

**THE HIGH COURT**

**[Record No. 2020/618 JR]**

**BETWEEN**

**CHARLOTTE MULHALL**

**APPLICANT**

**AND**

**THE IRISH PRISON SERVICE, THE GOVERNOR OF LIMERICK PRISION, THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL**

**RESPONDENTS**

**Judgment of Mr. Justice Barr delivered electronically on the 20th day of April, 2021.**

**Introduction**

1. This is an application for leave to proceed by way of judicial review, which has been brought on notice to the respondents. The applicant seeks to challenge the decision made by the first respondent to transfer her from the Dóchas Centre in Mountjoy Jail, Dublin to Limerick Prison, which decision was made on 24th December, 2018.
2. The applicant challenges that decision on a number of grounds: that in the circumstances of the case, the decision to transfer her was unfair, arbitrary and capricious; that the decision breached fair procedures in that the applicant was not given an opportunity to object to its implementation; that insofar as it related to an incident on the evening of 22/23 December, 2018, when the plaintiff was observed in what was described as “a compromising position” with a prison warder, it breached her rights to fair procedures, because she was not given any opportunity to explain that incident, which had she been afforded such opportunity, she would have explained was merely the administration of a beauty treatment by her to the prison warder; that insofar as the transfer constituted a punishment in respect of that incident, it was unjust, as the applicant was never charged with any breach of prison regulations, nor was she given an opportunity to explain the incident.
3. The applicant also alleges that the decision to transfer her to Limerick Prison, coupled with a further decision, which appears was taken subsequently to cater for her “welfare”, whereby a decision was made on some unknown date that she would not be brought to Mountjoy jail in Dublin on temporary transfer for access visits with her son, but such access visits would instead only be facilitated in Limerick Prison; such decision was arbitrary, capricious and unjust and was taken in breach of her rights to fair procedures as provided for under the Constitution and in breach of her rights under Art. 8 of the European Convention on Human Rights, due to the fact that she was not told of that subsequent decision; which decision was taken against the background where the Child and Family Agency, which had care of her infant son, would not bring him to Limerick Prison to visit her. As a result, she has not had a physical visit with her son since 2019.
4. In response the respondents allege that the applicant is out of time to challenge the decision to transfer her to Limerick Prison, as no step was taken by the applicant to even consider challenging same, until the first letter from her solicitor sent on 7th August, 2019 and where the *ex parte* application was not moved until 14th September, 2020. It was submitted that in these circumstances the applicant’s challenge to that decision was

well outside the time prescribed by O.84 of the Rules of the Superior Courts and furthermore, the applicant had not provided any grounds on which the court could extend the time pursuant to O.84, r.21(3).

5. Without prejudice to the objection taken that the proceedings were out of time, it was submitted that the first respondent enjoyed a wide discretion under s.17 of the Criminal Justice Administration Act, 1914, as amended, which states:

*"Prisoners shall be committed to such prisons as the Minister for Justice and Equality may from time to time direct; and may on the like direction be removed therefrom during the term of their imprisonment to any other prison."*

6. It was submitted by the respondents that the court could only interfere with such a decision where it had been established by the applicant that the prison authorities had acted arbitrarily, capriciously or unjustly: see *Nash v. Chief Executive of the Irish Prison Services & Ors.* [2015] IEHC 504 and *Murray v. Ireland* [1991] ILRM 465. It was submitted that on the evidence presented to the court on the present application, the applicant had not presented an arguable case that the decision under challenge had been taken by the first respondent in an arbitrary, capricious or unjust way.
7. It was submitted that in this case, where the evidence before the court was that on the evening of 22nd/23rd December, 2018, where there was evidence that the applicant had been found in a "compromising position" with a female prison warder, the first respondent was entitled in the interests of the proper management of the prison to make the transfer order. It was noteworthy that the applicant admitted the essential elements of the incident, although she described it as involving the administration of a beauty treatment. It could not be argued that the applicant was unaware of the basis on which the transfer had been made, as she was aware of the existence of that incident on the preceding evening.
8. It was submitted that insofar as the applicant complained that she was not consulted prior to making the transfer order, the evidence before the court was that the prison authorities did not consult prisoners prior to directing their transfer from one prison to the other, due to the security risks that that would involve. It was submitted that in the circumstances the applicant had not presented an arguable case that in making the decision to transfer her to Limerick Prison, the first respondent had acted arbitrarily, capriciously or unjustly.
9. It was denied that the transfer of the applicant from Mountjoy jail to Limerick Prison was a punishment, as alleged by the applicant. The applicant was never charged with any breach of prison rules arising out of the incident on the night 22nd/23rd December, 2018. It was submitted that the decision to transfer her was made by the first respondent for operational reasons connected with the proper management of the prison.
10. In relation to the issue of access visits to her son, the applicant had been facilitated with two temporary transfers back to Dublin for access visits with her son in May 2019 and

July 2019. In addition, there had been one access visit with her son in Limerick Prison subsequent to July 2019 and prior to October 2019.

11. A decision had been made by the second respondent not to have further temporary transfers to Dublin for such visits, because as the second respondent, Mr. Kennedy had averred in his affidavit sworn on 8th March, 2021, subsequent to each such visit, the applicant was noted to be out of sorts and took a number of weeks to return to a structured regime within Limerick Prison. Accordingly, he was of the view that the transfers were having a negative destabilising effect and accordingly that it would be in the best interests of the applicant that such moves cease and that she should have access visits with her son in Limerick Prison. He stated that he apprised her of these observations and concerns in discussions at that time.
12. It was submitted that in such circumstances, it had been reasonable for the second respondent to insist that such visits should thereafter take place in Limerick Prison. In that regard it was significant that Limerick Prison had received an award from the CFA for its "Sitting Room" visiting facility, which was acknowledged as being particularly suited to catering for child visitors. Indeed, in receiving the "Investing in Children Award", that was the only award of its kind to be given to a prison within Europe. It was submitted that in these circumstances, the decision to facilitate access visits for the applicant with her son in Limerick Prison, was reasonable, proportionate and justified in the circumstances.
13. The reason that such visits had not occurred after 2019, was due to the stance taken by the CFA and the child's foster parents, who had refused to bring the child to Limerick to visit his mother, on the grounds that same was not in the best interests of the child. It was submitted that it was noteworthy that, insofar as it had been suggested by them initially that such reluctance was due to pressures of schoolwork and sport activities during the week and due to family time with the foster family at weekends, no such visits had been facilitated either during half term holidays, or the summer holidays in 2019. It was submitted that insofar as the CFA had subsequently suggested that the reluctance to bring the child to Limerick Prison was on the ground that it was not good for him to be brought to another prison where he might meet other prisoners and their families; that objection did not apply in relation to Limerick Prison, where the visiting facilities were totally separate from other prisoners and did not involve children meeting with any other families that may be visiting prisoners. As such, it was submitted that the decision that had been taken by the second respondent, had to be viewed in light of the somewhat unreasonable stance taken by the CFA and the foster parents.
14. Finally, it was submitted that it was noteworthy that the applicant herself had stated to the parole board that she was happy and doing well in Limerick Prison. In the report of an interview which had been carried out by members of the parole board with the applicant on 5th October, 2020, the applicant had made it clear that she was getting on well in Limerick Prison; she liked the regime there and was enjoying taking part in various activities. The respondents further referred to a letter dated 9th December, 2020 from Ms. Paula Connolly in the department of the third respondent, wherein she noted "the

board heard that Ms. Mulhall is happy to remain in Limerick and to meet with her son in “the sitting room”, the dedicated family visit suite in Limerick Prison”.

15. It was submitted that the court was also entitled to take account of the fact that during the Covid-19 pandemic, the applicant had been afforded video call facilities with her son, three times per week. At the request of both the applicant and her son, these had been reduced to once per week.
16. In these circumstances it was submitted that it could not be argued that the applicant’s continued incarceration in Limerick Prison, with the excellent visiting facilities available there, constituted an infringement of the applicant’s rights under the Constitution or Article 8 of the ECHR.
17. In response to the time bar argument raised by the respondent, it was submitted on behalf of the applicant that the respondent had failed to respond to her letter dated 9th April, 2019; had not responded to the letters from her solicitor dated 7th August, 2019, 16th August, 2019 and 26th September, 2019; she had not received materials under the FOI request that had been submitted by her until January 2020 and further more relevant documentation concerning the reasons for her transfer until June 2020 and in view of the fact that the *ex parte* application seeking leave to seek judicial review was first moved on 14th September, 2020, that was within three months of the date upon which the applicant actually obtained the necessary information to enable her to challenge the transfer decision. Accordingly, it was reasonable that the court should extend the time for the bringing of the within application to 14th September, 2020.

**Chronology of relevant dates**

18. The relevant dates in this application can be set out in the following manner: following her conviction for murder, the applicant was committed to the Dóchas Centre in Mountjoy Prison, Dublin on 27th September, 2006. On 4th May, 2007 an order was made by the District Court pursuant to s.18(1) of the Childcare Acts, that the applicant’s son, who was born on 29th May, 2006, be transferred to the care of the Health Service Executive (now the CFA) until 27th May, 2024. That order directed that there should be access between the applicant and her son twice a week, with an additional access visit once a month. The HSE was given the right to cancel access visits if that was deemed to be in the best interests of the applicant’s son.
19. On or about 21st August, 2008, the applicant was transferred from the Dóchas Centre to Limerick Prison, until 19th December, 2008. She was transferred again from the Dóchas Centre on 30th December, 2011 to Limerick Prison until 8th January, 2012. On 24th February, 2015, the applicant was transferred from the Dóchas Centre back to Limerick Prison until 2nd April, 2015.
20. Following the incident in the Dóchas Centre on the evening of 22nd/23rd December, 2018, the challenged decision to transfer the applicant to Limerick Prison was made by Mr. Martin Smyth, director of operations of the first respondent on 24th December, 2018.

21. On 9th April, 2019, the applicant wrote to the second respondent requesting that she be returned to the Dóchas Centre so that she could have access with her son. She highlighted that a court order was in place regarding same and that not being able to see her family was causing her loneliness and sadness.
22. The applicant was transferred from Limerick Prison to the Dóchas Centre between 13th May, 2019 and 16th May, 2019, to facilitate access to her son. She was transferred a second time from Limerick Prison to the Dóchas Centre from 24th July, 2019 to 28th July, 2019 to assist with a meeting with the CFA in relation to the childcare situation for her son and to permit an access visit with him. It appears that the applicant also had one access visit with her son in Limerick Prison. The date of this visit is not known, but it was referred to as a "recent visit" in the letter sent by Assistant Governor Beirne to the District Court dated 6th December, 2019.
23. The applicant's solicitor wrote a number of letters to the respondents, commencing with a letter dated 7th August, 2019 and followed by letters on 16th August, 2019, 26th September, 2019, 18th November, 2019 and 29th November, 2019. In these letters the applicant's solicitor sought details of the decision making process in relation to her client.
24. These letters contained a partially incorrect address for the Dóchas Centre. The letters were addressed to "Governor of Dóchas, North Circular Road, Inns Quay, Dublin 7." Whereas the correct address is "The Governor, Dóchas Centre, North Circular Road, Dublin 7". There is no averment on the papers that this correspondence was not received by the respondents. It is common case that the letters were not responded to by the respondents.
25. In an internal email within the IPS, it was noted that "The letters were addressed to a Dóchas Centre based at Kings Inns, Dublin 7. I am unaware of any such place". That email was dated 4th December, 2019. Thus, it appears that the IPS did have possession of the correspondence at that time.
26. On 2nd December, 2019, the first response from the first respondent was received by the applicant's solicitor, which advised that the Operations Directorate and the Freedom of Information Section would be in contact.
27. In January 2020, some documentation, being some extracts from the applicant's medical records, was furnished to the applicant's solicitor pursuant to the FOI request that had been lodged on behalf of the applicant. Certain other documentation was furnished to the applicant's solicitor on 8th June, 2020. This documentation concerned the decision making process that had led to the decision to make the transfer order on 24th December, 2018.
28. On the 14th September, 2020, the applicant, through her solicitor and counsel, moved her application seeking leave to proceed by way of judicial review. The High Court (Meenan J.) directed that the *ex parte* application should proceed on notice to the respondents.

## **Decision**

29. The test which the court has to apply when considering an application for leave to proceed by way of judicial review, is that set out in the well-known case of *G. v. The DPP* [1994] 1 I.R. 374. In essence, the test provides that an applicant must establish that he has an “arguable case” that he should be granted the reliefs set out in the statement of grounds.
30. In relation to the decision to transfer the applicant from the Dochas Centre in Mountjoy jail to Limerick Prison, which decision was made on 24th December, 2018, the applicant did nothing for eight months thereafter, until a letter was sent from her solicitor on 7th August, 2019. The fact that that letter was unanswered by the respondents is not relevant, because the request for information made therein, was made long outside the time for bringing any challenge to the decision to transfer the applicant to Limerick Prison.
31. The letter which was written by the applicant to the second respondent on 9th April, 2019, is not relevant to the issue that arises in relation to the application being time barred, because that letter was not a challenge to the decision to transfer her to Limerick Prison, nor was it seeking any reasons for that decision; it was simply a request by the applicant for a transfer back to the Dóchas Centre for the reasons set out therein. Accordingly, it is not relevant to the issue before the court as to whether it should extend the time for the bringing of this application.
32. Similarly, the fact that the letters sent by the applicant’s solicitor in August 2019 and the succeeding months, were not answered by the respondents, is also not relevant to the issue of whether there should be an extension of time in this case. Nor is the fact that the applicant only received information pursuant to her FOI request in January and June 2020 relevant, because the requests for that information, as with the requests that had been made by the applicant’s solicitor in her correspondence, were all made well outside the three-month period provided for under the rules.
33. The applicant cannot allege that she was unaware that the decision had been made. She became immediately aware of the transfer decision, because she was transferred on foot of it on the day that it was made. Nor can she credibly allege that she was unaware of the events that had given rise to the making of that decision. It is clear from her affidavits that she was well aware that the decision had been taken due to the incident that had occurred with the prison warder on the evening of 22nd/23rd December, 2018. In reality, she knew that the decision had been taken for “operational reasons” connected with the incident that had occurred that evening. Therefore, the applicant had all the necessary information that she needed to challenge the transfer decision, if she was minded so to do. The facts of the case are that the applicant knew that she had been transferred; she knew the likely reasons for such transfer and yet she did nothing for eight months until she instructed her solicitor to send the first letter seeking information on 7th August, 2019.
34. The applicant cannot rely on the late delivery of information pursuant to her FOI request, when the request for that information was not made until long after the expiry of the

applicable time period, when the applicant had been fully aware of the making of the decision at or about the time that it was made and yet did nothing to challenge it. In these circumstances, the applicant has not established arguable grounds for an extension of time as provided for under O.84, r.21(3). The court does not have jurisdiction to make that order as the necessary matters have not been established in evidence by the applicant to enable it so to do.

35. Accordingly, I hold that the applicant is out of time to challenge the decision to transfer her to Limerick Prison, which decision was made on 24th December, 2018.
36. The remaining question concerns the decision to terminate the visiting arrangement which had formerly existed, whereby the applicant was brought to Dublin on temporary transfer so as to have access visits with her son. That arrangement had worked satisfactorily in May and July 2019, but was discontinued some time thereafter, probably in or about September 2019, for the reasons set out by the second respondent in the affidavit sworn by Mr. Kennedy on 8th March, 2021, as referred to above.
37. As already noted, that change in arrangements was apparently brought about due to the fact that the authorities in Limerick Prison were concerned that the applicant was "out of sorts" and "took a number of weeks to return to a structured regime within the prison". As such, the decision to change the access visit arrangement was motivated by a desire to promote the welfare of the applicant. However, that decision was apparently taken without consulting the applicant as to what she wanted done to promote her welfare. In particular, the change in the visiting arrangements had the effect that the applicant would be deprived of physical visits with her son, due to the fact that the CFA and the foster parents were apparently unwilling to bring the child to Limerick to visit his mother. That was a very serious consequence from the applicant's point of view.
38. The court accepts that under the provisions of the European Convention on Human Rights, and in particular pursuant to Article 8 thereof, a person has the right to respect for their family rights. The case law clearly establishes that such rights are enjoyed by prisoners, notwithstanding that their ability to enjoy them in the fullest sense is necessarily curtailed by virtue of their incarceration in prison.
39. In *Wakefield v. United Kingdom* (Application No. 15817/89, 1st October, 1990) the European Commission of Human Rights determined that a refusal to sanction the transfer of a prisoner from a prison in England to a prison in Scotland, so as to enable him to be close to his fiancée, was capable of engaging the rights provided for under Article 8 of the Convention. However, in the circumstances of that case, it was held that the family rights section of that Article was not engaged due to the fact that the applicant had only met his fiancée on one occasion and had corresponded with her on numerous occasions. Nevertheless, the Commission held that the refusal to allow the applicant's permanent transfer to Scotland to be near his fiancée, constituted an interference with the applicant's right to respect for private life within the meaning of Article 8.1 of the Convention.

40. In *Butcher v. Minister for Justice and Equality* [2012] IEHC 347, O'Malley J. (then sitting as a judge of the High Court) had to consider the rights of a prisoner to be transferred to a prison in his country of residence pursuant to the Transfer of Sentenced Prisoners Acts, 1995 and 1997. In the course of her judgment, O'Malley J. stated as follows in relation to the impact of the jurisprudence of the European Court of Human Rights on decisions affecting the rights of prisoners at paras. 40 and 41:-

*"[40] In my view the developments in the jurisprudence of the Court of Human Rights in this area are sufficient to ground a finding that a request by a prisoner for transfer to his home country on the grounds of access to his family is capable of engaging Article 8 rights. The consequence of that is that a decision to refuse such a request is an interference with the right to a family life requiring to be justified according to the Convention criteria.*

*[41] Where decisions encroach on rights it is the duty of the decision-maker to take account of and to give due consideration to those rights. Where an applicant says that the decision is unreasonable the court must examine it to ensure that the decision-maker has complied with that duty. In considering the reasonableness of a decision the court will look at the proportionality of its impact on the right in question – see *Meadows*, referred to above."*

41. In its judgment in *Hirst v. The United Kingdom (No. 2)* (2006) 42 EHRR 41, The European Court of Human Rights clearly recognised that prisoners generally continue to enjoy all the fundamental rights and freedoms guaranteed under the Convention, except for the right to liberty. Similar observations were made by the European Court of Human Rights in *Messina v. Italy (No. 2)* (Application No. 25498/94, 28th September, 2000) at para. 61 of the judgment. At para. 65 of the judgment, the court recognised that there must be proportionality in relation to any necessary interference with rights enjoyed by prisoners under the Convention.
42. The fact that the decision was made by the second respondent on the basis of the perceived welfare of the applicant, rather than being an operational measure connected with the running of the prison; yet the applicant was not consulted in respect of the measure, is a relevant factor.
43. Perhaps of more relevance, is the factual consequence that arose as a result of the decision whereby as a result of the attitude of the CFA and the foster parents, being of the view that it was not in the best interests of the applicant's son to bring him to visit his mother in Limerick Prison; the decision made by the respondent, which was made at some unknown date in 2019 and does not appear to have been formally communicated to the applicant, has had the practical effect of removing the possibility of physical access visits for the applicant with her son.
44. That constitutes a significant interference with the applicant's family rights. It is arguable that the measure taken was not proportionate to the end sought to be achieved by the removal of such visiting regime.

45. The court recognises that there is certainly a counter argument to be made on the basis that the applicant has stated in the recent parole board interview, that she was happy in Limerick Prison. However, that is not the same as saying that she is happy with the access arrangements currently in place, whereby her son cannot travel to Limerick Prison to see his mother; which state of affairs is due to the attitude of the CFA and the foster parents.
46. In these circumstances, the court is satisfied that there is an arguable case that the applicant may be entitled either to a transfer back to the Dóchas Centre so as to secure her visiting rights with her son, or that, at a minimum, she be provided with the access visiting arrangements previously in place, which were effected by means of temporary transfer to Dublin, as happened in May and July 2019.
47. The court has not had regard to the letter written by Ms. Paula Connolly dated 9th December, 2020, wherein she ascribed certain comments as having been made by the applicant at the interview with representatives of the parole board held on 5th October, 2020. The court has not had regard to Ms. Connolly's assertions for two reasons: firstly, Ms. Connolly was not noted in the minutes as having been present at that interview; secondly, the comment reported by Ms. Connolly as allegedly having been made by the applicant at that interview, was not contained in the detailed minutes of the interview, which were exhibited at MK 6 in the papers.
48. However, the court has noted that somewhat similar concerns were expressed by Asst. Gov. Beirne in her letter to the District Court judge dated 6th December, 2019 and, in particular, the court has had regard to the concerns expressed by her in the penultimate paragraph thereof.
49. The court notes that in the minutes of the interview held between the representatives of the parole board and the applicant on 5th October, 2020, which was subsequent to the commencement of the judicial review proceedings herein, the applicant is recorded as having stated that she was enjoying the activities that were available to her in Limerick prison and she appeared to be reasonably happy with the placement there. In light of those assertions, and in particular their effect on the within proceedings, it is appropriate that a further affidavit should be sworn by the applicant setting out her current position.
50. In addition, the court cannot lose sight of the fact that visits with family members must have been severely curtailed, if not entirely eradicated, due to the onset of the Covid-19 pandemic in March 2020. The reality of the situation probably is, that it was not possible for prisoners to have face-to-face meetings with members of their families during that time. It is appropriate in the circumstances, that the respondent should be given an opportunity to put in an affidavit dealing with the situation that existed in prisons during 2020 and dealing with the current position. Accordingly, each of the parties have liberty to file further affidavits in the matter.
51. For the reasons outlined above, the court will grant leave to the applicant to proceed for the relief sought at paras. 2, 4 and 5 in her notice of motion.

52. As the judgment is being delivered electronically, the parties will have two weeks within which to make written submissions on the form of the final order, together with such further observations as may arise.