

**THE HIGH COURT**

**[2023] IEHC 488**

**[2023 No. 1 P.]**

**BETWEEN**

**THE GOVERNOR OF X PRISON**

**PLAINTIFF**

**AND**

**B.K.**

**DEFENDANT**

**JUDGMENT of Mr. Justice Paul Burns delivered on the 11<sup>th</sup> day of January 2023**

- 1.** In these proceedings the plaintiff seeks:-
- (i) A Declaration pursuant to the inherent jurisdiction of this Honourable Court that the defendant has capacity to make a decision to refuse food and nourishment and further, that the defendant has the capacity to make a decision to refuse all forms of medical assistance arising from such refusal of food and nourishment, should the necessity for such assistance arise;
  - (ii) Further to the foregoing, a Declaration pursuant to the inherent jurisdiction of this Honourable Court that the defendant has capacity to make a decision to refuse medication for treatment of diabetes and any other underlying medical conditions, except pain relief medication, coma-inducing medication and end of life treatment insofar as that may arise;
  - (iii) A Declaration pursuant to the inherent jurisdiction of this Honourable Court that the defendant's decision of 30 December 2022 to refuse food, nourishment, medication and medical treatment is valid and should remain operative in the event that the defendant becomes incapable of making a decision of whether to accept food and nourishment, medication, or medical treatment;
  - (iv) A Declaration pursuant to the inherent jurisdiction of this Honourable Court that the plaintiff's decision not to feed the defendant against his wishes, namely not to force-feed the defendant, is lawful;
  - (v) A Declaration pursuant to the inherent jurisdiction of this Honourable Court that the plaintiff is entitled to give effect to the defendant's wishes not to be fed or receive nourishment, and not to receive medication or medical assistance except pain relief medication, coma-inducing medication and end of life treatment insofar as that may arise;
  - (vi) In the alternative, directions pursuant to the inherent jurisdiction of this Honourable Court as to the appropriate course of action for the plaintiff to take if emergency care for the defendant is required as a result of his decision to refuse food and nourishment, medication, and medical treatment; and
  - (vii) An Order under section 45 of the Courts (Supplemental Provisions) Act, 1961 and/or under section 27 of the Civil Law (Miscellaneous Provisions) Act, 2008 and/or pursuant to the inherent jurisdiction of this Honourable Court prohibiting any party to the proceedings or any persons having knowledge thereof from broadcasting or

publishing any information which would or could identify the defendant who is the subject of the proceedings, and for that purpose to direct that the name of the defendant and his place of incarceration be anonymised until further Order of the Court.

**2.** Interim relief was granted by Bolger J. on 31 December 2022 and the proceedings were dealt with by way of an expedited plenary hearing on 4 January 2023. At hearing, the defendant's position was that he consented to the orders sought by the plaintiff at paras. 1-5 inclusive in the Plenary Summons. Accordingly, no party made any arguments contrary to the plaintiff's submissions.

**3.** The defendant is approximately 72 years old. He pleaded guilty to ten counts (referred to as sample counts) of indecent assault before the Circuit Criminal Court and, on or about 19 February 2016, a total sentence of 14 years and two months' imprisonment was imposed on him in respect of the said offences. These offences were committed a number of decades prior to conviction. The defendant was committed to Prison X to serve the said sentence. His appeal against severity of sentence was dismissed by the Court of Appeal.

**4.** Further charges of a similar nature involving different complainants, and also relating to events alleged to have occurred a number of decades ago, were subsequently brought against the defendant in respect of which he is awaiting trial in the Circuit Criminal Court on 16 January 2023. The defendant brought judicial review proceedings seeking to prohibit the trial of such charges but those proceedings were dismissed by the High Court and, in turn, the Court of Appeal.

**5.** An unusual feature of this matter is that the handling of original complaints of abuse made to An Garda Síochána against the defendant by or on behalf of some young persons is the subject matter of a Commission of Investigation. In respect of the charges currently pending the defendant sought an Order from the Circuit Court directing disclosure of documents held by the Commission of Investigation and this was refused.

**6.** The reasons for the defendant's refusal of food and medication appear to be as follows:-  
(a) His concern that he will not receive a fair trial;  
(b) The reporting restrictions in respect of these proceedings put in place by the Court as an interim measure;  
(c) The failure of various public representatives and office holders to engage with his correspondence or complaints; and  
(d) A general perception on his part that he is being dealt with unfairly.

**7.** It should be borne in mind that when the current charges pending come on for hearing, the trial judge is entrusted with ensuring that the defendant receives a fair trial. The complaint in regard to reporting restrictions appears to have fallen away.

**8.** The defendant suffers from diabetes and receives insulin injections on a daily basis in the prison from the plaintiff's servants and agents. In addition, the plaintiff is under daily medical supervision from the plaintiff's servants and agents for high cholesterol, high blood pressure, hypertension and depression.

**9.** On or about 20 June 2022, the defendant notified the prison authorities that he intended to refuse to accept food and also medication which was prescribed to manage his diabetes.

**10.** On 16 December 2022, the defendant notified the plaintiff that he was refusing to accept food and medication prescribed to manage his diabetes. The defendant refused food and medication until approximately 20 December 2022 when he began to accept same again.

**11.** On or about 20 December 2022, the defendant informed medical personnel acting on behalf of the plaintiff that he would again refuse to accept food or medication as and from 30 December 2022. The defendant indicated to the said medical personnel that he would accept liquids and that, in the event he becomes unconscious, he does not wish to be resuscitated. He also indicated that he did not wish to be taken to hospital for treatment.

**12.** On or about 20 December 2022, the defendant sent a letter to the general medical practitioner working in the Prison X setting out his reasons for refusing food and medical treatment. The defendant claimed *inter alia* that there has been a failure by the State to grant him a fair hearing, a public hearing and a hearing in a reasonable time relating to his upcoming criminal trial.

**13.** On 29 December 2022, the defendant was examined by Dr. T, a psychiatrist employed by the HSE, who concluded that the defendant was aware of the risks arising from his refusal to accept food, nourishment, medication and medical treatment.

**14.** The defendant recommenced refusing food and medication on 30 December 2022. He continues to accept and consume liquids. The defendant further maintains his position that he does not consent to being force-fed. He does not consent to the receipt of medical treatment if his condition worsens as a result of his refusal, save that he has indicated that he will accept pain relief medication, coma-inducing medication and end-of-life treatment when it comes to that stage. Further, the defendant does not consent to being resuscitated in the event he is rendered unconscious.

**15.** The defendant was examined by Prof. G, consultant forensic psychiatrist, on 2 January 2023. Prof. G concluded, *inter alia*:-

*"Opinion and Recommendations*

*1. Mr K did not display symptoms of a severe mental illness at the time of the assessment. In particular, there was no evidence of a depressive or psychotic illness.*

*2. Mr K did not suffer from a mental illness that would impair his decision making capacity to refuse food, at the time of the assessment. I formed the impression that he had the ability to comprehend information that had been provided to him by prison healthcare professionals, retain this long enough to make a decision, weigh up the pros and cons of a decision and communicate his decision.*

*3. Decision making capacity is time-specific and decision-specific. This should be reassessed at regular intervals by the clinical care team within the Irish Prison Service, as it may be subject to change over time with changing physical and mental health parameters, particularly in light of food and medication refusal. In parallel, collaborative monitoring of Mr K's intentions, physical health parameters and mental state should be conducted on a regular basis.*

*4. Decision making should be voluntary, informed and with capacity. Mr K should be offered information on consequences of refusing physical health medication by a doctor who is a specialist in physical healthcare, particularly in diabetes and cardiovascular risk. His capacity to refuse medication should be assessed separately*

*by this specialist following the provision of such information and an appropriate plan documented. This is relevant as there are specific risks over and above food refusal which may become enhanced if antidiabetic medication is used inappropriately or intermittently during a period of food refusal.*

*5. A 'best interests' plan should be considered and documented by the clinical team within the Irish Prison Service to outline a treatment plan in the event that there is a loss of decision making capacity."*

**16.** Prof. G confirmed the contents of his report in oral evidence. He stated his view that the gist of the defendant's grievances was frustration with a sense of not being heard and being ignored.

**17.** On 3 January 2023, the defendant was examined by Dr. W, a Consultant in Forensic Psychiatry, since 2007. Her opinion and recommendations were as follows:-

*"Diagnostic issues*

*6.1 Mr. K has no history of major mental illness. There was no evidence of either affective or psychotic illness at interview with him on 03.12.2022.*

*Mental disorder*

*6.2 Mr. K does not have a mental disorder as defined within the Mental Health Act 2001, or the Criminal Law (Insanity) Act 2006.*

*Motivation for refusal of food and medication.*

*6.3 It appears by Mr. K's own account that he is motivated in his food refusal by a sense of injustice. It appears that he is of the view that he has been treated unjustly by a number of state agencies over the years, including An Garda Síochána, the Department of Justice, the Minister for Justice, and the Courts.*

*Capacity in relation to Mr. K's decision to refuse food and medication*

*6.4 It is my view that Mr. K has the capacity to make the decision to refuse food and medication. At the time of interview, his capacity was not impaired by a mental illness, intellectual disability, dementia, or any other medical condition. He had the capacity to understand, believe, appreciate and retain information regarding the consequences of refusal of food and medication, and to balance information regarding the consequences of this action, including risks to his physical health, and possible death. Further, he is capable of accurately communicating his decision regarding food and medication refusal.*

*6.5 Mr. K's decision making capacity is likely to change as his food and medication refusal continues. Therefore he will require ongoing assessment of capacity.*

*6.6 I agreed with Prof. G's recommendation that information on the consequences of continued food and medication refusal would best be provided by a specialist in physical health care, particularly in diabetes. As Prof. G has indicated there are specific risks over and above food refusal which may become enhanced if antidiabetic medication is used inappropriately or intermittently during a period of food refusal, including the possibility of Mr. K misusing insulin as he has done in the past with suicidal intent."*

**18.** In oral evidence Dr. W confirmed the contents of her report based upon an examination of the defendant on 3 January 2023. She confirmed her opinion that the defendant had no suicidal ideation, no mental impairment and that he was able to explain his motivation for his actions and understood the possible consequences of same.

**19.** The defendant gave evidence before me. He listed the various grievances and complaints he had. Having heard the defendant, I agree with Prof. G that the gist of the defendant's grievances is frustration with a sense of not being heard. He asked the Court to respect his decision to refuse food and medication, even in the event of his becoming unconscious or falling into a coma.

**20.** It appears that, should the defendant continue to refuse to accept food, nourishment, medication and/or medical treatment, there would not be a predictable course of events or outcome for the defendant. There is a risk that the defendant may lapse into unconsciousness and/or suffer a stroke and/or suffer sudden death. His prognosis is complicated by his underlying medical condition including diabetes.

**21.** All the available evidence is that the defendant has sufficient capacity to refuse food and medical attention. Bearing in mind the gravity of the decision made by the defendant, I am satisfied that the defendant has full capacity to decide to refuse food and medical treatment and that he fully understands the ultimate consequences of his protest.

**22.** The plaintiff does not, whether the defendant is conscious or unconscious, wish to act contrary to the defendant's expressed wishes by feeding or force-feeding the defendant, or by providing or facilitating the provision of medical treatment, should the need for such treatment arise.

**23.** Evidence was given before me by Mr D, Governor of X Prison. He confirmed that it is long-standing prison policy to respect the wishes and right to self-determination of a prisoner who refuses food and/or medication, provided the prisoner has the mental capacity to make such decisions. He indicated that the defendant was under medical supervision and subject to a 15-minute observation routine. The defendant had a consultation with an advanced nursing practitioner on the morning of the hearing and was being monitored by the prison doctor. He indicated that the Irish Prison Service has developed a protocol on food refusal, and this prohibits the force-feeding of prisoners of full capacity who have refused nourishment. For that purpose, the plaintiff operates under a Standard Operating Procedures and Protocol ("the Protocol") for the treatment and handling of a prisoner who refuses food and/or medical treatment. Accordingly, it is against prison policy to force-feed a prisoner. The Protocol was being operated in respect of the defendant. The Protocol provides as follows:-

*"FOOD REFUSAL WITHIN PRISON - MANAGEMENT PROTOCOL*

*Where a prisoner informs the prison authorities that s/he intends to refuse food or does so:*

- 1. The reasons for this refusal should be established.*
- 2. Where it is considered that his/her refusal is based on delusional beliefs or other psychiatric illness a full psychiatric assessment (with psychiatric hospitalisation, if necessary) should be arranged and the underlying illness treated without delay.*
- 3. Where there is no evidence of psychiatric illness then the wishes of the prisoner (in refusing food) should be respected. Force-feeding is not an option. This fact should be explained to the prisoner by the doctor with clinical responsibility for his/her medical care.*
- 4. The prisoner's medical condition should be monitored by a doctor on a daily basis.*

*Monitoring should include the following:*

- 1) Daily fluid intake and urine output*
- 2) Pulse and blood pressure both lying and standing each day*
- 3) Urine tested for ketones each day*

4) *Weight recorded on a weekly basis*

*The effects of continuing food refusal on his/her health should be explained in terms the patient understands. The progress of the situation, together with any interventions considered appropriate on medical grounds, should be communicated by the doctor to the prison management without delay.*

*5. The prisoner should continue to be offered meals at the appropriate times and note made of his refusal.*

*6. It is desirable that the prisoner be admitted to a single room in an appropriate medical facility when there has been a significant loss of weight with ketonuria. The prisoner should be admitted immediately if he/she refuses fluids.*

*7. Bearing in mind the likelihood that if the food refusal continues the prisoner will, at a certain stage lose consciousness, he/she should be asked at an early stage to nominate a legal advisor or family member to act on his/her behalf in relation to resuscitation in the event that unconsciousness or incoherence occurs.*

*The prisoner should be given the opportunity at an early stage to instruct the legal advisor or family member regarding his/her wishes. This is to safeguard the doctor from any accusations of negligence (in failing to resuscitate the unconscious patient) or assault (by providing treatment without the consent and contrary to the express wishes of the patient).*

*8. The fasting prisoner should be assessed by a psychiatrist at least twice weekly to establish that his/her capacity for rational judgement is unimpaired.*

*9. Medical supervision and advice, together with appropriate food and fluids, should continue to be made available to the prisoner.*

*10. At all times it should be made explicit to the prisoner by the responsible doctor that there is no rule of medical practice which requires the doctor to resort to artificial feeding and that the inevitable deterioration in his/her health may be allowed to continue without medical intervention unless he/she specifically requests it.*

*Healthcare Directorate*

*April 2004."*

**24.** The issue of whether the prison authorities should respect a prisoner's decision to refuse food, having regard to the fatal consequence which that might have, in circumstances where that prisoner has full capacity to make that decision, has already been considered in the High Court by Baker J. in *Governor of X Prison v. McD (P)* [2015] IEHC 259 and by Burns J. (T) in *Governor of A Prison v. GDC* [2020] IEHC 354.

**25.** In *Governor of X Prison v. McD (P)* Baker J., then of the High Court and now of the Supreme Court, stated at para. 106 of her judgment:-

*"106. .... Thus it seems to me that while it could not be said that a person has a right to commit suicide, it can be said that he has a right to freely elect to refuse food, provided his choice is full, free and informed and he does not require assistance to achieve that end, and it is rather the case that he has refused such assistance. The distinction is between a positive right to directly end one's life, and to make choices which have the indirect effect that death follows. The latter right is constitutionally recognised as flowing from the autonomy of the self."*

At paras. 115-116 of her judgment Baker J. went on to hold:-

*"115. I conclude that the right of self-determination may prevail over the duty of the State to preserve the right to life. The duty of the State imposed upon it by the Constitution reflects the social order and the fact that the citizen is part of a community, and that the social contract requires that the State protect that citizen from an attack on his or her life and person. While the duty on the State may be stated in the affirmative and is not merely a reactive obligation, or an obligation to react or defend a right that is actively under attack, that duty, if it is fully to protect the citizen, must in an appropriate case give way to the express free choices of the individual. To consider otherwise would be in my view to give the State power to overbear the right of the individual not envisaged by the Constitution, and would fail to recognise the right of autonomy and individual self-determination that it promotes.*

*116. Thus, there is in my view no reason arising from considerations of the Constitution or human rights law that mandates the Court or the plaintiff to ignore [the prisoner's] express wishes, and that the constitutional imperative goes the other way, and requires that the plaintiff abide by his wishes."*

**26.** While a prisoner loses many of their constitutional rights as a result of their incarceration, as a human being they retain the constitutional right to personal autonomy and bodily integrity. These rights have been recognised in many cases involving prisoners, including *Creighton v. Ireland* [2010] IESC 50; *Simpson v. Governor of Mountjoy Prison* [2019] IESC 81 and *Connolly v. Governor of Wheatfield Prison* [2013] IEHC 334.

**27.** In *Connolly v. Governor of Wheatfield Prison*, Hogan J. (then of the High Court and now of the Supreme Court), stated:-

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

*15. While due and realistic recognition must accordingly be accorded by the judicial branch to the difficulties inherent in the running of a complex prison system and the detention of individuals, many of whom are difficult and even dangerous, for its part the judicial branch must nevertheless exercise a supervisory function to ensure that the essence of these core constitutional values and rights - the dignity of the individual*

*and the protection of the person - are not compromised: see, e.g., Creighton v. Ireland [2010] IESC 50 per Fennelly J.*

*16. The obligation to treat all with dignity appropriate to the human condition is not dispensed with simply because those who claim that the essence of their human dignity has been compromised happen to be prisoners. ...*

*17. For even though prisoners may have strayed from the path of righteousness and even ... severely and wantonly injured other persons, the protection of the dignity of all is still a*

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

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*18. By solemnly committing the State to protecting the person, Article 40.3.2 protects not simply the integrity of the human body, but also the integrity of the human mind and personality."*

**28.** In *Governor of A Prison v. GDC* [2020] IEHC 354, Burns J. (T) considered the various relevant, and possibly competing, constitutional imperatives and public interests. At paras. 49–50 of her judgment she stated:-

*"49. What is at issue in the present case is a prisoner determining that he does not want to intake any sustenance with the inevitable consequence that ultimately death will ensue. This will not be immediate. It will be over a long drawn out period. In the present case, at the time of hearing, the Defendant had been without food for 48 days. Deterioration will be gradual and painful: dizziness, blindness, exhaustion, muscle wasting. All of this is known and understood by the Defendant and yet he wishes to continue with this course of action. He does not want to engage in the most basic, natural and necessary action which all living creatures must engage in to survive, the action of taking nourishment. He wishes to continue with this course to demonstrate his autonomy and self-determination. This cannot be a decision which is taken and pursued lightly, most certainly not 48 days into a hunger strike when death looms.*

*50. In light of his right to bodily integrity to include integrity of mind and personality and his right to autonomy, it is not appropriate that his will would be overwhelmed so as to force feed him. Although he is a prisoner on whom a substantial term of imprisonment has been imposed having been found guilty of the most vile crimes, his core and basic rights as a human being would be completely violated by such action. It would turn him into a lesser being and turn society into the captors of lesser beings. This is not what is envisaged by our noble Constitution. While the enforcement of court orders in the criminal justice system is of major significance, it does not trump the core rights of the person to autonomy and self-determination."*

**29.** As stated earlier herein, I am satisfied that the evidence establishes that the defendant has full capacity to decide to refuse food and medical treatment on foot of same and that he fully understands the ultimate consequences of his decision. In light of his constitutional rights to bodily integrity to include integrity of mind and personality and his right to autonomy, it is not appropriate that his will should be overwhelmed so as to force-feed him or medicate him contrary to his express wishes. Although he is a prisoner on whom a substantial term of imprisonment has been imposed having been found guilty of serious offences, his core and basic rights as a human being would be violated by such action.

**30.** On the basis of the authorities opened to the Court, I am satisfied that the plaintiff is entitled to the Declarations sought. As regards the declaration sought at (v) of the Plenary Summons, this should be amended to permit the transfer of the defendant from prison to hospital for the purpose of receiving palliative or end-of-life care, respecting his wishes as regards medical treatment. Both the prison governor and Dr. W gave evidence that a prison setting was not ideal for such care, particularly having regard to visits by family members and having regard to the dignity of the defendant. The defendant did not object to such provision being made provided his wishes as regards treatment were respected.

**31.** Arising from the fact that the defendant has an impending criminal trial, and in order to ensure that no prejudice is caused to that trial where the publicity attaching to these proceedings would identify that the defendant is in custody and serving custodial sentences for sexual offences of a similar nature to those for which he is to stand trial, I believe it is appropriate for this Court to impose a reporting restriction on the name of the defendant, and anything which would or could identify him as such. This would include the name of the prison. This is to protect the integrity of the criminal trial process and to ensure that the complainants in the case are also not deprived of the trial proceeding on the date set by anything that arises in this case.

**32.** Bearing in mind the nature of the defendant's grievances, the Court pointed out to him that through these proceedings he had obtained a public airing of his complaints and implored him to reconsider his decisions as regards food and medication. It is not known at this stage whether any such reconsideration has taken place.