

THE HIGH COURT

JUDICIAL REVIEW

[2025] IEHC 56

[Record No. 2021/768JR]

BETWEEN

JOHN O'BRIEN

APPLICANT

AND

THE GOVERNOR OF CORK PRISON

&

THE IRISH PRISON SERVICE

&

THE MINISTER FOR JUSTICE AND EQUALITY

&

IRELAND

&

THE ATTORNEY GENERAL

RESPONDENTS

AND

IRISH HUMAN RIGHTS AND EQUALITY COMMISSION

NOTICE PARTY

JUDGMENT delivered by Mr. Justice Micheál O'Higgins on 5th February 2025

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Introduction

1. The applicant was detained in Cork Prison for certain periods between March 2013 and April 2014. He had no in-cell sanitation, and was required to urinate and defecate in a bucket in his cell, sometimes in the presence of other prisoners. He then had to “slop out” the contents of the bucket in the morning when his cell door was opened.
2. In February 2020, in the wake of the Supreme Court judgment in *Simpson v. Governor of Mountjoy Prison & Ors.* [2019] IESC 81, [2020] 3 IR 113, the State Claims Agency established a settlement scheme (“the Scheme”) to enable prisoners who had been subjected to the indignity of a “slopping out” regime to claim compensation without having to go to court. The eligibility criteria for this non-statutory scheme included a requirement that the claimant’s claim, or at least part thereof, not be statute-barred.
3. The applicant applied for compensation under the Scheme in November 2020 and, more formally, in March 2021. By letter dated the 27th May 2021, the solicitors for the respondents rejected the application on the ground that the claim was statute barred.
4. This judicial review seeks to quash that decision, and claim damages for breach of the applicant’s right to an effective remedy, and certain other reliefs which I will return to presently. The respondents oppose the proceedings on their merits, but also raise the following arguments: that, pursuant to O. 84 r. 21 RSC, the proceedings were brought outside the 3 month time limit set down thereunder; an objection that the applicant’s legal arguments are not sufficiently grounded in factual evidence; and an objection that the case as pleaded is vague, theoretical and overly generalised.

Background

5. The case has a somewhat complicated legal and procedural background. The applicant formally opened his application for leave on the 11th August 2021 during the long vacation. Leave was granted by Meenan J. on the 22nd November 2021 and opposition papers were

filed in response. In January 2024, the applicant sought leave to amend his statement of grounds. The motion to amend came on for hearing before Phelan J. on the 29th January 2024. My task in writing this judgment has been made much easier as a result of the comprehensive judgment delivered by Phelan J. on the 1st February 2024 ([2024] IEHC 109). The judgment considers the law on amending pleadings, traces developments in “slopping out” cases in Ireland and other jurisdictions, and identifies legal issues arising in such cases.

6. As noted by Phelan J., the practice of slopping out has been condemned by the European Court of Human Rights as contributing to findings of breaches of Articles 3 and/or 8 of the European Convention on Human Rights. In the Scottish case of *Napier v. The Scottish Ministers* [2004] S.L.T. 555, a combination of slopping out and prison overcrowding led to findings of inhuman and degrading treatment under Articles 3 and 8 of the Convention.

7. In *Mulligan v. Governor of Portlaoise Prison* [2010] IEHC 269, a claim was advanced on both constitutional and ECHR grounds. The High Court (MacMenamin J.) rejected the claim on both grounds following a detailed consideration of the evidence and the case law. MacMenamin J. found that the Strasbourg jurisprudence did not support the proposition that slopping out *per se* was necessarily inhuman and degrading for the purpose of Article 3, or unlawful under Article 8, in all places and at all times. Importantly, whether a breach of Articles 3 and/or 8 was established was found to depend on all the circumstances of the case. MacMenamin J. held that the *cumulative effect* of the conditions of detention must be considered when assessing whether damages should arise. As it transpired in *Mulligan*, the applicant’s case for damages failed. MacMenamin J. emphasised that the applicant did not have to share a cell at any stage and did not make significant complaints as to the manner in which the staff dealt with the sanitation issues on a day-by-day basis.

8. Phelan J. also referenced the leading case of *Simpson* where the Supreme Court found that the practice of slopping out evidenced in that particular case infringed the personal rights

of the citizen as guaranteed by Article 40.3 of the Constitution, and damages were awarded in that case in the sum of €7,500 for the said breach. The damages were measured with reference to conditions of detention occurring in the six-year period prior to the commencement of the proceedings. The proceedings issued in 2014 in respect of the period of detention occurring between February and September 2013. The claim for damages for breach of rights under Articles 3 and 8 of the Convention, which was advanced under s. 3 of the European Convention of Human Rights Act 2003 (the “2003 Act”), was found to be largely statute-barred insofar as it related to periods of detention occurring more than one year prior. Phelan J. notes that this finding was not appealed. Moreover, it was observed by MacMenamin J. in the Supreme Court regarding the decision not to appeal that “*this was a prudent and correct decision*”.

9. The Supreme Court delivered the substantive judgment in *Simpson* on the 14th November 2019. Following delivery of the judgment, which reversed the decision of the High Court refusing damages, the Scheme under consideration in this case was introduced in February 2020.

10. Returning to the present applicant’s case, it was originally listed for hearing in March 2023. However, it was adjourned on the respondents’ application pending the determination of the Supreme Court appeal in *McGee v. Governor of Portlaoise Prison & Ors.* [2023] IESC 14, which was an appeal from the decision of the High Court in that case ([2022] IEHC 210). The judgment of the Supreme Court was delivered in May 2023. The Supreme Court found that where a vindication of constitutional rights takes the shape of permitting a claim for damages against other wrongdoers, such a claim is properly characterised as an action founded upon a civil wrong, and therefore, an action founded upon tort. It follows that such a claim is subject to s. 11 of the Statute of Limitations Act 1957.

11. Following the delivery of the Supreme Court judgment in *McGee* in May 2023, the applicant in the present case sought to amend his statement of grounds to include a claim for damages under s. 3 of the 2003 Act, and a declaration of incompatibility in respect of s. 11(2) of the Statute of Limitations Act 1957, under s. 5 of the 2003 Act.

12. In the concluding part of her judgment Phelan J. stated the following:

“47. Where the Scheme was established as a remedy for breach of rights arising from the practice of slopping out and it is established by the Applicant that there was no effective remedy contemporaneous with those breaches such that the inclusion of a retrospective limitation period and its application to the Applicant to exclude his claim renders the Scheme ineffective as a remedy, then I consider it is arguable (recalling again the low threshold which applies on an application for leave to amend) that the exclusion of the Applicant under the Scheme coupled with the unavailability of any other remedy, if this is established, is in breach of his right to an effective remedy (contrary to Articles 6 and/or 13 of the Convention), albeit it seems to me that to get to consideration of this argument the Applicant must first engage with the question of a constitutional right to an effective remedy as protected within the ambit of Articles 34 and/or 40.3 of the Constitution.”

13. Having reviewed the relevant case law and affidavits, Phelan J. determined that the interests of justice favoured granting the applicant liberty to amend the statement of grounds so as to permit the applicant *inter alia* to bring:

- (i) A claim for damages under s. 3 of the 2003 Act for breach of a right to an effective remedy in respect of rights infringed by the practice of slopping out contrary to Article 6 and/or 13 of the Convention at para. D(iv) of the statement of grounds; and

- (ii) If necessary, an application, pursuant to s. 3(5) of the 2003 Act and/or O. 84 r. 21 RSC for an extension of time within which to bring the proceedings.

14. Phelan J. refused the amendment sought at the proposed para. D(v) where a declaration of incompatibility was sought in respect of s. 11 of the Statute of Limitations Act 1957. She also refused to permit a claim to be included for damages for breach of Articles 3 and/or 8 of the Convention arising from the practice of slopping out, as it affected the applicant historically.

15. Phelan J. was critical of the paucity of factual information within the applicant's original pleadings and noted also that a number of the legal arguments were inadequately pleaded. Paras. 40 to 44 of the judgment are also worth mentioning, since they have a bearing on some of the issues I have to decide in this judgment.

“40. While I am satisfied that a low threshold of arguability is demonstrated in relation to damages for claimed breach of a right to an effective remedy, I have very significant misgivings as to whether a threshold of arguability is reached in relation to a claimed breach of Articles 3 and 8 of the Convention not least given the obvious time issues arise in bringing such a claim at this remove in respect of events occurring in 2013-2014. The pleadings are advanced on the basis of an asserted “admitted” breach of Article 3 and 8 (which is clearly in dispute and will require to be established in evidence) and leave has already been granted on this basis. A claim for damages under s. 3 of the 2003 Act for breach of Articles 3 and/or 8 of the Convention would need to overcome the one-year limitation period prescribed under s. 3(5) of the 2003 Act and dicta in Simpson to the effect that a claim under the 2003 Act was out of time in that case.

41. While there is a power to extend time under s. 3(5) of the 2003 Act and a case for extension might be advanced on the basis identified on affidavit on behalf of the

Applicant, little evidence has been adduced on affidavit to establish the existence of conditions in his case which were such as would constitute a breach of Articles 3 and/or 8 of the Convention and these are issues of fact which could only properly be determined on a plenary hearing, except in straightforward cases of uncontested evidence.

42. In view of the absence of evidence to ground a finding of breach and clear issues regarding time, it does not seem to me that it is arguable, even on a low threshold, that a claim for damages for breach of Articles 3 and/or 8 of the Convention properly lies in these proceedings at this remove from the events which occasioned the alleged breaches. In my view such a claim is bound to fail.

*43. Turning then to the application to introduce a claim for a declaration that the [sic] s. 11 of the 1957 Act is incompatible with the Convention, it seems to me that were leave granted to seek this relief it would change the nature of the case advanced and that accordingly the application to introduce this plea warrants some scrutiny in line with the dicta of Collins J. in *North Westmeath Turbine Action Group v. An Bord Pleanala* [2022] IECA 126. No grounds have been pleaded to substantiate an entitlement to such relief. Section 11 of 1957 Act was not challenged on the case as originally pleaded and no new grounds are proposed, other than an omnibus reference to Article 6 of the Convention, upon which to base this extended plea. Furthermore, no authority was identified before me in argument to support a conclusion that a statutory limitation period of the type prescribed under the 1957 Act and at issue in these proceedings (six years) is incompatible with the Convention.*

44. The decision to rely on the 1957 Act in determining eligibility under the Scheme or in defending proceedings is not mandated by law but arises at the election of the party against whom a claim is initiated. Accordingly, I am not satisfied based on the

case as argued before me that an arguable basis has been shown for contending that s. 11 of the 1957 Act is incompatible with the Convention as the State is never obliged to invoke a statutory limitation period which does not go to jurisdiction. It seems to me that the real question which arises is whether the inclusion of a requirement that a claim not be statute barred under the Scheme renders that Scheme ineffective as a remedy for the purpose of the Convention given the asserted lack of a remedy at material times. I note, in any event, that the Applicant contends that this relief is not required to be pleaded specifically as the Court may grant such relief of its own motion. In all the circumstances, I am not satisfied that an arguable basis to give leave to seek a declaration of incompatibility in amended proceedings is demonstrated.”

16. In light of Phelan J.’s judgment, the applicant was required to further amend his statement of grounds, beyond the additional paragraphs that he had sought leave to rely upon in the motion. Phelan J. states at para. 50 that she considered it appropriate that the applicant further amend his statement of grounds to include *inter alia* the following express pleas:

- (1) There was no effective remedy under Irish law for breach of a right occasioned by the practice of slopping out prior to the decision of the Supreme Court in *Simpson*;
- (2) The imposition of a retrospective limitation period in the Scheme, introduced following the decision in *Simpson*, coupled with the absence of any other effective remedy for breaches of constitutional rights established for the first time in that case is contrary to the Convention by reason of a failure to vindicate a right to an effective remedy contrary to Article 6 and/or 13 of the Convention and Articles 34 and/or Article 40.3 of the Constitution.

An amended statement of grounds containing these additional grounds was duly prepared and served on the respondents. The written submissions of the parties that I will now endeavour to summarise were based on the amended pleadings.

Summary of submissions on behalf of the applicant

17. Dealing firstly with the O. 84 r. 21 RSC time point, the applicant submits that the “operative” refusal letter is the letter from the solicitors for the respondent dated 27th May 2021, wherein they wrote to the solicitors for the applicant stating that the applicant’s claim was entirely statute barred. The applicant relies upon the second affidavit of his solicitor, Matthew Byrne, sworn on the 20th November 2023. At para. 12 Mr. Byrne avers that it is clear the applicant moved promptly and within the strictures of O. 84 RSC in making his application for judicial review, and that he moved promptly in seeking to amend his pleadings in light of the Supreme Court’s judgment in *McGee*. Earlier at para. 7 of the affidavit, Mr. Byrne points out that, in fact, judicial review proceedings were commenced on the 11th August 2021 when at a vacation sitting of the High Court, papers were opened for the purpose of O. 84 RSC, with the duty judge noting same, and a record number was issued by the Central Office on that date. Counsel submits that this had the effect of stopping the clock for the purpose of the three-month time limit. The full application for leave proceeded before Meenan J. on the 22nd November 2021, and leave was granted on that date.

18. In the alternative, if the applicant is deemed to be out of time for the purpose of the three-month time limit, an extension of time is sought under O. 84 r. 21 RSC. In that regard, the applicant relies upon the matters set out within the initial affidavit, the criteria referenced by Mr. Byrne in his second affidavit, the public interest element of the proceedings and the fact that the proceedings were ready and listed for hearing on 7th March 2023. The reason why the matter did not proceed on this date was because the State sought an adjournment to await the outcome of the Supreme Court judgment in *McGee*. Moreover, the applicant relied

upon the judgment of Phelan J. in the amendment application which also addressed certain aspects of the timeline issue.

19. The applicant relies upon paras. 11 and 12 of the second affidavit of Mr. Byrne where he avers that it is in the interests of justice that an extension of time be granted having regard to the overall facts of the case, the clarification in the law by the Supreme Court in *McGee* and the lack of any prejudice on the part of the respondents.

20. Turning to more substantive issues, the applicant points out that the Scheme introduced by the State Claims Agency was not formally published, but that solicitors, including the applicant's solicitors, were notified of same. The State Claims Agency, in administering the Scheme, sets out the relevant statistics in the National Treasury Management Agency "*NTMA Annual Report & Financial Statements 2023*", stating:

"The scheme of settlement continued to make progress through 2023. As of end-2023, 2,805 claims associated with the Simpson case had been received and, of these, 88% had been settled, discontinued or otherwise concluded, while 12% remained open and ongoing."

21. The applicant emphasises the historic nature of the wrong, and contends that the effect of applying a rigid limitation rule to a scheme designed to atone for historic wrongs committed against prisoners is that, in the case of an appreciable number of prisoners, they will be shut out from claiming compensation, even in cases of an admitted wrong. This undermines in a serious way the core purpose of the Scheme. The initial projected cost of the Scheme was €30 million but, in fact, the actual cost is likely to be much lower at €15 million.

22. The applicant submits that the Scheme could have been constitutionally devised by allowing a window of time for claimants, who established that they were subject to slopping out, to make a claim for compensation. The applicant's application was no more than a few

months outside the statutory time period – his last period of incarceration in Cork Prison being from the 31st March 2014 to 3rd April 2014.

23. The applicant submits that the Scheme as devised and applied gives rise to the following questions:

- (a) Does the Scheme as devised constitute a breach of Article 40.3.2 of the Constitution in failing to vindicate the rights of citizens (including former prisoners), or is otherwise unconstitutional?
- (b) Can the strict application of time limits, as applied in the within proceedings, be set aside to ensure that the State as a wrongdoer vindicates the constitutional rights of the applicant?
- (c) Does the Scheme, as devised, comply properly with the requirements of the European Convention on Human Rights?
- (d) If the Scheme is unconstitutional and/or in breach of the ECHR (or the 2003 Act) what are the appropriate remedies?

24. The applicant contends that the Scheme as devised does not meet the objectives mentioned by MacMenamin J. in *Simpson* at para. 64. The Scheme as devised is contrary to Article 40.3.2 “*in shutting out the applicant from deserved compensation*”. The Scheme was clearly devised to primarily deal with historic matters, given that most prisons by 2020 had in-cell sanitation. By not allowing persons subject to slopping out a reasonable window of opportunity in which to apply for compensation, but instead applying a guillotine to all pre-2014 claims, meant that a large number of persons, including the applicant, were left with no redress, even though they met every other criterion of the Scheme. This element of the Scheme is in sharp contrast with other Irish schemes of redress and indeed, from a comparative perspective, schemes scrutinised by the European Court of Human Rights.

25. The Constitution affords an unenumerated right to an effective remedy and the Scheme, by the imposition of a six-year cut off point and/or no grace period, infringes this right. The applicant submits that the jurisprudence prior to *Simpson* was not settled and had onerous hurdles, as was described by Dr. Mary Rogan in “*Prison Law in Ireland enters adulthood: Simpson v. Governor of Mountjoy Prison*”, (2021) 3 ISCR 121-139 (I will come back to Dr. Rogan’s article presently). The applicant says the restrictions in domestic law are evident, not only from pre-*Simpson* judgments, but also from the State’s position in defending the *Simpson* proceedings.

26. In these circumstances, the applicants says the imposition of a six year cut-off point, without allowing a reasonable window of opportunity to apply for compensation or grace period under the Scheme constitutes a failure by the State to vindicate the applicant’s rights pursuant to Article 40.3.2.

27. The effective remedy applicable in this case is appropriate compensation in accordance with the terms of the Scheme, for which the applicant is otherwise entitled, if the respondents chose not to rely on the statute of limitations and/or such reliance is deemed to be incompatible with the State’s obligations to the applicant pursuant to Article 40.3.2.

28. The applicant relies upon a passage from Hogan and White *et al.*, *Kelly: The Irish Constitution* 5th Ed., (Bloomsbury Professional, 2018), paras. 7.1.173 to 7.1.175. In analysing the denial of rights by the operation of the statute of limitations, the authors make the point at para. 7.1.175 that there may be a relaxation of the limitation bar in constitutional cases:

“Particularly when the State is the wrongdoer, it is not clear that its constitutional duty to vindicate rights can or should be circumvented by strict application of time limits. Courts could find that a different limitation period applies; that the State’s duty to vindicate rights means that on occasion the State should not or cannot raise

the Statute even when prima facie entitled to; or that the Statute must be read as allowing exceptions to avoid constitutional problems.”

29. The applicant contends that this is the constitutional approach that is appropriate in the context of the Scheme under discussion. While the comments of the learned authors of *Kelly: The Irish Constitution* predate *McGee*, they still apply given that *McGee* simply dealt with the discreet issue of whether constitutional torts are ‘caught’ by the statute of limitations. The *McGee* judgment did not address the issue of a relaxation of the limitation rule or preventing the State from relying upon the six-year limitation period in order to comply with constitutional principles and vindicate the rights of former prisoners who meet the criteria of the Scheme, bar the limitation period.

30. The applicant relies on the observations of Walsh J. in *Meskeil v. CIE* [1973] IR 121 on page 133 where he said the following:

“If a person has suffered damage by virtue of a breach of a constitutional right or the infringement of a constitutional right, that person is entitled to seek redress against the person or persons who have infringed that right.”

31. The respondents appear to accept that the applicant suffered a breach of rights under Article 40.3 as a result of having to slop out. The reliance by the respondents on the statute of limitations, in the particular factual and jurisprudential circumstances of the within proceedings, fails to protect and vindicate the applicant’s constitutional rights.

32. It is an entirely inadequate response by the State to respond to a Supreme Court judgment crystalising the vindication of constitutional rights of prisoners regarding slopping out, by establishing a scheme, and then immediately inserting a limitation clause and/or not allowing a grace period for historic injustices. This is particularly so where the State has fully fought litigation concerning this issue in *Simpson* and earlier cases. The *Mulligan* judgment is helpful in analysing why the Supreme Court judgment in *Simpson* provided an effective

remedy for the first time and why, in fact, the Scheme was established as a direct result of the ruling, and not after *Mulligan* or indeed after the High Court judgment in *Simpson*.

33. What is beyond doubt is that the compensation Scheme was established primarily for historic infringements of constitutional rights, and yet its parameters are clearly unsatisfactory. For all these reasons, it is contended, the Scheme as designed and administered does not pass constitutional muster.

34. Given that the Irish Constitution takes precedence over the ECHR, the compatibility of ECHR/ Irish Law will only fall to be considered in the event the applicant's case under the Constitution fails. If on the other hand the Scheme is deemed constitutional, then the applicant says the Scheme is contrary to the ECHR and/or the 2003 Act.

35. A key part of the applicant's submission under this heading is the contention that there was no effective remedy in Irish law (prior to *Simpson*) for him to bring an action and claim damages for slopping out. In addition, he had to share a prison cell with at least one other prisoner in such conditions. He asserts that such conditions constitute a breach of Articles 3 and 8 ECHR, and that Irish jurisprudence prior to *Simpson* did not allow for an effective remedy because of its inherent strictness, including a requirement to establish that the gaoler's actions and intentions were punitive, malicious or evil in purpose. He submits that since the pre-*Simpson* landscape required an applicant to prove such malicious or evil intent, the respondents' reliance on the statute of limitations and/or their decision not to afford a grace period infringes both Articles 6 and 13 ECHR.

36. In *Stagno v. Belgium* (case 1062/07) the European Court of Human Rights held that Belgium had infringed Article 6.1 of the ECHR by depriving the applicants of an effective remedy by rejecting their action on the basis that it was statute-barred. The court held that whilst statutory limitations, *de jure*, were not objectionable, the limitation of the applicants'

right of access to court, on the facts, was disproportionate in relation to the aim of guaranteeing legal certainty and the proper administration of justice.

37. The applicant submits that, given the circumstances in which the Scheme under discussion arose i.e. directly after the landmark *Simpson* judgment which clarified the law on slopping out in this jurisdiction, the imposition of a limitation period in the Scheme was unnecessary and disproportionate and a violation of Article 6(1). In considering Article 6(1), a court must enquire not just whether reliance by the respondents on the statute of limitations meets a legitimate aim but, even if it does, whether their reliance on such is proportionate in all the circumstances.

38. The Scheme's reliance on the statute of limitations is disproportionate for the following additional reasons:

- (1) Whilst there is a sound policy rationale for limitation periods in general, the Scheme's reliance on the statute of limitations for a constitutional tort that did not crystallize until the landmark Supreme Court judgment is disproportionate. Prior to *Simpson* the constitutional tort at issue was not "*jurisprudentially bedded down*" like established torts at common law. In circumstances including where no civil legal aid was available for such actions, it is not wholly surprising that persons such as the applicant, who had to suffer the indignity of slopping out while incarcerated, did not commence actions within the limitation period.
- (2) The Scheme ought to have allowed a "*delai de grace*" or grace period as a proportionate and proper response to the Supreme Court's judgment in *Simpson*. The Scheme was not formally published but, in any case, the applicant applied shortly after its establishment but was nonetheless refused.
- (3) There was a relatively small number of persons affected, and modest compensation awards were available.

39. The applicant invokes Article 13 ECHR which states:

“Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

40. The manner in which the Scheme has been administered by the respondents provides the applicant with no effective remedy, contrary to Article 13 ECHR.

41. In the case of *Domjan v. Hungary* (case no. 5433/17) the court considered a redress scheme for slopping out type wrongs and examined the permissible limitations on same. The redress scheme had preconditions that were set out under statute, the relevant precondition requiring compliance with a six-month time limit, only from the day on which the inadequate conditions of detention have ceased to exist, or for those who have already been released, *at the date of entry into force of the new law*, or a more particular date set by law. The court held that the scheme was reasonable as the limitation point was not closed retrospectively and included a six-month window subsequent to the coming into force of the redress scheme for the benefit of historical complaints.

42. Arising from the foregoing, the applicant contends that the State has failed to justify reliance on the six-month limitation clause. Therefore, the impugned refusal should be quashed.

43. In conclusion, the applicant submits that the price of prison ought to be the loss of liberty and no more. This does not extend to subjecting prisoners to the appalling practice of slopping out. The applicant was forced to endure such practices not decades ago, but only in the 2010s. His constitutional rights ought to be vindicated. The imposition or reliance on a time bar is a “protective screen” by the State that does not properly recognise the injustice caused.

Summary of the respondents' submissions

44. The respondents say it is a remarkable feature of the applicant's submissions that the case is advanced without any meaningful reference to the underlying factual position. This is all the more surprising in circumstances where one might have expected the applicant to explain why he had not brought a claim in respect of conditions of detention during the currency of that detention or shortly thereafter, given the centrality of that issue to these proceedings. Moreover, insofar as an issue patently arises in relation to the time limits for bringing judicial review proceedings, the failure of the applicant to deal with that aspect of the case on an evidential basis is also notable.

45. The applicant's submissions seek to advance, by way of broad brushstroke, various high-level arguments as to the nature of the Scheme which are very clearly decoupled from any underlying facts or the actual terms of the Scheme itself. Proceedings of this type should not be a dry academic exercise. They fall to be considered against the backdrop of an actual case. The fact that the applicant largely seeks to ignore the specific facts of his own case in framing this argument is telling.

46. As to the time issue, the applicant has decided to entirely ignore the procedural objections of the respondents which have been pleaded in express terms in the amended statement of opposition – most notably the fact that these proceedings are clearly out of time under O. 84 r. 21 RSC. No attempt has been made by the applicant to explain why time should not run from the date of the earlier refusal of 17th November 2020.

47. Apart from the time issue, the respondents complain that there has been a pointed refusal by the applicant to engage with his own circumstances, both during and after his periods of incarceration. Other than the legal argument to the effect that there was no cause of action open to him until the decision of the Supreme Court in *Simpson*, the applicant makes no meaningful attempt to identify how or why, it is said, he had no effective remedy open to

him prior to that point in time. No evidence is offered as to whether he sought to raise or agitate the issue of slopping out with the prison authorities, nor whether he sought legal advice in respect of same, either during the currency of his detention or later. Notably, the applicant does not articulate how and when it first occurred to him that he might make a claim.

48. Moving to more substantive issues, the respondents submit that the applicant is incorrect in arguing that there was no effective remedy under Irish law as regards slopping out prior to the judgment of the Supreme Court in *Simpson*. The applicant's core contention is self-evidently incorrect if for no other reason than the plaintiff in *Simpson* clearly succeeded in bringing such a claim on the basis of his pre-existing constitutional rights.

49. The applicant implicitly suggests that it was the judgment of the Supreme Court that in some way *created* or otherwise gave rise to a novel cause of action. Even on the applicant's own analysis, that is not sustainable. The plaintiff in *Simpson* succeeded in establishing a breach of his rights at first instance. That judgment of the High Court (White J.) was delivered on the 13th September 2017 at a time when, had the applicant issued plenary proceedings, he would have been within time to make a claim as regards the entirety of the various periods of his incarceration. Not only did the applicant choose not to do so, but he has also failed to explain his acts and omissions in this regard.

50. Even on the applicant's own case, he had a perfectly good and effective remedy open to him from September 2017 onwards when White J. delivered judgment in the High Court in *Simpson*. The applicant allowed his complaint to become statute-barred, and no facts have been put forward to explain this state of affairs.

51. Even taking the applicant's argument at face value, the Supreme Court judgment in *Simpson* did not represent the creation of a new cause of action. Rather, it amounted to the granting of relief on the basis of pre-existing constitutional rights and obligations.

Specifically, MacMenamin J. held that the breach of constitutional rights at issue in the case could not be easily identified as a nominate tort. It was, however, a constitutional tort – in the sense of a civil wrong for which a remedy sounded in damages. What is clear from *Simpson* is that, although no nominate tort fully described the nature of the infringement of the applicant’s rights, it was an infringement of rights under the Constitution which could be vindicated within the contours of established law.

52. It is an unavoidable feature of the applicant’s claim for compensation that it is predicated on a breach of his constitutional rights. Those are rights that necessarily predate the judgment in *Simpson*. Moreover, as MacMenamin J. noted in *Simpson*, the result in that case arose from within the contours of established law. Although the applicant repeatedly asserts that *Simpson* in some way established a new cause of action or tort, that is a view of the judgment that is entirely unsustainable.

53. Turning to the applicant’s claim that the imposition of a limitation period is contrary to Articles 6 and 13 ECHR and/or Articles 34 or 40.3 of the Constitution, it is not entirely clear from the amended statement of grounds the precise basis upon which this is asserted. The respondents rely upon the plea made at para. 35 of the statement of opposition that the imposition of limitation periods is an inveterate and fundamental feature of legal systems and is vital in ensuring the timely prosecution of civil claims and providing legal certainty.

54. The applicant acknowledges within his submissions that there is a sound policy rationale for limitation periods in general. He goes on then to assert that such limitation periods should not operate in a strict way where the issue giving rise to the claim has not been “*jurisprudentially bedded down*”, where it would be disproportionate, where there is no civil legal aid to bring an action or where it is not wholly surprising that a person did not bring a claim because he was incarcerated. The respondents submit that this aspect of the applicant’s case is incoherent to the point of being incomprehensible.

55. Limitation periods generally operate on the basis of a bright-line distinction. The orderly and efficient operation of a legal system requires this. The contention that the operation of the statute of limitations is a moveable feast because of jurisprudential development, proportionality, the availability of legal aid and the fact that a person is incarcerated is, in reality, an argument against limitation periods generally and in favour of an *ad hoc* and case by case approach. Such an approach would be entirely unworkable and is not a widespread feature of legal systems generally.

56. On this issue as well, the applicant has failed to engage with the point evidentially. It is not established in evidence that civil legal aid would not be available for such a claim, that the applicant sought or was refused legal aid, or that this was in any way a relevant consideration in his case. It is a notable feature of slopping out litigation, and indeed prison litigation generally, that there has been no difficulty in current and former prisoners obtaining legal advice and representation in respect of such claims.

57. The working assumption has always been (and continues to be in light of *McGee*) that any claim for a constitutional tort was subject to the general limitation period applicable to torts. The judgment in *McGee* recites and relies on a substantial body of pre-existing authority to like effect.

58. There is nothing unusual in a scheme of settlement not responding to claims that are statute-barred, particularly where the expressed purpose is to provide claimants and the State with a speedy and cost-efficient means of disposing of actions. Critically, inclusion of a limitation clause has no effect in terms of restricting such claimants' entitlements to issue proceedings before the courts. Indeed, there are many such plenary cases pending before the courts at present.

59. A thread of illogicality runs through the applicant's submissions. The applicant's case, in relying upon the principle of access to the courts, has no proper connection with the

applicant's core argument. Prisoners who were subjected to slopping out are entitled to pursue claims under the Scheme to the same extent that they might before the courts. The applicant's case appears to assert that there is some vague constitutional imperative that schemes of settlement must go further than what might be available from the courts.

60. A further logical difficulty in the applicant's case is that it inevitably leads to the conclusion that, if the Scheme impermissibly interferes with constitutional and ECHR rights by reason of its strict operation, then so does the statute of limitations itself. The applicant has chosen not to challenge the constitutionality of the Act. This highlights a weakness in the applicant's whole argument.

61. Taken to its logical conclusion, the applicant's case requires acceptance of the idea that any scheme of settlement must operate in a manner that is more favourable (or less restrictive) than the laws that would apply to a claim before a court. No submission has been made as to why this should be so. Notably the applicant does not cite any authority for such a striking proposition. The applicant's core submission amounts to no more than an insistence that those whose cases have become statute barred must be accommodated in some way.

62. The contention at the heart of the applicant's case is novel and startling – namely that limitation periods when operated in the context of a scheme of settlement must either be ignored, or a grace period allowed. Why this should be so in the context of such a scheme, but not in the context of court proceedings, is not spelt out by the applicant. Nor is any authority offered for such a radical submission. For all these reasons, the respondents submit the applicant is not entitled to the relief claimed.

Plea that the case is outside the three-month time limit for judicial review

63. I will deal firstly with the respondents' objection under the three-month time limit.

The respondents submit that for the purpose of O.84 r.21 RSC, the grounds of the application

first arose on the 17th November 2020 when the State Claims Agency notified the applicant's former solicitors that no offer would be made under the Scheme on account of the claim being statute-barred. The respondents say the applicant's argument, that the decision of the 27th May 2021 is the relevant date for the purpose of judicial review time limits under O. 84 r.21 RSC, is little more than an artificial device, the purpose of which is to circumvent the time limits.

64. However, before we get to that objection, it seems to me that the first point I have to decide is whether the respondents' time objection has been properly pleaded and whether the statement of opposition specifies with sufficient clarity the facts on which the respondents rely to make the time objection. The leading case is the decision of the Supreme Court in *AP v. DPP* [2011] IESC 2. *AP* concerned frailties and omissions in an applicant's statement of grounds. However, it seems to me the same necessity for precision and factual underpinning applies to the preparation of statements of opposition by respondents. In *AP* the Supreme Court held that in the interests of the good administration of justice, it is essential that a party applying for relief by way of judicial review sets out clearly and precisely each and every ground upon which such relief is sought. The same applies to the various reliefs sought. It is incumbent on the parties to judicial review proceedings to assist the High Court by ensuring that grounds for judicial review are stated clearly and precisely. Case law makes clear that these requirements apply to a respondent just as much as they do to applicants.

65. O. 84 r. 20(3) RSC provides insofar as material that:

"It shall not be sufficient for an applicant to give as any of his grounds ... an assertion in general terms of the ground concerned, but the applicant should state precisely each such ground, giving particulars where appropriate, and identify in respect of each ground the facts or matters relied upon as supporting that ground."

(emphasis added)

A similar obligation is placed upon respondents by O. 84 r. 22(5) which is in the following terms:

“It shall not be sufficient for a respondent in his statement of opposition to deny generally the grounds alleged by the statement grounding the application, but the respondent should state precisely each ground of opposition, giving particulars where appropriate, identify in respect of each such ground the facts or matters relied upon as supporting that ground, and deal specifically with each fact or matter relied upon in the statement grounding the application of which he does not admit the truth (except damages, where claimed).” (emphasis added)

66. Having reviewed both the original and amended statements of opposition, I am not satisfied that the material facts necessary to ground the respondent’s time objection have been identified with sufficient clarity or precision. It should be acknowledged that the two refusal letters are mentioned in the original statement of opposition at paras. 14 and 16. However, there is no express plea in the original statement of opposition – either at the beginning of the document where one would normally expect to find it – or indeed even in the body of the statement – that the application is out of time on account of having been brought more than three months outside the first refusal of the 17th November 2020.

67. When one turns to the amended statement of opposition, the only time objection under O. 84 r. 21 pleaded is the objection identified at the additional para. 5:

“Additionally, without prejudice to the foregoing, the Applicant’s claim for damages is time barred by virtue of the requirements of O.84, r.21 of the Rules of the Superior Courts”.

68. Several things should be noted about this. First, the time objection at para. 5 is limited to the claim for damages and does not concern the other reliefs claimed. Second, there is no factual averment that the claim is out of time because the three-month time limit should be

run from the date of the first refusal on the 17th November 2020, and not from the second refusal of the 27th May 2021.

69. Third, insofar as there is an express plea that the claim for damages is out of time, I take that to be based on the belated inclusion of the damages claim in the amended statement of grounds dated the 12th February 2024, and as not referring to the initial claim pleaded in the original statement of grounds. I am fortified in this view by the fact that the original statement of grounds contained no claim for damages. Accordingly in my view, the amended statement of opposition, properly and fairly interpreted, does not raise the time objection that is now sought to be advanced, does not plead with sufficient precision or clarity that the judicial review is out of time due to the fact that time ran from the earlier refusal date, does not meet the strictures identified by the Supreme Court in *AP v. DPP* and is ultimately not sufficient to ground the time objection that has been identified by the respondents in their written submissions.

Respondents' complaint concerning the paucity of facts in the pleadings

70. Turning to the respondents' second complaint, it seems to me that this objection has more substance. I agree with the respondents' observations that the applicant's claim is quite generalised and theoretical in nature, and that insufficient focus has been placed on the applicant's own individual circumstances. It seems to me that the applicant has not demonstrated why, in the context of his own factual circumstances, the imposition of a limitation period presents an injustice or, on his case, is unconscionable, oppressive or somehow constitutionally unfair.

71. Having reviewed the affidavits of the applicant and his solicitor, it seems to me that the applicant has not established on the facts why he *personally* was precluded from challenging the slopping out regime at an earlier stage. He has not explained why he made no

complaint during his incarceration, or in the six-year period thereafter. He has also not explained why he made no claim in the aftermath of the High Court decision in *Simpson* delivered on the 13th September 2017. Further, he has not demonstrated why it took him until the 10th November 2020 to make a claim under the Scheme of Settlement.

72. In short, I am not satisfied that the applicant has demonstrated why, in the context of his own individual factual circumstances, enforcement of the limitation period would give rise to unconstitutional unfairness, such that the respondents should be restrained from invoking the limitation clause in his individual situation.

73. A further difficulty arises from the fact that the applicant's real target in these proceedings appears to be the Scheme itself, and yet no relief is sought by way of *certiorari* to quash any element of the Scheme. While *certiorari* of the impugned decision to refuse entry to the Scheme is sought, it is surprising that no relief is sought – even in the amended statement of grounds - to quash the particular element of the Scheme to which the applicant takes objection. In my view, there is something in the respondents' point that if the impugned refusal is quashed, that will not assist the applicant because the terms of the Scheme would remain unchanged, and the administrators of the Scheme would still be obliged to implement the (unchallenged) eligibility criterion, including the rule that claims must not be statute-barred. Whether the absence from the amended statement of grounds of any challenge to the scheme itself is or is not fatal to the proceedings, is a question I propose to hold over, pending my decision on the core issue, to which I now turn.

Was there an effective remedy under Irish law prior to *Simpson*?

74. Phelan J. in her judgment on the amendment application, stated at para. 29 that for the applicant's case to be intelligible at all, it must be established as a starting point that neither an action for a constitutional tort nor an action for damages pursuant to s.3 of the 2003 Act

was available at the time of his incarceration in 2013/2014. I respectfully agree with that statement. Indeed, senior counsel for the applicant did not seriously contest the point that this was an essential hurdle for the applicant to cross. Therefore, it seems to me that the key issue I must address in this judgment is the question whether there was an effective remedy available under Irish law prior to *Simpson*.

75. In my view, there are a number of difficulties with the applicant's core submission. Before addressing those difficulties, I should refer to one other objection raised by the respondents concerning the material relied upon by the applicant. Long after the joint book of authorities had been agreed and finalised, the applicant sought to introduce, on the eve of the trial, an additional booklet of 305 pages containing various articles, caselaw (including decisions of the European Court of Human Rights), an excerpt from a textbook, and an article by Dr. Rogan (cited above).

76. The applicant sought to rely upon these additional materials without leave of court and without the agreement of the respondents. The additional materials were simply furnished the day before the hearing. In my view, this was unsatisfactory. It was unfair to the respondents and to the court that things were done this way, particularly in circumstances where the case was being heard during the High Court Personal Injuries sessions in Waterford, and the court was hearing the matter remotely. If additional materials are sought to be introduced in litigation at the eleventh hour, this gives rise to inevitable problems for the other side and defeats the purpose of the court reading and digesting the papers in advance. It also gives rise to obvious issues of fair procedures and potentially imperils a hearing date.

77. I don't wish to make more of this point than is necessary because, undoubtedly, the preparation of the additional booklet was well intentioned, and some of the materials had already been referenced in earlier papers. However, in my view, it was reasonable for the

respondents to object to the late filing of the materials in the manner they have and to complain about the failure to flag the issue at the weekly callover. Having made these remarks, I think on balance that fairness requires that I should not, in this particular instance, refuse to have regard to the additional materials, notwithstanding their lateness. The article from Dr. Rogan and the excerpt from *Kelly: The Irish Constitution* had been mentioned in the papers already and during the hearing formed a significant part of counsel's oral submissions. On that basis, I was prepared to regard as admissible for the purpose of the hearing, the additional materials referenced in the booklet.

Analysis of the judgments in *Simpson*

78. Two separate judgments were delivered by the Supreme Court in *Simpson*. The main judgment was delivered by MacMenamin J. with a shorter judgment from O'Donnell J. (as he then was). The three other judges on the court (Clarke C.J., McKechnie and O'Malley J.J.) agreed with both judgments.

79. In my view, it cannot be said that the judgment of MacMenamin J. represented the creation of a new cause of action. Rather, Mr. Simpson was granted declaratory relief and an award of damages on the basis of pre-existing constitutional rights and obligations. Moreover, while the claim for damages had been refused in the High Court, this was on the specific ground that the plaintiff was adjudged to have told lies and exaggerated his evidence.

80. In the Supreme Court, MacMenamin J. held that the breach of constitutional rights at issue could not be easily identified as a nominate tort. It was, however, a constitutional tort – a civil wrong for which a remedy sounded in damages. Consistent with what he had indicated in his own earlier judgment in *Mulligan*, MacMenamin J. concluded that in determining whether there had been an infringement of a prisoner's constitutional rights under Article 40.3 of the Constitution, the court had to carry out a cumulative assessment of the positive and negative features of the prisoner's detention. No *one* factor would create a presumption

of inhuman and degrading treatment, but features such as the duration of detention, the space in a cell, overcrowding, sanitation and hygiene, lighting, heat, ventilation, predictable out of cell time, out of cell activities and access to showers, education and work were all features that would attract particular weight.

81. At para. 106 of the Irish Reports judgment, MacMenamin J. stated that to describe the right infringed in the case as simply that of privacy alone fell short of a full description of the plaintiff's conditions. He pointed out that if, hypothetically, the plaintiff had been detained in solitary confinement, and therefore in total privacy, he would nonetheless have been subject to conditions which constituted an unjust attack on his constitutional right to protection of the person.

82. Then at para. 107 of the Irish Reports judgment, and of relevance to the applicant's core submission in the present case, MacMenamin J. said the following:

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

83. As mentioned by Dr. Rogan in her article, MacMenamin J. clarified that when determining whether there had been a breach of Article 40.3, a court must have regard to the cumulative nature of the conditions. There was no single factor which would create a presumption of inhuman and degrading treatment, which was in any event an impermissible concept imported from the Convention. However, intentional mistreatment would nonetheless create a presumption of a violation of Article 40.3 resulting in exposure to a claim for damages, as would a regime attempting to break the spirit of a prisoner or to deprive him of the normal core elements of human dignity, autonomy and privacy, within the limitation of imprisonment.

84. The judgments of both MacMenamin and O'Donnell JJ. make clear that Mr. Simpson succeeded on the basis of a demonstrated breach of his constitutional rights, not his rights under the Convention. The court's conclusion that the plaintiff was entitled to an award of damages was a conclusion that was arrived at within the contours of existing constitutional principles. I think the issue is put beyond any doubt at para. 143 of the judgment where MacMenamin J. confirms that the plaintiff's claim, and the legal issues, fell to be considered under the Constitution

85. For these reasons, it is not correct in my view to assert that the *Simpson* judgment in some way established a new cause of action or a new tort. Furthermore, MacMenamin J. observes that it was not open to the plaintiff to seek to incorporate concepts and principles derived from Article 3 ECHR case law into the claim for damages for infringement of constitutional rights. The prison conditions in question infringed the plaintiff's personal rights under Article 40.3 of the Constitution, including those of privacy and the values of dignity and autonomy. He observed that the infringement was not susceptible to the identification of any one nominate tort. But nonetheless, as the Constitution itself provides, that fact will not

prevent a court from granting a suitable remedy where the evidence shows there was a violation of the plaintiff's rights under Article 40.3.

86. For his part, O'Donnell J. expressly agreed with the judgment delivered by MacMenamin J. However, he observed that while it was perhaps understandable that the plaintiff would seek to blend the established ECHR jurisprudence on prison conditions with a claim for damages for breach of an Irish constitutional right, such an approach was not in fact permissible. He observed at para. 12 of the Irish Reports judgment that when the Constitution is viewed as a whole, it seems clear that the guarantee of protection of the person in Article 40.3.2 must mean that, while the State may lawfully deprive a citizen of liberty in accordance with law, it may not do so by a means which, far from assuring the dignity of the individual, falls below a standard that could be considered minimally acceptable. He concluded by confirming his agreement with MacMenamin J. that the constitutional rights of the plaintiff, and particularly the rights of the person protected by Article 40.3.2, were breached in Mr. Simpson's case.

Claim of an impossible standard and no clear limitation period

87. The applicant makes two other arguments in support of the proposition that there was no effective remedy available to challenge slopping out conditions prior to *Simpson*. The first argument made is that, prior to *Simpson*, there was significant uncertainty in respect of the operation of limitation periods as regards constitutional torts. The second argument is that pre-*Simpson* caselaw set an impossible standard of requiring an applicant to prove malicious intent or evil purpose, and that this is borne out by the small numbers of challenges against slopping out conditions, and the virtual absence of any cases where a prisoner succeeded. I will take each of these arguments in turn.

88. In my view, the first argument that significant uncertainty existed in respect of the operation of limitation periods as regards constitutional torts is not supported by the Supreme

Court's detailed consideration of the case law in *McGee*. In that case the appellant was imprisoned in Portlaoise Prison from 2000-2004 and was subjected to a slopping out regime. Following *Simpson*, the appellant sought damages for breach of his personal rights under Article 40 of the Constitution. The respondent pleaded the claim was statute barred under s. 11.2 of the Statute of Limitations Act 1957, which provided that an action founded on tort should not be brought at the expiration of six years from the date in which the cause of action accrued. The claim was described as a "pure *Meskeil claim*" and the main issue for the court was whether a pure *Meskeil* claim was founded on tort so that the limitation period under s. 11.2 of the 1957 Act applied. The applicant in *McGee* argued that pure *Meskeil* claims are *sui generis* constitutional claims, which cannot be considered to be founded upon tort. He argued that this was because *Meskeil* claims arise where the case does not fall within the heading of any existing tort claim. Therefore, it was argued, the claim could not fall within s. 11.2.

89. O'Donnell C.J. carried out a detailed review of the case law, including the *Simpson* case, *Meskeil v. CIE*, *Hanrahan v. Merck Sharp & Dohme* [1988] ILRM 629, *McDonnell v. Ireland* [1998] 1 134, *Savickis v. Governor of Castlerea Prison* [2016] IECA 372, *Bailey v. Commissioner of An Garda Siochána* [2017] IECA 220 and *Blehein v. Minister for Health and Children* [2018] IESC 40. O'Donnell C.J. states at para. 76 that, having analysed the case law, there has been a relatively high degree of consensus that a claim for *Meskeil* type damages is one which is properly characterised as a breach of duty, and which falls under s. 11 of the 1957 Act as being "founded on tort". Notably, he observed that *Meskeil* and *Hanrahan* recognised the possibility that the common law may not be comprehensive, such that the Constitution may at times be required to provide a plaintiff with a remedy. He states that in such a case, the State, through the judicial branch, provides a horizontal remedy against a wrongdoer, rather than a pure vertical claim against the State. He concluded,

therefore, that it was apparent that a *Meskill* claim performs exactly the same function as an action for damages for a nominate tort established by the common law.

90. In my view, the analysis of the earlier cases carried out by O'Donnell C.J. in *McGee* supports the respondents' submission in the present case that the overwhelming preponderance of the authorities make it clear that the working assumption has always been that any claim for a constitutional tort is subject to the general limitation period applicable to torts.

Consideration of the judgment of MacMenamin J. in *Mulligan*

91. Even if there was uncertainty pre-*McGee* as to whether constitutional torts were subject to the general limitation period, I agree with the respondents that that fact does not, in and of itself, justify a conclusion that the present applicant had no effective remedy available to him prior to *Simpson*. Indeed, it could fairly be said that the main launch pad of the plaintiff's case in *Simpson* was the earlier High Court judgment of MacMenamin J. in *Mulligan*. The term of imprisonment under discussion in *Mulligan* was a sentence of five years served by that applicant in Portlaoise Prison from the end of 2002 until April 2005. He in fact brought his judicial review challenge in July 2004, prior to the expiry of his sentence. He argued that the absence of in-cell sanitation, allegedly unhygienic conditions and the necessity to engage in slopping out gave rise to a violation of his constitutional rights, and his rights under the Convention. In addition, he argued that the prison regime that he was subjected to rendered symptomatic his pre-existing susceptibility to colorectal complaints. Much like Mr. Simpson, he sought declarations that the respondents' breaches of duty gave rise to remedies by way of declaration and damages. His flagstone argument was that his detention was a violation of his rights under Article 40.3.1 of the Constitution.

92. As noted by Dr. Rogan in her article, the judgment of MacMenamin J. in *Mulligan* expressly left open the strong possibility that slopping out in the presence of another prisoner

would amount to a finding of a breach of the right to privacy. Commenting upon this aspect at page 127, Dr. Rogan writes:

“In Mulligan, MacMenamin J. had left open the strong possibility that slopping out in the presence of another would amount to a finding of a breach of the right to privacy. This was precisely the situation in Simpson and White J. [in the High Court in Simpson] took the court through the gap opened by Mulligan and held that there had been a breach of this right. The court decided to carry out an analysis on the Convention in light of the finding under the Constitution”.

93. It should also be remembered that the plaintiff in *Simpson* succeeded in establishing in the High Court that a breach of his rights had occurred. The judgment of White J. was delivered in September 2017 at a time when, had the applicant issued plenary proceedings, he would have been *in time* to make a claim as regards the entirety of the various periods of his imprisonment. In my view, the respondents make a reasonable point when they say that the applicant has not explained why he did not bring a claim in 2017 based upon Irish law as it stood at the time of the High Court judgment in *Simpson*.

Malicious intent or evil purpose

94. Turning then to the second main argument pressed by the applicant in oral submissions, namely the contention that pre-*Simpson* Irish law required an applicant to meet an impossible standard of demonstrating malicious intent or evil purpose. In my view, that submission is difficult to reconcile with the clarity of the High Court judgment in *Simpson*. White J.’s judgment represented Irish law on the issue as it stood in 2017. The judgment conclusively rejects the submission that proof of malicious intent or evil purpose was a pre-requisite. It should be recalled that the plaintiff actually succeeded in the High Court. White J. granted the plaintiff declaratory relief as to a breach of his constitutional rights. This was not appealed by the State. The only reason White J. refused damages was on account of his

finding that the plaintiff had told lies and exaggerated his evidence. As I have mentioned, the refusal of damages was reversed on appeal by the Supreme Court.

95. The present applicant argues that the jurisprudence prior to *Simpson* was not settled and presented onerous hurdles, as was described by Dr. Rogan in her article. The applicant contends that the restrictions in domestic law were evident, not only from the pre-*Simpson* judgments, but by the State's position in defending the *Simpson* proceedings, and its view of the domestic jurisprudence. The applicant cites the example that, even in the High Court proceedings in *Simpson*, the State asserted that the actions of public officers acting *bona fide* without negligence were immune from an award of damages.

96. The difficulty with this aspect of the applicant's case is that the applicant appeared to have an effective remedy open to him from at least as early as September 2017 (if not earlier), when White J. delivered his judgment in the High Court in *Simpson*. The applicant took no steps to bring a case at that point and instead appears to have allowed any such claim that he had to become statute barred. As I have mentioned earlier, the applicant has chosen not to set out any evidence on this issue, and therefore there is no treatment of the factual position to assist the court in considering whether there truly was an impediment preventing the applicant from bringing a case at an earlier stage.

97. Separately, if one goes back to *Mulligan* itself, it is clear from para. 177 of the judgment of MacMenamin J. that the outcome of the case may have been different, if that applicant had adduced evidence of overcrowding or doubling-up in cells. While the overall prison conditions in *Mulligan*, including the slopping out regime, were deemed insufficient on the evidence to entitle that particular applicant to relief, it is evident from the judgment that the court felt that such practices could breach a prisoner's right to privacy or dignity, provided that there was proof of overcrowding or doubling-up in cells.

98. At the end of the day, the presentation of the plaintiff's case in *Simpson* largely built on the existing groundwork already established in *Mulligan* in 2010. It was the plaintiff who emphasised *Mulligan*, not the State. Moreover, a key additional factor in *Simpson* was that the plaintiff was "on protection" and for lengthy periods was on 23 hour "lock-up", meaning that he was locked into his cell for up to 23 hours a day and on some occasions, even longer (see para. 56 of the judgment in the Irish Reports). This factor undoubtedly intensified the breach of the plaintiff's rights in *Simpson*.

Claim that the absence of a successful damages claim pre-*Simpson* proves the absence of an effective remedy

99. The applicant contends that there were no successful claims recorded during the relevant period and that this tends to support the proposition that, as a matter of reality, Irish law pre-*Simpson* provided no effective remedy. When considering the matter initially, I thought there might be something in this point. However, on closer scrutiny, I don't think this argument is strong. In the first instance, I am not sure it is safe or necessarily correct to conclude that there were no successful claims brought during the period between *Mulligan* in 2010, and *Simpson* in 2017/2019. While there appears to be no published or reserved judgments upholding a prisoner's challenge to slopping out conditions or awarding damages, I think it would be speculative and unwise to attempt to draw any firm conclusions from what appears to be the paucity of legal challenges brought. In the first instance, I don't think one can with any certainty rule out the possibility that legal challenges were brought, but were settled, and therefore may not appear "on the radar" or be available in published statistics from the Courts Service.

100. Purely by way of an example, proceedings were brought in 2011 by a prisoner who was a member of the Muslim faith who contended that slopping out conditions in Cork Prison breached his constitutional rights, including his constitutionally protected right to practise his

religion. The claim came on for hearing in the High Court before Dunne J. in July 2013 (*Damache v. Governor of Cork Prison and others*) and was ultimately settled on terms acceptable to the applicant and agreed between the parties. There was no formal order or judgment. I mention this example to underline the point that the seeming absence of published judgments in slopping out cases is not necessarily the full picture and may not be a fully reliable indicator of the true position.

101. Nonetheless, I don't wish to overstate this point because I think it would be generally accepted by most practitioners that successful challenges in prison conditions cases were something of a rarity. However, acceptance of a low success rate is not proof positive that the legal standard was set at an impossibly high threshold. Even if, for the purposes of the discussion, one proceeds on the premise that successful challenges for prisoners were few and far between, that may be so for any number of reasons, unrelated to the legal standard set by the caselaw during the relevant period.

102. In my view, it would be a speculative leap to assume that the seemingly low success rate was *solely* down to the legal standard set by Irish law, or to conclude that a deserving plaintiff with the right facts and evidence, had no fair means of bringing a case. There may be lots of reasons why some cases fail, while others succeed. Most cases are decided on their own individual facts, and oftentimes it comes down to the run of the evidence in a case, witness credibility, expert testimony, the availability of documentation, and other trial issues. Moreover, there may be lots of reasons why some cases get brought, while others never get out of the stalls or never see the light of day at all. Again, this may be so for any number of reasons. In my view, even if established, the mere fact of a zero or low success rate in "slopping out" cases, cannot be a basis for concluding that Irish law during the relevant period provided no effective remedy.

103. For all these reasons, I am not persuaded that the applicant has discharged the burden of demonstrating that there was no effective remedy available in Irish law to prisoners to challenge slopping out conditions during the period under review. In my view, that finding is fatal to the present applicant's case. However, in case that is incorrect, I think it would be appropriate for the court to go on to consider the other arguments made by the applicant in contending that reliance on the limitation element of the Scheme under discussion is constitutionally unfair or impermissible under the Convention. Accordingly, I will now consider the other legal arguments made by the applicant.

Claim that reliance on the limitation clause is disproportionate and a violation of Article 6(1) of the ECHR

104. The applicant argues that, given the circumstances in which the Scheme arose i.e. directly after the landmark *Simpson* judgment which clarified the law in slopping out in this jurisdiction, the imposition of a limitation period within the Scheme was disproportionate and a violation of Article 6(1) ECHR. He submits that, in considering Article 6(1), a court must enquire, not only whether reliance by the respondents on the statute of limitations meets a legitimate aim but, even if it does, whether its reliance on such is proportionate in all the circumstances.

105. In my view there are a number of problems with this part of the applicant's case. In the first instance, counsel acknowledges that there is a sound policy rationale for limitation periods in general. That acknowledgement, appropriately made, immediately reduces the applicant's room for manoeuvre. Secondly, the applicant has not sought to challenge the constitutionality of the Statute of Limitations Act 1957. Instead, he seeks to argue that the enforcement of a limitation clause within the Scheme of Settlement is disproportionate in his particular circumstances. Again, there are a number of difficulties with this argument. First, as I commented at the commencement of this judgment, the applicant has failed to adduce

specific evidence as to his own factual circumstances in this case. In the absence of specific factual pleading, the applicant has failed to demonstrate why the enforcement of the limitation clause in his factual situation, over and above anybody else's, is disproportionate.

106. Thirdly, the reasons I have outlined above for rejecting the argument that there was no effective remedy available pre-*Simpson*, are also relevant to the applicant's arguments under the Convention.

107. Fourthly, if the applicant is correct that the Scheme of Settlement impermissibly interferes with constitutional and Convention rights by reason of a suggested unfair invocation of the limitation clause, then so too does the statute of limitations itself – an act of the Oireachtas which the applicant has expressly chosen not to challenge. I agree with the respondents' point that this highlights the essential limitations within the applicant's case.

108. Fifthly, the applicant makes no case that a 6-year limitation period in his case works a particular injustice in his personal factual position, as distinct from any other limitation period that might have been chosen. Sixthly, there are other difficulties with the applicant's case including the important point that the Scheme itself does not *oust* or restrict the applicant's right to go to court. As a result, the applicant was in effect left to fall back on the argument that the respondents were obliged to ensure that the Scheme must somehow operate in a manner that was *more favourable* than the law that would apply in the case of an ordinary damages claim before a court. Again, I am not satisfied that the applicant has explained why this should necessarily be so.

109. The Scheme under discussion was a voluntary scheme intended to provide an efficient and more informal means for prisoners to claim compensation, where they had been subjected to the indignity of slopping out. It seems to me that the respondents were entitled to some margin of discretion in deciding what terms and conditions should apply to the Scheme. On one view, the Scheme that was introduced is more generous than *Simpson* because the

individual features that combined to bring the plaintiff over the line in that case – 23 hour lock-up, restricted regime for prisoners “on protection” and doubling-up or trebling-up in cells - are not required as pre-requisites for compensation under the Scheme.

110. Even if one felt that more generous or less restrictive conditions might have been chosen, that is far from establishing that inclusion of a limitation clause is unlawful or unconstitutional. The respondents say that limitation periods generally operate on the basis of a “bright line” distinction, and that the orderly and efficient operation of a legal system requires this. Without such bright line distinctions, they say imperatives such as legal certainty would be undermined. The respondents contend that the operation of the statute of limitations cannot be regarded as a “movable feast” simply on the basis of the issues suggested by the applicant, such as developments in jurisprudence or the availability of legal aid.

111. In my view, the applicant needs to go further than demonstrating that the Scheme could have been devised to allow a window of time for claimants. Amongst the options available to the State was the option of not applying a statute of limitations *at all* or the option of including a grace period. However, the mere availability of different options or models is not sufficient to entitle the applicant to the relief that he seeks. Whilst these options may well have been open, I am not satisfied that the applicant has demonstrated that the inclusion of a limitation rule *per se* is contrary to the applicant’s rights either under the Constitution or the Convention.

Conclusion

112. In these circumstances, it is not necessary for me to determine the question of whether the absence of a challenge to an element of the Scheme itself is a bar to relief. I find that the applicant has not demonstrated that limitation periods, when operated in the context of the Scheme of Settlement, must as a matter of principle be ignored, or a grace period allowed. At

the core of the applicant's case is the submission that a key feature of the Scheme should be simply disapplied in his case. He has not adduced evidence to show that the circumstances of his exclusion from the Scheme are oppressive or unfair in his personal circumstances. Nor has he discharged the burden of demonstrating that Irish law during the relevant period failed to provide an effective remedy. For all of these reasons, I conclude that the applicant is not entitled to the relief claimed.

Micheál O'Higgins

Appearances:

For the applicant, Glen Gibbons SC and Rachel McGovern BL instructed by Burns Nowlan Solicitors LLP.

For the respondents, Remy Farrell SC and Conor Duff BL instructed by the Chief State Solicitor's Office.