for his being detained separately from other prisoners is other than in accordance with the requirements of natural and constitutional justice.

The said reliefs were sought upon the following grounds as pleaded in Part E of the aforementioned draft statement:-

"1. The factual circumstances giving rise to the applications herein are set out in the affidavit of the applicant and in the affidavits of Declan Fahy and Jenny McGeever.

2. The applicant has not been the subject of any proceedings for any breach of prison discipline, either within the meaning of the Prison Rules, 2007 or otherwise, yet he is being detained in a manner, and subject to a regime, which amounts to punishment, without any, or any valid basis for same. Such a regime amounts to arbitrary and unlawful punishment, and fails to have regard to the constitutional rights of the applicant including his right to bodily integrity, his right to fair procedures, his right to be treated with dignity and his right to liberty, notwithstanding his status as a convicted person.

3. The applicant has not made any request to any of the named respondents or to any other relevant person to be detained separately from other prisoners nor has he been the subject of any or any valid direction under the Prison Rules, 2007, that such separate detention is necessary for the maintenance of good order and safe and secure custody.

4. The applicant has not at any stage been informed by any of the named respondents or otherwise, of the reasons for his being detained separately from other prisoners.

5. The applicant has not been informed at any stage by any of the named respondents or otherwise, of the date upon which it is proposed to end his period of separate detention.

6. The detention of the applicant in the manner averred is other than in accordance with the Prison Rules, 2007 and in particular Part 3 of same, having regard to the lack of any access to educational or leisure facilities within the prison and lack of any opportunity being given to the applicant to exercise in the open air.

7. The decision to detain the applicant separately from other prisoners was a decision taken other than in accordance with the requirements of natural and constitutional justice, having regard to the following matters:-

- The applicant was at no stage informed of the reasons upon which it was proposed to detain him separately from other prisoners;

- The applicant was not informed of the proposed duration of his separate detention, nor was he informed of any proposed period of time after which the separation regime and the continued justification for same would be reviewed.

- The applicant was at no stage given any opportunity to offer his view on the proposed change to his detention regime;

- The applicant was not given any opportunity to challenge the decision, to hear any evidence against him or to challenge same;

8. Such further or other grounds as may be adduced at the hearing of this application."

The application was grounded, as has been indicated, upon three affidavits, namely an affidavit of the applicant sworn on 13th February, 2009; an affidavit of the aforementioned Declan Fahy sworn on 11th February, 2009 and an affidavit of Jenny McGeever sworn on 16th February, 2009. It is proposed to review each of them in turn. The affidavit of the applicant contains averments which amplify the complaints which I have already outlined in general terms. He states the following at paras. 4 to 7 inclusive:-

"4. I say that since the 20th January, 2009, I have been detained in a segregation unit of Portlaoise Prison. I am locked alone in my cell at all times, save between 10.00 and 12.00 hours, 14.00 and 15.00 hours and between 17.30 and 19.00 hours. During these times I have access only to the corridor outside my cell and am permitted to walk up and down. I am not permitted to see or associate in any way with other prisoners and my meals are provided to me in my cell.I am not permitted access to education, training or leisure facilities of any kind. I say further that previous to 20th January, 2009, whilst detained in Mountjoy Prison, I associated with the general prison population in the same manner as all other prisoners and attended school and the gymnasium on a regular basis.

5. I am only permitted to receive screened visits from my family, those being visits conducted through a glass screen separating my visitors and I, and such visits are supervised by a prisoner officer who is present in the room with me. I am restricted to a maximum of six minutes telephone usage daily and I understand that prisoners in ordinary detention in Portlaoise Prison are not subject to this restriction.

6. The section of Portlaoise Prison in which I am currently detained is a punishment facility. I say that I am not in fact the subject of any properly imposed punishment pursuant to the Prison Rules or otherwise. I was not the subject of any disciplinary proceedings within Mountjoy Prison prior to this transfer being effected nor have I been the subject of any such proceedings since the 20th January, 2009. I have not at any stage been informed either of the reason for being detained in isolation or for how long it is proposed to maintain this detention regime.

7. I say that my detention in the manner outlined above, and in particular my isolation from the rest of the prison population and the lack of any access to education, training or leisure facilities, has been a cause of significant physical and psychological distress to me. I have suffered migraines, earaches and insomnia and I am concerned for my mental and physical wellbeing, were the said isolation to be continued."

In his affidavit Declan Fahy, solicitor, states that he wrote to the Governor of Mountjoy Prison on 26th January, 2009 seeking the reasons for the applicant's transfer to Portlaoise Prison. That letter is exhibited DF1. A further letter was sent to the Governor of Portlaoise Prison on 30th January, 2009 seeking clarification of the applicant's entitlements with respect to visits and telephone access. This letter is exhibited DF2. A reply was received to the letter of 26th January, 2009 from John Quinn, Assistant Governor of Mountjoy Prison, dated 2nd February, 2009 and it is exhibited DF3. It is in the following terms:-

> "Re: Derek Devoy: PRIS 37038
>
> Dear Sir, or Madam,
>
> The transfer of offenders within the prison system is a matter for the Operations Directorate of the Irish Prison Service.
>
> From time to time, security requirements may dictate that offenders are not notified in advance of a transfer.
>
> Any further correspondence in relation to the transfer of Derek Devoy to Portlaoise Prison should be addressed:
>
> The Director of Operations,
>
> Irish Prison Service Headquarters,
>
> IDA Business Park,
>
> Ballynalee Road,
>
> Longford,
>
> County Longford.
>
> Yours sincerely,
>
> John Quinn
>
> Assistant Governor."

Mr. Fahy deposes that on 3rd February, 2009 he spoke with Governor Ned Whelan in Portlaoise Prison by telephone. Mr. Whelan advised him that the applicant had been transferred to Portlaoise Prison on foot of a ministerial order and he stated that he did not know why such a decision had been taken. On 5th February, 2009, Mr. Fahy again spoke with Governor Whelan by telephone who told him on this occasion that the applicant was not the subject of any punishment within the prison. According to Mr Fahy, Governor Whelan stated that he did not know why the applicant was being detained in the segregation unit. He confirmed to Mr. Fahy that his instructions were to the effect that the applicant should only receive screened visits and that in any event it was not feasible to bring him from the segregation unit to the main prison for the purposes of open visits. According to Mr. Fahy, Governor Whelan told him that he could not put the matter any further than that.

Mr. Fahy deposes that on 6th February, 2009 he spoke by telephone to a member of staff at Portlaoise Prison who did not provide his name but who stated that he was Chief Officer. This officer informed Mr. Fahy that he could not provide any information as to why the applicant was detained in isolation or for how long he would be so detained. This person stated that Mr. Fahy would have to speak to the Governor on Monday. The officer in question was informed by Mr. Fahy that he would be faxing through a letter in the next few minutes, and a letter addressed to the Governor of Portlaoise Prison, and dated 6th February, 2004, was then duly transmitted by fax. This letter is exhibited marked DF4 and it is in the following terms:-

> "Re: Our Client: Derek Devoy
>
> Dear Sir,
>
> Further to previous correspondence and telephone calls we would be obliged if you could confirm in writing to us by return the legal justification for the segregation of isolation of our client within the prison. Please also confirm what grounds evidential or otherwise support the segregation and isolation of our client. This confinement is causing our client and his family deep distress. We are concerned for client's mental health as a result.
>
> In the event that we are not informed in writing of the substantial and legal justification for his isolation within 48 hours, we shall take all necessary steps to protect our client's rights and shall bring an application to the High Court for an enquiry into the legality of our client's detention and/or an application for leave to seek an order of mandamus and we shall rely on the contents of this letter inter alia to ground such applications and to ground an application for costs of same.
>
> Your faithfully."

Mr. Fahy further disposed that, following his fax of 6th February, 2009, he received no further contact or correspondence from Portlaoise Prison or from the Irish Prison Service.

Jenny McGeever, Solicitor, states in her affidavit that on 3rd February, 2009 she spoke with Governor Ned Whelan of Portlaoise Prison by telephone. He advised her that the applicant had been transferred to Portlaoise Prison on foot of a ministerial order but stated that he did know why such decision had been taken. Ms. McGeever deposes that on 5th

February, 2009 she again spoke with Governor Whelan by telephone who informed her that the applicant was not the subject of any punishment within the prison and that he did not know why the applicant was being detained in the segregation unit. Ms. McGeever states that Governor Whelan confirmed to her that his instructions were to the effect that the applicant should only receive screened visits and that in any event it was not feasible to bring him from the segregation unit to the main prison for the purpose of open visits. He informed Ms. McGeever that he could not put the matter any further than that.

When the matter was opened to the Court on 16th February, 2009, the Court was concerned about the apparent unwillingness of the prison authorities to provide basic information, either to the applicant himself or to his solicitors, concerning the reasons for his transfer, the exact circumstances of the new regime of detention to which he was now being subjected, and the reasons for the imposition of that new regime. The applicant was contending that certain of his natural and constitutional rights were being breached (including, but not limited to, his right to bodily integrity, his right to fair procedures, his right to be treated humanely and with human dignity, and his right to associate, with necessary lawful limitations, notwithstanding his status as a convicted person), and in order for the Court to make even a preliminary assessment in respect of these issues there was undoubtedly a need to obtain urgent answers to the seemingly reasonable questions that had been posed of the prison authorities by the applicant's solicitors in their correspondence. Although the applicant had come into Court seeking judicial review, his complaints concerned, *inter alia*, the conditions under which he was being detained, and the Court was of the view that they could, if deemed sufficiently serious, have possible implications for the lawfulness of his detention and so justify an enquiry under Article 40.4.20 of the Constitution.

When the leave application was opened to this Court, the Court had some misgivings as to whether the correct procedure had been adopted. These misgivings were centred primarily on whether, in the circumstances of this case (where the applicant was alleging, *inter alia*, that he was being subjected to inhumane and undignified treatment on account of being unlawfully kept in isolation) judicial review proceedings could be prosecuted with sufficient speed to secure for the applicant a meaningful vindication of his rights, if they were in fact being breached. Moreover, some of the reliefs in respect of which leave to apply was being sought, and in particular the mandatory orders sought, raised separation of powers issues. The Court was, and remains, acutely conscious of the fact that the control and management of the nation's prisons, and of prisoners within the prison system, are matters that have been entrusted by the legislature to the executive, and in respect of which the executive enjoys a wide discretion, subject to the constitution and the law.

The decision to frame the proceedings as an application for judicial review was probably influenced by (i) the fact that the applicant is a sentenced prisoner, and (ii) decisions or dicta in cases such as *The State (Cannon) v. Kavanagh* [1937] I.R. 428; *The State (McDonagh) v. Frawley* [1978] I.R. 131; *The State (Richardson) v. Governor of Mountjoy Prison [*1980] ILRM 82 ; *Cahill v. Governor of Military Detention Barracks, Curragh Camp* [1980] ILRM 191 and *The State (Comerford) v. Governor of Mountjoy Prison* [1981] ILRM 86, indicating that, save in exceptional circumstances, judicial review is the appropriate procedure in this type of case. Moreover, the judgments in both the *Cahill* and *Comerford* cases suggested that if the applicant invoked the wrong procedure he might have to start afresh. However, subsequent to those decisions, both the High Court and the Supreme Court have acknowledged, and have exercised, an inherent jurisdiction to convert a misdirected application for an enquiry under Article 40.4.20 to judicial review proceedings, and vice versa.

Accordingly, and mindful of the need to respect the principle of separation of powers, the Court determined upon the following course of action. It decided that, in the first instance, the applicant should only be granted leave to apply for those reliefs set out at paras. D(2), D(3), D(7), D(8) and D(9), respectively, of his draft statement. The Court granted leave limited to that extent on the grounds set forth at para. E of the said draft statement. The judicial review aspect of the matter was then made returnable for the 6th March, 2009.

Further, having regard to the exceptional seriousness of the general allegation being made, namely the alleged detention of the applicant in circumstances amounting effectively to open-ended solitary confinement, the Court decided that it would, of its own motion, open a parallel enquiry into the legality of the applicant's detention pursuant to Article 40.4.20 of the Constitution. It was also felt that the information that was urgently required could be obtained more quickly in that context, rather than in the context of a judicial review, even if were possible to expedite the hearing of the judicial review. However, the Court was conscious in taking this step that the remedies available to it within the context of an Article 40.4.20 enquiry were limited, and that ultimately the matter might have to be dealt with as a judicial review notwithstanding the complications that I have previously adverted to. The applicant's counsel was therefore informed that if it appeared, once the requisite information had been ascertained and the full facts were known, that the substantive legal issues between the parties could be satisfactorily resolved, and the applicant's rights effectively vindicated, by means of the judicial review procedure, the Court would then close the Article 40.4.20 enquiry, and allow such amendment of grounds and further pleadings within the existing judicial review proceedings, as seemed to it to be appropriate, to enable those issues to be properly litigated.

The Article 40.4.20 enquiry and further affidavits, pleadings and procedural issues in that matter and also in the present proceedings.
The Article 40.4.20 matter was made returnable for 12 noon on 17th February, 2009, at which time the first named respondent was required to produce the applicant before the Court and to certify in writing the grounds of his detention.

On the 17th February, 2009 the applicant was produced before the Court. The first named respondent (who was the sole respondent in the Article 40.4.20 enquiry) was represented by the Chief State Solicitor and Counsel. (As a matter of courtesy, Counsel also indicated to the Court that both she and her instructing Solicitor had received instructions, and would be appearing in due course, on behalf of all of the respondents in the related judicial review proceedings.) The first named respondent produced a certificate in writing certifying the grounds of the applicant's detention in the following terms:-

> "I hereby certify as follows:
>
> I hold the applicant in custody in Portlaoise Prison pursuant to warrant dated 9th March, 2007, warrant dated 6th February, 2008 and ministerial order dated 20th January, 2009. I refer to the said (sic) when produced and to photostat copies thereof upon which pinned together and marked 'A' I have endorsed my name prior to the swearing hereof

Dated 17th February, 2009.

Edward Whelan.

Governor."

The Court then indicated to counsel for the respondent that the certificate produced was not dispositive of the matter. Counsel was informed that the Court was not solely concerned with the legal basis for the applicant's detention. It was also concerned with the conditions of his detention. Counsel indicated that the respondent wished to file a number of affidavits in response to the affidavits that had been filed on behalf of the applicant and that a short period of time was needed to do this. Accordingly, the Court adjourned the matter to the 19th February, 2009 to facilitate the filing of affidavit evidence on behalf of the respondent.

When the matter came before the Court again on 19th February, 2009 the respondent sought to rely on three affidavits, namely an affidavit of Edward Whelan sworn on the 19th February, 2009, an affidavit of Colm Barclay sworn on the 19th February, 2009 and an affidavit of Andrew Brennan sworn on 19th February, 2009. It is appropriate to refer to the essential averments in each of these affidavits in turn.

In his affidavit Edward Whelan stated that he is the Governor of Portlaoise Prison. He then referred to the recent convictions and sentences of the applicant (to which the Court has already referred) and to the fact that the applicant was committed to Mountjoy Prison to serve his said sentences. He produced the committal warrants marked with the letters and numbers "EW01". Mr. Whelan then deposed that on 20th January, 2009 the applicant was transferred to Portlaoise maximum security prison on foot of transfer order which was signed by William Connolly, Director of Prison Operations on behalf of the Minister for Justice, Equality and Law Reform and he produced a copy of the said transfer order marked with the letters and numbers EW02. Mr. Whelan then stated that the applicant was placed in the "A Block" on "Unit 4" upon his arrival at Portlaoise Prison. He stated that the "A Block" in Portlaoise Prison is a stand alone building which includes 40 single cells. It is divided into five separate units and association between prisoners on different units is not allowed. He stated that it was originally built as part of the new Midlands Prison which was opened in the year 2000, and this was transferred over to the authority of the Governor of Portlaoise Prison in May, 2007. He stated that prior to its handover to the Governor of Portlaoise Prison, this block was used to accommodate ordinary prisoners assigned to work party duties in the Midlands Prison. Unlike the rest of Portlaoise Prison, or indeed his original place of detention i.e.Mountjoy Prison, this unit is of a modern design with in-cell sanitation and shower. Two of the five units have recently been used to accommodate prisoners "on punishment" for serious breaches of prison discipline. The applicant is not located in one of these units and is instead detained in another unit where his regime is not similar to the prisoners detained in the "punishment" cells. Prisoners on punishment can be deprived of privileges such as recreation, visits, phone calls and/or remission. According to Mr. Whelan the applicant is not deprived of any of these things.

Mr. Whelan further stated that on the morning after the applicant's committal to Portlaoise Prison he was interviewed by Governor John Sugrue who explained, and made the prisoner aware of, the rules, regulations and procedures in place in the "A Block" units in Portlaoise Prison. He states that most of these rules are similar to those in operation in Mountjoy Prison, one exception being that "screened visits" are the standard type of visit allowed. This is also the case in Cloverhill Prison, which is one of the biggest prisons in the system currently accommodating over 450 prisoners.

Mr. Whelan further stated that on the morning of 21st January, 2009 the applicant was medically examined by a Dr. Chidley. He stated that this was the normal procedure for all committals to the prison. He stated that the applicant has the same access to medical attention as all other prisoners detained in Portlaoise Prison. The normal practice is for the prisoner to request a meeting with the prison doctor who visits the prison each morning.

Mr. Whelan further stated that on 23rd January, 2009 the applicant was seen by the head teacher, a Mr. Mark Kavanagh, regarding his educational requirements. Mr Kavanagh agreed to provide classes as requested by the applicant. Mr. Whelan understands that the respective education units in Portlaoise Prison and in Mountjoy Prison will be in contact with each other to discuss the applicant's educational accomplishments to date and to draw up a future plan for him. Mr. Whelan stated that he is prepared to provide a room within the applicant's current unit for the purpose of facilitating his engagement with the educational service.

Mr. Whelan states that the applicant has access to both indoor and outdoor recreation on a daily basis. He is not on punishment and therefore can avail of exercise at the same time as other prisoners not on punishment. Mr. Whelan states that in a wide number of the other prisons in the state this concession is not provided to prisoners not in the general prisoner population. Mr Whelan avers that it would not be practical to supply the applicant with, nor does he believe he is entitled to, what would amount to a personal gym.

Mr. Whelan states that the applicant is entitled, as are all prisoners, to a six minute phone call per day, which is the normal practice throughout the prison service. This call is free of charge.

Mr. Whelan states that, unlike the prisoners on punishment in the "A block", the applicant is permitted to have visits from approved family members and friends and that it is normal practice in all closed prisons for prison officers to monitor and supervise visits taking place between prisoners and those visiting them.

Mr. Whelan further stated that with the exception of a handful of prisoners in one of the three blocks in use, prisoners in Portlaoise Prison all have single cell occupancy. The "A block" is the only area with full in-cell sanitation.

Referring to the correspondence received from Fahy, Bambury and McGeever, Solicitors, Mr. Whelan acknowledges that the letter of 26th January, 2009 was received by the Governor of Mountjoy Prison. He confirms that this letter was replied to by Assistant Governor Quinn. The Court has already recited the terms of this reply. He states that on the 2nd February, 2009 he received a letter from Jenny McGeever of Fahy, Bambury and McGeever, Solicitors. It is unclear as to why he believes that this letter was written by Ms. McGeever as it is clear that this is the letter that Mr. Declan Fahy claims to have written on the date in question. He exhibits a copy of the first page of the letter. However that page contains no reference to indicate who the author of the letter is and, unfortunately, the second page of the letter is not exhibited, Perhaps the letter was signed by Jenny McGeever. At any rate, and I don't think anything turns on it, Declan Fahy has claimed authorship of the letter. Be all of that as it may, Mr. Whelan states that following receipt of this letter

he telephoned Ms. McGeever on 2nd February, 2009 and discussed the contents of the letter with her. He avers that they discussed the following points:-

(a) The applicant's visitation rights in terms of family visits and non-family visits and

(b) The applicant's telephone access to his family and in particular his young son.

Mr. Whelan states that he informed Ms. McGeever that both visitation facilities and phone calls were available to the applicant in Portlaoise Prison. He further informed her that prisoners on punishment are generally deprived of such privileges. In support of his assertion that these matters were discussed, and as I have previously stated, he exhibits the front page of the letter of 2nd February, 2009 on which he has made handwritten notes. This exhibit is marked with the letters and numbers "EW04".

Mr. Whelan also refers to the letter of 6th February, 2009 from Fahy, Bambury, McGeever, Solicitors. He states that this letter was received in the prison on 8th February, 2009. He does not refer to having received the fax copy said to have been sent on the 6th February, 2009. The Court presumes that, as would be common business practice, a hard copy was despatched by post after the electronic copy was transmitted by fax, and that it is probably the postal copy that arrived on the 8th of February, 2009. At any rate, Mr Whelan states that he replied to the letter of the 6th of February, 2009 by means of a letter dated the 12th February, 2009 and he exhibits his reply marked with the letters and numbers "EW05". It is in the following terms:-

"Re: Your Client - Derek Devoy

Dear Jenny,

Derek Devoy was transferred from Mountjoy Prison to Portlaoise on 20th January, 2009. He was transferred for operational reasons on a ministerial order. He has access to family visits, professional visits, education and recreation and phone calls in Portlaoise Prison.

Yours sincerely,

Edward Whelan.

Governor."

Mr. Whelan concludes his affidavit by averring that the restricted association of the applicant is necessary in the interest of prison and public safety and security.

The second affidavit filed on behalf of the respondent is an affidavit of Colm Barclay. Mr. Barclay is the Governor of Mountjoy Prison and in the first part of his affidavit he covers similar ground to that covered by Mr. Whelan in terms of setting out the circumstances relating to the applicant's convictions and sentences, his committal to Mountjoy Prison on the 9th March, 2007 and his subsequent transfer to Portlaoise Prison on the 20th January, 2009, on foot of a transfer order signed by William Connolly, Director of Prison Operations on behalf of the Minister for Justice, Equality and Law Reform. Then, he makes the following further averments at paras. 8 and 9 of his affidavit and it is appropriate to set these out in full:-

"8. I say and believe that applicant is considered to be a 'major player' in the gang scene here in Mountjoy Prison. I say and believe that while in Mountjoy Prison the applicant has been on disciplinary report (P19) in the past for possession of mobile phones and threats to others.

9. While being housed in Mountjoy Prison, the applicant was located on the B Division. The regime in Mountjoy Prison allows for all prisoners to have access to a wide range of services including work, training, education, probation and recreation. The regime of the prison operates on a step-up/step-down system. The area of the prison where the applicant was housed was the B Division. Prisoners housed in the A and B Divisions are restricted in their contact with prisoners from the C and D Divisions. Given the applicant's gang status in Mountjoy prison the applicant was subject to additional security reviews. I say and believe that prisons by their nature control the movement of all prisoners in custody. I say and am told that the applicant did not engage with the work, training and probation services available to him in Mountjoy Prison. I say and am told that he did take part in the education services. I say and am told that while in Mountjoy Prison the applicant took part in the cookery, music and mosaic classes. I say that the applicant while in Mountjoy Prison shared a cell with another prisoner and further I say that this cell did not have in-cell sanitation. I say and believe that while in Mountjoy Prison the applicant had access to visits, phone calls and recreational facilities as do all other prisoners that are housed in Mountjoy Prison and who are subject to the A and B Division regime."

The third affidavit filed on behalf of the respondent in the article 40.4.20 matter was an affidavit of Andrew Brennan, an Assistant Principal Officer employed in the Operations Directorate of the Irish Prison Service. Once again, the first part of his affidavit sets out the history of the applicant's convictions and sentences, his committal to Mountjoy Prison on the 9th March, 2007, and the fact that he was transferred on the 20th January, 2009, to Portlaoise maximum security prison on foot of a transfer order signed by William Connolly, Director of Prison Operations on behalf of the Minister for Justice, Equality and Law Reform. Mr. Brennan then goes on to explain why this was done. He states that the applicant was transferred "on the basis of confidential information that the activities of the applicant are of a grave and imminent threat to the life of another person or persons". Mr. Brennan went on to state that while the prison service regularly receives security information on prisoners, in the applicant's case the view was taken that the threat to others was so serious that a transfer to Portlaoise Prison was essential in order to restrict his ability to exert inappropriate influence over other

prisoners and persons not in custody.

Mr. Brennan further deposed that "the applicant has disciplinary reports recorded against him for numerous breaches of the prison rules which include the possession of mobile phones, assaulting other prisoners, abusive behaviour, wilful damage, possession of weapons, incidents of threatening staff, possession of drugs and inciting a riot." He exhibited the relevant P19 forms in respect of the breaches of prison rules referred to. At para. 9 of his affidavit he states the following:-

> "I say and believe that the applicant is regarded as a very influential and serious criminal with heavy involvement in gangland crime. I say and believe that this view has been arrived at from intelligence received from both prison based and outside sources along with the offences for which he is being convicted."

Mr. Brennan further deposed that while many security initiatives have been introduced in the prison system in recent times the reality is that no security measure can ever be 100% foolproof in preventing the flow of contraband such as weapons, drugs or mobile phones into the prison system. He asserts that all of these items would be regarded as highly valuable by some prisoners for a wide variety of reasons. He states that the applicant's status is such that, even if there was a very small supply of such items in the area of a prison he was located in, he would be able to acquire access to such contraband either by agreement with another prisoner who had these items or by the application of pressure to extract these items from others. He further asserts that the applicant's disciplinary record proves that he has had access to such items in the past. At para. 11 of his affidavit Mr Brennan states:-

> "I say and believe that from confidential information received that the applicant is making every effort to continue his criminal activity while in custody and I say and believe that access at this time to the general prisoner population would make this much easier for him either because it would be easier for him to have access to contraband or by forcing or asking other prisoners to channel information out to the general public at visits, Court appearances, etc."

Mr. Brennan states that having regard to the issues just referred to and "other specific confidential information" the applicant was transferred to Portlaoise Prison in order to protect the safety and possibly the life of a person or persons not currently in prison custody. He asserts that the applicant's current location makes it much more difficult for him to have access to contraband and that his current detention is necessary to restrict his ability to channel instructions or information to criminal colleagues. Mr. Brennan states that the decision to transfer the applicant was not taken lightly and he asserts a belief that this is the first such instance of a prisoner being removed from the general prisoner population to protect the safety of persons outside of prison custody. He further contends that this action was a necessary, reasonable and proportionate response in all the circumstances of the case in the interests of prison and public safety and security. He states that "while the Prison Service is conscious of the rehabilitative benefits that can be accrued by less restrictive regimes for all prisoners, we believe that these have to be backed with safety and security considerations applicable in each prisoner's case". He contends that in this instance the security issues were so serious as to outweigh other matters and to necessitate the detention of the applicant in his current circumstances. He states that the location of the applicant's imprisonment will remain under regular review in the future with due regard to security considerations and intelligence received. He concludes by contending that the restricted association of the applicant "is necessary for the interests of prison and public safety and security".

In the light of the affidavits that had been filed on behalf of the respondent, the applicant then sought a further adjournment to enable him to put in a replying affidavit. Counsel for the respondent also sought leave to file a further short affidavit to be sworn by Mr. Whelan. The Court acceded to these requests and the Article 40.4.20 enquiry was then adjourned to 25th February, 2009, to enable the applicant to file his further affidavit. In adjourning the enquiry the Court suggested that, on the next day, the parties should be in a position to make submissions as to whether it was appropriate to continue with the Article 40.4.20 enquiry or, alternatively, whether it would be more appropriate to close that enquiry and deal with the outstanding issues in the context of the judicial review proceedings. In response Counsel for the respondent submitted that the matter was properly one for judicial review and stated that she hoped to have filed a Statement of Opposition in the judicial review proceedings by the 25th February, 2009, so that the case could proceed to a hearing on that date or shortly thereafter. Counsel for the applicant did not demur, but wished to be taken as formally reserving his position on possible closure of the enquiry until the 25th of February, 2009. The Court then indicated that both sides should file written submissions with respect to the substantive issues on or before the 25th February, 2009.

On 25th February, 2009, Counsel for the respondents informed the Court that her clients had filed their Statement of Opposition in the judicial review proceedings. Further, a replying affidavit was filed in the Article 40.4.20 enquiry on behalf of the applicant, as well as a further affidavit sworn by Mr Whelan on behalf of the respondent. Further, and in accordance with the Court's directions, both sides handed in written submissions for the Court. The matter was then put in for a full hearing of the judicial review on Friday 27th February, 2009, on the understanding (i) that on that date the Court would close the Article 40.4.20 enquiry, and (ii) that evidence contained in the affidavits filed by both sides in the course of the Article 40.4.20 enquiry could be relied upon in the judicial review.

For completeness I should briefly summarize the contents of the applicant's replying affidavit and also of the further affidavit of Edward Whelan. The applicant swore his replying affidavit of 25th February, 2009, in response to the affidavits of Edward Whelan, Colm Barclay and Andrew Brennan, respectively, all three of which were sworn on 19th February, 2009. In his replying affidavit the applicant joins issue with many of the factual assertions contained in the three affidavits mentioned.

He acknowledges that while the unit in which he is detained does contain eight cells he states that no other prisoner is housed in that unit with him. Further, he says that all of the units in Block A are for use by prisoners on a punishment regime. Accordingly, he contends that his detention amounts to a regime of solitary confinement.

He further says that the cell in which he is detained does not have shower facilities.

He acknowledges that he did have a meeting with Governor Sugrue shortly after his transfer to Portlaoise prison but he states that Governor Sugrue did not then, or at any time, tell him why he had been transferred or for how long it was proposed that he would be kept in solitary detention. He says that nobody has discussed with him the possible impact of

these changes upon his entitlement to remission, nor has he received any assurances in that respect.

He acknowledges that he did have a meeting with the prison doctor but says that this meeting lasted for no more than a few seconds.

He complains that the respondents' insistence on screened visits is an entirely disproportionate measure. He acknowledges meeting Mr. Kavanagh, but says that when he asked to be allowed to have access to school facilities outside of the segregation unit Mr. Kavanagh then indicated he (Mr. Kavanagh) would in turn have to speak to the Governor, and that he would revert to him. He says that he has not had an opportunity to meet with Mr. Kavanagh since then and that Mr. Kavanagh has not reverted to him.

The applicant says that access to outdoor recreation has been denied to him on the vast majority of days since his transfer to Portlaoise prison. He states that there are three outdoor and adjoining recreation yards for the segregation unit and he is only allowed outdoor access when there are no other persons in any of the three yards. He says that on occasions he has been denied access to outdoor recreation because of fading light or weather and that no reasonable effort has been made to schedule his outdoor recreation for an appropriate part of the day, having regard to those factors. He states that he only had access to outdoor recreation on six days from the date of his transfer on 20th January, 2009, to the date of the swearing of his affidavit on 25th February, 2009. Further, he states that the only indoor exercise available to him is the opportunity to walk in the corridor outside of his cell.

He complains that prisoners in the main Portlaoise prison population have greater telephone access than the six minute per day period of telephone access which he is currently allowed.

He rejects the allegations made in respect of him at paras. 8 and 9 of Colm Barclay's affidavit, and at paras. 6, 7, 9, 10 and 11 of Andrew Brennan's affidavit. In essence these are the allegations that the applicant is heavily involved in gangland crime, has a bad disciplinary record within the prison system, and represents a threat to the life or safety of a person or persons outside of the prison.

In his short additional affidavit sworn on 25th February, 2009, Mr. Whelan says that he took the decision to house the applicant in the A Block of Unit 4 in Portlaoise prison, having regard to the particular circumstances of this prisoner. He asserts that the applicant posed a significant threat to the maintenance of good order and safety in the prison and that the decision was necessary for the proper administration of life in the prison. He says that the decision to impose the existing conditions on the applicant's imprisonment were made in good faith and were a proportionate response to the threat posed by the applicant to the maintenance of good order and safe and secure custody in the prison. Additionally, the decision was taken in the interests of the security of the state, that is to say, in order to protect the life of persons who were not in the prison. He states that the conditions of the applicant's detention are monitored carefully and remain under constant review.

In their Statement of Opposition the respondents plead the following. They say that the applicant is held separately from other prisoners and that the decision to do this was taken on the grounds that the applicant posed a significant threat to the maintenance of good order and safety in the prison, and that it was required for the proper administration of life in the prison and also in the interests of the security of the state in order to protect the life of persons who are not in prison. They assert that this decision was made in good faith and was a proportionate response to the threats posed by the applicant. They further state that the conditions of the applicant's detention remain under constant review. It is pleaded that the applicant was informed prior to the institution of the present proceedings that his removal from contact with other prisoners was for operational security reasons and they assert there is no general obligation to disclose to prisoners the reasons upon which such a decision is based. They further plead that the decision made by the first named respondent in relation to the conditions of the applicant's imprisonment was reasonable. They contend that the principles of natural justice do not apply to the making of such a decision; alternatively there was no breach of the principles of natural justice by the first named respondent in reaching that decision. It is further pleaded that that there was no breach of natural and constitutional justice by reason of the failure to provide the applicant with reasons for his detention separately from other prisoners.

At para. 9 of the Statement of Opposition, the respondents plead certain factual matters in rebuttal of specific allegations contained in the applicant's Statement of Grounds. It is pleaded that:

> "The applicant is currently a prisoner in the A Block of Unit 4 in Portlaoise prison. He has access to education and leisure facilities and is also entitled to a six minute phone call each day, free of charge, which is the normal practice throughout the prison service. The applicant is also allowed visits from family which are supervised and monitored and are the standard type of visits allowed in Portlaoise. The applicant enjoys single cell occupancy with full in-cell sanitation."

The statement of opposition concludes with a plea that the applicant has failed to particularise which section (s) of the Prison Rules, 2007 the respondents are alleged to have been in breach of. The respondents say that they reserve the right to respond further should the applicant particularise his claim in that regard. Finally, they assert that there was no breach of the Prison Rules, 2007.

Submissions and oral hearing.
The court was grateful to receive the written submissions of the parties. These were developed and amplified in the course of the oral hearing which took place on 27th February, 2009.

At the outset of the hearing Mr. O'Braonain S.C. on behalf of the applicant, referred to the limited nature of the leave that had been granted by the Court, which related to the alleged failure to give reasons for various changes to the applicant's conditions of detention, including the decision to detain him in isolation. He reminded the Court that formal leave had not been granted to seek *certiorari* of the decision to detain the applicant in isolation (although this had been sought in paras. D5 & D6 of the applicant's Statement of Grounds). He indicated that he was nevertheless seeking *certiorari.* Although he did not request an extension of leave in terms, this indication was regarded by the Court as an application to extend the leave originally granted to include the reliefs sought initially at paras. D5 and D6. Counsel for the respondents, Mr. Gageby S.C., did not object to him doing so. In the circumstances, the applicant was allowed to proceed.

No application, either formal or informal, was made at that stage either for leave to amend, or for leave to bring a motion on notice seeking amendments, of the pleadings on either side. On the contrary, both sides seemed content to proceed with their submissions on the understanding that the applicant's claim included a claim for *certiorari* to quash the decision of the respondents, or some or one of them, to detain the applicant in isolation. Nevertheless, the Court clearly understood that Counsel for the applicant was reserving his right to seek necessary amendments before the conclusion of the proceedings, relying on the Court's earlier indication that it would, if necessary, allow such amendment of grounds and further pleadings as seemed to it to be appropriate to enable the issues in controversy between the parties to be properly litigated.

The detailed arguments presented both at the hearing and in writing will be separately reviewed below.

However, one matter of significance requires to be alluded to at this point. It was conveyed to the Court at the hearing by Counsel for the respondents, Mr. Gageby S.C. that another prisoner had recently been allocated to the applicant's unit and the applicant had the society of this prisoner during unlocked times. A draft proposed supplemental affidavit of Edward Whelan covering this was handed in, and leave to file it when sworn was sought and granted. This affidavit was duly sworn and filed later on the same day.

At the end of the oral hearing both sides requested leave to file further written submissions and the Court expressed a willingness to receive them. The matter was then listed for mention on the 27th of March, 2009. In the meantime the Court received supplementary submissions in writing from both sides.

When the matter was mentioned on the 27th of March, 2009, the Court indicated a degree of unhappiness at the state of the pleadings, and concern as to whether they were adequate to enable the Court, in terms of any orders it might make, to do justice between the parties and address the real issues in the case. In response to this the applicant sought, and was granted, leave to bring a motion seeking leave to amend his Statement of Grounds.

Amendments to the Pleadings
A motion to amend was brought by Notice of Motion dated the 31st of March, 2009, grounded upon an affidavit of Jenny McGeever, Solicitor, sworn on the same date. In her said affidavit Ms. McGeever stated (*inter alia*):

> "On the 25th February, 2009, the applicant was served with a further affidavit of Edward Whelan sworn the 25th February, 2009. Therein Mr. Whelan avers that he in fact made the decision to detain the applicant in isolation and in the manner complained of and he advances certain general reasons for his decisions. This was the first point in either the judicial review or the proceedings pursuant to Article 40.4.2 of Bunreacht na hEireann, that this position had been advanced and it is a position which is directly at odds with what had been the state of knowledge of the applicant and his solicitors as averred to in the affidavit sworn by me on the 16th February, 2009."

An affidavit of Cathy O'Brien was filed in response by the respondents. In the Court's view the affidavit of Ms. O'Brien provided, for the first time, a degree of clarity as to the exact relationship between the first and second named respondents and their respective roles in determining or fixing the conditions of the applicant's detention. At paragraph 6 of her said affidavit Ms. O'Brien states (*inter alia*):

> "The first respondent is responsible for deciding in which part of the prison a prisoner will be housed. In relation to a prisoner's detention he is obliged under The Prison Rules to follow any directions given to him by the second respondent. However, the precise location where the applicant is to be held is a matter for the first respondent. Accordingly it is denied that the decision to place the applicant in Unit 4 in Block A is at odds with the decision taken by the second respondent in relation to the segregation of the applicant."

The hearing of the applicant's motion seeking leave to amend his Statement of Grounds was dealt with on the 2nd of April, 2009. Although the application was opposed, the Court, after due consideration of the relevant jurisprudence, including *McCormack v. Garda Síochána Complaints Board* [1997] 2 I.R. 489; *O'Leary v. Minister for Transport, Energy and Communications* [2000] 1 ILRM 391; *Hynes v. Wicklow County Council* [2003] 3 I.R. 66; *O'Síodhacháin v. Ireland* (Unreported, Supreme Court, 12th February, 2002); Shine v. The Medical Council [2008] IESC 41; Cox v. ESB (No 2) [1943] I.R. 231 and *Wildgust v. Bank of Ireland* [2001] 1 ILRM 24, and being of view that (i) in general there were exceptional circumstances to justify the amendments sought; (ii) certain facts existed which could not have been known to the applicant at the time leave was obtained (namely the precise identity of the relevant decision maker at each stage; the division of responsibility for the conditions of the applicant's detention as between the first and second named respondents, and aspects of their operational relationship); and (iii) that the proposed amendments would not prejudice the respondents, made an Order pursuant to O. 84, r. 23(2) of the Rules of the Superior Courts permitting the applicant to file an amended Statement of Grounds which effectively added a new para. D5, renumbered the existing paras. D5 to D9 inclusive as D6 to D10 inclusive, and added a new para. D11. The new para. D5 claimed:-

> "An order of certiorari quashing the decision of the first named respondent to detain the applicant in isolation."

The new para. D 11 claimed:-

> "A Declaration ……that the decision to detain the applicant separately from other prisoners and in the conditions complained of and averred to, was made without any or any adequate regard to the principle of proportionality and/or is disproportionate to the aim which is pursued by the decision."

Further, the respondents were permitted to file an amended Statement of Opposition in response which added the following eleven additional paragraphs (numbered 11 to 21 inclusive) to those originally pleaded by them:-

> "11. The decision to hold the applicant separately from the general prison population on his transfer to Portlaoise prison was made by the second respondent as appears from the affidavit of Andrew Brennan filed on the 19th of February, 2009. The applicant has not obtained leave to challenge this decision and accordingly cannot do so in these proceedings.

12. The first respondent is subject to the directions of the second respondent pursuant to the provisions of Rule 75(1) and (7) of the Prison Rules 2007, and must comply with any directions given to him in this regard.

13. The decision to place the Applicant in the A Block of Portlaoise prison was one taken by the first respondent in order to comply with the directions of the second respondent to hold the applicant separately from the general prison population.

14. Since the commencement of these proceedings, the Applicant has been transferred from E5 Unit to E3 Unit in the A Block of the prison. Cells and layout in both areas are both similar, however, the exercise yard available in E3 Unit is approximately 35 sq metres bigger than the exercise yard attached to the E5 Unit.

15. There is currently one other prisoner located in this Unit along with the applicant. Both prisoners can freely associate with one another at all unlocked times.

16. The decision of the first respondent in relation to the placing of the applicant in a particular unit is an executive decision which is not amenable to certiorari in this case. The aforesaid decision can only be challenged where the applicant can show bad faith or that the decision is a disproportionate response to the threat posed.

17. The aim of the respondent in holding the applicant separately from the general prison population included the preservation of the human life of other persons. This aim was not challenged in these proceedings. The failure of the applicant to cross-examine the deponents of the respondent's affidavits means that this Honourable Court must accept the evidence of the respondents in this regard.

18. In those circumstances, the manner in which the applicant is held cannot amount to a disproportionate response to this threat.

19. The applicant has not discharged the onus on him of showing that the decision can be challenged in the circumstances of this case.

20. The applicant has failed to identify which of his rights should be balanced against the threat to the exigencies of the proper administration of life in the prison, the interests of the security of the state and the right to life of other parties. No rights of the applicant have been infringed in any way in the circumstances of this case.

21. The right to life takes precedence over any rights and interests of the applicant which are alleged to have been infringed."

With the further leave of the Court the respondents were also permitted to file a further two short supplemental affidavits, and duly did so, namely a further affidavit of Andrew Brennan sworn on the 1st of May, 2009, and a further affidavit of Edward Whelan also sworn on the 1st of May, 2009.

Mr Brennan deposes in his affidavit of the 1st of May that the conditions of detention of the applicant had remained under constant review since the date of his previous affidavit and that the second named respondent believed that the decision to hold the applicant separate from the general prison population remained necessary "in the interests of prison and public safety and security". He added: "Public safety in this regard means the life of a person (or persons) not currently in prison custody."

In his affidavit of the 1st of May Mr Whelan deposes (*inter alia*):-

"4. The current position in relation to the applicant is as follows. On the 27th of February, 2009, when this matter was listed for hearing, another prisoner had recently been allocated to the applicant's unit and accordingly it was conveyed to the Court at the hearing that the applicant had the society of this prisoner during unlocked times. Since that time the applicant and the other prisoner have been transferred from the E3 unit of the A Block to the E5 unit. The cells and layout in both areas are the same. However, there is a bigger exercise yard available in the E5 unit. The previous exercise yard was approximately 220 sq metres and the yard to which the Applicant and the other prisoner now have access is approximately 255 sq metres.

5. Both prisoners continue to freely associate with one another at unlocked times. They regularly watch television together in each other's cells where they have access to seven channels on the television.

6. The applicant is unlocked from his cell for breakfast at 8.15 am daily. He is then locked in his cell between 8.30am and 9.20 am. For the remainder of the day he is unlocked between 9.20 am and 12.15 pm and 2.15 pm and 4.00 pm and lastly between 5.15 pm and 7.30 pm.

7. During his unlocked time, the Applicant has access to outdoor and indoor exercise. He has the use of an exercise bicycle at all times. Other gym equipment has also been put in place and is available to him including gym fit balls, a medicine ball and a chin-up bar. The gym officer has indicated a willingness to give instructions and put together a programme in relation to the applicant's fitness regime. The head teacher has also given an undertaking that a fitness teacher will visit the applicant weekly in order to carry out fitness exercises.

8. The head teacher has also interviewed the applicant and based on the information provided to him has put together a timetable for maths, English and Irish classes. These classes would consist of three double classes per week of approximately an hour and a half duration. The applicant also has access to books from the prison library and regularly reads crime thrillers.

9. The applicant is visited by the prison chaplin about four times every week and at any other time at the applicant's request. The prison doctor and medical staff visit the A Block daily and are available to the applicant on request. The medical staff visit the applicant twice daily to issue medication. I, as Governor, and the Chief Officer of the prison also visit the applicant daily.

10. The applicant is facilitated with up to two visits each week from approved family members.

11. At the beginning of April, the applicant was subject to a disciplinary hearing for damaging or disfiguring Government property. This arose because he had smeared excrement on the walls of his prison cell. The applicant admitted this breach of prison rules and the sanction imposed included a loss of privileges for a two week period."

Mr Whelan then concluded by reiterating that it remained necessary to keep the applicant separate from the general prison population "in order to maintain proper discipline within the prison and also to safeguard the right to life of persons both inside and outside the prison."

The Relevant Legislation

The relevant legislation today consists of the Prisons Acts 1826 to 2007, and the regulations made thereunder, and in particular, the Prison Rules 2007, which are contained in S.I. 252 of 2007. It is appropriate at this point to consider certain specific provisions of the Prisons Act 2007, and of the Prison Rules 2007.

Section 35 of the Prisons Act 2007, empowers the Minister for Justice, Equality and Law Reform (the third named respondent herein) to make prison rules. Subsections (1) and (2) respectively of s.35 provide:-

"(1) The Minister may make rules for the regulation and

good government of prisons.

(2) Without prejudice to the generality of subsection (1) and to Part 3,

such rules may provide for—

(a) the duties and conduct of the governor and officers of a prison,

(b) the classification of prisoners,

(c) the treatment of prisoners, including their diets, clothing, maintenance, employment, instruction, discipline and correction,

(d) the provision of facilities and services to prisoners, including educational facilities, medical services and services relating to their general moral and physical welfare,

(e) the acts which constitute breaches of prison discipline committed by prisoners while inside a prison or outside it in the custody of a prison officer or prisoner custody officer,

(f) the remission of portion of a prisoner's sentence,

(g) the manner of publication of decisions of an Appeal Tribunal,

(h) the entry to a prison of a member of the Garda Síochána in the performance of his or her functions,

(i) photographing and measuring prisoners and taking fingerprints and palmprints from them, and

(j) testing prisoners for intoxicants, including alcohol and other drugs."

Part 3 of the Prisons Act 2007, (ss. 11 to 16 inclusive) relates to prison discipline. Section 12 and s.13 respectively are of particular interest. Section 12 allows for the conduct of an inquiry into an alleged breach of prison discipline. Subsections (1) to (4) of s. 12 provide:-

"(1) If a prisoner is alleged to have committed a breach of prison discipline, the governor of the prison may decide to hold an inquiry into the alleged breach.

(2) The prisoner shall be informed of the alleged breach and of the date

and time of the inquiry.

(3) The procedure relating to an inquiry may be specified in prison rules.

(4) At the conclusion of an inquiry, the governor shall—

(a) if he or she finds that the prisoner committed a breach of prison discipline—
(i) impose such one or more of the sanctions provided for in section 13 as he or she considers appropriate, and(ii) record the finding and the sanction imposed,

or

(b) if he or she does not so find, record a finding that the allegation has not been substantiated."

Section13 sets out, *inter alia*, the sanctions that may be imposed, as well as those that may not be imposed for a breach of prison discipline. Subsection (1) of s. 13 sets out the sanctions that are permissible, and is in the following terms:-

"(1) One or more than one of the following sanctions may be imposed on a prisoner who is found by the governor to have committed a breach of prison discipline:

(a) caution;

(b) reprimand;

(c) confinement in a cell (other than a special observation cell) for a period not exceeding 3 days;

(d) prohibition, for a period not exceeding 60 days, on—

(i) engaging in specified authorised structured activities or recreational activities,

(ii) receiving visits (except those from a doctor or other healthcare professional, his or her legal adviser, a chaplain or member of the visiting committee to the prison, the Inspector of Prisons, a judge or representative of a court or tribunal, a member of either House of the Oireachtas, a representative of the Minister, Parole Board, Human Rights Commission or European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment or, if the prisoner is a national of another state, a diplomatic or consular officer of that state),

(iii) sending or receiving letters (except letters from a person mentioned in subparagraph (ii) or the United Nations Committee against Torture or any document relating to the registration of electors (including entry in the postal voters' list) or to voting at an election or a referendum),

(iv) using money or credit or any other facilities, including telephone facilities, or

(v) possessing specified articles or articles of a specified class the possession of which is permitted as a privilege;

(e) forfeiture of such sum of money credited or to be credited to the prisoner from public funds as may be specified by the governor;

(f) forfeiture of not more than 14 days' remission of portion of a sentence;

(g) postponement, for a specified period not exceeding 60 days, of payment of the amount of any gratuity to which the prisoner would have been entitled under prison rules in respect of such a period;

(h) where the breach of prison discipline concerned relates to an attempt to escape from lawful custody, a requirement to wear prison clothes for a specified period not exceeding 60 days."

Subsection (7) of s. 13 sets out the sanctions that are not permissible, in the following terms:-

"The following sanctions for breaches of prison discipline are prohibited:-

(a) collective punishment;

(b) corporal punishment;

(c) placing in a restraint;

(d) any form of sensory deprivation;

(e) deprivation of sleep;

(f) deprivation of food or drink;

(g) reduction in, or denial of, normal prison diet;

(h) confinement in a special observation cell;

(i) placing in a cell or room without adequate light, heat or ventilation;

(j) a sanction of indeterminate duration;

(k) a sanction constituting cruel, inhumane or degrading treatment."

The particular significance of ss. 12 and 13 for the present case is that even where there has been a breach of prison discipline, such as might, by way of sanction, justify increased interference with, or restriction upon, the rights and/or privileges then being enjoyed by the prisoner concerned, the legislation clearly mandates a proportionate response.

Turning now to the Prison Rules, 2007 the applicant places particular reliance upon the following specific provisions contained in Parts 3 and 4 respectively of those Rules. (Part 3 deals with "Treatment of Prisoners" and Part 4 deals with "Control, Discipline and Sanctions".) He refers the Court to Rule 27 dealing with "out of cell time and authorised structured activity"; Rule 32 dealing with "exercise"; Rules 35 & 36 dealing with "visits" and "regulation of visits"; Rule 45 dealing with examination of letters; Rule 46 dealing with "telephone calls" and Rule 62 dealing with "removal of prisoner from structured activity or association on grounds of order". The Court considers that Rule 75 in Part 7 dealing with "Duties of a Governor" is also of importance. It is appropriate that I should recite so much of these Rules as is relevant to the arguments:

Rule 27 provides:

"(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 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.

(2) Subject to Rule 72 (Authorised structured activity), each prisoner may, while in prison, engage or participate in such structured activity as may be authorised by the Governor (in these Rules referred to as "authorised structured activity") including work, vocational training, education, or programmes intended to ensure that a prisoner, when released from prison, will be less likely to re-offend or better able to re-integrate into the community.

(3) In so far as is practicable, each convicted prisoner should be engaged in authorised structured activity for a period of not less than five hours on each of five days in each week."

Sections (1) & (2) respectively of Rule 32 provide:

"(1) Each prisoner not employed in outdoor work or activities shall be entitled to not less than one hour of exercise in the open air each day, provided that, having regard to the weather on the day concerned, that is practicable.

(2) In so far as is practicable, each prisoner shall be permitted to have access to, and the use of, indoor space and equipment, suitable for physical recreation, exercise or training, and shall be provided with appropriate instruction where necessary."

Ss (1) (8) & (9) respectively of Rule 35 provide:

"(1) Subject to the provisions of these Rules, a convicted prisoner who has reached the age of 18 years shall be entitled to receive by prior appointment not less than one visit from relatives or friends each week of not less than 30 minutes duration.

(8) A person, who is not a relative or friend, wishing to visit a

prisoner shall make an application in writing to the Governor, detailing

the purpose of the visit and such a visit may be permitted subject to such conditions, if any, as may be specified by the Governor.

(9) The Governor, shall consider whether or not a visit should be permitted under paragraph (8) and, if so, what if any conditions should be imposed and take into account,

(a) the prisoner's consent or otherwise to the visit

(b) the interests of the prisoner

(c) the need to maintain good order and safe and secure custody within the prison,

(d) the need to avoid:

(i) the facilitation or encouragement of a criminal offence or the hampering of the prevention, detection, investigation or prosecution of a criminal offence,

(ii) any person being threatened or put in fear,

(iii) serious offence or distress being caused to any person, including the victim, or family of the victim, of the crime for which the prisoner has been convicted,

(iv) giving rise to a legal action by a third party,

(v) jeopardising the interests of national security or

(vi) infringing the rights and freedoms of another person (including the right to privacy of another prisoner), and

(e) any guidelines issued by the Director General."

Ss (1), (4) (5), (6), (7), (8) & (9) respectively of Rule 36 provide:

"(1) In the interests of security, good order and government of the prison, visits to which Rule 35 (Ordinary visit) applies shall take place on such days and times as are designated by the Governor.

(4) Visits to which Rule 35 ……..apply shall take place within

the view and hearing of a prison officer, unless the Governor otherwise

directs.

(5) No articles shall be exchanged between a prisoner and a visitor

during the course of a visit, except with the permission of the Governor.

(6) Visits to which Rule 35 …….apply shall take place in a

part of the prison designated for that purpose but the Governor may permit a visit to take place in a part of the prison other than a part so

designated, where …….(not relevant),

(7) (a) A part of the prison designated under paragraph (6) for visits shall have facilities to allow a prisoner and visitor to see and talk to one another but which prevent, through the use of screens or otherwise, physical contact between a prisoner and a visitor.

(b) The Governor may allow physical contact between a prisoner and a visitor when he or she is satisfied that such contact will not facilitate the entry into the prison of controlled drugs or other prohibited articles or substances.

(8) A person who attends the prison for the purpose of visiting a

prisoner shall, if requested to do so, provide photographic evidence of

identification and evidence of address and failure to do so may result in

refusal of entry to the prison.

(9) The Governor, where he or she believes it to be necessary in

order to:

(a) prevent the entry into the prison of controlled drugs or other prohibited articles or substances,

(b) prevent a conspiracy to commit a criminal offence, or

(c) otherwise maintain good order and safe and secure custody,

may refuse to permit a visit to a prisoner by a person or persons."

Ss (1) of Rule 43 provides:

"Subject to the provisions of these Rules, a prisoner Shall be entitled to send letters to his or her family or friends, and to receive as many letters as are sent to him or her by his or her family or friends."

Ss (1) and (2) of Rule 45 provide:

"(1) A letter given by a prisoner for sending, other than a letter referred to in Rule 44 (Letter to authorities), may be opened and examined by the Governor and he or she may confiscate the letter or any article enclosed therewith if he or she is of the opinion that -

(a) it is threatening in nature,

(b) were the letter or article sent to the person for whom it was intended, it could cause serious offence or distress to that person or other persons or there could be an interference with the course of justice,

(c) the prisoner has not adequately identified himself or herself as the sender of the letter,

(d) the person for whom it is intended has informed either the Minister or the Governor that he or she does not wish to receive letters from the prisoner,

(e) it would facilitate or encourage the commission of a criminal offence or hamper the prevention, detection, investigation or prosecution of a criminal offence,

(f) it could give rise to a legal action by a third party against the Governor or the Minister,

(g) it is contrary to the interests of national security,

(h) it is contrary to the interests of the security, good order and government of the prison or

(i) it infringes the rights and freedoms of another person (including the right to privacy of another prisoner).

(2) A letter sent to a prisoner under paragraph (1), (2) or (3) of

Rule 43 (Letters) may be opened and examined by the Governor and he or she may confiscate the letter or any article enclosed therewith, if he or she, upon reasonable grounds, believes that were the letter or article to be given to the prisoner, that

(a) the maintenance of good order or safe or secure custody in the prison could be threatened, or

(b) it might facilitate a criminal offence or hamper the prevention, detection, investigation or prosecution of a criminal offence or

(c) it might, otherwise, cause an interference with the course of justice."

Ss (1), (2), (7) & (8) respectively of Rule 46 provide:

"(1) The Governor may permit a prisoner to

communicate with members of his or her family or his or her friends by means of telephone calls, for such period or periods of time and in accordance with such procedures, as the Governor shall determine.

(2) Subject to the availability of facilities, a convicted prisoner who is not less than 18 years of age shall be entitled to make not less than one telephone call per week to a member of his or her family or to a friend.

(7) The Governor may, for the purposes of maintaining good order and safe and secure custody or ensuring that a prisoner does not make any telephone calls to which paragraph (8) applies, intercept a telephone communications message made during a telephone call, provided that the prisoner or the person with whom he or she proposes to communicate is informed before any communication takes place that any telephone communications message made during the course of the telephone call may be intercepted.

(8) The Governor or a prison officer authorised by the Governor may effect the termination of a telephone call to which this Rule applies if, upon reasonable grounds, he or she believes that the telephone communication -

(a) is threatening in nature,

(b) could cause serious offence or distress to the recipient of the call

(c) could cause an interference with the course of justice,

(d) the recipient of the call has informed either the Minister or the Governor

that he or she does not wish to receive telephone calls from the prisoner,

(e) would facilitate or encourage the commission of a criminal offence or hamper the prevention, detection, investigation or prosecution of a criminal offence,

(f) could give rise to a legal action by a third party against the Governor or the Minister,

(g) is contrary to the interests of national security,

(h) is contrary to the interests of the security, good order and government of

the prison or

(i) infringes the rights and freedoms of another person (including the right to privacy of another prisoner)."

Rule 62 provides:

"(1) Subject to Rule 32 (Exercise) a prisoner shall not, for such period as is specified in a direction under this paragraph, be permitted to -

(a) engage in authorised structured activities generally or particular authorised Structured activities,
(b) participate in communal recreation,
(c) associate with other prisoners, where the Governor so directs.

(2) 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.

(3) A period specified in a direction under paragraph (1) shall not continue for longer than is necessary to ensure the maintenance of good order or safe or secure custody

(4) Where the direction under paragraph (1) is still in force, the Governor shall review not less than once in every seven days a direction under paragraph (1) for the purposes of determining whether, having regard to all the circumstances, the direction might be revoked.

(5) 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) The Governor shall make and keep a record of -

(a) any direction given under this Rule,

(b) the period in respect of which the direction remains in force,

(c) the grounds upon which the direction is given,

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

(e) the decision made in relation to any review under paragraph (4).

(7) The Governor shall, as soon as may be after giving a direction under paragraph (1)(c), inform the prison doctor, and the prison doctor shall, as soon as may be, visit the prisoner and, thereafter, keep under regular review, and keep the Governor advised of, any medical condition of the prisoner relevant to the direction.

(8) The Governor shall, as soon as may be after giving a direction under paragraph (1)(c), inform a chaplain of the

religious denomination, if any, to which the prisoner belongs of such a direction and a chaplain may, subject to any restrictions under a local order, visit the prisoner at any time.

(9) 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."

Ss (1), (2) (3), (5) & (7) respectively of Rule 75 provide:

"(1) Subject to the directions of the Minister and the Director General, the Governor shall be responsible for the management of the prison of which he or she is Governor.

(2) The Governor shall at all times conduct himself or herself and perform his or her functions in such a manner as to --

(i) influence prisoners for good by his or her example,

(ii) maintain the respect of the prisoners in the prison, and

(iii) respect the dignity and human rights of all prisoners.

(3) The Governor shall --

(i) develop and maintain a regime which endeavours to ensure the maintenance of good order and safe and secure custody and personal well-being of prisoners; and

(ii) assist and encourage prisoners in --

(a) coping with their imprisonment,

(b) achieving their personal development,

(c) taking responsibility for their lives, including offending behaviour, and

(d) preparing for reintegration into society after release.

(5) The Governor shall ensure that these Rules are applied fairly, impartially and without discrimination and that all persons to whom these Rules apply are made aware of these Rules and of the consequences of any breach of prison discipline under these Rules.

(7) The Governor shall comply with any directions of the Minister or the Director General or such persons as may be designated by the Minister or the Director General."

The Arguments

The Applicant's Case

The applicant makes six discreet points and it is appropriate to deal with the arguments and counterarguments advanced in respect of each.

Before doing so I should say that the applicant has submitted, and I agree with this submission, that there are two decisions referred to in these proceedings which must be clearly distinguished. The first is the decision to transfer the applicant from Mountjoy Prison to Portlaoise Prison on 20th January, 2009. The second decision is the decision of Edward Whelan (Governor of Portlaoise Prison), the first named respondent (acting it would seem under the direction of the second named respondent), to detain the applicant in the manner now complained of. Having regard to the limited nature of the leave to apply for judicial review granted to the applicant we are only concerned at this stage with the second decision.

The applicant contends that the decision to subject him to his present regime of detention is invalid and of no legal effect for the following reasons:-

(i) The governor did not enjoy any lawful power to take this decision and

in particular, did not enjoy the alleged power to take this decision suggested in the affidavits, pleadings and submissions filed by the respondents.

(ii) It was taken other than in accordance with the Prison Rules, 2007.

(iii)It was taken other than in accordance with fair procedures and the rules of natural and constitutional justice.

(iv)The governor had regard to irrelevant considerations in making his decision.

(v) The reasons given for the decision are so vague and general as to be inadequate to ground the purported decision and

(vi)The isolation of the applicant is a disproportionate interference with his constitutional rights to liberty, to human dignity and freedom of association.

The Court will now deal with each of these points. In some instances it may be convenient to deal with two or more of them together.

Points (i), (ii) and (vi) :
The applicant's starting point is the contention that notwithstanding his status as a convicted prisoner, he continues to enjoy, and has the protection of, all of his constitutional rights save (i) those which must necessarily be limited or suspended in order to give effect to the Court Orders sentencing him to prison, and the lawful committal warrants based upon those Court Orders, and (ii) those which are required to be restricted in order to maintain security and order within the prison. He relies upon the Supreme Court decision in *Murray v. Ireland* [1991] ILRM 465 and also on *Holland v. The Governor of Portlaoise Prison* [2004] 2 I.R.573 in support of this.

The correctness of this proposition is beyond all doubt at this stage. However, with a view to evaluating how it is to be applied in the circumstances of the present case I consider that it may be useful to rehearse in a little detail some of the more important judicial pronouncements concerning the principle at issue.

The Court notes that in *The State (Richardson) v. Governor of Mountjoy Prison* [1980] ILRM 82 Barrington J., having referred to *The State (McDonagh) v. Frawley* [1978] I.R. 131 (which concerned an application for an enquiry under article 40.4.20 by a convicted person) and the approval by the Supreme Court in that case of the dictum of Maguire P in *The State (Cannon) v. Kavanagh* [1937] I.R. 428 to the effect that it would require "most exceptional circumstances for this Court to grant even a conditional order of habeas corpus to a prisoner so convicted", said at p.91:

> "This, however, is very far from saying that a convicted prisoner has no rights. A convicted prisoner must accept prison discipline, and accommodate himself to the reasonable organisation of prison life as laid down in the Prison Rules. The court said that while he is serving his sentence 'many' of his normal constitutional rights are abrogated or suspended. The clear implication of this is that not all of his constitutional rights are abrogated or suspended. Examples of constitutional rights which are clearly not abrogated or suspended are the right to life or the right to the free profession and practice of religion subject to public order and morality.
>
> Mr Carney invited me to hold that a sentence of imprisonment implies only the deprivation of the prisoner's right to liberty, and leaves all his other constitutional rights intact. I cannot accept this. First, it appears to me that the right to personal liberty is such a fundamental right that its loss necessarily has implications for many other personal rights of the prisoner. But the matter must go further than this. A person detained under *s. 2 of the Emergency Powers Act, 1976* has also been deprived of his right to liberty, but the Supreme Court has clearly indicated that many of his other constitutional rights remain intact. A convicted prisoner, on the other hand, is undergoing a recognised form of punishment for his crime. One of the incidents of this form of punishment is that he must submit to, and is entitled to the protection of, the Prison Rules."

Later in the same judgment Barrington J. went on to say:

> "It appears to me that the purpose of the Prison Rules is to reconcile the need for security and good order in the prison with the prisoners' subsisting constitutional rights. Clearly, the prison authorities must be allowed a wide area of discretion in the administration of the prisons in the interests of security and good order. Clearly also the Rules, being made by an executive authority established under the Constitution, must be presumed to have respected the prisoners' subsisting constitutional rights. For the same reason they should be interpreted in a manner consistent with these rights. In the normal case it would be possible to ascertain the correlative rights and duties of the prison authorities and the prisoners respectively from the Rules themselves and it would not be necessary to look any further."

Having reviewed the authorities to that point in time Barrington J. summarised the applicable legal principles as follows:

> "Summary
>
> From this discussion of the authorities, I think it possible to extract the following principles:
>
> (1) Convicted prisoners, as human beings and citizens, have rights under the Constitution, including a right of access to the courts.
>
> (2) Many of these rights are abrogated, suspended or limited by reason of the prisoner's conviction and sentence.
>
> (3) A prisoner lawfully convicted and sentenced has lost his right to personal liberty for the period of his sentence. Therefore, habeas corpus is not an appropriate procedure in which to investigate his complaints.
>
> (4) Exceptionally, however, the conditions under which a prisoner is detained may be such as to make his detention unlawful, notwithstanding the existence of a valid warrant. In such case, habeas corpus will lie.
>
> (5) Lesser legitimate complaints of prisoners fall to be investigated in other forms of legal proceedings.
>
> (6) The prisoners' subsisting rights can often be ascertained from the Prison Rules themselves, read in the light of the Constitution."

In *the State (Boyle) v. The Governor of the Curragh Military Detention Barracks* [1980] ILRM 242 Barrington J. said at p. 254:

> "Many of the prosecutor's constitutional rights are affected by being a prisoner and by having to live subject to regulations made for the good order and security of the prison: see *The State (McDonagh) v. Frawley* [1978] I.R. 131 and *The State (Richardson) v. Governor of Mountjoy Prison* [1980] ILRM 82. But, apart from this, his constitutional rights are unaffected."

Further , in the case of *Holland v. The Governor of Portlaoise Prison* [2004] 2 I.R.573, cited by the applicant, McKechnie J. referred to the High Court's decision in *Murray v. Ireland* [1985] I.R. 532, and said (at p. 592/593):

> "In *Murray v. Ireland* [1985] I.R. 532, Costello J. when dealing with the constitutional position of a prisoner post his lawful conviction, at p. 542 of the report said:-
>
> > 'When the State lawfully exercises its power to deprive a citizen of his constitutional right to liberty many consequences result, including the deprivation of liberty to exercise many other constitutionally protected rights, which prisoners must accept. Those rights which may be exercised by a prisoner are those (a) which do not depend on the continuance of his personal liberty (so a prisoner cannot exercise his constitutional right to earn a livelihood) or (b) which are compatible with the reasonable requirements of the place in which he is imprisoned, or to put it another way, do not impose unreasonable demands on it.'
>
> *Wolff v. McDonnell* (1973) 418 U.S. 539 was cited as an American authority which accorded with the view just expressed. See also *Kearney v. Minister for Justice* [1986] I.R. 116 where at p. 118 of the report, this view was again affirmed by Costello J.
>
> *Kearney v. Minister for Justice* [1986] I.R. 116 is also, of course, of considerable importance in that the applicant challenged the constitutionality of r. 63 of the Prison Rules. In upholding the respondent's submitted justification for the existence of that rule, an important aspect of which was the governor's method of implementing it, Costello J. said that his approach to the case was similar to that adopted in two cited American authorities including *Procunier v. Martinez* (1973) 416 U.S. 296. A very short passage from *Procunier v. Martinez*, quoted at p. 120 of *Kearney v. Minister for Justice* reads:- "Second, the limitation of First Amendments freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved". Whether the ultimate decision in Kearney v. Minister for Justice could be said to have fully articulated this limitation is not a matter of concern to me in this judgment but what is, is the clear and definite enjoinder that any infringement or restriction on the exercise of a constitutional right of a prisoner must be no more than what is "necessary or essential" for the protection of the interest or objective which grounds the justification for such interference or restriction in the first place. In *Procunier v. Martinez* it was said to be security, order and rehabilitation.
>
> In the instant case it is said, by the deputy governor, to be the security and good order of the prison as well as concerns for victims and their families. I, therefore, believe that the views of Costello J. in both *Murray v. Ireland* [1985] I.R. 532 and *Kearney v. Minister for Justice* [1986] I.R. 116 were that any such limitation must not only be reasonable but also, by declaring that this approach was the same as the court's in *Procunier v. Martinez* (1973) 416 U.S. 296, must pass this test of necessity; otherwise such interference cannot be justified with the result that an infringement may be declared. With regard to the general position of a prisoner, I endeavour to summarise the position in *Gilligan v. Governor of Portlaoise Prison* (Unreported, High Court, McKechnie J., 12th April, 2001). At p. 16 of the judgment the following principles are outlined:-
>
> > '(a) A convicted person differs from a person untouched by the legal process.
> >
> > (b) A convicted person differs from a person arrested and detained, simplicter .
> >
> > (c) A convicted person:-
> >
> > (i) must accept discipline and accommodate himself to prison life;
> >
> > (ii) must accommodate himself to a reasonable organisation of that life;
> >
> > (iii) must understand that prison life is a recognised form of punishment and he, as such, is part of that;
> >
> > (iv) must understand that his loss of personal liberty, legally provided for, inevitably attaches to it, the abolition, albeit temporary, of some rights and the curtailment and restriction of others;
> >
> > (v) must recognise that such rights, diminished or otherwise, have their legitimacy interfered with by reason of and pursuant to the needs and exigencies of the institutional environment in which that person is detained.'
>
> I also said, as White J. had in *Wolff v. McDonnell* (1974) 418 U.S. 539, that there is no iron curtain between the Constitution and prisoners in this country and that convicted individuals continue to enjoy a number of constitutional rights, including the right of access to the courts. One can, of course, add that several other rights also continue to be enjoyed by such a person, including the right to life, to bodily integrity, the negative right not to be tortured or to suffer any inhuman or degrading treatment, the right, as Barrington J. said in *The State (Richardson) v. Governor of Mountjoy Prison* [1980] I.L.R.M. 82, to practice one's religion and the right to natural and constitutional justice. This enumeration is indicative only and is not in any way exhaustive."

The case of *Murray v. Ireland* [1985] I.R. 532 (H.Ct) & [1991] I.L.R.M. 465 (S.Ct) concerned a husband and wife who were both serving life sentences for capital murder. Asserting a constitutional right to procreate children within marriage, they sought from the prison authorities, and were refused, either temporary release to facilitate the exercise of their conjugal rights, or alternatively, the provision of facilities within the prison system to facilitate the exercise of their conjugal rights. They then brought High Court proceedings claiming declarations as to their entitlement. Costello J. held that the restriction on the plaintiffs' rights to beget children was a reasonable consequence of the State's power to imprison and was constitutionally permissible. He held that the State, as guardian of the common good, is empowered by

the Constitution to restrict rights in certain circumstances. The rights which may be exercised by a prisoner are those which do not depend on the continuation of his liberty and which are compatible with the reasonable requirements of the prison service or which do not impose unreasonable demands on it. The Supreme Court dismissed an appeal. In the course of his judgment Finlay C.J. (with whom Hamilton P., O'Flaherty J. and Keane J. concurred) said:

> "The length of time which a person sentenced to imprisonment for life spends in custody and as a necessary consequence the extent to which, if any, prior to final discharge, such a person obtains temporary release is a matter which under the constitutional doctrine of the separation of powers rests entirely with the executive: *Director of Public Prosecutions v. Tiernan* [1989] ILRM 149.
>
> So also does the regulation of the conditions under which convicted persons are detained subject to the statutory regulations for the administration of prisons.
>
> This latter category of conditions would, of course, include such matters as the right of association with other prisoners and the frequency and arrangements for association with visitors.
>
> 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.
>
> This is not a case where the plaintiffs can assert the deprivation of a constitutional right the restriction of which could be said to be without association with the fact of custody.
>
> The finding of the learned trial judge that the grant of temporary release, as a right, was clearly incompatible with the restriction on their liberty which is constitutionally permitted by their imprisonment is, in my view, a correct conclusion of law once it is understood (as I have no doubt it was intended to be understood) as meaning the grant of temporary release, not as an exercise by the executive of its discretion, but rather as the granting of a right defeasible only by very special circumstances.
>
> The finding that the provision of facilities within the prison to enable all prisoners of the same relevant category as the plaintiffs to exercise these conjugal rights would place unreasonable demands on the prison service is, in my view, well supported by the evidence and is a correct conclusion.
>
> These two findings would a *fortiori* exclude what I consider to be the vital consideration for intervention by the courts in this matter, namely, the exercise by the prison service of its authority in a capricious, arbitrary or unjust manner. I would, therefore, dismiss this appeal."

Returning to the present case, the applicant further contends that the respondents have no powers to deal with him beyond those given to them by statute.

Counsel for the applicant says that the applicant is being detained under conditions that effectively amount to isolation and that the decision to subject him to such a regime is unlawful.

The applicant places particular reliance on the statement of Barrington J in *The State (Richardson) v. Governor of Mountjoy Prison* [1980] ILRM 82 at 92 to the effect that "prisoners subsisting rights can often be ascertained from the Prison Rules themselves, read in the light of the Constitution". In this regard the applicant contends that he has a right to associate with other prisoners as an aspect of his constitutional right to be treated humanely and with human dignity. He points to Rule 27 as providing for the exercise of such a right at the discretion of the prison Governor, which discretion must not, of course, be exercised arbitrarily or capriciously. In support of this he further points to Rule 62 and says that this rule sets out the appropriate procedure by which a prisoner may be removed by the Governor from communal recreation and association with other prisoners. Under Rule 62 a prisoner may not be removed by the Governor from communal recreation and association with other prisoners 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 or participate in communal recreation or to associate with other prisoners would result in there being a significant threat to the maintenance of good order or safe or secure custody. Further, if a prisoner is to be removed by the Governor from communal recreation and association with other prisoners his removal may not be open ended and shall not continue for longer than is necessary to ensure the maintenance of good order or safe or secure custody. It was further submitted that this rule clearly requires that the prisoner in question should be made aware of the making of the decision, of the grounds upon which it is made and of the period for which the regime will remain in place, and also that the prisoner should be given an opportunity to express his views on the matter.

It was submitted that, although Mr Whelan stated in his first affidavit (sworn on the 19th of February, 2009) that the restricted association of the applicant was necessary "for the interest of prison and public safety and security", the first clear articulation of the precise reasons for it was contained in the first affidavit of Andrew Brennan (also sworn on the 19th of February, 2009). They say that in that affidavit Mr Brennan deposed clearly that the regime complained of was imposed because of an allegation that the applicant poses a grave risk to the life or lives of another person or persons outside of the prison, and in order to prevent him from communicating with or directing criminal colleagues outside of the prison by the use of contraband technology. They say that Mr Brennan fairly acknowledges that the imposition of an isolation regime for this preventative purpose is a new departure for the Irish Prison Service, although he seeks to justify it as being necessary "for the interests of prison and public safety and security" – a formula of words identical to that used by Mr Whelan.

The applicant's Counsel submit that insofar as the impugned decision was taken purportedly for the purpose of preventing

the commission of some future crime outside of the prison, it was a decision taken without any legal basis, authority or precedent for it. They say that while a Prison Governor enjoys a discretion, albeit one which must be exercised lawfully, to organise his prison according to the requirements of good order and discipline, he has no power, whether deriving from statute or otherwise, to take decisions which impose a regime of isolation upon a prisoner in order to prevent the possible commission of offences outside of the prison. His role is confined to the lawful execution of a warrant of committal and the orderly running of his prison. They further say that it is particularly relevant to note that Rule 35, dealing with visits, and Rules 45 and 46, dealing with letters and telephone calls, allow the restriction of those facilities in the interests of national security and to prevent the encouragement or facilitation of the commission of criminal offences. No such power is given to the Governor in respect of the isolation of prisoners, either in Rule 62 or elsewhere. Indeed the Governor is expressly prohibited from making a direction under Rule 62 unless he believes upon reasonable grounds that the direction is necessary *"to ensure the maintenance of good order or safe or secure custody"*. The applicant contends that knowing full well that the circumstances of the case would not allow them to rely on it the respondents completely disregarded Rule 62.

The Court's attention is drawn to what the applicant regards as a subsequent shifting of position by the respondents in their affidavit evidence. It emerged from the second affidavit of Edward Whelan (sworn on the 25th of February 2009) that Mr Whelan's decision to detain the applicant under the regime complained of was purportedly made because the applicant *"posed a significant threat to the maintenance of good order and safety in the prison"* as well as to protect the life of persons outside the prison population. It was submitted by Counsel for the applicant that this was the first time that it was suggested that the isolation regime was for a reason other than the protection of persons outside of the prison. They say that no reasons are offered to substantiate the suggestion made and submit that the formulaic recitation of these purported additional grounds is clearly at odds with the affidavit of Andrew Brennan sworn six days before. In essence, their contention is that the late articulation of these additional grounds is a clumsy attempt on behalf of the respondents to set up a basis ex post facto for possible reliance on a general discretion on the part of the prison Governor to restrict prisoner association in the interests of good order and safety within the prison as a justification for the decision complained of.

They further correctly point out that, in any case, at the hearing of oral arguments on the 27th of February, 2009, lead Counsel for the respondents, Mr Gageby S.C., in answer to a question posed by the Court, stated that the respondents were not confined by Rule 62 and that Rule 62 was not being relied upon as justification or authority for what was done. Rather, Counsel had stated that the respondents were happy to rely "on the truth of the generality of the constitutional duty to protect life".

In all these circumstances the applicant submits that the decision of the Governor to impose on the applicant the regime complained of on the grounds of external threat was not the exercise of any lawful power devolved to him by statute. In support of this the applicant relies on the comments of McKechnie J. in *Holland v. The Governor of Portlaoise Prison* [2004] 2 I.R.573 at 596 where he states:

> "As I understand the legal position, the power of the respondent in dealing with prisoners, including the applicant, within his prison, derives solely, at least for the purpose of this case, from the Prison Rules. It has never been suggested in the written documentation or through verbal submissions that the foundation for his authority lies elsewhere. I am, therefore, somewhat uncertain as to how, on his behalf, it can be validly asserted, as it has been, that he can make a decision on the applicant's request on the basis of what has been described as a long standing policy of the Irish Prison Service. I know of no authority, and none has been advanced, for the proposition that this body has any legal entitlement to establish a practice, or policy, which, on its own, could be used to determine the position of a prisoner."

As previously stated, the applicant contends that he has a right to associate with other prisoners as an aspect of his constitutional right to be treated humanely and with human dignity. As regards the issue of proportionality (point vi), the applicant says that while it is accepted that Governor enjoys a discretion to deny a prisoner free association within the prison for certain reasons, any step taken in that regard must be proportionate to the stated objective and restrict the right at issue to the minimum extent possible. The applicant's Counsel submit that the law in respect of the requirement of proportionality and more broadly in terms of prisoners rights is as stated in the *Holland* case, and they particularly rely upon the following passage from the judgment of McKechnie J., at para. 31 et seq, in addition to those already quoted:

> "In *Gilligan v. Governor of Portlaoise Prison* (Unreported, High Court, McKechnie J., 12th April, 2001), no issue arose about necessity or proportionality and, accordingly, there was no need to describe the essential requirements of a governor so as to maintain security and good order, otherwise than by way of general words and expression.
>
> Given that the right in issue in this case is constitutionally based, it can I think be taken that any permissible abolition, even for a limited period, or any interference, restriction or modification on that right should be strictly construed with the onus of proof being on he who asserts any such curtailment. In addition, the limitation should be no more than what is necessary or essential and must be proportionate to the lawful objective which it is designed to achieve. That a test of proportionality, where relevant, is now applied when considering constitutional rights is beyond doubt. In *Heaney v. Ireland* [1994] 3 I.R. 593 at p. 607 Costello J. described this principle as follows:-
>
> > 'In considering whether a restriction on the exercise of rights is permitted by the Constitution, the courts in this country and elsewhere have found it helpful to apply the test of proportionality, a test which contains the notions of minimal restraint on the exercise of protected rights, and of the exigencies of the common good in a democratic society. This is a test frequently adopted by the European Court of Human Rights (…) and has recently been formulated by the Supreme Court in Canada in the following terms. The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right. It must relate to concerns pressing and substantial in a free and democratic society. The means chosen must pass a proportionality test. They must:-
> >
> > (a) be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations;
> >
> > (b) impair the right as little as possible; and

(c) be such that their effects on rights are proportional to the objective.'"

In this context the applicant confronts what he believes to be the respondent's reliance upon a hierarchy of rights in purported defence of the right to life of a person or persons outside of the prison. The applicant says that it is clear, on the basis of the respondents submissions to Court, that the respondents seek to rely upon the hierarchical theory of constitutional rights as expounded in the case of *DPP v. Shaw* [1982] I.R. 1 and that where a conflict arises between competing constitutional rights the right which ranks higher, as determined by the Courts, must prevail. Counsel for the applicant says that this principle is uncontroversial in so far as it goes. However, the striking immediacy of the situation in *Shaw* is significantly at odds with the position in the present case. The situation was utterly stark and, assuming for the purposes of the argument that the unfortunate victim was still alive, no more was done than was absolutely necessary to save her life. Furthermore, on the basis of the facts outlined in the judgment, the choice facing the Gardaí was a polar one, as between detaining in the hope of saving the life of the victim and not doing so. The factual context in which the Supreme Court made its decision is underlined in the comments of Kenny J. as follows (at p.63 of the report):

> *"When passing judgment on the actions of the Garda Síochána, we must remember that they have to make many immediate decisions and cannot possibly get a court decision to guide them. Our function is to decide whether the choice they made in the priority of constitutional or legal rights was correct. I have no doubt that the decision made by Detective Superintendent Reynolds to regard Mary's right to life as ranking higher than the appellant's right to personal liberty for three days was the correct one." (the applicant's emphasis)"*

Shaw is followed by the Supreme Court in *DPP v. Delaney* [1997] 3 I.R. 453. In that case, the decision of the Gardaí to enter a dwelling place without the consent of its occupants in order to protect children inside from being harmed by a violent besieging crowd was deemed to be lawful, on the basis that the Gardaí were attempting to vindicate a superior constitutional right. In so holding O'Flaherty J. noted (at p. 460) that the *"Sergeant McGrath had to make a choice in an extremely fraught situation"* and went on to quote the passage from *Shaw* set out above. Addressing the lawfulness of the choice made by the Gardaí he then notes the following:

> *"He was entitled to make the choice that he did and such choice, far from being in breach of the Constitution, was in fulfilment of the obligation that devolves on all citizens to observe and implement the requirements of the Constitution because the safeguarding of life and limb must be more important than the inviolability of the dwelling of a citizen,* ***especially when it is under attack in any event****." (the applicant's emphasis)*

It was submitted that the final qualification in the comments of O'Flaherty J. makes it clear that the matter was decided in the context of a stark and violent situation which called for immediate action to save life. The applicant therefore contends that the Court's comments are not authority for the proposition that one right will inevitably cede to another, but rather that the *immediacy* of the threat in that case justified such a prioritisation.

The applicant says that the *Shaw* and *Delaney* cases do not and cannot provide authority for the establishment of a unique system of open-ended solitary preventative detention on the basis of the scantest of factual justification, being a regime of detention which purports to operate outside of the legislative and regulatory framework which governs the management of the prison system.

The applicant submits that it was unnecessary for the Court in either *Shaw* or *Delaney* to consider to what extent the encroachment upon the rights involved was constitutionally permissible. The facts in those cases spoke for themselves and the decision facing the Gardaí was simply to act or not to act. This does not mean that competing rights can generally be balanced without regard to the facts involved, and in particular in a case involving a threat to the right to life, to the proximity and reality of the perceived threat and the proportionality of the actions taken on foot of it. The applicant says that the case of *D. v. DPP* [1994] 2 I.R. 465 (although involving wholly different facts) illustrates the correct approach to be adopted. The correct approach is to first establish the appropriate hierarchy of rights and then consider those rights in the context of the particular facts. The applicant says that the Court should adopt that approach in the present case.

In his judgment in the *Shaw* case, Griffin J. makes the following observations about the hierarchy of constitutional rights:

> "The existence in a Constitution of certain guaranteed civil, as distinct from natural, fundamental human rights does not mean that a person is entitled to insist on a particular guaranteed right to the exclusion or disregard of another person's guaranteed right, or of the common good. Indeed, many of the guaranteed personal rights under our Constitution are expressly limited in their application. But even where there is no such express limitation, it is a fundamental canon of construction, as well as being a phenomenon of every legal order, that rights, whether constitutional or merely legal, are prone to come into conflict with one another to such an extent that in particular circumstances one of them must yield right of way to another. If possible, fundamental rights under a Constitution should be given a mutually harmonious application, but when that is not found possible, the hierarchy or priority of the conflicting rights must be examined, both as between themselves and in relation to the general welfare of society. This may involve the toning down or even the putting into temporary abeyance of a particular guaranteed right so that, in a fair and objective way, the more pertinent and important right in a given set of circumstances may be preferred and given application."

The applicant submits that even in the context of a conflict of constitutional rights the principle of proportionality remains relevant, and in support of this view relies both on the stated preference for approaching constitutional rights from the point of view of mutually harmonious application, and on the reference to the "*toning down*" of rights in the passage just quoted. Counsel for the applicant submits that the mere invocation of the right to life does not in the present case justify all and any action by the Governor and does not remove from the State the onus of demonstrating that the course of action embarked upon is required, and is no more than is required, to achieve the desired objective. It is for the respondents to bring themselves within *Shaw*, by demonstrating to the Court that the immediacy of the alleged threat posed was such as to render any lesser response inadequate and why this unique regime of detention ought to be permitted. It was submitted that on the state of the evidence as it currently stands, the respondents have failed to so do.

The Applicant submits that the decision to detain him in the manner complained of is not a proportionate one having

regard to the following matters:

- No information or no adequate information has been made available such as allows the Court to form any view whatever as to the reality and proximity or otherwise of the perceived threat;

- No indication has been given to the applicant as to the proposed length of his detention in isolation nor has any ultimate limit been placed on same;

- Insofar as reliance is placed on the applicant's criminal and disciplinary record, no justification is advanced as to why these matters place the applicant in a unique category of prisoner, separate and distinct from the remainder of the prison population;

- The applicant is detained in the most high security prison in the State wherein the prison authorities have access to the most sophisticated security technology for the interception of contraband and the maintenance of good order, safety and security. However the applicant, unique among the entire prison population, has been singled out for the imposition of an unprecedented regime of restricted association amounting to isolation and in those circumstances the burden upon the respondents is particularly onerous.

- There is no suggestion that other less extreme methods of dealing with the alleged threat have been utilised or even considered and no explanation as to why the very high security facilities available to the Prison Service in Portlaoise Prison are inadequate in this case;

- None of the protections which would otherwise be available to the applicant under the Prison Rules are available, in particular in respect of review and reporting to the Director General

- Moreover, no explanation has been offered as to why adequate protection cannot be provided to the person or persons outside of the prison who are perceived to be under threat from the applicant, given that the alleged threat is known about or has been anticipated.

It is submitted that the information available to the Court in order to assess the appropriateness and proportionality of this decision is inadequate having regard to the following:

- The absence of any information upon which the Court can come to a conclusion as to the proportionality or otherwise of this unique detention. In order to form such a view, the Court must be made aware in some detail of the proximity of the apprehended threat. Even if such information cannot be made available to the applicant or to his advisors, which is not conceded, it is submitted that there must be some information or material before the Court such as would allow it to assess the decision of the Respondent having regard to the requirements of proportionality.

- The fact that, whilst Governor Whelan avers on the 25th February, 2009, that he took the decision to detain the applicant in the manner complained of and for certain reasons, it appears not to be contested by the Respondents that he had subsequent to the 20th January, 2009, told Jenny McGeever, solicitor for the Applicant, that he did not know why the applicant was so detained. There remains therefore considerable doubt as to who actually took this decision and as to the basis for the decision.

- Insofar as reliance is placed on the convictions of the applicant it is submitted that same are of limited use in grounding the decision to detain the applicant in isolation as these have and had been known to the State since his being first incarcerated in Mountjoy Prison. Nor is any information provided such as might establish a nexus between these convictions and the harm apprehended.

- No detail has been provided as to the source of the confidential information relied upon, such as might allow the Court to form a view as to its reliability. This can be done without compromising either the Gardaí or the source and a parallel can be drawn with procedures adopted in the District Court for the issue of a warrant. There a Garda can give evidence of his own view of the source's reliability and the previous dealings with this source upon which that view is based and based on that a Court can form a view as to whether the decision sought is required or not.

- No detail has been provided as to the timing of the receipt of this information such as might allow the Court to form a view as to how seriously the information was taken by the State upon its receipt.

In the circumstances, it is submitted that the respondents have not established that the preventative regime of detention imposed on the applicant is proportionate and lawful.

Point (iii)
The applicant submits that it is well established that the rules of natural and constitutional justice apply to prison disciplinary hearings where some wrong doing is alleged against an inmate - *State (Gallagher)v. Governor Portlaoise Prison* (Unreported, High Court, 18th of May, 1977). It can scarcely be the case therefore that where a reasoned decision is being made, which has as its result the imposition of significant additional limitations on the rights of an inmate who is not being punished for anything, that such an inmate enjoys lesser protection from unlawful or capricious treatment than his fellow prisoner who is being punished for some wrongdoing. It was submitted that such a view would be irrational and at odds with the Prison Rules.

Moreover, the applicant submits that Rule 62 is instructive as to the precise reach of the applicant's right to fair procedures in the situation that he is in, and that it is clear that the requirements of Rule 62 were not observed at all in the making of the decision to detain the applicant in circumstances amounting to isolation. He further contends that such reasons as have thus far been elicited from the respondents for the decision to detain him in the circumstances complained of, and which he still maintains are vague and unsatisfactory, would not have been forthcoming without the institution of these proceedings nor, he contends, would any indication have been given to him that his detention regime would be kept under review.

Point (iv)
The applicant submits that in deciding to restrict the association of the applicant the Governor was only entitled to have regard to the considerations mentioned in Rule 62, namely whether or not information had been supplied to the Governor, or the prisoner's behaviour had been such as to cause the Governor to believe, upon reasonable grounds, that to permit the prisoner to so associate would result in there being a significant threat to the maintenance of good order or safe or secure custody. He contends that in deciding to restrict his association and to effectively detain him in isolation the Governor had regard to an irrelevant consideration, namely a perceived imperative to prevent crimes from being committed at some time in the future, not just inside the prison but outside of the prison as well.

The applicant relies on the following passage from *Judicial Review of Administrative Action* by Hilary Delany (2nd edition, 2008, Round Hall), approved by Charlton J. in an ex-tempore judgment of this Court in the case of *Johnston v. McDonnell & DPP* (2006 No. 622 J.R.) delivered on the 23rd May, 2008:

> "An examination of the relevant case law on this question shows a tendency to adopt a stricter approach in certain types of situation, e.g. where an individual's personal liberty is at issue, so in *Dwarka Das v. Jammu & Kashmir*[ ] the Indian Supreme Court concluded that if irrelevant grounds 'might reasonably have effected' the decision making process, the order made should be declared invalid. However, it would seem that where the right at stake is not of such pressing importance, less strict standards may apply."

The applicant submits that it is clear from the affidavits sworn on behalf of the respondents in this case that a very significant consideration in the decision was the prevention of future crime. That being so, it was submitted that even partial reliance on relevant considerations (though it is not accepted as a matter of fact that any relevant considerations were in fact relied upon) cannot save the impugned decision.

Point (v)
Under this heading, the applicant complains again about the absence of detail in relation to the nature, proximity and supposed subject of the alleged threat and reiterates that, absent such information, the Court will not be able to come to a conclusion as to the proportionality or otherwise of the unique detention regime to which he is being subjected. He also reiterates that no detail has been provided as to the source of the confidential information relied upon, such as might allow the Court to form a view as to its reliability.

The Respondents' Case

Points (i), (ii) & (vi)
The Respondents say that the decision taken to detain the applicant under the present regime of detention is lawful, is consistent with the Prison Rules and is consistent with and respectful of the applicant's constitutional rights.

First, they contend that the evidence does not support the alleged facts upon which the applicant's case is based. They say that the while it is acknowledged that the applicant's ability to associate with other prisoners within the prison is restricted he is not being kept in isolation. In this regard they place significant reliance on the affidavits of Mr Whelan sworn on the 27th of February, 2009, and on the 1st of May 2009. They say that it is clear from these affidavits that:

- The applicant has the society of another prisoner during unlocked times.
    - The applicant and the other prisoner in question are now accommodated in the E5 unit of the A Block which has available to it an exercise yard of approximately 255 sq metres.
    - Both prisoners associate freely with one another at unlocked times. They regularly watch television together in each other's cells where they have access to seven channels on the television.
    - The applicant is unlocked for a substantial portion of the day. He is unlocked from his cell for breakfast at 8.15 am daily. He is then locked in his cell between 8.30am and 9.20 am. For the remainder of the day he is unlocked between 9.20 am and 12.15 pm, again between 2.15 pm and 4.00 pm and finally between 5.15 pm and 7.30 pm.
    - During his unlocked time, the Applicant has access to outdoor and indoor exercise with fitness instruction.
- He has access to educational and library facilities.
    - He is visited regularly by the chaplin, by medical staff, by the Governor himself and by the Chief Officer.

Moreover, the applicant is facilitated with up to two visits each week from approved family members.
The respondents contend that this regime is humane and although his ability to associate with the general prison population is restricted his rights are nevertheless fully respected. In particular he is not subjected to any kind of sensory deprivation. On the contrary he has society with a variety of persons, albeit from a limited class of approved persons, and this together with the fact that he is accommodated in good physical facilities with in-cell sanitation, proper diet, and access to exercise, television, education, library books, medical and chaplaincy services ensures that his dignity as a human person is respected.

The respondents further contend that the Governor has a broad area of discretion as to the government of his prison. This is reflected in Rule 75(3) of the Prison Rules 2007 which states:

> "The Governor shall develop and maintain a regime which endeavours to ensure the maintenance and good order, and safe and secure custody and personal well-being of the prisoners."

They say that by virtue of this statutory imperative, and the general scheme of the Prison Acts and Rules, the Governor must be afforded a wide margin of appreciation in any analysis of his actions. It is contended that nothing that has been done by the prison authorities has been done out of vindictiveness, or out of a desire to discriminate against the applicant

for the sake of it. Rather, the applicant is being kept separate from the general prison population for good and substantial reasons, namely in order to maintain proper discipline within the prison and also to safeguard the right to life of persons both inside and outside the prison.

The respondents say that the applicant is equating his enjoyment of the facility of associating with other prisoners at Mountjoy Prison, before he was transferred to Portlaoise Prison, with the exercise of a constitutional right. They say that the applicant has no constitutional right to associate with other prisoners or with anyone else for so long as he is in prison. The one thing he is deprived of without doubt is his personal liberty, and as an aspect of that the right to select those with whom he may associate or as to how and where he may be accommodated. Accordingly he may have no control over who he shares a cell with or doesn't share a cell with, over what landing he is on, over whether he has a south facing window or a north facing window, or indeed as to what prison he is in. The respondents say emphatically that a prisoner has no stand alone constitutional or legal right to associate with the general prison population. They acknowledge that under the Prison Rules there is a presumption in favour of a prisoner being allowed to have a degree of association but say that this is subject to the good order of the prison. They say that the Governor's discretion is very wide in regard to that and that he must be afforded a wide margin of appreciation in the exercise of it.

In response to the applicant's reliance on *Holland v. The Governor of Portlaoise Prison* [2004] 2 I.R.573 the respondents say that the circumstances in the present case are readily distinguishable from those that obtained in *Holland*. In *Holland* there was a constitutional right at stake, namely the right to communicate. It was uncontroverted that the prisoner did have a constitutional right to communicate, this being one of the unspecified personal rights protected by Article 40.3 and whose existence was expressly acknowledged by Barrington J. in *Murphy v. Independent Radio and Television Commission* [1999] 1 I.R. 12. Mr Holland relied on a general prison policy not to grant access visits to prisoners by members of the media. This blanket ban was not based on a determination of any individual situation. Accordingly no test of proportionality had been applied to the restriction of Mr Holland's constitutional right and Mr Holland succeeded on this ground. However, the Court accepted that the right could be restricted if such restriction was proportionate to the objective sought to be achieved. McKechnie J. adopted the proportionality test propounded by Costello J in *Heaney v. Ireland* [1994] 3 I.R. 593 at p. 607, and previously quoted. In the present case the respondents reject any suggestion that the decision taken in this case impinges on a constitutional right of the applicant. However, they argue in the alternative that if it does do so, the decision taken in this case impinges satisfies Costello J.'s proportionality test.

In their supplemental written submissions the respondents say that although Mr Gageby S.C. did refer in oral legal argument to *The Director of Public Prosecutions v. Shaw* [1982] I.R. 1, he qualified his remarks by asserting that it was respondents' case that the Court is not concerned with a breach of any of the applicant's constitutional right. They are borne out as being correct in this assertion, in the Court's memory and also in the transcript (27th February, page 80, at line 19).

Shaw was not cited in support of any suggestion that the action taken in the present case could be justified on the basis of the need to breach some subordinate constitutional right of the applicant in favour of a superior right, namely the right to life of a person outside of the prison. Rather, *Shaw* was cited in support of the respondents proposition that the State, and its agencies (including the Governor of Portlaoise Prison and the Irish Prison Service) have a duty under the Constitution to protect the right to life of persons within the State if it is within their ability to do so by the taking of some appropriate action. The respondents submitted that no question of proportionality could arise between the life of one person and the mere comfort of a prisoner. They say that that is the situation here. In summary their case is that the decision to restrict the applicant's association with other prisoners was justified having regard to their duty to protect life, and as the action taken does not impinge on any constitutional right of the applicant no question of proportionality arises for consideration.

Point (iii)
The respondents contend that the principles of natural justice do not apply to the decision taken in this case nor to any decision relating to the conditions of a prisoner's detention made in the interests of the good governance of the prison. They accept that in taking such decisions the authorities must act reasonably but rely on the decision of Clarke J. in *Fennessy v. Chief Superintendent of Kells Garda Station and others* (Unreported, High Court, Clarke J., 16th of November, 2006) and the decision of Charleton J. in *Fennessy v. The Governor of Wheatfield Prison* (Unreported, High Court, Charleton J.,16th April, 2007,) in support of the proposition that such decisions can only be challenged on limited grounds. They rely in particular on the following passage from the judgment of Clarke J.:

> "However, no evidence has been put before the court which would allow me to reach a conclusion that there are arguable grounds for the contention that the governor could not reasonably have concluded that there was a threat.
>
> The question of whether there is a threat in respect of which measures need to be adopted for the safety of a prisoner is a matter to be decided by the Governor. The Governor is clearly entitled to have regard to any suggestion of a threat emanating from whatever source (including senior members of An Garda Síochána). In any case where a prisoner, as Mr Fennessy does, contends that there is no threat, then it is a matter for the Governor to reach a conclusion on the basis of all the information available to him as to whether the threat, in fact, exists or indeed, whether there is a reasonable risk that the threat exists such as would justify appropriate measures for the protection of the prisoner concerned. There is nothing before me that would allow me to conclude that the Governor has come to an unreasonable decision in relation to the existence of a threat in this case."

Point (iv)
The respondents reiterate that as agents of the State they are subject to an overriding duty to preserve life if it is within their ability to do so by the taking of some appropriate action. They say that there is clear evidence that the life of a person or persons outside of the prison is under threat and that this was clearly a relevant consideration for them.

Point (v)
The respondents contend that the applicant is now in possession of sufficient information from the correspondence and from the affidavits that have been filed in the case that he can be in no doubt as to the basis for or reasons underlying the taking of the decision that he seeks to impugn. Moreover, he has not sought to cross-examine any of the respondents' deponents.

Decision
The management and governance of the nation's prisons is a matter for the executive. It is provided for in the Prisons Acts 1826 to 2007, and in particular the Prisons Act 2007, and the rules made by the third named respondent under s. 35 of that Act, namely the Prison Rules 2007. Under this scheme of legislation, and in particular Rule 75 of the Prison Rules day to day governance of a prison is entrusted to the Governor of the prison who is responsible for its management subject to the directions of the third named respondent, and of the second named respondent through its Director General. The Governor of each prison has a broad discretion which is reflected in Rule 75(3) of the Prison Rules 2007, which states:

> "The Governor shall develop and maintain a regime which endeavours to ensure the maintenance and good order, and safe and secure custody and personal well-being of the prisoners."

However, 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."

The applicant in the present case claims that the decision to subject him to his present regime of detention, which restricts his ability to associate with other prisoners, is unlawful on several grounds. These have already been fully rehearsed. This Court is completely satisfied that the applicant does not enjoy a specific constitutional right to associate either with the general prison population or with particular prisoners within the prison. That said there is no question but that we have moved on from the days of routine solitary confinement and the types of regimes described so vividly by the leading penologist Michael Ignatieff in his book entitled "*A Just Measure of Pain – The Penitentiary in the Industrial Revolution 1750 - 1850*". Because man is a social animal the Court recognises that the humane treatment, and respect for the human dignity, of a prisoner requires that he or she should not be totally or substantially deprived of the society of fellow humans for anything other than relatively brief and clearly defined periods. To that extent a prisoner such as the applicant may be entitled to a degree of freedom of association as an aspect of his constitutional right to humane treatment and human dignity. The Prison Rules expressly recognise this. The combined effect of Rules 27 and 62 is to reflect what Counsel for the respondents fairly described as a "presumption" in favour of a prisoner being allowed to have a degree of association subject to the good order of the prison.

Moreover, even in the absence of specific expert evidence on the question, it is easy to appreciate as a matter of common sense that total or substantial isolation from the society of one's fellow man, may over time amount to a form of sensory deprivation and be inhumane and abusive of the prisoner's psychological welfare and constitute a breach of his right to bodily integrity. Again recognition of this is reflected in the Prisons Act 2007, and the Prison Rules. Although the disciplinary provisions of the code allow (*inter alia*) for solitary confinement as a penalty for breach of discipline such a penalty can only be applied "for a period not exceeding 3 days". Moreover, among the penalties expressly outlawed are penalties consisting of any form of sensory deprivation, penalties of indeterminate duration and penalties which amount to cruel, inhumane or degrading treatment.

Having said all of that, in most instances restrictions placed on a prisoner's ability to associate will have no implications for the humaneness of his/her treatment, or for his/her human dignity or for his/her right to bodily integrity. As has been pointed out by Counsel a prisoner cannot reasonably have an expectation of confinement in any particular prison, in any particular wing of a prison, on any particular landing within a prison, or within any particular cell. Once a prisoner has been received at whatever prison his/her committal warrant specifies the first and second named respondents must have, and do in fact have, the widest possible discretion as to the prisoners placement from time to time within the prison system and issues ancillary thereto, including the question as to with whom he or she may have society.

In the present case the applicant contends that he is subject to such far reaching restrictions on his ability to associate with other prisoners as to be effectively in isolation. He contends that by virtue of his being so isolated his detention is inhumane and contrary to his human dignity. While not disputing that the Governor has a discretion to restrict his ability to associate in the interests of the maintenance of good order, or safe or secure custody, the applicant contends that he could only exercise that discretion within the parameters of Rule 62, and that, because a constitutional right is being breached, the Governor was obliged to apply the principle of proportionality. The applicant says that Rule 62 was ignored and that the Governor failed to apply the principle of proportionality.

The Court is against the applicant in his contention that his regime of detention amounts to isolation and that by virtue of the restrictions that have been imposed on his ability to associate that his detention is inhumane and contrary to his human dignity. The evidence does not bear out his contention that he is in isolation. Moreover, though there are significant restrictions on his ability to associate with other prisoners, he can associate and is associating with the other prisoner in his unit. Moreover, he regularly sees his teacher, his fitness instructor, his chaplain, the Governor, the Chief Officer, the medical officer and has visits from approved family members. He is not being deprived of human society, he has significant out of cell time, he has entertainment, exercise, facilities for self improvement and his physical conditions of detention are very good. The Court is completely satisfied that there is no evidence to justify his contention that his regime of detention is inhumane and contrary to his human dignity.

As regards Rule 62 it undoubtedly could, and perhaps should, have been invoked by the first named respondent for the purpose of restricting the applicant's association. It is not clear why it was not invoked. The evidence establishes that the respondents were in possession of information suggesting that the applicant was likely, if afforded the opportunity, to conspire with others both within and without the prison to assault or to kill a person or persons outside of the prison, alternatively to direct a third party outside of the prison to commit that crime or those crimes. Such a conspiracy, if it were allowed, or the giving of such a direction, would undoubtedly have adverse implications for the maintenance of good order within the prison. It would be inimical to the operation of any prison that its inmates should be facilitated in the running of an outside criminal empire from within the prison. Nor can serious breaches of the criminal law, whether of the substantive or inchoate variety, occurring within, or emanating from within, a prison be tolerated. The Court is satisfied that Rule 62 could have been invoked. The situation would seem to be covered by the clear wording of Rule 62(2) which refers to the "maintenance of good order". However, even if could be argued that the wording of Rule 62(2) would not on a literal reading thereof cover the prevention of criminal action outside of the prison, I am satisfied that a purposive

interpretation of the Rule would be appropriate and that the Rule interpreted in that way would cover the prevention of criminal action outside of the prison at the behest or direction of, or in conspiracy with, a person within the prison.

Counsel for the respondents has argued that the Governor was not confined by Rule 62 and that he and the other respondents, as agents of the State, were entitled to rely on the generality of the constitutional duty to protect life. The Court accepts the proposition that the State, and its agencies (including the Governor of Portlaoise Prison and the Irish Prison Service), have a duty under the Constitution to protect the right to life of persons within the State whose life is threatened if it is within their ability to do so by the taking of some appropriate action. However, faced with that situation they should not resort in the first instance to extraordinary measures if they can achieve the desired result by means of ordinary measures. In this case it would have been perfectly possible to achieve the desired objective by restricting the applicant's entitlement to associate using Rule 62. The respondents are obliged to comply with the Prison Rules save in exceptional circumstances of overwhelming urgency justifying direct reliance on the State's constitutional duty to preserve life. There is no evidence before the Court as to why Rule 62 could not have been invoked. On the face of it neither urgency, nor the need to protect the confidentiality of a source, nor any issue of State security, could justify the non adherence to the Rules as all of those issues could have readily been accommodated. In the circumstances I am satisfied that the first named respondent's decision to restrict the applicant's association other than in accordance with Rule 62 was unlawful and I will grant a declaration to that effect. However, in the exercise of my discretion I will not grant certiorari to quash that decision. Although in most circumstances an applicant for judicial review who has established that a decision which he has sought to impugn was unlawful will be entitled ex debito justitiae to an order of certiorari, it would be wholly inappropriate to grant that relief to this particular applicant in the circumstances of this case. The State, and it's agencies, have a duty to protect life. This Court, although part of the judicial arm of government, is nonetheless an agency of the State and is equally bound by that duty. In circumstances where the evidence suggests that the perceived threat to life persists, and where the right of the applicant that is being breached is a statutory right only, and not a constitutional or human right, it would be inappropriate for the Court to immediately quash the impugned decision. However, the first named respondent must immediately take steps to remedy the illegality that exists.

That disposes of the essential issue. As I have found the impugned decision to be unlawful for failure to comply with Rule 62 it is not necessary in the circumstances to consider the further arguments based on alleged irrelevant considerations, alleged breach of fair procedures or of natural and constitutional justice.

As regards the subsidiary issue of the alleged failure to give reasons I am satisfied that at this stage the applicant knows full well the reasons for the decision to subject him to the regime in question and I do not consider it necessary to make any order in relation to that.

I will hear arguments on costs.