Neutral Citation Number: [2011] IEHC 235

THE HIGH COURT

IN THE MATTER OF ARTICLE 40.4.2 OF THE CONSTITUTION

2011 1125 SS

BETWEEN

WAYNE KINSELLA

APPLICANT

AND

GOVERNOR OF MOUNTJOY PRISON

RESPONDENT

JUDGMENT of Mr. Justice Hogan delivered on 12th June, 2011

1. The applicant, Wayne Kinsella, is currently a prisoner in Mountjoy Prison. Mr. Kinsella is presently serving a five month sentence for theft, but he is also currently on remand awaiting trial for murder. That trial date is currently scheduled to take place in the Central Criminal Court in May, 2012. In these proceedings Mr. Kinsella applies for his release under Article 40.4.2 of the Constitution on the basis that his constitutional rights have been infringed by reason of the prison conditions which he has been required to endure and that his detention is said thereby to have become unlawful.

2. Mr. Kinsella's conviction for theft took effect on 1st June, 2011, following his decision on that day to withdraw an appeal in the Circuit Court against a District Court conviction. Prior to that point he had been a remand prisoner at Cloverhill Prison, where he had shared a cell with three other prisoners. The conditions at Cloverhill Prison (which is principally a remand prison) would appear to have been humane and civilised. The prisoners had their own clothes, access to recreation facilities and a library. They could listen to radio and a television was supplied by the prison authorities. There were two bunk beds in a cell, together with lockers and wardrobes.

3. This all changed following the conviction of the applicant, whereupon his status changed from being that of a remand prisoner to that of a sentenced prisoner. Following conviction on 1st June, 2011, Mr. Kinsella was then conveyed to Mountjoy Prison. Although the fundamental complaint here relates to the particular conditions which he has experienced since his detention in Mountjoy Prison, I must here digress slightly to record the critical dilemma currently confronting the prison authorities having regard to the fact that Mr. Kinsella is a protected prisoner. It is common case

that his life would be in danger were he to be allowed to mix freely with the majority of other prisoners. This stark fact imposes real constraints on the authorities, as they must at all times take effective security precautions to protect Mr. Kinsella on the occasions when he is permitted to leave his cell.

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

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

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

Whether the present conditions meet constitutionally acceptable minimum standards?

7. Article 40.3.2 of the Constitution requires the State by its laws to:-

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

8. So far as the present application is concerned, it is the State's duty to protect and vindicate the person of Mr. Kinsella which is principally engaged here, although I do not overlook the fact that the applicant's present conditions of confinement also arise, in part, at least, from the State's duty to protect his right to life and, perhaps, the life of other persons as well. Yet it is undeniable that detention in a padded cell of this kind involves a form of sensory deprivation in that the prisoner is denied the opportunity of any meaningful interaction with his human faculties of sight, sound

and speech - an interaction that is vital if the integrity of the human personality is to be maintained. I use the term "a form of sensory deprivation" advisedly, because it is only fair to say that confinement in such conditions as Mr. Kinsella has had to experience is nonetheless very far removed from the "five techniques" of sensory deprivation - such as intentionally subjecting the prisoner to constant "white" noise, sleep deprivation and the hooding of prisoners - condemned by the European Court of Human Rights in *Ireland v. United Kingdom* (1978) 2 EHRR 25 as inhuman and degrading treatment and, hence, a breach of Article 3 ECHR.

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

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

Whether the applicant is entitled to be released by reason of this breach of his constitutional rights?

11. It seems clear that the principal - and, perhaps, indeed, the exclusive - function of the High Court on an Article 40.4.2 application is to determine whether the applicant is detained in lawful custody, although the court may also may enjoy some residual jurisdiction for the purposes of making its orders effective: see, *e.g.,* the comments of Murray C.J. in *N. v. Health Service Executive* [2006] 4 IR 470, [2006] IESC 60 and those of Clarke J. in *H. v. Russell* [2007] IEHC 7. In this context, therefore, the question is whether the breach of the applicant's constitutional right which has occurred here - while undoubtedly serious in itself - is such as would

entitle him to immediate and unconditional release in the course of an Article 40.4.2 application.

12. The starting point here is, of course, the well known jurisprudence commencing with the Supreme Court's decision in *The State (McDonagh) v. Frawley* [1978] I.R. 131 where O'Higgins C.J. observed ([1978] I.R. 131, 137):-

> "The confinement of orders of release under Article 40.4 to cases where the detention is not 'in accordance with law' in the sense that I have indicated means that application under Article 40.4 are not suitable for the judicial investigation of complaints as to conviction, sentence or conditions of detention which fall short of that requirement. These fall to be investigated, where necessary, under other forms of proceedings."

13. A further factor is that the intentional violation of the prisoner's right which Budd J. considered in *Brennan v. Governor of Mountjoy Prison*[1999] 1 ILRM 190, 205 might be a ground for ordering the release of a convicted prisoner in an Article 40.4.2 application is not present here. In *H v. Russell*, a case concerning the adequacy of treatment to be provided to a patient detained under the Mental Health Act 2001, the general approach of the courts to the raising of such matters in an Article 40.4.2 application was summed up thus by Clarke J.:-

> "However by a parity of reasoning with the jurisprudence of the courts in respect of persons who are detained within the criminal justice process, it does not seem to me that anything other than a complete failure to provide appropriate conditions or appropriate treatment could render what would otherwise be a lawful detention, unlawful. See, for example, *The State (Richardson) v. Governor of Mountjoy Prison* [1980] I.L.R.M. 82. That is not to say that a person may not have a remedy in circumstances falling short of such complete failure. If there is a legal basis for suggesting that the conditions in which a person is detained or the treatment being afforded to a person so detained are less than the law requires, then an appropriate form of proceeding (whether plenary or judicial review) may be used as a means for enforcing whatever legal entitlements may be established. In many cases (and it would appear on the evidence that this case is one of them) the issues may well centre around the availability of resources for more appropriate treatment. Such cases are undoubtedly complex and require the court to consider the legal entitlements of persons in the context of there being argued to be a lack of resources available to provide more appropriate treatment. It does not seem to me that such cases are properly determined in the context of an application under Article 40.4 of the Constitution, which is concerned with the narrow question of the validity or otherwise of the detention of the person concerned. In my view counsel for Cavan General was correct when he argued that cases involving resources issues are not ones which can properly be dealt within the narrow parameters of an Article 40.4 inquiry.

> In those circumstances I was not satisfied that the undoubted questions which arise as to the appropriateness or otherwise of the treatment of Mr. H. are ones which, even from the high watermark of his case, could conceivably result in a conclusion that his detention was, on that ground alone, unlawful. Therefore, if I had not been satisfied that there were grounds for deeming Mr. H.'s detention unlawful by reason of the process, I would not have been satisfied that his detention was unlawful by reason of the treatment (or the lack of it) which he has received. If (and I express no concluded view on the issue) there is any merit to his contention that his treatment falls short of that which the law entitles him to, then his entitlements should be determined in appropriate proceedings designed to obtain appropriate declarations or orders concerning the nature of the treatment to which he is entitled rather than in proceedings which question the validity of his detention."

14. In the present case I cannot *presently* say that the applicant's continued detention has been rendered entirely unlawful by this breach of his constitutional right or that the authorities have completely failed in their duties and obligations towards him in the manner indicated by Clarke J. in *H.* I have reached this conclusion regarding the lawfulness of his detention in light of what I consider is the real and genuine concern for Mr. Kinsella's safety on the part of the prison authorities and having regard to the substantial difficulties which they have hitherto encountered in finding suitable accommodation for him, whether in Mountjoy Prison or elsewhere within the prison system. Furthermore, as illustrated by decisions such as *The State (Richardson) v. Governor of Mountjoy Prison* [1980] I.L.R.M. 82, absent something akin to an intentional violation or manifest negligence on the part of the authorities (which is not the case here), it would be only proper to give them a fair opportunity to remedy the situation in the light of this decision.

15. The proposed solution - *i.e.,* upholding the claim of a violation of a constitutional right, but giving the authorities an opportunity to remedy this breach - is also perhaps the one which is the most apt having regard to the principles of the separation of powers, given that onerous duty of actually running the prisons rests with the executive branch. In his closing submission, Mr. McDermott urged me to take this step were I to hold that the applicant's constitutional rights had been breached. The present case may yet prove to be an example of a constructive engagement of this kind between the executive and judicial branches which achieves a just solution in line with appropriate separation of powers concerns without the immediate necessity for a coercive or even a declaratory court order. At the same time, if the guarantee of Article 40.3.2 is to be rendered meaningful in the present case, then this further opportunity can really only be measured in terms of days having regard to the known facts concerning the applicant's present conditions of confinement.

Conclusions

16. To sum up, therefore, I have concluded that:-

> A. The detention of the applicant in the padded cell in the manner that I have described for a continuous eleven day

period objectively amounts to a breach of the State's obligation under Article 40.3.2 of the Constitution to protect the person of Mr. Kinsella.

B. It cannot *presently* be said that this breach is so serious that it immediately vitiates the lawfulness of his detention. It is clear from the Supreme Court's decision in *McDonagh* that, so far as sentenced prisoners are concerned, the Article 40.4.2 jurisdiction can only be used in quite exceptional cases. Having regard to the fact that the prison authorities are acting from the best of motives in a complex and difficult situation, it would be only fair and proper to give them one further opportunity to remedy the situation. It cannot yet be said that the present case comes within the exceptional category of cases envisaged by O'Higgins C.J. in *McDonagh* and by Clarke J. in *H. v. Russell.*

C. It follows, therefore, that this application for release must technically fail. But if the applicant's circumstances of detention were to continue as heretofore, then, of course, with each passing day, the present case would inch ever closer to the point whereby this Court could stay its hand no longer. In this regard, it should be noted that were these conditions to continue for much longer, the applicant would be justifiably entitled to make a fresh application for release under Article 40.4.2 or to take such further legal steps as he might be advised.

Postscript

17. This judgment was originally delivered at approximately 7pm on 12th June, 2011, the application itself having been made on 11th June. Subsequent to the delivery of this judgment, I was informed that a prison place had become available in Cloverhill Prison and that it was intended to transfer Mr. Kinsella on the following morning, 13th June. I was then informed on the following day, 13th June, that the transfer had taken place.