THE SUPREME COURT

[Record No. 170/17]

Clarke C.J.
O'Donnell J.
McKechnie J.
MacMenamin J.
O'Malley J.

BETWEEN:

GARY SIMPSON

PLAINTIFF/APPELLANT

AND

THE GOVERNOR OF MOUNTJOY PRISON, THE IRISH PRISON SERVICE, MINISTER FOR JUSTICE AND EQUALITY, IRELAND, AND THE ATTORNEY GENERAL

DEFENDANTS/RESPONDENTS

Judgment of Mr. Justice John MacMenamin dated the 14th day of November, 2019

Introduction

1. The fundamental principle that no person should be deprived of liberty save in accordance with law is laid down by Article 40.4.1° of the Constitution. But this protection, and others under the Constitution, also give rise to consequential legal duties towards prisoners. Prison conditions must comply with the law. Ultimately, questions of legal compliance may fall to be determined by the courts.

2. The fact of imprisonment necessitates a restriction on freedom and other fundamental rights; but this does not mean that all of a detainee's personal constitutional protections are abrogated. In addition to the fundamental constitutional rights which, subject to necessary limitations, continue to apply, statutory provisions such as the Prisons Act,

2007 ("the 2007 Act") and the Prison Rules, 2007 (S.I. No. 252/2007) ("the Prison Rules"; "the Rules") not only set out specific disciplinary procedures and principles governing prison conditions, but also outline the obligations of administrators toward those under their care and supervision.

3. When at liberty, a person who commits crimes may be a threat to other individuals or to society in general. He or she may be under threat from other criminals. But even when in custody, a prisoner may also be subject to the threat of violence or intimidation from other detainees. To address this problem, Rule 63(1) of the Prison Rules provides that a prison governor may make provision for special protection by directing that a detainee be placed in a separate cell and kept apart from the general body of "ordinary" prisoners. A prisoner may also apply for this status. The Prison Rules also set out conditions which govern the identification of the prisoner in question, and the timing and basis for making such a direction (Rule 63(3)).

4. In the year 2013, the appellant was serving a sentence in Wheatfield Prison. He considered himself under personal threat from other prisoners. He applied under Rule 63 to be treated as what is generally known as a "protection prisoner". He was transferred to the D Wing of Mountjoy Prison and detained there from the 13th February to the 30th September, 2013. Later, on the 30th July, 2014, he instituted legal proceedings. He claimed that the conditions under which he had been detained in Mountjoy Prison infringed his rights under the Constitution and the European Convention on Human Rights ("ECHR"; "the Convention").

5. The case came on before the High Court (White J.). It lasted 30 days. The appellant made allegations that the conditions of his detention were health-threatening; that prison staff members had a vendetta against him; and that certain fellow prisoners who carried out cleaning work were on drugs. These assertions were held to be without substance. But other evidence clearly showed that there were, in fact, serious deficiencies in the appellant's conditions in Mountjoy Prison during this time. What White J. found caused him to grant a declaration that the appellant's constitutional right to privacy had been infringed. But because the appellant had lied and exaggerated in significant aspects of his claim, the judge refused to award him any damages or costs ([2017] IEHC 561).

6. To fully understand the judge's order, it is necessary to say a little more about the legal framework of the case. Here, two main points arise. First, the proceedings were brought under the Constitution and the ECHR. But, as the Constitution is the primary law of the State, it takes precedence over the Convention on fundamental rights issues (see, the judgments of this Court in *McD v. L* [2009] IESC 81; [2010] 2 I.R. 199). For this reason, a court will first address constitutional issues prior, if necessary, to considering any claims made under the ECHR (*Carmody v. Minister for Justice, Equality and Law Reform and Ors.* [2009] IESC 71; [2010] 1 I.R. 635, at para. 50). A requirement for resort to the Convention will arise only "if no other remedy in damages is available" (s.3(2) of the European Convention on Human Rights Act, 2003 ("the 2003 Act")). The duty of a court is to ensure that the rights are fairly and effectively vindicated, whether under the

Constitution, or, if necessary, the Convention. If a constitutional remedy which vindicates an infringement is available, it will seldom be necessary for a court to go further.

7. A second point flows from the first. The ECHR has not been directly incorporated into the law of the State. It is only indirectly applicable, subject to the general limitations set out in the 2003 Act. The primary duty of Member States is to ensure that fundamental rights are protected, and that there are effective remedies for any infringement. Article 13 of the ECHR provides that persons are entitled to an effective remedy. But Article 35 provides that applications can be made to the European Court of Human Rights ("ECtHR"; "the Court of Human Rights") only when domestic remedies have been exhausted. This same principle is to be found expressed in ECHR jurisprudence on prison conditions (see *Grzinčić v. Slovenia* (App. No. 26867/02, 3rd August, 2007), at para. 82, and *Canali v. France* (App. No. 40118/09, 25th July, 2013), at para. 56). Therefore, Member States have the primary duty to ensure that prison conditions comply with national constitutions and, where necessary, the ECHR.

8. In this case, the learned High Court judge held that the Constitution did provide a remedy confined to the form of a declaration, but not damages. The situation under the 2003 Act was a little more complex.

9. The ECHR claim was essentially twofold. The appellant alleged a breach of Article 3 (the prohibition of torture or inhuman or degrading treatment or punishment) and Article 8 of the ECHR (privacy rights). Whilst holding that the declaration was a sufficient remedy, the judge also held that he could not, in any case, have granted relief in respect of large parts of the ECHR claims. He held that the preponderance of any such ECHR claims was time-barred under s.3(5) of the 2003 Act. This subsection provides that a claim under that Act must be brought within one year of an alleged human rights violation. The appellant's complaints concerned events between the 13th February, 2013 and the 30th September, 2013. By the time the proceedings were issued on the 30th July, 2014, just two months of the relevant period of detention remained within that one year statutory timeframe (paras. 344-347 of the High Court judgment). The judge also dismissed any remaining balance of the ECHR privacy claim under Article 8 of the ECHR as he had already made a declaration under the Constitution on that issue.

10. The respondents did not appeal the making of the declaration. Bearing in mind the evidence in the High Court, this was a prudent and correct decision. But it has significance for this appeal in the sense that the respondents do not deny the existence of certain core facts which formed the basis of the judge's findings.

11. The appellant applied for leave to appeal directly to this Court. The respondents did not resist the application. A very large number of similar cases are at present pending before the courts. All are said to concern claims regarding prison conditions. The parties were agreed that, insofar as possible, it was desirable that generally applicable principles in such cases should be considered by this Court. A panel of the Court granted leave ([2018] IESCDET 84), and the appeal proceeded on a set of agreed facts.

12. While this appeal proceeded on agreed facts, it is important to bear in mind that "prison condition cases" are highly fact-specific. This claim has unusual features. The appellant was one of a special category of protected detainees. As a result, he was held in one particular landing of one wing of Mountjoy Prison. The events occurred during a specific time period when the prison was being refurbished. White J. observed that, by the time of the hearing, all the cells where the appellant had earlier been held had been refurbished and appointed to a high standard.

13. The main aims of this judgment are twofold: first, to determine the correctness or otherwise of the High Court judgment; and second, insofar as possible within the limits of this case, to identify certain principles of more general application. Some further observations on the protections at stake are necessary. The judgment now considers the nature of the claim, and then the judgment under appeal, including the judge's approach to assessing prison conditions.

The Claim

14. The appellant's claims were wide ranging. He made a series of complaints about the conditions themselves and his treatment by prison officers. The remedies he pursued were similarly extensive. These included claims for punitive or exemplary damages. To address the case, the respondents' counsel called more than 20 witnesses. These included prison officers, officials of the Irish Prison Service ("the Prison Service") and a broad array of experts from disciplines stretching from economics to microbiology, and from medicine to forensic engineering. This judgment expresses no view on many of the weighty legal issues raised in defence of this claim. The task here is of more limited scope. Although many of the respondents' lines of defence were highly developed and sophisticated, the judge's findings of fact have inescapable consequences.

The Judgment under Appeal

15. The judgment delivered by White J. is comprehensive in its breadth and impressive also in its narrower focus on particular aspects of the conditions under scrutiny. Any process of compression will scarcely do it justice, but is nonetheless necessary to clearly identify the judge's methodology against the factual background. Where necessary, observations or findings in the High Court judgment are referred to by their corresponding paragraph numbers.

16. What the judge ultimately concluded is best summarised in two paragraphs:

> *"454. The Plaintiff in this action was in a cell for most of his imprisonment with another inmate, on a restricted regime with no in cell sanitation.*
>
> *455. There was a breach of the Plaintiff's constitutional right to privacy. Having determined the issue on constitutional principles, it is not appropriate to make any order pursuant to Article 8 of the Convention."*

17. These succinct observations provide a useful introduction to considering the evidence in the High Court, the judgment under appeal and the issues raised in an Issue Paper submitted by counsel. The pithy words just quoted do not, of course, convey a full picture

of what the High Court judge had to deal with, or what now falls to be considered. In this appeal, there was much emphasis on the point that damages should have been awarded. For reasons that will become clear, the case, as now made, actually raises significant questions as to the relationship between the Constitution, the application in domestic law of principles now identified in ECtHR jurisprudence, and the appropriateness of seeking to apply such principles to this claim for damages for infringement of constitutional rights. These questions are discussed later.

The Judge's Approach

18. The first point of reference must be to identify the judge's core findings. Applying an approach previously adopted in the High Court judgment of *Mulligan v. Governor of Portlaoise Prison and Ors.* [2010] IEHC 269; [2013] 4 I.R. 1, White J. considered both the "positive" and "negative" features of the appellant's detention.

Positive and Negative Features

19. The judgment described the "negative features" as being:

(a) that the appellant was obliged to share a cell with another prisoner and, for a short period or periods, two others prisoners;

(b) the absence of an in-cell toilet or running water;

(c) the serious limitation on the appellant's time outside his cell compared to other "non-protection" prisoners and to his entitlements under law, particularly the Prison Rules;

(d) that the appellant was unable to know in advance when he would be entitled to out-of-cell time;

(e) that prison authorities were not always able to facilitate requests to go to the toilet during lock-up;

(f) that, on a restricted regime, the appellant did not have sufficient access to showers during times when he was frequently confined to his cell for prolonged periods;

(g) the absence of any access to education or work; and

(h) the inadequacy of in-cell space, not only seen in regard to physical allocation of space, but combined with the length of time in-cell.

It requires little imagination to envisage the impact of some of these features on the appellant. I refer especially to those at (b) and (c) above, in a cell where in addition to the appellant there were one, and for some short periods, two other prisoners, over a prolonged time span of seven months.

20. The judge then considered certain "positive features". These were:

(a) that the appellant had requested transfer from Wheatfield Prison to Mountjoy Prison. In Wheatfield he had been housed in a cell which did have in-cell sanitation;

(b) that he himself had requested protection status;

(c) that, for two short periods during the period of detention, he had been transferred to the Separation Unit and away from the D1 landing;

(d) that he had access to medical, nursing and counselling facilities;

(f) that he had both regular and special visits as well as access to telephone calls and the Prison Tuck Shop;

(g) that the prison staff had organised a special form of "Governor's Parade" under which arrangement prison staff voluntarily came into work at 7 a.m. each morning and visited each protection prisoner in his cell to identify whether they had any complaints, which were then logged;

(h) that the appellant had been transferred to the Medical Unit on the 30th September, 2013, and thereafter provided with access to a Drug Treatment Programme during the time he remained in prison;

(i) that he had access to Legal Advisors and the Prison Visiting Committee and, thereby, the ability to make complaints;

(j) the fact that, at the relevant time, Mountjoy Prison was undergoing refurbishment in order to install in-cell sanitation; and

(k) the availability of showers.

21. When seen in the context of the judgment as a whole, it is clear White J. concluded that, while the conditions did involve an infringement of the appellant's constitutional privacy right, they were not of such a nature as would warrant a finding that he had been exposed to inhuman or degrading treatment.

22. In deciding to grant the declaration under the Constitution, the judge correctly placed particular weight on the linked issues of cell-overcrowding, the absence of adequate hygienic and sanitary facilities, and reduced out-of-cell time. In refraining from making any graver finding, he attached significance to the steps taken by the staff and administrators to ameliorate the appellant's personal situation, and evidence which he heard as to a generally good relationship between the prison staff and the prisoners. However, taken together, these positive features were not sufficient to redress the balance. The judge concluded that, despite these features, the appellant's rights had been infringed.

23. These conclusions must be accompanied by an acknowledgement that, from the year 2006 onwards, the government began to take steps to improve the conditions in many

Irish prisons, including Mountjoy. As a further part of the reforms, Part 5 of the 2007 Act gave statutory recognition to the office of the Inspector of Prisons. Judge Michael Reilly, the first holder of this new office, in accordance with his statutory functions, furnished annual reports to the Minister for Justice. Amongst other matters, these addressed the conditions and general health and welfare of prisoners (ss. 31-32 of 2007 Act).

Protection Prisoners

24. Dealing with protection prisoners creates significant administrative difficulties. To ensure their safety, they must often be held under "lock-up"; that is, to be kept in their cells. Some years prior to 2013, Judge Reilly pointed out that, because such prisoners had to be kept apart from other detainees, they might have to spend lengthy periods in their cells separated from "ordinary" prisoners moving about the prison. For this reason, he directed that protection prisoners should never have to "double-up"; that is, each such prisoner should have a cell to himself.

25. Cell conditions are governed by the Prison Rules. Rule 18(1) provides that there is to be a system of certifying cells in respect of size, lighting, heating, ventilation and fittings. Rule 18(2) states that the Minister is to specify the maximum number of prisoners to be accommodated in each cell. All cells are to contain a "mechanism" to attract the attention of a prison officer (Rule 18(4)). Rule 19(1) provides for the temporary accommodation of prisoners in non-certified cells in exceptional circumstances. In the case of other prisoners, the Prison Rules do allow for some margin for cell sharing where there are "exceptional circumstances". However, even then, the Rules provide that the Minister is to be kept on regular notice of such a situation (Rule 19(2)). But, by contrast, as a protection prisoner, the appellant was entitled to a single-occupancy cell. The period under consideration is seven and a half months, less two short periods during which he was held in the Separation Unit in the gaol. Even though the protection prisoners were informed that their placement on the D1 landing of Mountjoy was to be temporary, there is no sense in which what occurred in this case could be seen as an exceptional case coming within the Rules.

Numbers

26. The High Court judgment does not precisely identify how many such prisoners were detained on the D1 landing of Mountjoy during this time. But it is possible to obtain some idea of the scale of the problem by inference. The evidence of the prison staff was that there were, at times, between 12 and 15 factions of prisoners in the prison (para. 94). Many of these factions could not even be permitted even to come into contact with each other. There were also smaller "splinter factions", numbering from 2 or 3 up to 10 prisoners each. The fact that such extensive measures were necessary in order to protect prisoners within a prison is itself a disturbing feature of this case.

Foreseeability

27. While a rapid expansion in numbers might not have been easily foreseeable, the problem was evident as the "protection cells" on the D1 landing became filled. There was a real overcrowding problem. It was inevitable such a situation would create humanitarian and administrative difficulties. Issues also arose in arranging out-of-cell time for protection

prisoners. While the appellant was to be kept segregated from other non-protection prisoners, under Rule 27 of the Prison Rules, he was nonetheless entitled to exercise facilities. White J. had regard to evidence that the prison staff themselves attempted to address the problem by operating a "roll-over" system, which allowed protection prisoners to have some safe out-of-cell recreation periods.

Other Limitations

28. But the judge found that these exercise periods had sometimes to be curtailed because of administrative demands on staff elsewhere in the prison. On other occasions, the staff sought to compensate those in the D1 landing by lengthening their exercise periods. There were times when the prisoners were reluctant to leave their cells for the early morning governor's parade. Additionally, again as a result of stretched staff resources, the appellant did not always know in advance when, or if, he would get out of his cell, either for exercise or to go to the toilet.

29. Each cell had a "red light" system, the purpose of which was to allow prisoners to alert warders when they wished to go to the toilet. However, the judge held the system did not always operate effectively (para. 153). Had there been adequate sanitary facilities in the cells in 2013, this might have posed a lesser problem than it did.

Cell Conditions

30. By the year 2013, many, if not all, of the cells in the B and C Wings of the prison had been refurbished. But the cells on the D1 landing had not. That work was not completed until April 2015. When the original decision was made to use the D1 landing cells for the purpose of housing protection prisoners, the number of such prisoners was small, no more than seven in number (para. 332). Apparently, the D1 landing was chosen because it had certain logistical advantages. But when the number grew, the judge held no consideration was given to placing the protection prisoners in the refurbished cells or elsewhere.

31. The judge observed that the respondents never explained the reasons for this failure. The D1 landing had not been refurbished. The cells on it were not certified as fit for use as cells. This was, in itself, a breach of Rule 18 of the Prison Rules. In and of itself, one breach of Prison Rules will not give rise to a violation of a constitutional right. But what occurred here must be seen as part of a broader pattern of events.

32. Rule 24 of the Rules provides that "insofar as is practicable" sanitary or washing facilities are to be provided in a prisoner's cell. To describe the in-cell sanitation arrangements in this case as "sub-standard" would be an understatement (see, paras. 103-134). There were no toilets or basins in any of the cells in which the appellant was held during this time. Instead, as late as the year 2013, the protection prisoners were still provided with chamber pots, and buckets of water for washing. The appellant denied that he himself ever defecated in the chamber pots, claiming that he used newspapers which he then folded and disposed of outside the cell the following day (paras 105-106). The trial judge rightly observed that the daily "slopping out" of chamber pots into a sluice or hopper was an "unpleasant" and "unacceptable" activity which occasionally led to spillages (para.

160). While under normal conditions the ventilation in the cells would have been sufficient, it was not adequate as, throughout the seven-and-a-half month period in question, the appellant had to double-up with another prisoner and, on a number of days, there were actually three prisoners held in the cell which was furnished only with two beds (para. 133).

33. The cells were not provided with internal "privacy screens". There were no "commode type" constructions which would have permitted a prisoner to be seated comfortably whilst using a chamber pot (paras. 103 and 335). The judge held that "modesty screens" could have been provided without difficulty, but that this was not done (para. 109). He pointed out that, in the year 2010, three years prior to the events described here, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("CPT") had been informed that camping-style toilets were being introduced on a roll-out basis in Mountjoy Prison. White J. criticised the fact that there was no indication that such an arrangement had ever actually been put in place, either in the year 2010 or any time subsequently (para. 113). Shower facilities were not as available as they should have been.

34. The D1 landing was the main service area for other non-protection prisoners on the wing at the D2 and D3 levels. It provided access to the food servers, the gymnasium, exercise facilities and workshops. On occasions, other "non-protection" prisoners passing from the D2 and D3 landings would move through the D1 landing, at which times they engaged in "mischief", and potentially intimidatory conduct toward the protection prisoners (para. 265). It is necessary now to discuss space requirements in the context of cell overcrowding.

Measurement of Space

35. In recent years, ECtHR Article 3 jurisprudence on prison conditions has evolved considerably and has moved towards identifying a minimum space requirement as one of the criteria for assessment. ECtHR decisions have held that an allocation of less than a minimum of 3 sq. metres per prisoner would create a rebuttable presumption of a violation of Article 3 of the ECHR. Measurement of cell-space became an issue in the High Court hearing. Counsel for the appellant requested that a consulting engineer should measure the space in the various cells where the appellant had been held. The resulting evidence established that, less furniture, the total space available in each cell was some 6.03 sq. metres (para. 28). This amount of space must, of course, be seen in the context of the number of cell occupants, as outlined earlier.

36. In the High Court also, counsel for the appellant submitted that, when making a constitutional assessment of the conditions, the judge should place a numeric value on the minimum space which should be allowed for each prisoner. However White J. declined to do so. He took the view that such a process would not be appropriate in carrying out the balancing process which he held was necessary under the Constitution (paras. 415-416). The fact that he was asked to engage in this process was one illustration of the appellant's attempts to frame the claim for damages by reference to, or in reliance on, ECtHR jurisprudential principles. There were other instances, described later.

37. But any discussion of the legal principles applicable in this case must take account of the fact that the reason *why* the High Court judge refused to award damages was because he held that substantial parts of the appellant's testimony were untruthful and exaggerated. It is necessary to now describe this feature of the case.

Lies and Exaggeration

38. As well as claiming that certain prison officers had a vendetta against him, the appellant complained that he was ignored by prison staff, and that they displayed an attitude of contempt or lack of respect toward him (para. 267). He suggested that, at times, he had been deliberately denied access to showers (para. 169). The trial judge did not accept this testimony. The appellant persisted in allegations against one specific prison officer arising from an altercation said to have occurred on the 5th July, 2013, when he was being visited in prison by his partner. The judge held that it was the appellant had misunderstood the conditions governing that visit which gave rise to the dispute (para. 197). In the High Court, the appellant chose to persist in these and other allegations of vindictiveness, which the judge rejected.

39. The appellant was also found to have told untruths about the standards of food and hygiene (para. 135). His allegations of prisoners carrying out cleaning work while being on drugs were likewise rejected (paras. 172-177). The judge held that the appellant tried to "amplify" certain issues into an "invented conspiracy" (para. 266). His complaints of having suffered stomach cramps as a result of unhygienic food was rejected as being without substance. The judge found that he had never complained about such a problem to the medical staff (paras. 272-73). Similarly, his allegation that he had been immuno-compromised was rejected. How many days were expended in the High Court dealing with these issues is not presently known, but may well be a factor when it comes to a consideration of costs.

The Judge's Application of the Law

40. I will now consider the judge's approach to the legal issues which arose. The first question concerns the judge's methodology. The process of identification and then balancing of positive and negative features was the same as that applied in *Mulligan v. Governor of Portlaoise Prison* (cited at para. 18 above). All parties to this appeal are in agreement that this was the correct approach. It should be said however, that *Mulligan* concerned prison conditions which obtained more than a decade ago. In that case, counsel for the respective parties agreed that, in assessing the conditions, ECtHR jurisprudence then current at the time of that detention should be the main point of reference.

41. But White J. drew an important distinction between *Mulligan* and the case before him. In *Mulligan*, the applicant prisoner was exposed to similar in-cell sanitary conditions as here. But his overall prison conditions were considerably better. He could spend upwards of 12 hours per day circulating in the wing and had access to a wide range of educational, leisure, and exercise facilities. Critically, Mr. Mulligan had a cell to himself. On those facts, therefore, the High Court had concluded that his constitutional right to privacy had not been infringed, and he was not entitled to damages.

42. Here the situation was different. For very considerable periods, the appellant was locked up for 23 hours a day, and on some occasions, even longer. He had to share a cell which had no privacy or sanitary facilities and inadequate hygiene facilities with one or, on some short occasions, two other prisoners. These were key factors in the trial judge's mind which led him to conclude there had been a constitutional infringement.

43. As mentioned earlier, the conduct of the staff was also an aspect of his assessment. He took into account the fact that the staff provided a guard for the protection prisoners during dinner time, toilet patrols and shower-time (para. 448). The staff voluntarily came in early to assist the prisoners and visit their cells to ensure their well-being (para. 336). The evidence of human interaction between the prison staff and the prisoners has been described. The judge did not find any evidence that the staff in Mountjoy Prison engaged in conduct with the intention of degrading the prisoners.

44. Balancing these, the judge concluded that the conditions offended against the appellant's constitutional right to privacy. This unenumerated right was first outlined by Henchy J. in his seminal dissenting judgment in *Norris v. The Attorney General* [1984] 1 I.R. 36. It formed the basis of the judgment delivered by Hamilton P. in *Kennedy and Ors. v. Ireland* [1987] 1 I.R. 587.

45. But, in making this assessment on this constitutional right, White J. also adverted to a number of ECtHR prison-condition judgments where that Court concluded that there were circumstances where privacy rights, as guaranteed under Article 8 of the ECHR, could afford a protection in cases which did not attain the level of severity required by Article 3 of the ECHR. The High Court judgment refers to Article 8 privacy judgments such as *Raninen v. Finland* (App. No. 152/1996/771/972, 16th December, 1997) and *Szafrański v. Poland* (App. No. 17249/12, 15th December, 2015).

46. The appellant's case in this appeal must now be outlined. In argument, both senior counsel who appeared for the appellant subjected the High Court judgment to wide-ranging critique.

The Appellant's Case in this Appeal

47. As previously mentioned, the parties prepared an Issue Paper. This set out three main issues to be considered by this Court. Under broad headings, these were, first, the identification of legal principles applicable to prison conditions cases; second, the issue of damages; and third, the question of costs. The questions were broken down on a point-by-point basis, as described later. First, it is necessary to deal with other aspects of the appellant's submissions, and then to discuss the law applicable to this case. The questions in the Issue Paper can be considered in the light of this discussion.

48. The appellant's case rested on two main propositions, which, it was said, led to one ultimate end point, which was that, as a consequence of finding that there had been a constitutional wrong, the judge should nonetheless have awarded significant damages. While this critique concerned the general question of applicable legal principles, the discussion may now be subdivided into, first, a consideration of methodology, and second,

the application of Article 3 ECtHR jurisprudence to this case. For brevity, this second issue will be referred to as the "Convention application" issue.

Legal Principles: Methodology

49. Both parties agreed on the balancing methodology adopted by White J. But through counsel, the appellant submitted the judge had incorrectly applied this approach. It was argued that the judge had failed adequately to differentiate between features which were negative, and therefore truly relevant, by contrast to what counsel characterised as "non-relevant" positive aspects to their client's detention. Counsel put this point succinctly, submitting that not only had the learned trial judge failed properly to differentiate between all these features, but that, having made the negative findings which he did, he had then failed to "carry through" to what could have been the only logical conclusion: a finding of "inhuman and degrading treatment". It was argued that, as there is an absolute constitutional prohibition of such treatment allowing for no exceptions, it would follow that whatever might have been the deficiencies in the appellant's case, or the evidence, there could only have been an award of damages for infringement.

50. A consideration of the judgment in its entirety shows that the judge did, in fact, engage in an extremely careful assessment of the evidence. He distilled that material. He separately identified both the positive and negative conditions of the detention. Any argument that he had simply failed to segregate one category of features from the other could not succeed. The judge had to delve into a morass of evidence. But undoubtedly, he adopted the approach just described.

51. Even were the criticisms confined to the *weight* which he gave to the various features, the appellant's case remains a difficult one to make. Not only did the judge adopt the methodology for which the appellant urged, it must be remembered that, having done so, he actually did decide to grant a declaration. It would be much easier to engage in a critique of the methodology if the judge had not made any declaration at all. Ultimately, this part of the appellant's case comes down to a matter of very fine distinctions as to the degree of seriousness the judge attached to features which he did find as facts.

52. No matter whether the criticism is of an alleged failure to differentiate between positive and negative features, or as to the *weight* the judge attached to each feature, or even as to how the features were categorised, there are difficulties in each case. The judge carried out the process as described. He cannot be criticised for this.

53. I do not believe the judge can be criticised either for taking certain positive features into account. It is true that here the judge did have regard to certain positive features, some of which were not as weighty as the negative aspects he found. It is fair to say the fact that the appellant himself did apply for transfer, and for protection status, or that he had access to a tuck shop, cannot be seen as being as significant as other positive features, such as the conduct of the staff. But insofar as the appellant criticises the weight given to positive features, the argument cannot succeed either. The judge would have been wrong entirely to disregard the positive features identified. If some of these features were of less weight, they were nonetheless relevant. The fact is that none of them were of sufficient

weight to counterbalance the negative features as found. It is hard to avoid the conclusion that the argument begins at the end point; that is, the absence of an award of damages or costs, and works backwards from there to the starting point. I do not say the concern as to the absence of damages was an illegitimate one, but that simple point must be made.

54. What the judge did find has significance for another aspect of the appellant's case. It is said that, *even* in light of the findings of dishonesty, an award of substantial damages was appropriate, and that this was so, *even* if the appellant had told many lies, and exaggerated his case. This raises the issue of how the appellant sought to categorise the infringement in the claim for damages and, in turn, raises the question of how Convention jurisprudence was sought to be applied.

Legal Principles: The "Convention Application" Issue

55. The judgment now, therefore, moves to the topic of "Convention application". This discussion may begin with the Issue Paper. In this following paragraph certain quotes from the first question in that Issue Paper are emphasised. The Court is asked to identify whether there, is "*one overarching principle*" to be applied in determining whether the treatment of a prisoner amounts to inhuman or degrading treatment under the Constitution "*and/or the ECHR*". The Court is then asked to identify what should be "*relevant and irrelevant*" factors in such an assessment; whether particular features create a "*presumption*" of inhuman and degrading treatment; and whether the judge erred in finding there that there had been no violation of the appellant's "*right to protection from inhuman and degrading treatment"*. Taken together, these quoted words have a common origin, that is, an attempt to incorporate Convention principles, as explained in recent ECtHR Article 3 case law, into a claim for damages for infringement of a constitutional right. To understand the significance of this point, it is necessary to explain the background and remove some misapprehensions.

56. It is true that, when considering fundamental rights issues, an Irish court may *have regard* to ECHR jurisprudence on provisions similar to those found in the Constitution (see, the judgment of Clarke J. (as he then was) in this Court in *DPP v. Gormley and White* [2014] IESC 17; [2014] 2 I.R. 591). But this process requires care. In this case, the High Court judgment touches on some 20 ECtHR judgments concerning Article 3 of ECHR and prison conditions. White J. considered that it was appropriate and helpful to refer to these, but, correctly, was reluctant to extract some "factual matrix" from them and apply it to this case (para. 431).

57. Some of the key findings of the High Court judgment, at paras. 454 and 455, were quoted at para. 16 above. But, having stated these, the High Court judge then went on to state that the duty of the Court was to apply the facts found to Irish constitutional law principles "having regard to the Convention case law which the court should *rely on*" (para. 432). (Emphasis added). Thereafter, the judgment quoted a passage from the ECtHR judgment of *Bakhmutskiy v. Russia* (App No. 36932/02, 25th June 2009) which concerned the Article 3 ECHR prohibition of torture and inhuman or degrading treatment. In *Bakhmutskiy*, the Court of Human Rights held that:

> *"the State must ensure that [a prisoner] is detained in conditions which are compatible with respect for his human dignity, [and] that the manner and method of the execution of the measure [of imprisonment] do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention" (para. 88).*

But in that case the ECtHR proceeded to make a finding of violation of Article 3 of the ECHR on the basis that the applicant was afforded less than 1 sq. metre of personal space, had to take turns to use the beds in the cell for a period of five years and nine months, and was confined to his cell day and night, save for one hour per day. But, as will be seen, *Bakhmutskiy* can no longer be seen as representing the current state of ECtHR jurisprudence.

58. It is necessary to make clear in this discussion that what is at issue is not the *end* of vindicating rights, but rather the *means* whereby those rights are vindicated. Since its foundation, the ECtHR in Strasbourg has played an essential role in the development of protections to prevent rights violations, not least in respect of prisoners subject to poor conditions of detention. Nothing in this judgment should be interpreted as diminishing the vital importance of this jurisprudence. But, if taken literally, the passage just quoted, referring to the Court *relying* on ECtHR jurisprudence, is problematic. There is no doubt that White J. carefully sought to navigate a course addressing constitutional and, where necessary, ECtHR jurisprudence. But this particular sentence could be misinterpreted.

59. That observation must be viewed against the background of a recurrent theme in the appellant's submissions. That theme is an attempt to identify principles enunciated by the ECtHR in its Article 3 judgments on prison conditions, and then to apply those principles as if they were matters of domestic law. This is followed by a further step; that by application of the jurisprudence of this Court, established as long ago as in *Byrne v. Ireland* [1972] 1 I.R. 241, such ECtHR principles or tests are to be incorporated into domestic law and applied as "ingredients" of a constitutional tort, thereby giving rise to an entitlement to an award of substantial damages. Put more crudely, the ECtHR jurisprudence is called in aid to serve a purpose for which it was not intended; that is, that Article 3 ECtHR case law should become the "building blocks" for a substantial common law damages award.

60. A fundamental issue is at stake here. It concerns the primacy of the Constitution adopted by the people. Undoubtedly, there will indeed be instances where illustrations and citations from ECtHR jurisprudence can assist a court established under the Constitution in considering issues arising in a constitutional claim.

61. As pointed our earlier, the manner in which ECtHR jurisprudence is applicable in domestic law was set out in the judgments of this Court in *McD v. L*, and in statutory form in the 2003 Act. Section 3 of that Act has already been referred to. But, under s.2(1) of the Act, it is provided that:

> *"In interpreting and applying any statutory provision or rule of law, a court shall, **in so far as is possible**, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions."* (Emphasis added)

Section 4 of the 2003 Act provides that to assist courts in that interpretative task, judicial notice is to be given to an extensive range of materials including Convention provisions and, *inter alia*, "any declarations, decisions, advisory opinion or judgment of the European Court of Human Rights", and that a court shall take account of the principles they lay down (see, the judgment of Fennelly J. in *McD v. L* at p. 314).

62. Speaking for the entire Court in *McD v. L*, Fennelly J. pointed out that the Convention is an instrument of international law (p. 315). It imposes obligations in international law on the contracting states. But the Convention does not require domestic incorporation of its terms into the law of the contracting states. As this Court has repeatedly stated, the Convention does not have direct effect in our law. The obligation of contracting states under the Convention is to secure respect for the rights it declares within its domestic systems. While the Court in Strasbourg has the primary task of interpreting the Convention, national courts do not become Convention courts.

63. Quoting with approval the speech of Lord Bingham in *R (Ullah) v. Special Adjudicator* [2004] 2 A.C. 323, Fennelly J. made clear that, while ECtHR case law is not strictly binding, it has been held that courts should, in the absence of some special circumstances, follow any clear and constant jurisprudence of the Strasbourg Court (p. 315). But the portal through which the ECHR enters domestic law is a defined one. The need for it arises only in limited circumstances.

64. I pause here to mention that the Oireachtas has recently enacted s.54 of the Irish Human Rights and Equality Commission Act, 2014 ("the 2014 Act"). This inserts a new s.3A into the 2003 Act. This provision allows actions for deprivation of liberty to be brought in the Circuit Court having regard to the principles and practice applied by the ECtHR in relation to affording just satisfaction to an injured party under Article 41 of the Convention. The amendments limit the compensation to the jurisdiction of the Circuit Court in a tort claim.

65. Save for these exceptions, both the 2003 Act and the 2014 Act, and the established case law such as *McD*, prescribe the limitations under which, when necessary, the Convention should have effect in the State, paying regard to the dualist nature of the Constitution. While ECHR jurisprudence is frequently illuminating on themes and issues, the need for resort to the ECHR Act of 2003 only arises if no remedy can be found under the Constitution. Each of the emphasised words in Question 1 of the Issue Paper (set out at para. 55 above) reflects an inclination toward a form of impermissible direct incorporation, not simply into our domestic law, but for the purpose of creating a new constitutional tort which, if so found, would warrant substantial damages.

66. But there are then practical issues. Even if hypothetically it came to "incorporating" Convention principles in this context, there remain real textual distinctions which must be recognised. Even if, by some process of legal alchemy, Article 3 jurisprudence might be used in the manner urged, the outcome would not be to create some philosopher's stone capable of resolving the difficulties the appellant must face in making this argument.

The Textual Difficulty

67. Consideration of the relevant protections must begin with the words of the Constitution itself. Deprivation of liberty can only take place "in accordance with law" (Article 40.4.1°). In Article 40.3.1°, the State guarantees in its laws to respect, and, insofar as practicable, by its laws to defend and vindicate the personal rights of the citizen. Article 40.3.2° contains a pledge in similar terms, to the effect that, in particular, the State shall *by its laws* protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen. The words of the Constitution provide for vindication where justice requires it.

68. But, by contrast, Article 3 of the ECHR provides that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment". Seen from the point of view of a constitutional tort, this protection is in quite different terms from those of Article 40.3 of the Constitution as set out in the preceding paragraph; Article 3 contains an absolute prohibition, with consequences which are discussed below.

69. Article 8(1) of the ECHR addresses the right to privacy. It provides that everyone has the right to respect for his or her private and family life, home and correspondence, but then allows for a margin of appreciation: Article 8(2) provides that there shall be no interference by a public authority with the exercise of that right except such as is in accordance with the law and necessary in a democratic society in the interests of national security, public safety, the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or the protection of the rights and freedoms of others. There is no doubt that certain concepts considered in Article 8 ECtHR privacy jurisprudence do bear similarities to those which have arisen in the vindication of the unenumerated constitutional right to privacy as first recognised in *Norris* (cited at para. 44 above), and in subsequent Irish case law. Infringements of this constitutional right of privacy have been held to be remediable by damages, sometimes in substantial sums.

70. But, because of the jurisprudence which has now developed based on Article 3 of the ECHR, the position is rather different from Article 8. By contrast with Article 8, the distinction in Article 3 is not simply based on the *words* of the protection, but how these words, as now interpreted, might be applied within our law.

Jurisprudence

71. It is obvious that ECtHR jurisprudence has now evolved to the point where it seeks to identify the issue of minimum space allocation to each prisoner as raising a "strong presumption" of inhuman or degrading treatment.

72. By way of further background, in *Bakhmutskiy* (cited at para. 57 above), the space per prisoner was seen to be 1 sq. metre per prisoner in a vastly overcrowded cell with very limited out-of-cell time. But the later important ECtHR Grand Chamber decision of *Muršić v. Croatia* (App. No. 7334/13, 20th October, 2016) was not referred to in the High Court judgment. Like the earlier ECtHR First Section decision in *Ananyev and Ors. v. Russia* (App. Nos. 42525/07 and 60800/08, 10th April, 2012), *Muršić* does define minimum space as a test (*Ananyev*, at para. 148; *Muršić*, at paras. 124-126). The same test is referred to in the later ECtHR judgment of *Nikitin and Ors. v. Estonia* (App. Nos. 23226/16 and 6 others, 24th June, 2019) at paras. 159-160. The ECtHR has now, therefore, enunciated that personal space of less than 3 sq. metres per prisoner raises a "strong presumption" of violation of Article 3 of the ECHR.

73. But, in fact, the jurisprudence does not go so far as the appellant might seek to contend. In *Muršić*, the Strasbourg Court did indeed hold that the applicant's rights under Article 3 had been violated. But this was *only* during the first phase of the applicant's imprisonment, when his cell space was below that minimum level. However, the majority of the Court went on to hold that, during a later phase of the applicant's detention, at a time when he was subject to exactly the same level of cell space, there was no violation of Article 3. This was because, by then, he was subject to other, less restrictive "out-of-cell" conditions (paras. 129-132). The majority of the Court concluded that while the spatial test did create a strong presumption confirmed by other features in the first phase, the change in conditions rebutted that presumption in the later phase. *Muršić* establishes that space is not, in fact, an overarching principle. Rather, it is one element or test in an Article 3 assessment, albeit an important one. In fact, in considering Article 3 prison condition cases, the ECtHR continues to adopt the "cumulative effects" assessment (paras. 125-126).

74. The appellant's case ultimately rests on this "overlap" or mingling of constitutional and ECtHR jurisprudence. It derives from what can only be described as a "category error", and is contra-textual. It effectively seeks to give direct application of Article 3 of the ECHR in Irish law as constituting elements of a tort claim sounding in damages. This is constitutionally impermissible.

75. Indeed, it is not simply that the words, or even the principles enunciated in the Article 3 deliberations, are *different* from those to be found in the Constitution; the very purpose of those principles differs. It is the Constitution which identifies the fundamental rights which are justiciable in Irish courts and which may, where appropriate, give rise to an action sounding in damages.

76. The limited manner in which the ECHR should apply in this State is ultimately determined by Article 29.6 of the Constitution and the legal routes outlined earlier. Similar observations apply to legal authorities from other common law jurisdictions which, although illuminating, nonetheless apply the Convention principles in a manner different from this State. But the protections afforded by the Constitution will never be less than those provided by the Convention, and frequently will be greater.

77. Questions concerning the interaction between the Convention, the Constitution and the law of torts have previously emerged before this Court (see, most recently, the judgment of O'Donnell J., speaking for the Court, in *LM v. Commissioner of An Garda Síochána* [2015] IESC 81; [2015] 2 I.R. 45). There may well be other areas where our tort law will be shaped or influenced by the Convention. But when it comes to prison conditions, Article 3 poses serious obstacles to such a development.

78. The objection is not only doctrinal and textual; it is also practical. The *absolute* forms of protection in Article 3 would give rise to formidable challenges when it came to considering tort "indicia", such as standard of proof, causation and contributory negligence. It is hard to conceive how the underlying concepts and presumptions contained in the terms of Article 3 and its jurisprudence could "fit in" to a claim in tort for damages, where issues of standard of proof, causation and contributory negligence frequently arise. The determination of whether such a "tort" had been committed might have to be based on very finely balanced criteria, such as those which made the difference between a violation and non-violation of Article 3 in *Muršić*. These observations are simply illustrative of the variety of problems facing this type of "incorporation" of Article 3 principles in a more concrete way. Indeed, even were such an approach constitutionally permissible or practical, the effect of such a de-contextualised application might mean that the absolute nature of Article 3 would itself become distorted if it was vested with the characteristics, and subject to the contours and limitations, of tort law.

79. The words of Article 3 should be seen in their historic context. They were devised in the years 1949 and 1950, with the memory of concentration and extermination camps fresh in the minds of the framers of the Convention. Even at a practical level, therefore, Article 3 jurisprudence, as now embodied in judgments of the Court of Human Rights, contains developments where there is reason to be cautious when it comes to consideration within a constitutional framework, especially where there is a claim for damages.

80. For obvious reasons, the broad protection of Article 3, which includes torture, would also have to be held to be an absolute constitutional right under Article 40.3 which could not be subject to limitation on the grounds of proportionality or legitimate State interest. In itself, and within the context of this case, this is not controversial *if* Article 3 of the ECHR is viewed within its original scope, referring to torture perpetrated by the State. But the difficulties arise when it comes to considering this question as a constitutional tort requiring assessment with all the indicia of tort law.

81. But, as it now stands, the scope of the Article has been subject to what scholars might characterise as the "evolutive" interpretation described earlier, and has extended considerably beyond its original core meaning. The ECtHR has considered and analysed each aspect of the protections contained in Article 3. It is capable of a nuanced interpretation. But the effect of this evolving interpretation, contrasted with the original more strict view under the Convention, places the present jurisprudence and the concepts contained there within a formal framework which, for the reasons outlined, I would be very slow to contemplate placing within Irish constitutional law.

82. Our courts are vested with the responsibility to administer justice and to uphold the provisions of the Constitution. This Court cannot abdicate or devolve those duties to other courts by a simple process of "adopting" or "incorporating" the jurisprudence of those courts without thought of the purpose of the jurisprudence based on an international fundamental rights instrument, now subscribed to by 47 Member States of the Council of Europe.

83. This is not, of course, to say that the Constitution has nothing to say on these fundamental issues or that the protections in national law are any less than those under the ECHR. In fact, the jurisprudence focused on the rights of the person is well developed.

The Constitutional Protections as Identified in the Case Law

84. As interpreted and applied by the Superior Courts, therefore, the Constitution has been held to provide a wide-range of protections for the personal rights of prisoners. A deprivation of liberty must not only be in accordance *with* law, but any attenuation of prisoners' fundamental rights must be proportionate: the diminution must not fall below the standards which we identify to protect human dignity. The range of protections has been considered in cases such as *The State (Richardson) v. Governor of Mountjoy Prison* [1980] I.L.R.M. 82, *Brennan v. Governor of Portlaoise Prison* [1999] 1 I.L.R.M. 190, *Holland v. Governor of Portlaoise Prison* [2004] IEHC 97; [2004] 2 I.R. 513, and *Mulligan* (cited at para. 18 above). The rights of the person who is a prisoner were considered in *Kinsella v. Governor of Mountjoy Prison* [2011] IEHC 235; [2012] 1 I.R. 467. These are valuably surveyed by Mary Rogan in *Prison Law* (Bloomsbury Professional 2014).

The Nature of the Right

85. Having dealt with the misapprehensions involved in the appellant's present claims, it is now possible to address the constitutional protections actually applicable. Some parts of the protections are briefly alluded to in Rule 85(3)(c)(iii) of the Prison Rules which provides that a prison officer shall respect the "dignity" and "human rights" of prisoners under his or her care.

86. Seen even at this most basic level, this provision conveys the simple truth that, within, and subject to, the constraints of imprisonment itself, prisoners should not be exposed to conditions which are unnecessarily humiliating, or which offend against standards of decency. The prison officers did take various steps to ameliorate the appellant's situation. But here the *conditions* were humiliating and invasive by any reasonable standard of personal privacy protection. They fell substantially below the standards to be expected of an Irish prison in the year 2013. This is not to set an artificial standard. The Prison Rules themselves set standards to be observed for all prisoners. These were not observed. It is not hard to find a comparator, were that necessary: the non-protection prisoners in the refurbished cells were not been exposed to the same sanitary and hygienic conditions as the appellant. The fact that the appellant applied for protection status did not diminish the duties owed to him by the Prison Service.

87. This is not to say that a single substandard condition or trivial infringement of the Rules, could, *per se*, render detention unlawful and justify an order for the release of a prisoner.

The detention of the appellant at all times remained lawful. But the appellant's entitlements must be measured against the constitutional guarantees contained within Article 40.3 of the Constitution which are to vindicate the rights of the *person*, insofar as "practicable".

Privacy and Dignity

88. The High Court declaration under the Constitution was based on Henchy J.'s dissent in *Norris* (cited at para. 44 above), now be regarded as having outlined the main contours of the unenumerated right to privacy. The right is derived from the protection of the *person* to be found in the words of Article 40.3 of the Constitution and from the ethos of the Constitution as a whole, in particular the value of dignity of the person expressed in the Preamble. Henchy J. memorably observed that there was necessarily given to the citizen, within the required social, political and moral framework, such a range of inherent personal freedoms or immunities as are necessary to ensure the *dignity and freedom of the citizen as an individual* (see, p. 71 of *Norris*). This complex of rights he categorised as the right to privacy.

89. Throughout the judgment there is a close link between this constitutional privacy right and the value of dignity. The right to privacy and the value of dignity find their focus point in the right of the appellant to be protected as a "person" as defined under Article 40.3 of the Constitution. The words "person" or "personal" not only carry with them the ideas of individual privacy and dignity, but additionally the respect due to each individual by virtue of his or her status as a human being. The terms "person(s)" and "citizen(s)" are referred to in Article 40 of the Constitution more than twenty times. By virtue of personhood, each individual has an intrinsic worth which is to be respected and protected by others and by the State.

90. The value of dignity underlies rights declarations as diverse as the Charter of the United Nations, the Universal Declaration of Human Rights, the German Basic Law, and the Charter of Fundamental Rights of the European Union, where it is described as "inviolable" (Article 1). It is also to be found in the Preamble to the Constitution of India. In a sense, it is a value which underlies all fundamental rights, especially that of equality before the law. It has arisen for consideration in *Quinn's Supermarket and Anor. v. Attorney General and Ors.* [1972] I.R. 1, *McGee v. Attorney General and Anor.* [1974] I.R. 284, *Norris, In re Ward of Court (No. 2)* [1996] 2 I.R. 79, *Fleming v. Ireland and Ors.* [2013] IESC 19; [2013] 2 I.R. 417, *O'Donnell and Ors. v. South Dublin County Council and Ors.* [2015] IEHC 28, and *Ruffley v. Board of Management of St. Anne's School* [2017] IESC 33; [2017] 2 I.R. 596.

91. How then to identify the constitutional right or rights in this case? Writing as long ago as 1992, Professor Binchy observed that the interpretation of the scope of particular rights in broad or narrow terms is, to a large extent, "a matter of linguistic preference and historical contingency" (William Binchy, 'Constitutional Remedies and The Law of Torts' in James O'Reilly (ed), *Human Rights and Constitutional Law* (Round Hall 1992), at p. 218). There is much in this. The observation applies as much to characterising a right as defining its range or scope.

92. To describe the right infringed in this case as simply that of "privacy" alone is, in a sense, a form of shorthand. Used in isolation, the word falls short of a full description of the appellant's conditions. If, hypothetically, he had been detained in solitary confinement, and therefore in total privacy, he would nonetheless have been subject to conditions which constituted an unjust attack on his constitutional protection of the person.

93. None of the nominate torts fully describe the nature of the infringement. In truth, what is at issue in this case lies at a point where the right of privacy and the value dignity could be seen as lying at the base points of a pyramid which has at its apex the respect due to any person. These are attributes of personhood, and, along with other values such as autonomy, are aspects of the protection of the person afforded by Article 40.3 of the Constitution. By contrast to any other approach, this identification of the right as being one under the Constitution forms a firm, yet flexible, starting point for consideration of vindication within the contours of established law. The conditions to which the appellant was exposed diminished the right of privacy and the value of dignity due to him as a person, even seen within the limitations which necessarily arose from the fact of his detention. His rights under Article 40.3 of the Constitution were thereby violated.

Response to the First Question

94. It is now possible to answer the first question of the Issue Paper. At risk of repetition, the Court is asked whether, when it comes to an "assessment of torture or inhuman or degrading treatment", there one common "overarching principle" to be found in Article 40.3 of the Constitution *and* Article 3 of the ECHR? The question itself can now be reduced to whether there is an overarching principle applicable in an assessment of prison conditions *under the Constitution*. The response is that the "overarching principle" is the cumulative approach correctly applied by White J. It is not true to say that, under the Constitution, there is one single "litmus test" or one single touchstone, such as a minimum space allocation. Nor is this true under the Convention. This is to misunderstand the ECtHR jurisprudence.

95. What are the "relevant" and "irrelevant" factors in terms of inhuman and degrading treatment? Again, for the same reasons outlined earlier, the premises and phrasing of this question are inappropriate.

96. In carrying out an assessment as to whether there has been an infringement of rights under Article 40.3, a court will have particular regard to features such as the duration of detention, the space in a cell, overcrowding, the linked issues of sanitation and hygiene, lighting, heat, ventilation, as well as predictable out-of-cell time, out-of-cell activities, and access to showers, in addition access to education and work. These are relevant features in the assessment. So, too, will be the attitudes of the prison staff and administration. These are the core elements. Positive features will be of little weight if there is a very substantial failing in respect of these key criteria.

97. Are there "particular factors" which create a *presumption* of "inhuman and degrading treatment"? No one factor will create such a presumption. But there are features which will attract particular weight. These have been identified above. The way this question is

phrased again seeks to inappropriately bring Article 3 elements into play in a constitutional assessment. As stated earlier, intentional mistreatment would create a presumption of a violation of Article 40.3 of the Constitution, resulting in exposure to a claim for damages under a number of possible headings. So, too, would a regime which attempts to break the spirit of a prisoner or to deprive him or her of the normal core human elements of dignity, autonomy and privacy, although subject to the necessary limitations of imprisonment. There may, however, be circumstances where proper prison administration, staff safety, or other public interest requirements might require the isolation or segregation of a prisoner, or prisoners, from others. But these would require justification.

98. Do proportionality or margin of appreciation considerations arise? If, in a constitutional assessment, a court determines that there has been intentional mistreatment, no proportionality test could arise. Such a finding would almost inevitably have consequences in damages. But this would be as part of an assessment process carried out to identify, within the spectrum of protections afforded by Article 40.3, whether the conditions were of such gravity as to give rise to a finding of that type, or whether the conditions and treatment would give rise to a finding of lesser seriousness.

99. Did the High Court judge err in finding that there had been no violation of the appellant's right to freedom from inhuman and degrading treatment under the Constitution? I would here respectfully differ from the way in which the learned High Court judge characterised his findings. For the reasons described earlier, it would be more accurate to say that, rather than privacy alone, the appellant's Article 40.3 rights to protection of his person were infringed.

100. This was not a situation where the appellant's *own* conduct required his segregation from other prisoners. His rights were not abrogated by his application to become a protection prisoner. The Prison Service was on notice of the overcrowding and accommodation issue and failed to take any, or any adequate, measures to address the problem for reasons never satisfactorily explained. By any frame of reference, it should have been obvious that the use of uncertified, unsanitary cells would fall far below the standards to be expected in an Irish prison in the year 2013. There is no suggestion that what occurred in this case was part of any pattern or plan instigated by a prisoner, or a group of prisoners. In such a case, other considerations could well arise.

101. The question facing the Court can, then, be looked at in a different way. Rather than simply seeing it as whether there has been an infringement of a constitutional right where a declaration is appropriate, the point is, rather, whether the infringement requires remediation in damages? In my view, it must, on the facts of this case.

102. But, in distinction from *Kennedy*, or the other decided authorities of our courts where damages were awarded for the violation of constitutional rights, there is no indication that what happened in this case was *directly intended*, or was some *purposeful act or omission* on the part of the authorities. There was, rather, a negligent want of supervision and care on the part of the Prison Service. The situation was left to the Prison Campus Governor

and the prison staff to deal with. The problem was, as White J. observed, "self-evident" (paras. 333-335).

103. Moreover, the Prison Service was on notice of the issue. The appellant's previous solicitor had written not one, but two letters of complaint. The judge pointed out that the fact that the reply to one letter was inaccurate in its description of the appellant's conditions was a serious matter. So, too, was the failure to answer the second letter. He was correct in these observations. This then leads to a consideration of the second question, that of damages.

The Second Question: Damages

104. In the second question the Court is asked to address is whether the appellant is entitled to damages; in what circumstances it would have been appropriate for a court to decline to make such an award; and whether a court may, appropriately, refuse to make a monetary award on the basis that the evidence of a plaintiff has been found to be untruthful or exaggerated in certain respects? The Court was then requested to identify principles applicable in refusing to award damages. Finally, the Court was asked whether the trial judge erred in refusing to award damages by reason of the appellant's untruthful and exaggerated evidence.

105. Here, too, it is necessary to make a number of preliminary observations.

106. First, courts are necessarily cautious when asked to deal with hypothetical or overly-generalised questions. Therefore, the answer can only be given within the constraints of this case, although some observations may be more broadly applicable.

107. Second, counsel for the respondents raises questions of policy considerations and state immunity. The Court's attention was drawn to United States federal jurisprudence on civil actions concerning deficient prison conditions. This detailed survey began with *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics* 403 U.S. 388 (1971) and concluded with *Ziglar v. Abbasi* 582 U.S. (2017). United States federal jurisprudence on issues which are reflected in our own Constitution is entitled to great respect and will frequently contain valuable insights. However, just as in the case of the ECtHR, such jurisprudence in this area is subject to its own distinct and rather different process of evolution.

108. Earlier federal court decisions were delivered when the prevailing law assumed that a proper judicial function was to provide such remedies as were necessary to make effective the purpose of a statute. United States federal law now adopts a more cautious approach, holding that when deciding whether to recognise an implied cause of action, the determinative question may be one of statutory intent. Expanding the *Bivens* remedy is now considered a "disfavoured" judicial activity. One recent opinion of the United States Supreme Court, *Ashcroft v. Iqbal* 556 U.S. 662 (2009), significantly narrowed the scope of vicarious liability for the actions of prison staff. This jurisprudence is to be seen in the context of the United States Prison Litigation Reform Act, 42 U.S.C. § 1997e, which made substantial changes to the way in which prison condition claims could be brought in the

federal courts. Consequently, I do not think these authorities can be of assistance in this case.

109. Third, I do not see that there is any basis for state immunity in this case, any more than in *Byrne v. Ireland*. For the purposes of this case, the Prison Service was under a duty toward the appellant. For the reasons outlined earlier, it is just and reasonable to fix the Prison Service with liability.

110. Fourth, the respondents ask the Court to consider jurisprudence applicable in personal injury cases and the statutory and other sanctions which may be applied when there are lies and exaggerations. There have been a number of decisions on this issue from this and other courts (see *Vesey v. Bus Éireann* [2001] 4 I.R. 192, S*helley-Morris v. Bus Átha Cliath* [2003] 1 I.R. 232, *O'Connor v. Bus Átha Cliath* [2003] 4 I.R. 459 and *Platt v. OBH Luxury Accommodation Limited and Anor* [2017] IECA 221; [2017] 2 I.R. 382). In all of these, the courts have considered appropriate penalties for lies and exaggeration. In this area, the matter is now regulated by statute.

111. Fifth, in what follows, it is hardly necessary to say that no reflection is intended to be cast on the appellant's legal advisors. It is the duty of an advocate to present his or her client's case to the court on the basis of the instructions received from the client. This is a fundamental principle known to all who engage in litigation. But some of the appellant's complaints raise the question of whether some third party may have influenced the appellant's testimony. He described poor conditions which were referred to in Judge O'Reilly's earlier reports. But these complaints concerned conditions which obtained years prior to the appellant's arrival in Mountjoy in 2013. While it is the duty of counsel to present the case, this is not to say that when it comes to sanctions or costs, a litigant who seeks to mislead a court can expect to be treated in the same way as a litigant who seeks to tell the truth.

112. But, even acknowledging these serious deficiencies, the core findings, however, lead to a remedy in damages. In closing submissions in the High Court, counsel for the appellant is recorded as abandoning parts of the claim for common law damages, but persisting in the claim for punitive or exemplary damages. Perhaps counsel was referring to abandoning a claim for general damages. One cannot escape the sense that this claim for damages has had a significant "gravitational pull" on the entirety of these proceedings where, arguably, a simpler case might have been made simply on the basis of seeking declarations.

113. Ultimately, what is necessary is to stand back and enquire as to whether this was a case where there should have been no award of damages. The lies and exaggerations were serious. But in the ultimate analysis they cannot be seen as amounting to an outright abuse of process. The principle "*ex turpi causa non oritur actio*" does not apply. It was not a fraudulent claim.

114. Substantial parts of the evidence were found to give rise to a constitutional infringement. Not only can it be said that there was an infringement of a constitutional right, but also that there is a requirement for vindication in damages. But this is in circumstances which

do not conveniently lend themselves to an easy characterisation or measurement by reference to any one tort.

115. As with characterising a constitutional right and determining its scope, when considering damages much also depends on characterisation. This difficult area is thoroughly analysed in Bryan ME McMahon and William Binchy, *The Law of Torts* (4th edn, Bloomsbury Professional 2013), at Chapter 1, and in Gerard Hogan, Gerry Whyte, David Kenny and Rachael Walsh, *Kelly: The Irish Constitution* (5th edn, Bloomsbury Professional 2018), at para. 7.1.148 *et seq*. and para. 8.2.69 *et seq.*

Medical Evidence

116. This case cannot be seen as a personal injuries claim. At para. 295 of his judgment, White J. refers to medical evidence of Dr. Patrick Randall to the effect that, due to the experience of his conditions in prison, the appellant felt deeply humiliated, alienated from support and denigrated. This was further exacerbated by a perceived lack of response to his complaints. The doctor found that the appellant did not meet the criteria for a diagnosis in relation to any stress-related illness such as post-traumatic stress disorder, but that there were indications of stress. Thereafter, the appellant had done well, despite the fact that he was a vulnerable man from a traumatic background (para. 296).

117. But there was no diagnosable psychopathology. The appellant was not overly depressed or suffering from any anxiety disorder (para. 298). White J. concluded that while there was no risk to the appellant's physical health, he did find his time on the D1 landing to be "extremely stressful" (para. 299).

118. It cannot, therefore, be said the appellant sustained significant injuries. But neither can it be seen entirely as an action *sine damnum*, or without some personal detriment. The appellant was undoubtedly exposed to stress from the conditions described.

119. Next, this is not a case where punitive or exemplary damages would be justified. There is no indication of intentionality or any conduct on the part of the Prison Service which would warrant a punitive aspect to damages or that an award should be characterised as exemplary. This was, rather, a case where there was a want of care and where the Prison Service was on notice of the situation. But there was no indication of recklessness or that what happened was inflicted on the appellant. Counsel for the appellant points out that the respondents have not appealed the High Court finding that damages, *per se*, are recoverable in an action such as this. But it is not necessary for this Court to determine whether, in an action for infringement of constitutional rights, damages *per se* are recoverable.

120. Arguably, a case could be made for what has been called "vindicatory damages". However, the basis for such an award cannot be said to be well-established in our law or elsewhere in the common law world. In fact, there are elements in the idea of such damages which might link such an award to punitive and exemplary damages which do not arise here. The idea of vindicatory damages raises fundamental questions as to their range and scope. To recognise a new heading of damages would also raise the matter as

to whether such a new heading should be seen as being an addition to, or substitution for, some existing category. Such a case has not been argued.

121. It will be borne in mind that the courts have repeatedly emphasised that resort to constitutional remedies should take place only where strictly necessary. As Barrington J. pointed out in *McDonnell v. Ireland* [1998] 1 I.R. 134, at p. 138, only *if necessary* will the courts define a right and fashion a remedy for a breach of the Constitution. There may be cases where the fact that a tort is also the violation of a constitutional right may give rise to an award for exemplary or punitive damages. But, as Barrington J. warned, constitutional rights should not be seen as "wild cards" to be played at any time to defeat all existing rules (p. 148). If the general law provides an adequate cause of action to vindicate a constitutional right, an injured party cannot ask a court to devise a new and different cause of action. So, too, with remedy. I believe there is much substance in Keane J.'s observations in *McDonnell* that, insofar as practicable, constitutional remedies are to be seen as the vindication of a wrong and therefore subject to the necessary limitations which apply within the constraints of tort law and civil liability (pp. 157-159).

122. But here, the fact that it is not possible to identify the situation which evolved with any nominate tort does not prevent a remedy in damages.

123. Absent any other legal remedy then, the question of damages or remedy must be resolved within the words of the Constitution itself. As Ó Dálaigh C.J. pointed out in *The State (Quinn) v. Ryan* [1965] 1 I.R. 70, the power of the courts must be as ample as the defence of the Constitution requires (p. 122). Where necessary, this power must include the fashioning of an appropriate remedy for *vindication*, in the words of Article 40.3, insofar as practicable the "*injustice done*" to the *person* of the appellant, where there is no common law or statutory framework.

124. Here, to paraphrase Henchy J.'s words in *Hanrahan v. Merck Sharp Dohme (Ireland) Ltd.* [1988] 1 I.L.R.M. 629, a declaration is not an adequate mechanism of "implementation" to effectuate the constitutional guarantee in question. To frame the matter in a damages context, the appellant was exposed to conditions which constituted an infringement of Article 40.3 of the Constitution, which subjected him to a higher level of stress than would have occurred in the normal consequences of imprisonment. These effects were personal to the appellant himself. While there was stress, there must be a recognition that prison is inherently stressful. But, here there were truly exceptional conditions, both within and outside the cell.

125. In considering the question of damages, it seems to me that a court may apply the following basic principles. First, there must be a restitutionary element, seeking to put a claimant in the same position as if his or her constitutional rights had not been infringed. Second, it is necessary to ask whether what arose in a particular case was not simply some procedural error. Third, a court's approach should be an equitable one, having regard to the particular facts of an individual case and the seriousness of the violation. Fourth, if and where necessary, a court award damages under the various headings of common law, such as non-pecuniary loss including pain, suffering, psychological harm,

distress, frustration, inconvenience, humiliation, anxiety, and loss of reputation. Fifth, punitive damages will not generally be awarded save in very grave cases, such as where there was a direct intent or purpose in bringing about a significant consequence or detriment.

126. These general tests are derived from those set out by Irvine J. in *Pullen v. Dublin City Council* [2009] IEHC 452, para. 5.10. In *Pullen*, a High Court case, Irvine J. was dealing with damages for violation of a Convention right. But these can be guidelines in assessing what would constitute constitutional vindication. Here, there should be a restitutionary element. What occurred was not simply procedural. The approach should be equitable, reflecting that the seriousness of the violation requires more than a mere declaration. The Court may also take into account that there were elements of stress caused, but no more. This is not a case for punitive or exemplary damages.

127. Ultimately, all these considerations place the question of remedy within the category of compensatory damages. An award of compensatory damages can serve a vindicatory purpose. It will recognise that what happened was wrong and did have an effect upon the appellant over and beyond other constitutional infringements where a declaration would be adequate. To mark the wrong in this case, therefore, the vindication must go further than a mere declaration and contain a just financial redress.

128. One other factor is relevant. This judgment has sought to explain why ECtHR principles should not be applicable in determining the wrong. But such policy or practical considerations do not figure to quite the same degree when it comes to the question of identifying levels as to what would amount to "vindication" under the Constitution. Thus, some comparison to ECtHR jurisprudence may be useful, even if only for the purpose of illustration.

Summary

129. What is in question here is a seven-and-a-half month term of imprisonment, where the conditions to which the appellant was exposed were distressing, humiliating, and fell far below acceptable standards in an Irish Prison in the year 2013. The claim, and the issues, fall to be considered under the Constitution. It is not open to the appellant to seek to incorporate concepts and principles derived from Article 3 ECtHR case law in this claim for damages for infringement of constitutional rights. The conditions infringed the appellant's personal rights under Article 40.3 of the Constitution, including those of privacy, and the values of dignity and autonomy. The infringement is not susceptible to identification of any one nominate tort. But, as the Constitution itself provides, this fact will not prevent a court from granting a suitable remedy where the evidence shows there was a violation of the appellant's rights under, and values contained in, or derived from, Article 40.3 of the Constitution. The approach adopted in this judgment therefore seeks, insofar as practicable, to adhere to principles applicable in tort law, albeit in circumstances where the infringement in question is not easy to classify as a tort. The award should be characterised as compensatory damages.

Declaration and Damages

130. Identification of the constitutional right and remedy respects the constitutional order and allows for an appropriate vindication in a manner which more closely accords with national law. I would hold that this is an appropriate case for moderate compensatory damages. This award cannot be seen as establishing a "benchmark" when other cases may differ on their facts.

131. The appellant is entitled to a declaration that the conditions of his detention between the 13th February and the 30th September, 2013, infringed his constitutional rights under Article 40.3 of the Constitution. He is entitled to an award of damages in the sum of €7,500.

ECHR Jurisprudence

132. The declaration given, and the award of damages under the Constitution should be sufficient to dispose of the appeal. Generally speaking, a court would not have to proceed further to any ECHR consideration.

133. But the questions posed did also seek answers under the ECHR. There are other outstanding cases. It may, therefore, be helpful to briefly describe the level of redress in Article 3 prison conditions cases decided by the ECtHR, if only for comparison on the question of "just satisfaction" under Article 41 of the ECHR.

134. As discussed earlier, the jurisprudence of the ECtHR has significantly evolved since the time of the judgment in *Ireland v. The United Kingdom* (App. No. 5310/71, 18th January 1978). In an Article 3 consideration of prison conditions, the absence of evil purpose will not now preclude a finding of a violation (*Peers v. Greece* (App. No. 28524/95, 19th April, 2001), at para. 74). Numeric measurements of space per prisoner, now, do form a significant part of the assessment.

135. The jurisprudence has considerably developed, even since the time of T*repashkin v. Russia* (App. No. 36898/03, 19th October, 2007), where the ECtHR declined to lay down any numeric space requirement, pointing out however, that the particular factors of duration of detention and the physical and mental condition of a detainee would be amongst the factors to be taken into account, as well as the general standards in this area of law, as developed by international institutions, such as the CPT (para. 92). *Muršić*, and its successor, *Nikitin*, now show that a falling below a numeric figure of 3 sq. metre per prisoner creates a strong *but rebuttable* presumption of breach of Article 3 (see, para. 72 above). This reflects a trend discernible at least since *Orchowski v. Poland* (App. No. 17885/04, 22nd January, 2010) and *Ananyev* (cited at para. 72 above), where the ECtHR adverted to the CPT minimum standards of space allocation per prisoner (*Orchowski*, at para. 131; *Anayev*, at para. 144).

136. As well as Peers and the other ECtHR judgments mentioned earlier, this Court was referred to *Cenbauer v. Croatia* (App. No. 73786/01, 13th September 2006), *Ananyev, Kasperovičius v. Lithuania* (App. No. 54872/08, 20th February 2013), *Canali v. France* (cited at para. 7 above) and *Firstov v. Russia* (App. No. 42119/04, 7th July 2014).

137. These judgments are valuable in the sense of providing insight in respect of how ECHR standards for prison conditions were set, and also as to what is considered to be "just satisfaction" under Article 41 of the ECHR. In each, there was, expressly and in substance, a violation of rights under Article 3 followed by redress for breach of the Convention. It is helpful to select a representation group from the wide jurisprudence.

138. The earlier evolution in the case law culminated in the Grand Chamber of the ECtHR decision in *Muršić*, briefly described at paras. 72-73 above. In that case, the applicant's Article 3 right to be free from inhuman or degrading treatment had been violated in circumstances where he had been detained in a cell of 2.62 sq. metres of personal space for 27 consecutive days (paras. 146, 153 and 172). The cells were poorly kept, unclean and humid, and the living and dining areas were close to the sanitary facilities and caused a persistent smell (para. 16). The applicant was denied the opportunity to work in prison. For periods, he did not have adequate access for recreation or educational facilities. The Court of Human Rights held that personal space of less than 3 sq. metres raised a *strong presumption* of a violation of Article 3 of the ECHR (para. 124. See, also, *Orchowski*, at para. 131). The ECtHR held there the violation was aggravated by the deficiency of exercise facilities outdoors, a lack of privacy and unhygienic conditions.

139. However, illustrating that the cumulative and balancing approach remains the overarching principle, the majority of the Court in *Muršić* then drew the important distinction set out earlier (see, para. 73 above). They held that, in fact, there had been no violation of Article 3 during periods other than those 27 days, even though in later periods the applicant continued to be subject to less than 3 sq. metres of personal in-cell space, but for shorter periods of time each day (paras. 154-171). The Court held that there were mitigating factors in the latter phase of the detention, such as freedom of movement and the capacity to engage in other activities outside the cell. The applicant was given to two hours of outdoor exercise plus free movement within the prison for three hours in the evening. The ECtHR concluded that the general prison routine in those circumstances was adequate to compensate for the small living space. In the view of the majority of the Court, the "strong presumption" had been rebutted by those mitigating features.

140. It is interesting that, while the question of "just satisfaction" under Article 41 of the ECHR can be seen as having regard to the primary role of the Court in maintaining standards, it is nonetheless significant that the ECtHR pointed out that there were:

> *"undeniable efforts made by the domestic authorities to alleviate the problem of overcrowding in [the] Prison, which should be taken into account in determining the amount of any just satisfaction"* (para. 181).

141. But, in *Muršić*, the majority of the Court observed that suffering caused to a person contained in conditions so poor as to amount to a breach of Article 3 could not be made good by a mere finding of violation of that Article (para. 181). The judges in the majority affirmed that 3 sq. metres of floor surface per detainee in a multiple-occupancy cell was a prevalent norm in the case law as being the applicable minimum standard for the purposes of Article 3 (para. 110). The Court awarded the applicant €1,000, plus any tax

that might be chargeable to him in respect of non-pecuniary damages. The dissenting opinions are interesting from a number of aspects, but it is not necessary to go into those here.

142. Later, in *Nikitin* (cited at para. 72 above), the Second Section of the ECtHR again addressed the issue of prison conditions. This was not a decision of the Grand Chamber. The final decision was pronounced after this appeal was heard, but the judgment is again useful to set out the range of the awards made. Here, there were a number of different applicants and each case was separately considered. The judgment emphasised requirements for basic hygiene and sanitary necessities and a sufficient duration of out-of-cell time, and makes reference to prison rules. It also considers whether domestic preventative remedies were compliant. As the case has not been considered in argument, I make no further comment on it. There, the ECtHR made awards ranging from about €4,500 up to a maximum of just under €10,000 (para. 231).

143. The earlier case of *Ananyev* is noteworthy because of the severity of the conditions to which the applicant was exposed. Yet the first applicant, Mr. Ananyev, was awarded only the sum which he claimed of €2,000. A second applicant was awarded the sum of €6,000 for the first year of his detention and €3,500 for each subsequent year, culminating in a total of €13,000 (paras. 172-174). But he had been detained under these conditions in excess of three years, a much longer period than the appellant in this case. Just as in *Muršić*, the ECtHR emphasised that the length of stay and the conditions were undeniably the single most important factors in the assessment of non-pecuniary damage (para. 172). The Court also referenced the minimum 3 sq. metres requirement, as well as adding that each prisoner was entitled to his or her own bed space (para. 148).

144. The case of *Canali*, bears some similarities to the facts of this case. The sanitary and hygiene conditions were similar to those which arose in the case of the appellant in this appeal. But the conditions as to heat, ventilation and light were distinct from those on the D1 landing. There were, however, similarities in the time the applicant was allowed outside the cell. The ECtHR concluded that an appropriate award in that case was €10,000 due to moral damage, together with €4,784 in respect of costs.

145. Again, touching on the points raised in Question 1, and at risk of repetition, in *Muršić* and as late as *Nikitin*, the ECtHR has applied a cumulative test having regard to duration of imprisonment, privacy within cells, ventilation, access to natural light and air, heating quality and compliance with basic sanitary requirements. Substantial weight is also placed on limitations on outdoor exercise, especially if a prisoner only has limited opportunity to spend time outside his cell. In view of the general similarity in the treatment of prison conditions if not the jurisprudence, it is unnecessary to go further in considering the first and second questions on the Issue Paper.

The Third Question: Costs

146. The third question on the issue paper asks the Court to consider the principles applicable when a party has succeeded in establishing a breach of constitutional or Convention rights; to further consider the basis upon which there may be a refusal of costs; and to

determine whether the trial judge in this case was correct in refusing to award costs. Here, similar considerations arise as did in respect of the second question. A process of induction, that is, reasoning from the particular to the general can pose real problems in law. It is simply not appropriate to deal with this issue in the abstract or by enunciating general principles derived from this one case. It would not be fair to the parties to address the question pre-emptively. The parties must have the opportunity to consider this judgment and, thereafter, make submissions on the time expended on the various issues in the High Court.

147. In spite of the moderate level of the award in this case, the special circumstances did warrant that these proceedings be tried in the High Court and appealed directly to this Court. I do not go so far as to say that this was a test case. But the legal issues were substantial and it was necessary to explore them. Application for leave to appeal was not opposed. However, the fact that leave was granted is not itself determinative of the status of the case. In the light of the reasons outlined earlier, the extent of the costs award cannot be determined in this judgment. Submissions will be necessary setting out, in brief form, the length of time dedicated to the various issues raised in the High Court. Whether the appellant will ultimately receive the entire benefit of the award is a matter beyond the control of this Court. There may yet be forms of redress available to the victims of his crimes.

Conclusion

148. Society reserves to itself the right to sentence persons who commit serious crimes to imprisonment. But the conditions of detention must comply with national and international standards, which Ireland has pledged itself to uphold. The legal protections applicable are reflected in national law in the decisions of the Superior Courts, the 2007 Act and the Prison Rules. Ultimately, these protections are based on values enshrined in the Constitution itself.

149. Prison staff and administrators undoubtedly face a difficult task in maintaining good order. Sometimes this must involve protecting prisoners from other detainees. But the fact is that, for many years prior to the year the appellant was placed in the D1 landing, the State was on notice that prison conditions in some prisons, or sections of prisons, remained significantly below the standard to be expected. Here the appellant was exposed to conditions that would have fallen below acceptable standards, even if this case had been taken a decade or more earlier. It is fair to acknowledge that, during the same period, there have been public servants with the desire, will and perseverance to seek to improve this situation. But in this case the Prison Service fell down over a significant period of time.

150. The outcome of this case can only be seen within the context of its particular timeframe and circumstances. Pending cases will stand or fall on their own facts in whatever legal forum is deemed appropriate to hear them. While the facts in this case were established by the High Court, it must be open to question as to whether it would always be necessary to engage in a High Court hearing.

151. The difference between this judgment and that of the High Court lies in the form of the declaration and the extent of the remedy. I would frame the declaration in rather different terms, and allow the moderate award of compensatory damages in vindication set out earlier (see, para. 131). The award of damages will be against the Prison Service and no other respondent. To the limited extent outlined in this judgment, I would vary the order of the High Court judge.