

THE HIGH COURT

2SSP/2002

BETWEEN

SÉAMUS MARLEY

APPLICANT

AND

THE GOVERNOR OF THE MIDLANDS PRISON

INTENDED RESPONDENT

AND

**IRELAND, THE ATTORNEY GENERAL
THE CHIEF JUSTICE OF IRELAND, THE COMMISSIONER OF AN GARDA SIOCHANA, THE PRESIDENT
OF THE HIGH COURT, THE MINISTER FOR JUSTICE, THE IRISH HUMAN RIGHTS AND EQUALITY
COMMISSION AND THE IRISH PRISON SERVICE**

INTENDED NOTICE PARTIES

RULING

BY MR JUSTICE HOLLAND on the 18th of February 2022

1. By letter to the High Court dated 31 January 2022, received there on 14 February 2022 and by me on 15 February 2022, Mr Marley, prisoner #106919 detained in the Midlands Prison, complains by unsworn signed statement that the conditions of his detention are so constitutionally unacceptable and in breach of his rights pursuant to the European Convention on Human Rights as to make his detention unlawful. More specifically he complains of denial by the Governor of the Midlands Prison of his right of access to the High Court and of access to his solicitor for purposes of legal consultation in respect of pending proceedings before the Court of Appeal and the High Court. On that basis he seeks various orders – primarily an order pursuant to Article 40.4 of the Constitution directing an inquiry into the legality of his detention. Inter alia he also seeks orders committing the Governor of the Midlands Prison for what he calls crimes against the administration of justice, consisting of contempt of court and preventing the course of justice. Oddly, in the circumstances, he does not seek an order remedying his complaint – an order requiring that he be facilitated as to consultation with his solicitor.

2. It appears from his complaint that Mr Marley is detained pursuant to conviction by the Central Criminal Court dated 27 March 2019.

3. Mr Marley says his statement is unsworn by reason of the refusal of the prison authorities to allow him access to his solicitor such that he should be enabled to depose on oath in court to the facts he asserts. In the circumstances, and for the present, I accept Mr Marley's complaint as if sworn.

4. Mr Marley cites proceedings 2021/32 before the Court of Appeal in which, pursuant to S.2 of the *Criminal Procedure Act 1993*, he alleges that his detention is on foot of a miscarriage of justice. He refers also to civil proceedings 2021/5386P in the High Court in which he sues the State and the Governor of the Midlands Prison for alleged breach of his constitutional rights. In neither case does he give detail of the substance of the proceedings.

5. Mr Marley alleges that his solicitors on record have for some time been trying and failing to get access to him for consultation for purposes of his miscarriage of justice proceedings. Mr Marley encloses copy letters (1st page only) dated 14 January 2022 and 24 January 2022 from those solicitors to the Governor and Professional Visits section of the Midlands Prison.

6. The letter of 14 January 2022 complains of delays of 7 to 10 days in Mr Marley's receiving letters from his solicitors marked "Legal Privilege Rule 44" and seeks assurances that they have not been read or copied by prison authorities. It also asks if calls (I assume phone calls) to solicitors are listened to or recorded. The letter does not set out any factual background to or basis for these inquiries beyond the complaint of delay in delivery. The letter also complains that recent applications by the solicitors by e-mail to prison authorities for "visits/zoom visits" have gone unanswered and that the solicitors cannot get through by phone.

7. The letter of 24 January 2022 makes three complaints against the prison authorities:

- Of failure to reply to correspondence – specifically that of 14 January 2022
- Of numerous attempts to phone the prison authorities with no success or reply – including "*on five days running*"
- That a professional visit by Zoom arranged for 10:00 on 24 January 2022 was changed by the prison authorities to 11:00 and then to 11:45 without notice to the solicitor or Mr Marley. Given the terms of the complaint, I infer that such visit did not take place - though, if so, it is unclear why it did not take place.

8. The letter also seeks a visit in person by the solicitor to Mr Marley on "Saturday morning" at 10:00. That Saturday was 29 January. Given the terms and date of the complaint, I infer that such visit was not facilitated by the prison authorities and did not take place. I am unaware whether, since Mr Marley's letter of 31 January 2022, over two weeks having elapsed, consultation between the solicitor and Mr Marley has occurred. If it has, it might well be that part of his cause of complaint no longer subsists.

9. Mr Marley does not assert that the need for such consultations is urgent or that his hearing before the Court of Appeal is imminent or that by his inability to consult with his solicitor he has been substantially disadvantaged in his prosecution of his miscarriage of justice proceedings. It is not asserted by him, nor is it apparent on the facts asserted by him, that matters have reached the stage of interference with his specific constitutional right of access to the courts as it relates to those

proceedings, or for that matter, his High Court proceedings. That is not to say that such a point could not be reached – it is to say only that it is not a feature of his present complaint. Mr Marley does complain of interference in his right of access to a High Court judge but has in fact exercised that right by his complaint: hence this ruling.

10. I note that by Rule 38(1) of the Prison Rules, 2007¹ *“A prisoner shall be entitled to receive a visit from his or her legal adviser at any reasonable time for the purposes of consulting in relation to any matter of a legal nature in respect of which the prisoner has a direct interest, and any such visit shall take place within the view of, but out of the hearing of a prison officer.”*

I note that by Rule 44(4) of the Prison Rules, 2007 A letter sent to a prisoner by his legal advisor *“shall be given to the prisoner without delay and shall not be examined to any greater extent than is necessary to determine that it is such a letter. If any such letter is to be examined, it shall only be opened in the presence of the prisoner to whom it is addressed.”*

11. By reference, I infer, to the *“any reasonable time”* criterion in Rule 38(1), Mr Marley asserts that solicitors for other prisoners have not experienced similar difficulties on visiting their clients by video-link or in person.

12. Assuming (which I do only for purposes of analysis) the factual accuracy of the complaint, it is clear that his proceedings in the High Court and the Court of Appeal are proceedings in which Mr Marley has a *“direct interest”* within the meaning of Rule 38. Assuming on the same basis the factual accuracy of the allegations in the said letters suggests that for over 10 days to the date of his complaint, and possibly since then, Mr Marley was deprived of access to his solicitor for purposes of consultation as to proceedings in which Mr Marley has a *“direct interest”*. On those assumptions it may be that he has been deprived of his right pursuant to Rule 38(1) to a solicitor’s visit at *“any reasonable time”* and may be entitled to a remedy for such breach. However that is a view expressed on an ex parte application on incomplete information and is provisional accordingly.

13. Mr Marley does not in this application challenge or impugn the legality of his conviction by the Central Criminal Court dated 27 March 2019 or of his detention on foot thereof in – though I infer that he may do so in his miscarriage of justice proceedings. Accordingly the premise of this application is that his detention, otherwise lawful since March 2019, has been rendered unlawful since some date in January 2022 by his being deprived of access to and/or communication with his solicitor for purposes of consultation as to his High Court and Court of Appeal proceedings and, perhaps, delayed in his correspondence with his solicitor.

¹ S.I. No. 252 of 2007

14. I am conscious of the statement of Ó Dálaigh C.J. in **Application of Woods**² that a judge must examine any ground that might render detention unlawful. But even accepting that as a statement of the wide scope of inquiry under Article 40 and (for purposes only of analysis) taking the facts alleged by Mr Marley as true and at their height, it is not apparent to me that by reason of such alleged breach, as to its nature and/or duration, it is stateable that Mr Marley's detention has been rendered unlawful. As Hogan J observes in **Kinsella v The Governor of Mountjoy Prison**³ as to the appropriateness of Art 40 proceedings in the context of challenges regarding prison conditions, "*the question is whether the breach of the applicant's constitutional right which has occurred here – while undoubtedly serious in itself – is such as would entitle him to immediate and unconditional release in the course of an Article 40.4.2° application.*"

15. While exceptions are possible – for example an inquiry was ordered in a complaint as to conditions of imprisonment in **The State (C) v Frawley**⁴ - complaints of breach of prison rules or analogous complaints as to conditions of detention are not generally proper to inquiry pursuant to Article 40.4 of the Constitution. In **The State (Richardson) v The Governor of Mountjoy Prison**⁵ Barrington J cited authority to the effect that it would require most exceptional circumstances for the court to grant even a conditional order of *habeas corpus* to a convicted prisoner and that the *habeas corpus* procedure is concerned with the investigation of the fundamental question of the legality of the prisoner's detention - whether the prisoner is being detained 'in accordance with the law.' It is not concerned, in the normal case, with investigating the conditions of a prisoner's detention. Barrington J observed that if a duly convicted prisoner has complaints about the conditions of his detention, he should seek relief by other forms of procedure. Barrington J cited the Supreme Court in **State (McDonagh) v Frawley**⁶ for the proposition that, in the case of a convicted prisoner, a conditional order of *habeas corpus* or an initial order for an inquiry under Article 40 of the Constitution should not be granted save in the most exceptional circumstances. But that there may be exceptional circumstances in which the conditions under which a prisoner is being detained can invalidate a detention which is *prima facie* legal and authorised by warrant explains the decision of the Supreme Court in **The State (C) v Frawley**⁷ in the view of Barrington J.

16. As to the degree of exceptionality required and by way of comparison with the facts of the present case, I note that in **Kinsella v The Governor of Mountjoy Prison**⁸ Hogan J refused Article 40 relief to a convicted prisoner whose constitutional rights had been violated by 11 days solitary confinement in a small padded cell containing nothing but a mattress and a cardboard box. Hogan J reviewed, inter alia, the decisions in **McDonagh** and **Richardson**, the exceptionality of Article 40 relief as to the conditions in which sentenced prisoners are held and the question whether the breach of constitutional rights is so serious that it immediately vitiates the lawfulness of the detention. Notably, Hogan J considered that he could not "presently" consider Mr Kinsella's

² [1970] I.R. 154 at 162

³ [2012] 1 IR 467 See also Rogan Prison Law Bloomsbury Professional §9.03

⁴ [1976] IR 365

⁵ [1980] I.L.R.M. 82

⁶ [1978] IR 131

⁷ [1976] IR 365.

⁸ [2012] 1 IR 467 See also Rogan Prison Law Bloomsbury Professional §9.03

detention unlawful but held out the prospect of a renewed Article 40 application were the breach of constitutional rights to continue. He also referred to the propriety of permitting the Prison Authorities an opportunity to remedy the situation.

17. I note, for example that in **Foy v The Governor of Cloverhill Prison**⁹, the applicant, complaining that non-contact visits breached his constitutional rights as to his family, proceeded by judicial review and Charleton J confirmed that a governor's decisions as to visits to prisoners are subject to judicial review, albeit declining relief in that case. So too in **Mulhall v Irish Prison Service**¹⁰, in which the applicant, complaining that inadequate provision for visits by her son breached her constitutional rights as to her family, proceeded by and got leave to seek judicial review.

18. It appears to me unstateable that the breach of law and of his rights which Mr Marley alleges reaches the level of fundamental flaw or fundamental denial of justice that is the threshold under Article 40 for his immediate release from the Midlands Prison. That fundamental flaw or fundamental denial of justice is the relevant threshold is apparent from decisions such as **Ryan v. Governor of Midlands Prison**¹¹, **Knowles v Governor of Limerick Prison**¹² and **SMcG v Child and Family Agency**¹³.

19. Accordingly I refuse to direct an inquiry pursuant to Article 40.4 of the Constitution into the legality of Mr Marley's detention in the Midlands Prison.

20. However, I will treat Mr Marley's application as an application for judicial review seeking mandamus directing the Governor of the Midlands Prison to facilitate the Applicant's consultation with his solicitor and any other reliefs appropriate to remedy his complaints if found valid.

21. Having regard to the very limited papers currently before the court, I do not have a sufficient appreciation of the factual background to this matter to allow me to make an informed decision whether to grant leave to seek judicial review. I am conscious that I have, for reasons unclear to me (though perhaps good reasons), part only of each of the two letters in question. I am of the view that further information would assist me in determining what, if any, further course of action is required in this matter. That view is reflected in the following directions:

- a. I deem the application for leave to seek judicial review to have been made on 14 February 2022 for purposes of time-limits within which leave to seek judicial review must be sought.

⁹ [2010] IEHC 529

¹⁰ [2021] IEHC 267 (High Court (Judicial Review), Barr J, 20 April 2021)

¹¹ [2014] IESC 54

¹² [2016] IEHC 33 §58 et seq

¹³ [2017] IESC 9, [2017] 1 IR 1 at 21

- b. I give liberty to the Applicant to file, within 2 weeks of his receipt of a copy of this ruling, a statement of the grounds upon which he seeks judicial review and seeking such mandamus as I have described and any other reliefs by way of judicial review relating to the subject matter of his present application and an affidavit grounding such application. If Mr Marley has difficulty availing of this liberty, he has liberty to apply.
- c. I direct pursuant to Order 84, rule 24, of the Rules of the Superior Courts that the leave application shall be heard on notice to the Governor of the Midlands Prison.
- d. I direct that the Governor of the Midlands Prison file and deliver to Mr Marley an affidavit, within 2 weeks of his receipt of a copy of this ruling, in response to the facts asserted in the Application in its present form.
- e. I defer for the present any directions as to service of the proceedings on the intended notice parties.
- f. The registrar is requested to send, as soon as may be, a copy of this ruling and the perfected order on foot thereof by registered post to Mr Marley.
- g. The registrar is requested to send, as soon as may be, a copy of this ruling, the perfected order on foot thereof and the Complaint of Mr Marley by registered post:
- to the Governor of the Midlands Prison.
 - to the Irish Prisons Service.
 - by way of courtesy to the Office of the Chief State Solicitor
 - by way of courtesy to the solicitors whose correspondence Mr Marley has enclosed, and with whom he wishes to consult. I do so appreciating that they are not on record in these proceedings and it may be that they will not come on record.
- h. The hearing of the leave application will, in the first instance, be a hearing on the papers only. Accordingly, I do not for the present direct the production of Mr Marley in person in the High Court. I adjourn the matter sine die to that end and will give further directions on receipt of the Statement of Grounds (if any), the Grounding Affidavit of Mr Marley and the Affidavit of the Governor.
22. While not by way of direction, I observe that the difficulties disclosed in the Complaint, whatever their substance or otherwise, seem to me such as may be capable of resolution by constructive engagement between all relevant parties.

David Holland
18/2/22