THE HIGH COURT

[2024] IEHC 518

Record No. 2024/1179 SS

IN THE MATTER OF AN APPLICATION PURSUANT TO ARTICLE 40.4.2 OF THE CONSTITUTION OF IRELAND 1937

Between:

JONATHAN ABRAHAM

Applicant

AND

THE GOVERNOR OF CLOVERHILL PRISON

Respondent

EX TEMPORE Judgment of Ms. Justice Nuala Jackson delivered on the 11th August 2024:

1. This matter comes before me by way of an Inquiry pursuant to Article 40.4 of Bunreacht na hÉireann. I have before me three Affidavits, two in support of the Applicant's position being the Affidavit of Michael Staines, solicitor for the Applicant, sworn on the 8th day of August 2024 and the Affidavit of Rabbi Wieder, Chief Rabbi of Ireland sworn on the 9th day of August 2024.

2. I directed an Inquiry following the *ex parte* application made by the Applicant on the 9th August 2024 and a short period of time was afforded to the Respondent to submit a replying Affidavit. Such Affidavit was sworn by Paul O'Neill, Assistant Governor at Cloverhill Prison, and was sworn on the 10th August 2024.

3. These Affidavits were of very considerable assistance in setting out the factual circumstances pertaining to this application.

4. In addition to the Affidavits aforementioned, I heard oral testimony from the Applicant, from Rabbi Wieder, the Chief Rabbi of Ireland, and also from Paul O'Neill. I will set out the evidence below. In truth, there is little dispute between the parties in relation to the factual circumstances arising.

5. I should say at the outset that the Respondent has certified in writing the grounds for the detention of the Applicant. I have been provided with a certificate signed by Paul O'Neill, Assistant Governor of Cloverhill Prison, stating that the Applicant is held in custody in Cloverhill Prison, Cloverhill Road, Clondalkin, Dublin 22 pursuant to Warrant dated the 6th August 2024. The said Warrant is a Committal Warrant (Remand) issued by the Dublin Metropolitan District Court dated the 6th August 2024 and mandates the detention of the Applicant until the 20th August 2024 being the date to which the criminal proceedings against the Applicant have been adjourned before the District Court. No issue has been taken by the Applicant in respect of the said Warrant or the certification of the Applicant's detention.

6. The matter at issue herein is whether the conditions upon which the Applicant is being detained are such as to render such detention unlawful in consequence of which the Applicant should be released under Article 40.4.2 of the Constitution. The Applicant argues that such unlawfulness arises. The Respondent disputes this.

FACTUAL BACKGROUND

7. The Applicant is a Rabbi and is a most committed member of the Jewish faith. It is undoubtedly the case that Rabbi Abraham is most dedicated to his faith and it is the bedrock of his life. It is amply clear from the evidence that he is most learned in this faith and that his commitment is a long standing one. He impressed as a most devout and faithful person.

8. The Applicant is a married person and ordinarily resides in England with his wife and children. He was on a temporary sojourn in Ireland at the time of the events giving rise to his currently being charged with a criminal offence in Ireland. The evidence which Rabbi Abraham gave to the court whereby he indicated that he has never before had any encounter with the criminal law has not been disputed.

9. The Applicant appeared before Dublin District Court on the 1st day of August charged with an offence namely that on the 30th July 2024 at an address in Dublin 15 in said District Court Area of Dublin Metropolitan District, he did perform a surgical procedure to wit a male circumcision on a child without being a registered medical practitioner contrary to Section 37(1)(a) and 41(1)(a) of the Medical Practitioners Act 2007 as amended. Bail was refused at that time and the Applicant was remanded in custody with the matter adjourned to the 6th August 2024. The matter was further adjourned on that date to the 20th August 2024. It would appear that the Applicant has appealed the refusal of bail by the District Court and this bail application is listed before this Court on Tuesday 13th August 2024.

10. The Affidavit of Michael Staines makes it clear that there are two bases upon which it is asserted that the conditions of the Applicant's detention are such as to make it unlawful. The first relates to the failure on the part of the prison authorities to provide food to the Applicant which accords with the fundamental requirements of his religion. That this failure has occurred is not disputed by the prison authorities. There is no doubt that this failure has caused considerable and understandable distress to the Applicant. Mr. Staines deposes to the Applicant being a member of the Jewish faith and to the fact that one of the tenets of that faith is that he may eat only Kosher food, prepared in accordance with the Jewish Bible, Talmud and Rabbinic codes. This is not disputed. It is clear from the evidence before me that, while some effort was made by the prison authorities to provide food which was in compliance with the religious beliefs concerned, there would appear to have been a lack of understanding of the requirements to be fulfilled for food to be properly described as Kosher, as is required by the tenets of the Applicant's religion. These requirements go far beyond simply the culinary

preparation of such food, to the production methods adopted in respect of individual ingredients used in such culinary activities. While the Applicant's evidence indicated that a limited amount of the foods provided to him while in prison was compliant with Kosher traditions and practices, the failure on the part of the prison authorities has resulted in his having an extremely restricted diet and also with food being provided to him which, although described as Kosher by the prison authorities, was not in fact compliant.

11. The second basis upon which it is asserted that the Applicant's conditions of detention are such as to make it unlawful result from the failure of the prison authorities to permit him access to a Tefillin during daily prayers. Mr Staines in his Affidavit deposes to it being a further tenet of the Applicant's religion that he must [have] certain religious clothing and objects during prayer. In his oral testimony before me, the Applicant indicated that he had been given access to a prayer shawl. The evidence of Mr. O'Neill that the Applicant had been permitted to have copies of his religious books was not contested. I further note the evidence of the Chief Rabbi that a member of the Jewish faith can pray without a Tefillin. The Applicant's Tefillin, a most holy object, was produced to me. This is an item which consists of a box/boxes of religious significance to which long leather straps are attached, which straps are used to bind the arms and the top of the head during daily prayer. While undoubtedly an item which any member of the Jewish faith would most likely treat with the utmost of respect, I heard and accept the evidence of Mr. O'Neill that, within the confines of a prison, this is an item which would cause concern in the context of potential self-harm or third party harm. In this regard, I refer to paragraph 2 of the Affidavit of Paul O'Neill:

> *"I say that the position of the prison governor management team in relation to the tefillin were concerns that it may be used or adapted as a weapon or ligature, either by the applicant or by other prisoners. The Tefillin is a pair of leather boxes both on 12 foot leather straps. The Prison has concerns that this may be used as a ligature or could be swung as a weapon. These concerns include that the Tefillin could be used as a weapon against the Applicant by other prisoners. The Prison also has concerns that the box part of it may be used to conceal contraband."*

12. While these were the two issues raised in the Affidavits upon which the application was based, in the course of oral evidence two other issues emerged being an issue of body searches carried out upon the Applicant and an issue of the time spent by the Applicant alone in his cell. Mr. O'Neill indicated that the search regime applied to the Applicant was in accordance with normal prison discipline and regulatory regimes. The accommodation of Rabbi Abraham as a single cell occupant was deposed to by Mr. O'Neill as being a considered response to the Applicant's own protection. These explanations seem to me to be entirely reasonable and appropriate and these explanations were not challenged in cross-examination. Therefore, from the submissions made to me and the Affidavits filed, it would appear that the challenge to the conditions of detention relate to the two matters referenced above being the failure to provide Kosher food and the failure to provide access to the Tefillin for prayer time.

13. At this juncture, I am of the view that it is appropriate to refer to the correspondence exhibited in the Affidavit of Mr. Staines and to the averments of Rabbi Wieder in relation to efforts to address these issues prior to court application being made. A very comprehensive letter was sent by email by Michael Staines and Company, solicitors, to the Governor of the prison on the 6th August 2024. All pertinent issues were raised therein including comprehensive suggestions as to how the dietary requirements of the Applicant might be addressed as well as the efforts which had been made by members of the Jewish faith community to assist the prison authorities in this regard. A reminder letter was sent by that firm, also by email, on the 7th August 2024. These letters would not appear to have been substantively responded to by the time the matter first came before me on the 9th August 2024. What might be described as a "holding" response email was received from the prison authorities on the 7th August 2024 referencing "a response in due course" but it would not appear that there was any such response by the time the matter came before me. While I appreciate that prisons are undoubtedly very busy places and resources are likely challenged, it is most unfortunate that these concerns were not addressed more promptly. It is very clear from the Affidavit of Rabbi Wieder that these issues were being pursued with (and the religious importance of them indicated to) the prison authorities by members of the Applicant's faith community from

shortly after his first remand date on the 1st August 2024. In relation to the undoubtedly kind and well intentioned offers by members of the Jewish community to bring appropriately prepared food to the prison, I would refer to paragraph 5 of the Affidavit of Paul O'Neill:

> *"I say that the prison is not in a position to accept food being brought to prisoners from external sources. This carries a food safety and security concern. It is in opposition to HACCP principles which govern out food safety management systems in relation to traceability and temperature control. Further there are security concerns that those supplying food to prisoners, whilst well intentioned, may come under pressure to convey contraband to the prison."*

14. A comprehensive responding Affidavit was sworn by Assistant Governor O'Neill as referenced above. Of particular significance in the context of this application are the averments at paragraphs 3 and 4 thereof which indicate a positive and proactive approach by the prison authorities to the issues being raised. It is deposed to that the prison authorities are prepared to give the Applicant access to the Tefillin for periods of up to one hour daily under supervision to facilitate it usage in the Applicant's daily prayers. This was confirmed in oral evidence. Additionally, the Affidavit states *"Going forward we will endeavour to supply the Applicant with kosher meal purchased through the recommended Kosher suppliers."* This was further clarified in the course of oral testimony when the Assistant Governor acknowledged the failure to adhere to Kosher rules in relation to foods provided to date and a firm commitment was given to providing foods which were fully compliant with Kosher standards going forward. The necessary internal arrangements had been put in place and the ordering of such dietary supplies from the recognised and suggested supplier had been delayed simply due to the supplier in question not being contactable on the Sabbath (this hearing being held on a Saturday). It is therefore clear that the issues which understandably concern the Applicant are being addressed by the prison authorities in an entirely appropriate manner at this stage.

SUBMISSIONS

15. It was accepted on behalf of the Applicant that the issue concerning the Tefillin had been resolved.

16. The Applicant referenced Prison Rule 23(2) which states:

> *"(2) Subject to the maintenance of good order and safe and secure custody, the Governor shall, in so far as is practicable in the performance of his or her functions under paragraph (1), ensure that provision shall be made to enable a prison to observe dietary practices of a religion or culture of which he or she professes to be a follower."*

Counsel submitted that the provision of Kosher food comes within this Rule and that there is a positive obligation on the prison authorities to comply with it. A failure in this regard had occurred. It was submitted that the evidence in this regard was "quite shocking". It was submitted that the prison authorities ought to have had a plan in place prior to the situation arising. Inadequate preparation for the situation which arose was evident, it was argued. It was further submitted that the concern arising had only been addressed in the context of the application which is before me. It was submitted that the breach of the Prison Rule above which occurred here and the situation arising in relation to the failure to address the religious dietary mandates of the Applicant were of sufficient gravity to vitiate the Applicant's detention. The Applicant's Senior Counsel accepted that the bar to be reached for conditions of detention rendering detention unlawful was a high one and that torture or inhuman and degrading treatment or a complete denial of circumstances of human dignity was required but he further submitted that textbook examples could be simplistic. It was the Applicant's submission that the failure in this instance reached the requisite legal standard to render the detention unlawful; that it was a significant deficit, with the question being posited "what is more basic than being fed?".

17. In relation to the proposals being made to address the issues of concern, the Applicant submitted that the detention having been unlawful up to this point, the indications that these matters were being addressed was to be welcomed but that the issues had not been remedied as yet and that the appropriate manner in which to proceed was to admit the Applicant to appropriate bail until these issues were resolved. It was argued that a deficiency had been established; that deficiency went to the heart of the detention; that an offer had been made to fix it but that in the interim period, the Applicant should not have to continue in the allegedly unlawful regime. **N v. HSE** [2006] IESC 60 and **Kinsella v. Governor of Mountjoy Prison** [2011] IEHC 235 were referenced as authorities for such interim resolutions pending full addressing of the issues of unlawfulness arising.

18. The Respondent submitted that Article 40.4 was not the appropriate remedy here and that there were other, more appropriate remedies available (reference was made to injunctive and declaratory reliefs in this context). The circumstances in which prison conditions would successfully ground an Article 40.4 application were very limited and restrictive, it was submitted, and the requisite standards did not arise in this case. The Respondent's Counsel accepted that the Applicant was not a convicted prisoner but a remand prisoner but reference was made to many of the oft cited authorities in this regard and it was submitted that Article 40.4 relief had been refused in many instances where the conditions in dispute were significantly worse than is the position in this instance. Reference was made to the requirements of Article 40.4 applications and the **FX v. The Clinical Director of the Central Mental Hospital and Another** [2014] 1 IR 280. Reference was also made to **Byrne v. The Governor of Mountjoy Prison** [2013] IEHC 33 (Charleton J.); **The State (C) v. Frawley** [1976] IR 365; **The State (Smith and Fox) v. The Governor of the Curragh Military Detention Barracks** [1980] ILRM 208; **Brennan v The Governor of Portlaoise Prison** [1998] IEHC 140; (Budd J.); **J.H. v. Russell** [2007] 4 IR 242 (Clarke J.); **Gan v. The Governor of Arbour Hill Prison** [2011] IEHC 247 (Ryan J.).

19. The Respondent argued that the prison had done its best albeit that was not good enough. The actions were not deliberate and changes have been made and arrangements

advanced. It was argued that what arose here does not amount to illegality or, if illegal, not at the requisite level and not sufficiently serious to render the Applicant's detention unlawful.

THE LAW

20. The generally applicable circumstances in which relief under Article 40.4.2 of Bunreacht na hÉireann arises were stated by Denham CJ in **F.X. v. Clinical Director of Central Mental Hospital** [2014] 1 I.R. 280 in the following terms:

> *"64. In general, if there is an order of any court, which does not show an invalidity on its face, then the correct approach is to seek the remedy of appeal and, if necessary, apply for priority. Or, if it is a courts of local jurisdiction, then an application for judicial review may be the appropriate route to take. In such circumstances, where an order of the court does not show any invalidity on its face, the route of the constitutional and immediate remedy of habeas corpus is not the appropriate approach.*
>
> *65. An order of the High Court which is good on its face should not be subject to an inquiry under Article 40.4.2 unless there has been some fundamental denial of justice. In principle the appropriate remedy is an appeal to an appellate court, with, if necessary, an application for priority. Thus, the remedy under Article 40.4.2 may arise where there is a fundamental denial of justice, or a fundamental flaw, such as arose in The State (O.) v. O'Brien [1973] 1 I.R. 50, where a juvenile was sentenced to a term of imprisonment which was not open to the Central Criminal Court."*

There are, however, exceptional circumstances in which, notwithstanding the validity of the detention on the face of the order, the conditions of detention may be so egregious as to warrant relief under Article 40.4.

21. The circumstances in which conditions of detention will ground a successful Article 40.4 application or an application for *habeas corpus* were discussed in **The State**

(Richardson) v. The Governor of Mountjoy Prison [1980] ILRM 82 (Barrington J.). The facts involved the practice of "slopping out" and consequent allegations of failure to have due regard to the proper minimum standards of health, privacy, comfort and human dignity. Barrington J. referred to the detention only being invalidated in *"exceptional circumstances"*. He continued:

> *"It would clearly not be possible to enumerate in advance what are the conditions which would invalidate a detention otherwise legal. If a court were convinced that the authorities were taking advantage of the fact that a person was detained consciously and deliberately to violate his constitutional rights or to subject him to inhuman or degrading treatment, the court might order his release. Likewise, if the court were convinced that the conditions of a prisoner's detention were such as seriously to endanger his life or health, and that the authorities intended to do nothing to rectify these conditions, the court might release him. It appears to me that the position would be similar if the conditions of a prisoner's detention were such as seriously threaten his life or health, but the authorities were, for some reason, unable to rectify the conditions."*

Extracting principles from the authorities, Barrington J. stated, inter alia:

> *"(4) Exceptionally, however, the conditions under which a prison is detained may be such as to make his detention unlawful, notwithstanding the existence of a valid warrant. In such case, habeas corpus will lie.*
>
> *(5) Lesser legitimate complaints of prisoners fall to be investigated in other forms of legal proceedings."*

22. The application of Article 40.4 in such circumstances was further addressed by Hogan J. in **Kinsella v. The Governor of Mountjoy Prison** [2011] IEHC 235. I have recited from this judgment at some length as it is clear therefrom that even a determination of breach of a constitutional right (in that instance a violation of Article 40.3.2 was found, the Applicant having been detained in very adverse conditions in a padded cell for a continuous period of eleven days) did not result in a determination that the Applicant was entitled to be released from his detention. Hogan J. stated:

*"**Whether the applicant is entitled to be released by reason of this breach of his constitutional rights?***

11. It seems clear that the principal - and, perhaps, indeed, the exclusive - function of the High Court on an Article 40.4.2 application is to determine whether the applicant is detained in lawful custody, although the court may also may enjoy some residual jurisdiction for the purposes of making its orders effective: see, e.g., the comments of Murray C.J. in N. v. Health Service Executive [2006] 4 I.R. 470, [2006] IESC 60 and those of Clarke J. in H. v. Russell [2007] IEHC 7. In this context, therefore, 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.

12. The starting point here is, of course, the well known jurisprudence commencing with the Supreme Court's decision in The State (McDonagh) v. Frawley [1978] I.R. 131 where O'Higgins C.J. observed ([1978] I.R. 131, 137):

> *"The confinement of orders of release under Article 40.4 to cases where the detention is not 'in accordance with law' in the sense that I have indicated means that application under Article 40.4 are not suitable for the judicial investigation of complaints as to conviction, sentence or conditions of detention which fall short of that requirement. These fall to be investigated, where necessary, under other forms of proceedings."*

13. A further factor is that the intentional violation of the prisoner's right which Budd J. considered in Brennan v. Governor of Mountjoy Prison [1999] 1 I.L.R.M. 190, 205 might be a ground for ordering the release of a convicted prisoner in an Article 40.4.2 application is not present here. In H v. Russell, a case concerning the adequacy of treatment to be provided to a patient detained under the Mental Health Act 2001, the general approach of the courts to the raising of such matters in an Article 40.4.2 application was summed up thus by Clarke J.:

> *"However by a parity of reasoning with the jurisprudence of the courts in respect of persons who are detained within the criminal justice process, it does not seem to me that anything other than a complete*

failure to provide appropriate conditions or appropriate treatment could render what would otherwise be a lawful detention, unlawful. See, for example, The State (Richardson) v. Governor of Mountjoy Prison [1980] I.L.R.M. 82. That is not to say that a person may not have a remedy in circumstances falling short of such complete failure. If there is a legal basis for suggesting that the conditions in which a person is detained or the treatment being afforded to a person so detained are less than the law requires, then an appropriate form of proceeding (whether plenary or judicial review) may be used as a means for enforcing whatever legal entitlements may be established. In many cases (and it would appear on the evidence that this case is one of them) the issues may well centre around the availability of resources for more appropriate treatment. Such cases are undoubtedly complex and require the court to consider the legal entitlements of persons in the context of there being argued to be a lack of resources available to provide more appropriate treatment. It does not seem to me that such cases are properly determined in the context of an application under Article 40.4 of the Constitution, which is concerned with the narrow question of the validity or otherwise of the detention of the person concerned. In my view counsel for Cavan General was correct when he argued that cases involving resources issues are not ones which can properly be dealt within the narrow parameters of an Article 40.4 inquiry. In those circumstances I was not satisfied that the undoubted questions which arise as to the appropriateness or otherwise of the treatment of Mr. H. are ones which, even from the high watermark of his case, could conceivably result in a conclusion that his detention was, on that ground alone, unlawful. Therefore, if I had not been satisfied that there were grounds for deeming Mr. H.'s detention unlawful by reason of the process, I would not have been satisfied that his detention was unlawful by reason of the treatment (or the lack of it) which he has received. If (and I express no concluded view on the issue) there is any merit to his contention that his treatment falls short of that which the law entitles him to, then his entitlements should be determined in appropriate proceedings designed to obtain appropriate declarations or orders concerning the nature of the

treatment to which he is entitled rather than in proceedings which question the validity of his detention."

14. In the present case I cannot presently say that the applicant's continued detention has been rendered entirely unlawful by this breach of his constitutional right or that the authorities have completely failed in their duties and obligations towards him in the manner indicated by Clarke J. in H. I have reached this conclusion regarding the lawfulness of his detention in light of what I consider is the real and genuine concern for Mr. Kinsella's safety on the part of the prison authorities and having regard to the substantial difficulties which they have hitherto encountered in finding suitable accommodation for him, whether in Mountjoy Prison or elsewhere within the prison system. Furthermore, as illustrated by decisions such as The State (Richardson) v. Governor of Mountjoy Prison [1980] I.L.R.M. 82, absent something akin to an intentional violation or manifest negligence on the part of the authorities (which isnot the case here), it would be only proper to give them a fair opportunity to remedy the situation in the light of this decision.

15. The proposed solution - i.e., upholding the claim of a violation of a constitutional right, but giving the authorities an opportunity to remedy this breach - is also perhaps the one which is the most apt having regard to the principles of the separation of powers, given that onerous duty of actually running the prisons rests with the executive branch. In his closing submission, Mr. McDermott urged me to take this step were I to hold that the applicant's constitutional rights had been breached. The present case may yet prove to be an example of a constructive engagement of this kind between the executive and judicial branches which achieves a just solution in line with appropriate separation of powers concerns without the immediate necessity for a coercive or even a declaratory court order. At the same time, if the guarantee of Article 40.3.2 is to be rendered meaningful in the present case, then this further opportunity can rea ly only be measured in terms of days having regard to the known facts concerning the applicant's present conditions of confinement.

Conclusions

16. To sum up, therefore, I have concluded that:

A. The detention of the applicant in the padded cell in the manner that I have described for a continuous eleven day period objectively amounts to a breach of the State's obligation under Article 40.3.2 of the Constitution to protect the person of Mr. Kinsella.

B. It cannot presently be said that this breach is so serious that it immediately vitiates the lawfulness of his detention. It is clear from the Supreme Court's decision in McDonagh that, so far as sentenced prisoners are concerned, the Article 40.4.2 jurisdiction can only be used in quite exceptional cases. Having regard to the fact that the prison authorities are acting from the best of motives in a complex and difficult situation, it would be only fair and proper to give them one further opportunity to remedy the situation. It cannot yet be said that the present case comes within the exceptional category of cases envisaged by O'Higgins C.J. in McDonagh and by Clarke J. in H. v. Russe l. C. It follows, therefore, that this application for release must technically fail. But if the applicant's circumstances of detention were to continue as heretofore, then, of course, with each passing day, the present case would inch ever closer to the point whereby this Court could stay its hand no longer. In this regard, it should be noted that were these conditions to continue for much longer, the applicant would be justifiably entitled to make a fresh application for release under Article 40.4.2 or to take such further legal steps as he might be advised."

23. The dictum of Clarke J. (as he then was) in **H v. Russell** [2007] 4 I.R. 242, recited in the judgment of Hogan J. above is also instructive. I must reference, in particular, the learned Judge's dictum that *"it does not appear to me that anything other than a complete failure to provide appropriate conditions or appropriate treatment could render what would otherwise be a lawful detention, unlawful."*

24. I was also referred to the dictum of Hyland J. in **S.M. v. The Governor of Cloverhill Prison** [2020] IEHC 639 where it is stated at paragraph 4 that:

"The case law makes it clear that there must be an egregious breach of the fundamental rights of a person such as to render their otherwise lawful detention unlawful."

25. A failure to comply with Prison Rules is not, of itself, sufficient. This was discussed by Budd J. in **Brennan v. Governor of Portlaoise Prison** [1998] IEHC 140 where he stated:

> *"Failure to comply with the Prison Rules will not necessarily entitle the prisoner to obtain relief because for the most part the Prison Rules are regulatory only and non-compliance with them does not invalidate acts done or decision taken in purported compliance with the Rules. However, it was further conceded by the Respondent during the hearing that much of part five of the Prison Rules namely Rules 172–188 inclusive had fallen into disuse and were no longer operative. This failure to comply with the 1947 Rules does not of itself entitle the Applicant to be released. In the McDonagh case, the Supreme Court stated that the stipulation in Article 44(1) of the Constitution that a citizen may not be deprived of his liberties save in accordance with law "does not mean that a convicted person must be released on Habeas Corpus merely because some defect or illegality attaches to his detention". The Applicant must go further than showing that some of the Rules have fallen into disuse and that the authorities are failing to comply with the Prison Rules. He must show that the departures from the Rules have brought about conditions which endanger his life or health or subject him to inhuman or degrading treatment."*

Budd J. further stated:

> *"Both the **Richardson** case and **The State (Walsh and McGowan) -v- The Governor of Mountjoy Prison** seemed to support the proposition that where the conditions of detention are being challenged in order to remedy them so that the rights of the inmates may be vindicated and protected the appropriate remedy may be an order of mandamus where such conditions do not warrant immediate release."*

26. The willingness of the prison authorities to rectify the conditions is also of relevance. In this regard, I refer to the **Kinsella** decision of Hogan J. above and also to **R.A. v. Governor of Cork Prison** [2016] IEHC 504 in which Costello J. stated at paragraph 25:

> *"I, therefore, accept that there exists a legal basis for releasing an applicant otherwise lawfully detained where the conditions of his or her detention are such as to render the continued detention unlawful. However, it is clear that the courts will not immediately make such an order but will afford the detainer an opportunity to remedy the matters complained of prior to making an order under Article 40. In addition, the onus is on the applicant to establish that something in the order of a complete failure to provide appropriate treatment is and continues to exist."*

27. It was submitted by the Applicant in the present case that he ought to be immediately released on appropriate bail conditions pending full implementation of the dietary changes which the prison authorities proffered. It is to be noted that no such immediate release was ordered in the **Kinsella** case notwithstanding the finding of a breach of constitutional rights. Rather, Hogan J. found that the current circumstances did not justify release but, if they continued, might justify a further application pursuant to Article 40.4. However, it must be stated that the nature of the conditions of detention complained of in the **Kinsella** case were of a most extreme nature.

28. I was referred by Counsel for the Respondent to one decision concerning dietary requirements of prisoners being **Gan v. The Governor of Arbour Hill Prison** [2011] IEHC 247. Ryan J. stated:

> *"Ground No. (4) deals with food. The applicant claims to be entitled to Kosher food but says that he does not receive that and he also claims to have an allergy to onions and that he has nevertheless been supplied with that food and he specifies two recent occasions namely, the 2nd February, and the 15th March 2011. I think that a prisoner is entitled to seek to have special dietary needs*

and requirements catered for in a reasonable and proper manner. I do not know whether he is entitled to demand Kosher food – there is nothing in the papers that I can see to suggest such an entitlement but I am not deciding that the applicant is not so entitled. There is simply nothing on which a judgment can be made on this point, nor is there any documentation or detail about communication with the prison authorities about it. This is a matter of internal prison administration and the applicant is entitled to apply to the Governor with a complaint or request and his reasonable requirements and he can also seek the assistance of the visiting committee. There is nothing in the documents about any steps he has taken in this regard. As to the supply of onions, the applicant does not say whether he thinks that was deliberate or accidental and I cannot accept that the erroneous supply of onions on isolated occasions thereby renders a prisoner's custody unlawful and entitles him to an inquiry under Article 40."

I refer to this decision simply due to the fact that it is the only authority concerning prison food arrangements to which I was referred. I do not find it particularly of assistance due to the fact that the complaint was clearly not brought before the Court in any comprehensive manner, unlike in the present case.

29. I have also had regard to the fact that many of the authorities cited to me concerned convicted prisoners and not remand prisoners such as the Applicant herein. In this regard, however, I have been referred to the decision of Charleton J. in **Byrne v. The Governor of Mountjoy Prison** [2013] IEHC 33 and I accept the dictum therein which states:

"A person confined to prison, whether on remand or under sentence, is obliged to suffer the deprivations that necessarily follow from that loss of liberty but is entitled to reasonable medical attention such that will enable him or her to be treated for whatever physical or psychological condition that would be treated were the person at large in the community. Clearly, a prison is not a health clinic and the governor of a place of detention is not obliged to provide any superior level of care than that which an ordinary person who is not imprisoned

would be able to obtain from the health services either through their own efforts or, if they are disabled from seeking help, through their relatives or friends. While the standard is that of reasonable care, a failure by prison authorities to positively engage in seeking appropriate treatment for sick prisoners might in an extreme context remove from the condition of confinement its essential character of legality. A person in custody is entitled to medical attention appropriate to their condition in the context of imprisonment."

I would further note that the decision of Costello J. in **R.A. v. The Governor of Cork Prison** [2016] IEHC 504 (referenced above) concerned a remand prisoner.

CONCLUSION

30. Here I find:

i. A deficiency in compliance with the Prison Rules has occurred. The importance of respect for the dietary dictates of a religion are amply and rightly recognised in the Prison Rules. I do not however believe that this deficiency brings this matter into the category of wrong which goes to the unlawfulness of the Applicant's detention. This is a very high standard requiring, per **Richardson**, the conditions complained of to amount to a conscious and deliberate violation of constitutional rights or inhuman or degrading treatment or to seriously endanger life or health and that the prison authorities intended to do nothing to rectify them. I find that in the present instance, on the basis of the evidence before me, it cannot be said that the prison conditions constitute such a conscious and deliberate violation of constitutional rights, or inhumane or degrading treatment or that they seriously endanger life or health.

ii. There are undoubtedly other remedies which might well arise - I would reference potentially mandamus or mandatory injunctions - but these are not matters I have to consider in the context of this application.

iii. If I am wrong in so holding, in any event, the authorities support the detaining authority being given an opportunity to correct matters and address the wrong arising. Albeit regrettably late in the day, the Respondent here has done so. The Assistant Governor's evidence, oral and on Affidavit, has been genuine and open and has acknowledged the shortcomings and indicated how these are to be

addressed in a very comprehensive manner in respect of both issues arising and it is clear that the requisite resources are being deployed to do so. In this context, I do not find that there is a requirement for me to exercise any residual jurisdiction such as is referenced by Hogan J. in the **Kinsella** case referenced above.

iv. In these circumstances, I conclude that circumstances requiring a release from detention under Article 40.4.2 do not arise. The lawfulness of the detention has been proved and the current conditions of detention are not such as require the Applicant's release.

v. I am satisfied that the shortcomings in the application of the rules of detention have been recognised and addressed by the Respondent but should further default occur, I am satisfied that there are remedies (not being Article 40.4 remedies) available to the Applicant.