

THE HIGH COURT

Record No. 2014/ 636 JR

Between;

DANIEL MC DONNELL

Applicant

AND

THE GOVERNOR OF WHEATFIELD PRISON

Respondent

AND

IRISH HUMAN RIGHTS AND EQUALITY COMMISSION

Amicus Curiae

**LEGAL SUBMISSIONS of BEHALF OF THE IRISH HUMAN RIGHTS AND
EQUALITY COMMISSION**

Introduction

1. The Irish Human Rights and Equality Commission (hereinafter referred to as the “Commission”) notes that there are some matters of factual dispute between the parties in this case and has undertaken that it will not entrench upon such matters. In these submissions, the Commission will endeavour to set out the legal principles applicable generally to situations where prisoners are segregated for their own safety and will focus, in particular, on the need for rigorous and proportionate procedures before prisoners are segregated and the need for ongoing reviews and transparency when segregation measures are implemented for extended periods of time.

Segregation that Results in Isolation and Restricts Daily Activities.

2. There can be little doubt that measures that severely limit a prisoner’s right to associate with other prisoners and that restrict daily activities such as education or exercise can, at a certain stage, reach the level of severity so as to breach the right to bodily integrity under Article 40.3 of the Constitution and can constitute torture or inhuman and degrading treatment under Article 3 of the European Convention on Human Rights (‘the ECHR’). In *Connolly v Governor of Wheatfield Prison* [2013] IEHC 334, Hogan J. assessed the situation of a prisoner who was effectively on a 23 hour lock-up due to the concerns the prisoner himself had regarding his own safety. He was confined to his cell for 23 hours a day, while the single hour out of his cell was spent cleaning his cell, or with access to the yard with other prisoners. He had access to a television and reading material but was not able to participate in any training or recreational activities.
3. Hogan J. did not order the release of the prisoner under Article 40 of the Constitution and he acknowledged the difficulties involved in prison management when issues arise regarding the protection of prisoners. However, he stressed that extended periods of enforced isolation or segregation could breach the right to bodily integrity. In the case of Mr Connolly, the measures had been in place for 3 months and Hogan J. warned that if the conditions were to continue indefinitely, “*for an extended period of months*” with no sign of variation, then a point might well come where the right to bodily

integrity had been compromised. Hogan J. stressed that there is a high onus on the State to uphold the constitutional rights of vulnerable and marginalised prisoners;

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

22. ... the locking up of prisoners under such circumstances for very long periods of time – which I would rather measure in terms of an extended period of months – must be regarded as an exceptional measure, which might, in some instances, at least, compromise the substance of the detainee’s right to the protection of the person and the safeguarding of his human dignity. Certainly, the indefinite detention of a prisoner under such circumstances for periods of years would undoubtedly violate the guarantee to protect the person in Article 40.3.2, since it would be hard to see how the integrity of the detainee’s personality – the very essence of the guarantee of the protection of the person and preservation of the human dignity of the prisoner – could be preserved under such circumstances....

4. In *Piechowicz v Poland*¹ the European Court of Human Rights, in finding a breach of Article 3 of the Convention, recognised that “*all forms of solitary confinement without appropriate mental and physical stimulation are likely in the long term, to have damaging effects, resulting in the deterioration of mental faculties and social abilities.*” The Court went on to conclude that it had “*no doubt that the lack of any meaningful response to his repeated complaints about his solitude and exclusion must have caused him feelings of humiliation and helplessness.*”
5. In its *Report to the Government of Ireland on the visit to Ireland by the Committee for the Prevention of Torture and Inhuman and Degrading Treatment* (the “CPT”) in January and February 2010², the Committee stressed that resort to 23 hour lockup procedures should only ever be temporary and that prison authorities need to take a pro-active approach in ensuring that segregated persons have access to activities and to psychological and psychiatric care. Their recommendation at paragraph 57 was as follows:

57. The CPT recognises that a primary duty of the prison authorities is to prevent harm coming to the prisoners under their ward, and that the need to take

¹ 17 April 2012 ECHR APP No 20071/07 at para 173.

² This report was published February 2011. The Committee visited Ireland again last year but their report is not yet available.

protective measures in favour of certain inmates may inevitably have negative repercussions on the activities they can be offered. However, the prisoners concerned should not be left to languish in their cells on “23-hour lock-up”.

For those prisoners placed on protection for more than a few weeks, additional measures should be taken in order to provide them with appropriate conditions and treatment; access to activities, educational courses and sport should be feasible. Moreover, there needs to be a more proactive approach by the prison health-care service towards prisoners on protection, particularly as regards psychological and psychiatric care, especially as some of them might spend a year or more in conditions akin to solitary confinement. There should also be an individual assessment of their needs at regular intervals and, where appropriate, transfer to another prison should be considered. More generally, 23-hour lock-up should only be considered as a temporary respite, whereas in the Irish prison system it has developed into a general measure.

The CPT recommends that the Irish authorities take appropriate steps to provide prisoners placed on protection for more than a short period with purposeful activities and proper support from the health-care service.

The views of the CPT are relevant in the present context insofar as it expands on the protection provided pursuant to Article 3 of the ECHR. The CPT was established under the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment which directly recalls Article 3 of the ECHR and provided for a preventive mechanism in respect of Article 3 in the form of the Committee and country visits.

Monitoring of Segregation Measures

6. Given the potentially extreme repercussions of segregation measures and the risk to the mental health of prisoners that can result, Judges from both the European Court of Human Rights and the Irish domestic courts have constantly stressed that such measures must be constantly reviewed by the prison authorities to determine if such measures are warranted and whether they are proportionate to the aim that is sought to be achieved. In *Connolly*, Hogan J. stated as follows:

“24. In these circumstances, it is sufficient to say that the placing of prisoners in solitary confinement (or, as here, something approaching solitary confinement) must generally be regarded as an exceptional measure which requires monitoring and regular review by the prison authorities.....”

He also noted in paragraph 26 that; *“Doubtless the longer Mr. Connolly is so detained the more carefully and intensely his case will be considered and reviewed by the prison authorities who, it may be assumed, will be on guard for signs of psychological or psychiatric distress.”*

7. In *Killeen and Dundon v Governor of Portlaoise Prison* [2014] IEHC 77, Hedigan J. reviewed the domestic and international law in this area and summarised it as follows:

“6.5 This segregation may be required in certain circumstances and it must be for the prison authorities to determine when. It is something that should only occur in exceptional situations (see Connolly v. Governor of Wheatfield Prison [2013] IEHC 334, Hogan J). When it does, such segregation should be kept under review. Rights are being curtailed and it is clear both from national and international jurisprudence that the principle of proportionality must be applied. See Holland v. Governor of Portlaoise Prison (cited above). See also Ramirez Sanchez v. France Application 59450/00, 4th July, 2006, Grand Chamber, para.136 where the European Court of Human Rights dealt with the issue of the social isolation of the prisoner. He had been held in solitary confinement for eight years and two months. In view of the length of this period of isolation, the court considered that a rigorous examination was called for to determine its justification. Were these measures necessary and proportionate? What safeguards were afforded the applicant? In that case, an independent judicial review on the merits of and reasons for such a prolonged period in solitary confinement was essential.

Thus national and international requirements are broadly the same:-

(a) There must be good reasons – the segregation must be necessary – the onus is on the authority to justify.

(b) It should be no more than is necessary to meet the requirements of the occasion i.e. safety and security.

(c) It should be proportionate to the objective sought.

(d) There should be ongoing review.

In the event of prolonged segregation there should be available judicial review of the necessity and proportionality of the measure.”

8. In its most recent review in 2013, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (under the auspices of the Council of Europe), the CPT acknowledges that, at times, prison authorities feel it is necessary to place prisoners in what is, effectively, solitary confinement, for their own protection. However, at paragraph 53, the committee stresses that resort to solitary confinement should be kept to an absolute minimum and for the shortest possible period of time. At paragraph 55, the Committee also stressed the need for robust procedures so that the prisoner can understand why the segregation is necessary and can make representations regarding the measures;

“(b) Lawful: provision must be made in domestic law for each kind of solitary confinement which is permitted in a country, and this provision must be reasonable. It must be communicated in a comprehensible form to everyone who may be subject to it. The law should specify the precise circumstances in which each form of solitary confinement can be imposed, the persons who may impose it, the procedures to be followed by those persons, the right of the prisoner affected to make representations as part of the procedure, the requirement to give the prisoner the fullest possible reasons for the decision (it being understood that there might in certain cases be reasonable justification

for withholding specific details on security-related grounds or in order to protect the interests of third parties), the frequency and procedure of reviews of the decision and the procedures for appealing against the decision. The regime for each type of solitary confinement should be established by law, with each of the regimes clearly differentiated from each other.

(c) Accountable: full records should be maintained of all decisions to impose solitary confinement and of all reviews of the decisions. These records should evidence all the factors which have been taken into account and the information on which they were based. There should also be a record of the prisoner's input or refusal to contribute to the decision-making process. Further, full records should be kept of all interactions with staff while the prisoner is in solitary confinement, including attempts by staff to engage with the prisoner and the prisoner's response.

Principles Applicable in the Present Case

9. Applying the principles set out by Hedigan J, in *Killeen*, and Hogan J. in *Connolly* (which are very much in line with the recommendations of the CPT set out above), it is respectfully submitted that:
 - a. the onus is on the prison authorities to show that there were genuine threats to the Applicant, such that it was necessary to segregate him from other prisoners. It is for the Court to decide whether this onus has been discharged in the present case;
 - b. the limitation on his activities and the degree of segregation should be no more than is necessary to protect the Applicant. For instance, if the threats emanate from a small portion of the prison population, the prison authorities should consider whether some level of segregation can be achieved, without limiting the interaction of the Applicant with the majority of other inmates and still ensuring his ability to participate in day-to-day activities? If the threats are perceived to emanate from a number of specific prisoners, would it be more appropriate and proportionate to keep those specific prisoners segregated from the general prison population?
 - c. Any period of segregation should be for a specific period with a specific end date. There should be a substantive review mechanism at the end of the segregation period. This would require the prison authorities to consider as part of its periodic review, whether there are still threats to a vulnerable prisoner and whether those perceived threats could be addressed in any other manner;
 - d. If a prisoner is isolated for extended periods of time, there is an onus on the prison authorities to monitor the effect on his mental health by providing access to psychiatric and psychological services;

- e. When segregation is prolonged, prison authorities need to engage with segregated prisoners and their lawyers and to consider any submissions that are made by or on behalf of, the vulnerable prisoner.

Rule 63

- 10. Rule 63 of the Prison Rules, 2007, has been invoked by the Respondent for the segregation in the present case. Rule 63 is entitled "*Protection of vulnerable prisoners*" and provides as follows:

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

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

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

- (a) the names of each prisoner to whom this rule applies,
- (b) the date and time of commencement of his or her separation,
- (c) the grounds upon which each prisoner is deemed vulnerable,
- (d) the views, if any, of the prisoner,
- (e) the date and time when the separation ceases.

- 11. It is clear from the above that Rule 63 requires a specific start and end date. It requires that the Governor considers it *necessary* that the vulnerable person be kept *separate from other prisoners who are reasonably likely to cause significant harm to him or her*. This assessment must clearly be made each time that Rule 63 is invoked. The record of the direction must set out the grounds on which the prisoner is deemed vulnerable, together with the views of the prisoner.

Rule 63 Directions Issued in the Present Case

- 12. An examination of the Order 63 directions issued with respect to this Applicant, as exhibited to the affidavit of Sean O'Reilly, Assistant Governor reveals the following: Each appear to have been signed by a prison officer at ACO level. There is no indication on the face of the directions that the Governor was involved in the issue of the direction or that he was of the view that it was necessary that the Applicant should be kept separate from other prisoners who were reasonably likely to cause significant harm to him.

13. The first Order 63 direction appears to be dated 18 March, 2014. There does not appear to be any specific end date on this form. The reason for detention is said to be "*own protection*." And the Applicant is recorded as making "*no comment*."
14. The second direction exhibited is dated 3 April, 2014, and again contains little information other than that the reason for detention is "*own safety*". The Applicant is recorded as making "*no comment*." Again, no specific end date is apparent.
15. The third direction is dated 22 April, 2014 and there is no discernible end date. The stated reason for detention is "*own protection*." The Applicant is recorded as having stated "*threat to my life*."
16. The next direction is dated 26 May, 2014. The stated reason for detention is "*for own protection-re offence*." The Applicant is recorded as having stated "*I request to mix with the general population*." Again, there does not appear to be any end date.
17. The next direction is dated 11 July, 2014 and again there is no end date. The reason for detention is stated to be "*own protection. Re his offence*." and later in the form it is stated that the decision and reason is "*on rule 63 due to nature of offence*." The Applicant is recorded as having said "*I don't want to be on protection. I want to mix with the general population*."
18. The next direction is dated 19 August, 2014 and there is no specific end date. The reason for detention is that "*under threat from other prisoners because of his offence*." The Applicant is recorded as having said "*I want to mix with the general population to get my education and go to the workshops*."
19. The next direction is dated 18 September, 2014, and has actually set out a date of review of 18 October, 2014. The reason for detention is "*own safety-nature of offence*." The Applicant is recorded as saying "*there is no threat on my life in Wheatfield prison. I wish to go back into general population*.' At this stage, lawyers for the Applicant were corresponding with the Respondent regarding his continued segregation in the prison.
20. The next direction is dated 18 October, 2014. The Applicant seeks *certiorari* of this direction on the grounds that the Respondent made this direction, without having provided the Applicant's solicitors with the information sought in their letters dated 16 September, 2014, the 22nd of September, 2014, the 26 September, 2014 and 3 October, 2014. In this direction, the reason for detention is stated to be "*threat from other prisoners*." The Applicant is recorded as saying "*there is no threat. I wish to go to general population. I am being held on rule 63 against my will*.'" There is no end date or review date for the segregation period set out in this direction.
21. The next direction is dated the 21st of November, 2014 and again there is no end date. The reason for detention is stated to be "*on R63 long-term for own protection*." The Applicant is recorded as having stated "*I don't want to be on lock-up. I want to go into general population*."
22. The next direction is dated 14 December, 2014. The reason given in this direction is different in that it states the reason for detention is "*fighting with other prisoners in*

Wheatfield and other prisons." The Applicant is recorded as stating that he is "*happy to remain on Rule 63 in Wheatfield.*" However, it appears the Applicant is disputing that he made that statement.

23. The last direction available is dated January 14, 2015 and there is no end date. The stated reason is "*under threat from other prisoners.*" The Applicant is recorded as saying "*there is no threat on my life*".
24. It is submitted, that on their face, many of these directions would appear to have technical deficiencies. Firstly, all but one appear to violate the requirement in Rule 63(3) (e) that each direction should contain the "*date and time that the separation ceases.*") This date is important as it gives the Applicant an indication of how long a period of segregation will continue for and provides comfort to a prisoner that a new consideration of the circumstances must take place before another Rule 63 direction can be issued. A specific end date also allows a prisoner to prepare for the next review date and to instruct his lawyers to make representations before that next date. Even though the longest period of time between the directions was 2 months in this case, a prisoner faced with an indefinite Order 63 direction has no idea when his segregation will be reviewed.
25. This latter point ties in with the requirement for a meaningful review mechanism. Rule 63 requires the Governor to make a determination that segregation is necessary, every time the rule is invoked. There is no evidence before the Court that there was such a consideration or review each time that the direction was renewed.
26. Also, it is unclear whether the directions were issued to the Applicant and his views were sought prior to the decision being made to make another direction. From the face of the directions, there is no indication that there is any time lapse between the recording of the Applicant's views and the issuance of the direction. Thus (subject to any clarification from the prison authorities) it would appear that the direction is made at the same time as the views of the prisoner are solicited.
27. A further issue is the fact that the directions issued on 18 October, 2014, 21 November, 2014, 14 December, 2014 and any thereafter, were made in circumstances where Solicitors for the Applicant had sought specific information from the prison authorities regarding the continued application of Rule 63 and the authorities had failed to provide such information.
28. In particular, on September 16, 2014, the Solicitor had sought copies of any directions or documentation relating to the Applicant pursuant to Rule 63, details of any authorised structured activities which the Governor would permit the Applicant to participate in, confirmation as to whether or not the prison doctor and/or any prison psychologist or psychiatrist had visited the Applicant and kept him under review. This request was reiterated on the 22nd of September, 2014 and 26 September, 2014. The Respondent, by letter dated October 1, 2014, stated that a review had been conducted and that it had been determined that there was a viable and substantive threat to the Applicant due to the nature of his crime and the connections of his victim within the prison system. As a result of the review, the Applicant "*would be remaining on rule 63 for his own protection.*"

29. The Solicitors for the Applicant wrote back on 3 October, 2014, and asked for details of the "review and any earlier reviews", who conducted the review, what material was used, what alternatives were considered and who was consulted at/before the review, whether the source of the threat comes from identifiable individuals or from general connections between the victim of the murder within the prison system as well as the date that any threats were made. The letter also requested clarification of the period in respect of which the direction under Rule 63 remains in force and the date that it would be reviewed.
30. There was no reply to that letter from the Respondent and another Rule 63 direction was made on 18 October, 2014, without any of the requested information being provided to the Applicant.

Fair Procedures

31. It would appear that a key issue to be decided by this Court is whether there is a breach of fair procedures in circumstances where a Prison Rule has been invoked with respect to an Applicant repeatedly over an extended period (seven months), purportedly based on a review of the safety of the Applicant, and where the Respondent has failed to supply basic information regarding who conducted the review, the date of any review and the matters that were considered at such review.
32. The comments of Hedigan J. in *Killeen* at para 6.9 would appear to be particularly relevant to any determination by this Court of this issue. His comments apply to Rule 62 (which deals with the segregation of a prisoner because that prisoner is a threat to the good order of the prison), which rule provides specific time limits for certain reviews, unlike Rule 63, which does not). However, the comments of Hedigan J. are equally relevant, in fact, probably more so, to Rule 63.

*"No provision is made for review in the rules where the authority to remove is transferred to the director general. These rules, however, must be read in a constitutional manner and therefore it seems to me that some form of review analogous to that provided by rule 62(4) must be read into rule 62(9) so as to render lawful any authorisation given thereunder. It seems to me that the director general ought to review any removal ordered under this rule at least once every three months or upon request by the prisoner or his legal advisers providing such requests are not made vexatiously. Such review ought to be carefully recorded and should comply mutatis mutandis with the provisions set out in rule 62(6), (7) and (8). **The director general should give the prisoner or his legal advisers the opportunity to consider the grounds advanced for further removal prior to authorising any continuation of their removal. The prisoner or his legal adviser should be notified promptly by the director general of his decision together with the reasons therefor. Full, detailed records of this process should be accurately kept so as to assist the court in any further application in considering the lawfulness of continuing segregation.***

33. Hedigan J. clearly envisaged that there would be a meaningful review involving a level of engagement between the Applicant and the prison authorities before an extended period of segregation could be authorised. In that case, the prisoners were segregated

because they were considered to be a threat to the general prison population under Rule 62. The statement of the law must apply *a fortiori* to a situation where a prisoner is segregated not because of his own actions, but because of his perceived vulnerability to actions from other prisoners. It is submitted that this is necessary to give a Constitutionally compliant interpretation to Rule 63 and to ensure the prison authorities discharge their functions in a manner compliant with the State's obligations under the ECHR as required by Section 3 of the European Convention on Human Rights Act 2003.

34. It would appear that the Rule 63 direction made on October 18, 2014, and each direction thereafter was made in circumstances where the Respondent had failed to give basic information that had been requested on behalf of the Applicant, in order to allow him to make submissions regarding his continued segregation. At a very minimum, it is submitted that the Applicant was entitled to confirmation that the Governor had conducted a review and considered the segregation to be necessary. Further, the failure to communicate the basic information requested by the Applicant makes it very difficult for any person or Court to evaluate the proportionality of the measures applied by the Respondent.
35. It is respectfully submitted by the Commission that, in the current case, the Court must determine whether the prison has sufficiently justified the initial recourse to Rule 63 in the circumstances. If so, the Court should go on to determine whether the subsequent directions given were in compliance with the requirements of the Rule. The Court should also consider whether the conditions pertaining to the detention of the Applicant are proportionate to the perceived dangers to him and whether enough has been done to give him access to education, appropriate healthcare and structured daily activities. The Court should also determine whether the prison authorities have in place an appropriate review mechanism for the continued segregation of the Applicant and whether they have complied with fair procedures, in invoking the Rule in October 2014 and thereafter, in the circumstances as set out above.

IRISH HUMAN RIGHTS AND EQUALITY COMMISSION
February 4, 2015