THE COURT OF APPEAL

Appeal No. 2015/ 90

Between;

DANIEL MC DONNELL

Applicant/Respondent

AND

THE GOVERNOR OF WHEATFIELD PRISON

Respondent/Applicant

AND

IRISH HUMAN RIGHTS AND EQUALITY COMMISSION

Amicus Curiae

LEGAL SUBMISSIONS on
BEHALF OF THE IRISH HUMAN RIGHTS AND EQUALITY COMMISSION

Introduction

1. This case raises a significant human rights issue with regard to the isolation of prisoners for their own safety. In effect, the finding of the learned High Court judge was that there is a breach of the constitutional rights of a 20 year old prisoner, serving a life sentence, in circumstances where he is confined for his own protection to his (8 feet by 10 feet) cell for at least 22 hours a day and where time out of his cell involves no social interaction with other prisoners, limited social interaction with other persons and limited recreational and educational facilities. The trial judge held that such a regime of solitary confinement had lasted for a period of eleven months and it appeared it would continue indefinitely into the future. The Judge held that the regime of segregation imposed on the Applicant was not proportionate to the risk of harm to him.

2. It is submitted by the Irish Human Rights and Equality Commission (hereinafter referred to as the "Commission'') that the learned trial judge applied the correct legal principles and case law in his judgment delivered on February 17, 2015 and that the judgment should be affirmed by the Court of Appeal. The Commission is also aware of the further judgment of the Learned Trial Judge of 24 March, wherein certain mandatory orders were made to bring to an end the solitary confinement of the Applicant/ Respondent.

3. In particular, the Commission wishes to emphasise that it agrees with the reasoning of the trial judge in a number of respects, particularly in regard to his findings that the imposition of solitary confinement is an exceptional measure, even when used to

protect vulnerable prisoners, and that when used for any period exceeding three or four weeks, must be subject to intensive review and management to ensure such conditions come to an end as soon as possible. The Commission also submits that the Judge correctly recognised the undoubted dangers of prolonged segregation on the mental health of a detainee. It is submitted he was also correct in his findings that there is a need for rigorous monitoring procedures to review ongoing periods of solitary confinement and intensive management of segregated prisoners to ensure such conditions do not continue indefinitely.

4. The Commission accepts that due deference must be given to the Governor to carry out his duties in managing a prison. However, that discretion is not absolute. Where there is a prolonged situation of solitary confinement, there is an heavy onus on the prison authorities to justify why that situation is necessary and whether there are some other measures that could carry out the objective of protecting the prisoner without the risk to mental health that prolonged isolation can bring.

5. The Commission notes that there are some matters of factual dispute between the parties in this case and has undertaken that insofar as is practicable it will not entrench upon such matters.

The Definition of "Solitary Confinement'' and the Recognised Risks Resulting Therefrom.

6. Firstly, it is submitted that the trial judge was correct in the principles of law he applied in determining whether there had been a breach of the constitutional right of the Applicant to bodily and psychological integrity, particularly with regards to the human rights standards prescribed by Irish and international law and with regard to the undoubted negative effects that prolonged solitary confinement can have on mental health. In particular, the trial judge was correct in recognising that the deprivation of human contact, for whatever reason, is such a fundamental interference with the natural inclination of human beings to associate and interact, that extended periods of what is in effect, solitary confinement, must be subjected to rigorous standards of review.

7. There is a popular view that "solitary confinement'' is a term that refers only to those situations where a person is deprived of human contact as a form of punishment. However, the use of solitary confinement, or what is also known as "lockdown'', "Supermax'', "the hole'' is not confined to "black sites'' where extreme sensory deprivation is practised as a form of torture. The practice of *de facto* solitary confinement is often used for the protection of vulnerable individuals, as is recognised in the detailed report on solitary confinement from the *Special Rapporteur of the Human Rights Council to the United National General Assembly* dated 5th August, 2011. This report is worth reading in full for its clear exposition of the manner in

which the practice of solitary confinement is implemented throughout the world and for a clear explanation as to why the UN Special Rapporteur has expressed an abhorrence of the practice, and recommended that it should be banned, except in very exceptional circumstances.

8. In the Rapporteur's report, at para 40, it is recognised that solitary confinement is imposed for a number of reasons, including "*to protect vulnerable individuals*". At paragraph 43, it is recognised that solitary confinement is often used as a "*tool to manage certain prison populations'',* including individuals deemed to be dangerous. "*Similarly, individuals determined to be at risk of injury….are often allowed or encouraged to choose voluntary solitary confinement in order to protect themselves from fellow inmates".* The report recognises that the motivation for the imposition of solitary confinement, "*when used as a* ***management tool''*** ….. "*is pragmatic rather than punitive.''* However, the findings and recommendations in that report, apply equally to all forms of solitary confinement, regardless of why it is imposed, culminating in the key recommendation set out at para 89 of that report (cited at para 63 of the judgment of Cregan J.) that solitary confinement should only be used "***in very exceptional circumstances as a last resort, for as short a time as possible''*** If used in exceptional circumstances, the Rapporteur recommends that a number of procedural safeguards should be put in place to monitor the effects of such segregation.

9. It is submitted that the learned trial judge correctly examined and analysed in paras 53 to 66 of his judgment, the law and appropriate international standards applicable to situations of solitary confinement. He referred to the Istanbul Statement on the Use and Effects of Solitary Confinement adopted on 9th December, 2007 and to the UN report of the Special Rapporteur referred to above. In each of these reports, "solitary confinement'' is defined as a *de facto* situation where a person is confined to their cell for 22 to 24 hours a day. Further, it is notable that the trial judge gave due weight to both of these reports which contain a detailed analysis, supported by medical research, of the damaging effects of solitary confinement. The UN report specifically noted that solitary confinement may cause serious psychological and physiological adverse effects on individuals and is contrary to one of the essential aims of the penitentiary system, which is to rehabilitate offenders and reintegrate them into society (see para 53 and para 64 of the judgment of Cregan J.).

10. The trial judge also correctly gave due weight to the uncontroverted psychological evidence submitted by psychologist Mr Glanville, on behalf of the Applicant, as set out at para 27- to 31 of his judgment, which reiterates much of the extensive literature on the psychological and psychiatric effects of solitary confinement and details the impact of the regime on the health and behaviour of the Applicant. Cregan J. relied on the conclusion of Mr Glanville that if the Applicant continues to be held under the present regime of isolation/solitary confinement with minimal stimulation, the likelihood is that his outbursts of anger and aggression would become more frequent

and more violent, and that over the course of a 'life sentence' this was likely to have a very damaging effect on his personality development, his mental health and the prospects of his successful resettlement in the community whenever he is released from custody.

11. The trial judge also correctly applied the Irish case law that specifically recognises, as a matter of common sense, the risks posed to the health of a detainee if exposed to prolonged periods of solitary confinement. These cases acknowledge that specific expert evidence is not required to appreciate, as a matter of common sense, that prolonged isolation from one's fellow man can impact on a person's psychological welfare (see reference, at para 77 of the judgment, to extract from judgment of Edwards J. in *Devoy v Governor of Portlaoise Prison* [2009] IEHC 288. See also para 81 of the judgment, where the trial judge cites an extract from *Kinsella v Governor of Mountjoy* [2012] I IR 467, where Hogan J. acknowledged that one does not need to be a psychologist to envisage the mental anguish which would be entailed by more or less permanent lockup for an eleven day period or the fact that extended detention over weeks in isolation could expose a prisoner to the risk of psychiatric disturbance. Finally, see the reference in para 87 of the judgment to the extract from the judgment of Hogan J. in *Connolly v Governor of Wheatfield Prison* [2013] IEHC 334, where he recognised that indefinite detention in isolation for a period of years would undoubtedly be a breach of constitutional rights since the integrity of the detainee's personality could not be preserved in such circumstances. The evidence of the Respondent/ Appellant is also relevant in this regard, and points to the accepted need to reduce the use of solitary confinement as an inappropriate measure, other than in the most exceptional circumstances (para 12.a Written Submissions on behalf of the Respondent/ Appellant in Appeal No. 2015/160). This evidence also points to the fact that solitary confinement has been overly relied on in the prison system until very recently.

Solitary Confinement is an Extreme Measure

12. In short, the learned trial judge correctly recognised that segregation of a prisoner which deprives him of regular human interaction is an extreme measure with stark consequences for mental health, such that there is a high onus on the prison authorities to justify why such measures are necessary, particularly if they exceed a period of three or four weeks (see Conclusion 14 in the judgment of the learned trial judge).

Proportionality

13. The Respondent/Appellant relies heavily on what it terms the "wide discretion'' vested in the Governor to manage the prison and argues that the lack of any review mechanism in Rule 63 means that the Prison Governor can impose a lock-up regime indefinitely on a prisoner, without any independent review. That contention flies in the face of the decision of *Holland v Governor of Portlaoise Prison* [2004] 2 IR 573 (applied by the learned trial judge at para 72 -74 of his judgment), where McKechnie J.

held that prison rules must be construed in a manner which respects and vindicates the constitutional rights of the prisoner.

14. McKechnie J. relied heavily on the fact that if a prisoner's constitutional rights are being curtailed, then there is a heavy onus on the prison authorities to justify the measures adopted. He said at page 594 of his Judgment:

> *"Given that the right in issue [in this case] was 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 asserted 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. [McKechnie J. then refers to extract from Heaney v. Ireland [1994] 3 I.R. 593 at page 6 or 7]*

15. Later in his judgment, McKechnie J. assessed the balance to be struck with regard to the interference with a prisoner's rights and stated as follows (at page 600):

> *"6. the interference or restriction:-*
>
> > *(i) Must be rationally connected to the said objective and must not be arbitrary, unfair or based on irrational considerations*
> >
> > *(ii) Must be necessary or essential in order to achieve the legitimate aim to which it is addressed;*
> >
> > *(iii) Must be not more extensive than the minimum required to achieve its intended aim, and*
> >
> > *(iv) Must otherwise be proportionate to that objective." (Emphasis added).*

16. These principles were laid down in the context of an interference with the Applicant's access to members of the media. It is submitted that they must apply with even greater force to a situation where a detainee is being deprived of the succour of human contact, one of the essential attributes of man as a social being. Thus, it is respectfully submitted that the prison authorities cannot have an unfettered discretion to segregate prisoners indefinitely under Rule 63. Such a decision to impose involuntary isolation of a prisoner can and should be reviewed by the Court to determine whether it is a proportionate measure in the circumstances.

17. In *Killeen and Dundon v Governor of Portlaoise Prison* [2014] IEHC 77, the proportionality principle was endorsed by Hedigan J. He reviewed the domestic and

international law in this area and stated at para 6.5 that segregation may be imposed but should only occur in exceptional situations and when it does occur, such segregation should be kept under review. He summarised the relevant principles as follows:

> *"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."*

18. It is submitted that the trial judge correctly applied (at para 108 of his judgment) the authority of *Killeen*, in particular, with regard to the principle that even though Rule 63 is silent on the need for a regular review mechanism, such a review is necessary so that the Rule can be interpreted in a constitutional manner.

Proportionality and the Current fact Situation

19. It is recognised that the prison authorities do have an ongoing concern for the safety of the Applicant. It is also recognised that isolating the Applicant completely from other prisoners is an effective (although blunt) "*management tool''*, (as that term is used in the Report of the Special Rapporteur) to ensure he does not fall foul of other prisoners. However, when *de facto* solitary confinement becomes long term (and that must encompass any period that is longer than a few months, the proportionality rule requires that the onus is on the authorities to demonstrate that there is **no** other means by which they can ensure the safety of the prisoner. It is not sufficient to say that segregation has been imposed to protect a prisoner, there comes a stage when it is necessary for the prisoner authorities to show there is **no other way** of protecting the prisoner. Finding a solution may well require intensive management and even some innovation on the part of the prison authorities but a Court should be slow to accept that prolonged solitary confinement is the only option for a 20 year old man serving a life sentence. Once a breach of constitutional rights has been found by the Court, it is accepted that the Court can allow the prison authorities time to remedy the situation in the manner it deems most appropriate. However, in the absence of any solution being proposed by the prison, the Court may have to impose a mandatory order to ensure the prisoner is not left without an effective remedy.

20. Therefore the issue to be determined by this Appeal Court is whether the Prison authorities have adequately demonstrated that there is no other way of protecting this prisoner from those who might potentially harm him, other than the extreme measure of isolating him completely from all other prisoners and imposing a lock-up situation where he spends most of the day in his cell, with limited access to educational or recreational facilities.

21. As the trial judge correctly pointed out at para 106 of his judgment, Rule 63 permits the Governor to keep a prisoner *"separate from other prisoners who are reasonably likely to cause significant harm to him or her''*, it does not provide that the Governor can keep a prisoner separate from all other prisoners, even those who are not likely to cause harm to him. Further, the trial judge also correctly noted that under Section 13 of the Prisons Act 2007, that a Governor is not permitted to confine a prisoner to their cell for more than 3 days for a breach of prison discipline and that it could never impose a sanction of indefinite duration for a breach of prison discipline. It is difficult then to quibble with the judge's finding at para 106 (3) that the Oireachtas could never have intended that a regime of solitary confinement could be imposed for period of 11 months or longer, when the prisoner has not been segregated for a breach of discipline.

22. The Respondent/ Appellant points to the fact that a prisoner cannot be rewarded for bad behaviour and as such that part of the reason the Appellant/ Respondent cannot enjoy more privileges is down to his own choice (see paras 12-13 Submissions of the Respondent/ Appellant in Appeal No. 2015/160). The Commission respectfully draws attention to the finding of the Learned Trial Judge that as at the date of hearing, there was evidence that the Applicant's psychological and mental health is beginning to suffer as a result of his confinement (Judgment at p. 55, para 114(9)). This finding appears to be disputed by the Respondent/ Appellant. However if this Honourable Court were to come to a view that the Applicant/ Respondent is now suffering from some form of psychological impairment, then it is submitted that the prison authorities must take this into account when assessing his behaviour. This is important to understanding whether in fact he is in deliberate breach of prison discipline or whether his behaviour may in fact arise from his psychological state, in which case it would seem inappropriate to respond to his behaviour from a disciplinary perspective.

23. 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 2010*[1], 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.

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

24. The views of the CPT are important as this Committee was set up under the Council of Europe's "European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment", which came into force in 1989 and to which Ireland is a signatory. This Convention builds on Article 3 of the European Convention on Human Rights which provides that: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment".

25. In paragraph 57 of their report on their visit to Ireland, the CPT stated:

> *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 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.***

26. Further, in its most recent review of the prescribed standards for persons in detention, called "**CPT Standards 2015''**, the CPT (at page 33, paragraph 57, examined the practice of solitary confinement for protection purposes and concluded as follows:

> *"States have an obligation to provide a safe environment for those confined to prison and should attempt to fulfil this obligation by allowing as much social interaction as possible among prisoners, consistent with the maintenance of good order.* ***Resort should be had to solitary confinement for protection purposes only when there is absolutely no other way of ensuring the safety of the prisoner concerned.''***

27. The CPT further stresses the extraordinary nature of such segregation measures and emphasises that the extra restrictions involved are not inherent in the fact of imprisonment and thus have to be separately justified. One of the key tests is

proportionality as set out at para 55, page 30. Again, the CPT stresses that that solitary confinement is a measure of last resort.

> *(a) Proportionate: any further restriction of a prisoner's rights must be linked to the actual or potential harm the prisoner has caused or will cause by his or her actions (or the potential harm to which he/she is exposed) in the prison setting.* ***Given that solitary confinement is a serious restriction of a prisoner's rights which involves inherent risks to the prisoner, the level of actual or potential harm must be at least equally serious and uniquely capable of being addressed by this means.*** *This is reflected, for example, in most countries having solitary confinement as a sanction only for the most serious disciplinary offences, but the principle must be respected in all uses of the measure. The longer the measure is continued, the stronger must be the reason for it and the more must be done to ensure that it achieves its purpose.*

"Technical Breaches'' of Rule 63 in the Present Case

28. It is clear from the text of Rule 63 that it requires a specific start and end date. It also 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 each direction must set out the grounds on which the prisoner is deemed vulnerable, together with the views of the prisoner.

29. An examination of the Order 63 directions issued with respect to this Applicant, as exhibited to the affidavit of Sean O'Reilly, Assistant Governor, reveal 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. None of the Rule 63 directions (apart from one) contained a specific end date. The Rule 63 direction, which was in effect at the time of the High Court hearing, did not contain a specific end date and showed no indication that the Governor had made the requisite decision.

30. Cregan J. correctly held that this was a substantive breach of the Rules and not a technical one. It is argued by the Appellant that the Judge should not have made this finding because it served no useful purpose, as a fresh Rule 63 direction could be made immediately to cure the technical defect. This assertion is extraordinary. It suggests the fresh direction could be made as a matter of course when we know that such a direction can only be legally made when a fresh analysis has been made by the Governor with regard to whether such a new direction is warranted.

31. The direction under Rule 63 that was in existence at the time of the High Court hearing was a valid and subsisting order that was not spent and there was no reason in law why the trial judge should not quash such a bad order. The specified end date and the fact

that the Governor has made the required decision to segregate are much more than technical matters for any prisoner subject to a Rule 63 direction. It is also noteworthy that the High Court did not quash any of the spent Rule 63 directions, only the one subsisting at the time of his judgment.

32. In any event, the end 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. A haphazard and slipshod approach to the Rule 63 directions and a failure to specify the length of time for which they are in effect certainly creates the impression that there is a routine renewal of the directions rather than a proper procedural review each time a new direction is made under Rule 63.

33. 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. The trial judge was correct in concluding there was no evidence before the Court that there was such a consideration or review each time that the direction was renewed.

Conclusion

34. The Applicant is a 20 year old prisoner serving a life sentence for murder. The psychological report of Mr Williams paints a bleak picture of a prisoner with a difficult background, where his father is serving a prison sentence for robbery and has a history of convictions and alcohol and drug abuse. The Applicant was identified as having special needs in primary school and dropped out of education in second year of secondary school. He reports feelings of depression, hopelessness, agitation, anger and sleep difficulties. If he serves a typical life sentence, he may be released in early middle age. It is submitted that it would be a very grim prospect indeed that he would serve the remainder of his sentence in conditions where he is effectively isolated from all other prisoners and where a solution could not be reached where he would have some interaction with other inmates and greater access to education. It is accepted that the Applicant has committed a very serious crime. However, in a civilised society, one of the key aims of the penal system is rehabilitation and it is difficult to see how any such rehabilitation can be achieved if a prisoner is in de facto solitary confinement. As was pointed out by Hogan J. in the *Connolly* case,

> *"17. For even though prisoners may have strayed from the path of righteousness and even though – as with the case of Mr. Connolly – they may have severely and wantonly injured other persons, the protection of*

the dignity of all is still a vital constitutional desideratum. This is because the Constitution commits the State to the protection of these standards since it presupposes the existence of a civilised and humane society, committed to democracy and the rule of law and the safeguarding of fundamental rights. Anyone who doubts these fundamental precepts need only look at the preamble, Article 5, Article 15, Article 34, Article 38 and the Fundamental Rights provisions generally.

18. All of us are, of course sadly aware of the great failures of the past and the present where these rights seemed and seem like hollow platitudes. But this is not quite the point, since it is by upholding these values and rights that we can all aspire to the better realisation of the promise which these noble provisions of the Constitution hold out for us as a society."

Eilis Brennan BL
April 21, 2015

Legal Submission on behalf of the IRISH HUMAN RIGHTS AND EQUALITY COMMISSION