THE HIGH COURT

[2024] IEHC 99

[RECORD NO.: 2022/649 JR]

BETWEEN:

PAUL COFFEY

APPLICANT

AND

GOVERNOR OF LIMERICK PRISON & ORS.

RESPONDENT

AND

[RECORD NO.: 2022/650 JR]

BETWEEN:

TONY COLLOPY

APPLICANT

AND

GOVERNOR OF LIMERICK PRISON & ORS

RESPONDENT

RULING of Ms. Justice Siobhán Phelan, delivered on the 21st February 2024.

INTRODUCTION

1. The Applicants in these two proceedings have served custodial sentences in Limerick Prison commencing on different dates in 2021 in each case. At the date of their incarceration and immediately prior to the filing of court papers in intended judicial review proceedings on their behalf, they were both incarcerated for periods of time in single person cells lacking in cell sanitation and were required to engage in a practice known colloquially as "*slopping out*". There have been important developments since proceedings were filed in each case in that in

cell sanitation became available for all prisoners in Limerick Prison before the end of 2022 with the result that the Applicants' conditions of detention had improved by the time these proceedings were first listed before a Court.

BACKGROUND

2. By way of general background, the practice of slopping has been condemned by the European Court of Human Rights in contributing to findings of breaches of Articles 3 and/or 8 of the European Convention on Human Rights (hereinafter "the Convention") in several cases. That practice has also been challenged as unlawful in cases before the Irish courts. Notably in *Mulligan v. Governor of Portlaoise Prison* [2010] IEHC 269 a claim was advanced both on constitutional and Convention grounds and was rejected following a detailed consideration of the evidence and the caselaw. A further claim was advanced several years later in *Simpson v Governor of Mountjoy Prison* [2019] IESC 81; [2020] 3 I.R. 113; [2020] 1 I.L.R.M. 81 ("*Simpson*") where it was found in a judgment delivered by the Supreme Court in November, 2019 that the practice of slopping out evidenced in that case infringed the personal rights of the citizen guaranteed by Article 40.3 of the Constitution. Damages were subsequently awarded in the sum of €7,500 for breach of personal rights protected under Article 40.3 of the Constitution in a separate judgment ([2020] IESC 52).

3. Following the decisions in *Simpson* a Scheme of Settlement [hereinafter "the Scheme"] was introduced and administered by the Third Named Respondent. It was a term of the Scheme that compensation in amounts measured under the Scheme would be payable on compliance with conditions of the Scheme in respect of three different categories of case and subject to band caps. The practice of the Third Named Respondent in administering the Scheme is to make an open offer of a sum of money measured in accordance with the terms of the Scheme. A claimant may reject this offer and pursue civil proceedings if so desired.

4. Both Applicants were incarcerated in Limerick Prison after the decision in *Simpson* at a time when it had been clearly determined by the Supreme Court that the practice of slopping out could result in a breach of constitutional rights. Although their conditions were alleviated by the fact that they were not sharing cells, the single cells in which they were incarcerated lacked in cell-sanitation and in consequence they were eligible to apply under the Scheme. The Scheme provides for a pro rata rate of €76 per week capped at €2,500 for persons who were

required to slop out but were not sharing a cell with any other person at the time.

5. The Applicants in each of the two cases before me made an application under this Scheme, albeit in Mr. Coffey's case he did not do so until February 1st, 2024 being the date the matter was listed before me for hearing of the leave application.

6. Notwithstanding that he did not make a formal application under the Scheme until February 1st, 2024, Mr. Coffey's solicitor wrote on his behalf by letter dated the 10th of June, 2022. In this correspondence it was asserted that Mr. Coffey remained subject to the practice of slopping out found unconstitutional in *Simpson* in November, 2019. Compensation was sought *"whether under the Scheme or otherwise"* including compensation in respect of aggravated or exemplary damages and requesting a response within fourteen days. There was no response to the said letter.

7. In Mr. Collopy's case he applied for compensation under the Scheme. By letter dated the 7th of June, 2022, solicitors for the Third Named Respondent offered him €2,500 on an open basis together with appropriate legal costs due under the scheme in the amount of €1,000. The offer of settlement was expressed to be contingent on Mr. Collopy signing and returning the Settlement and Payment Authority Form.

8. By letter dated the 10th of June, 2022, Mr. Collopy's solicitors wrote to advise that he was still subjected to the practice of slopping out despite the finding of the Supreme Court in the *Simpson* case in November, 2019 that this practice was unconstitutional. Proposals for settlement to include aggravated or exemplary damages, "*whether under the Settlement Scheme or otherwise*" were invited. This letter was not responded to. Mr. Collopy has not accepted the offer made under the Scheme.

PROCEEDINGS

9. The proceedings come before me as an application for leave to proceed by way of judicial review on notice to the Respondents. The application was moved on foot of papers filed in the Central Office in July, 2022 but only listed before a Judge in October, 2022 at which time the applications were adjourned to the 19th of December, 2022 without being dealt with. These delays are to be regretted particularly considering that the Applicants initially moved for reliefs which included interim and interlocutory relief of an injunctive nature.

10. Finally, on the 19th of December, 2022, the applications were opened to the Court on an *ex parte* basis. I am informed that the Applicants' cases were outlined to the Court supported by written legal submissions. It is my understanding that by the time the leave application was opened to the Court, the practice of slopping out had ceased in Limerick Prison with the result that the injunctive relief pleaded had become moot albeit this may not have been clearly acknowledged at that time.

11. On hearing the *ex parte* applications in December, 2022 the Court directed the Applicants to put the Respondents on notice of the applications and adjourned the applications without granting leave. The Respondents duly filed an Affidavit and written submissions opposing the application for leave in April, 2023. Thereafter, the matters stood adjourned until it was transferred to me on the 1st of February, 2024 for hearing of the leave applications. On that date it was confirmed that the case urged in support of an application for leave had materially changed from July, 2022. Specifically, as noted above, the Applicants were no longer detained without in-cell sanitation with the result that claims for injunctive relief originally sought were confirmed to be moot and other relief directed to alleviating their conditions of detention were not being pursued.

12. In addition to the abandonment of a significant part of the case as originally pleaded, it further transpired, however, that the Applicants sought leave to argue an additional substantive ground which I was informed had been canvassed before the Court in December, 2022. This is confirmed by the fact that this argument was addressed in the written legal submissions filed at that time in support of the *ex parte* leave application. The additional relief and grounds addressed in the written submissions had not been included in a draft amended Statement of Grounds and counsel advises that it was hoped to deal with the issue on the hearing of the leave application without the necessity for further application.

13. Having heard the leave application I directed that a draft amended Statement of Grounds removing the relief and grounds no longer being pursued and including the relief and grounds which had been omitted and which were relied upon in seeking leave. Thereafter, I adjourned the matter to allow for consideration of the amended Statement of Grounds and affidavit evidence addressed to developments since proceedings had issued so that all matters were properly before me on ruling on these applications.

APPLICABLE TEST

14. The test to be applied on an application for leave (save for special statutory exceptions) to proceed by way of judicial review is set out in O.84, r.20 of the Rules of the Superior Courts, 1986. The application of the test was considered by the Supreme Court in its decision in *G v Director of Public Prosecutions* [1994] 1 I.R. 374, albeit on an unopposed application. Finlay C.J., with whom the other two judges agreed, set down the test in the following terms at pp. 377 to 378:

> *"An applicant must satisfy the court in prima facie manner by the facts set out in his affidavit and submissions made in support of his application of the following matters:- (a) That he has a sufficient interest in the matter to which the application relates to comply with rule 20(4). (b) That the facts averred in the affidavit would be sufficient, if proved, to support a stateable ground for the form of relief sought by way of judicial review. (c) That on these facts an arguable case in law can be made that the applicant is entitled to the relief which he seeks. (d) That the application has been made promptly and... within the ... [relevant] time limits... (e) That the only effective remedy, on the facts established by the applicant, which the applicant could obtain would be in order by way of judicial review or, if there be an alternative remedy, that the application by way of judicial review is, in all the facts of the case, a more appropriate method of procedure."*

15. In *Gordon v Director of Public Prosecutions* [2002] 2 I.R. 369 this test was described as a "*low threshold*", per Fennelly J. at p. 372. The aim of the leave application is to effect a screening process of litigation against public authorities and officers so as to prevent an abuse of the process or trivial or un-stateable cases proceeding, thus impeding public authorities unnecessarily. It is now well settled law that for a *prima facie* case to be established, it must be arguable. A point of law is only arguable if it could, by the standards of a rational preliminary analysis, ultimately have a prospect of success (see *O.O. v Min for Justice* [2015] IESC 26).

16. I must now consider whether in these two cases this low threshold is met.

GROUNDS

17. The primary relief claimed in the proceedings as filed in July, 2022 was injunctive in nature directed to the Applicants' conditions of detention. This relief is no longer sought. The Applicants also sought to contend on various grounds that the Scheme and decisions made thereunder are not lawful and fail to vindicate their rights. The grounds advanced on the Amended Statement of Grounds include:

- **I.** A claim that the terms of the Scheme is unlawful because it fails to make provision for aggravated or exemplary damages for conscious and deliberate breach of his constitutional rights for those persons incarcerated without in-cell sanitation post the delivery of the *Simpson* judgment;
- **II.** A claim that the Scheme fails to provide an effective remedy for the Applicants by reason of the failure to make any provision for compensation for persons whose rights have been consciously and deliberately breached by the State Respondents regarding the manner and conditions of their detention;
- **III.** A claim that the Scheme discriminates against persons such as the Applicants by treating fundamentally different factual situations in the same way contrary to Article 40.1 of the Constitution;
- **IV.** A claim that the Scheme operates as an unlawful fetter on the Third Named Respondent's discretion;
- **V.** A claim that the Scheme as operated by the Third Named Respondent is *ultra vires* its powers under Part 2 of the National Treasury Management Agency (Amendment) Act, 2000 because it relates to claims other than those which come within the definition of claims provided in s. 7 of the 2000 Act as delegated to the Agency pursuant to s. 9 of the Act;
- **VI.** Damages for breach of rights.

DISCUSSION AND DECISION

18. As persons who were subjected to a prison regime which included a lack of in cell sanitation and who are eligible to apply under the Scheme albeit they contend that the Scheme in its terms and operation is unlawful, I am satisfied that the Applicants have a sufficient interest in the matter to which the application relates to comply with O.84, r.20(4).

19. I am further satisfied that the facts averred on affidavit would be sufficient to provide a basis for relief by way of judicial review provided the test for leave is otherwise met.

20. No issues have been raised regarding the timing of the initial applications. Papers were filed in the Central Office in July, 2022 at a time when claims for compensation arising from conditions of detention had recently been advanced but a prompt date for the full hearing of the application was not given at that time, a matter beyond the Applicant's control. Insofar as additional relief is sought on new grounds, it is clear that these were identified before the Court when the application was opened in December, 2022. As the time issue arises, at least in part, because of court delays, I am satisfied that an arguable basis has been identified for an extension of time should the court hearing this matter determine that one is required. I would not refuse leave on time grounds alone in these cases where an arguable basis for extending time has been identified even though the amended Statement of Grounds produced on my direction did not expressly seek an extension of time.

21. Whereas these proceedings are not the only effective remedy in respect of a claim for damages pursued on behalf of the Applicants, the same cannot be said in respect of a challenge to the lawfulness of the Scheme. Accordingly, I am satisfied that the primary hurdle remaining in deciding on this application for leave is whether the Applicants have reached a threshold of arguability. It is to this issue I now turn.

22. Having considered the authorities relied upon and arguments advanced, I have little hesitation in concluding that sub-headings I to IV above do not meet a threshold of arguability. The Scheme operates on a non-statutory basis as a form of open offer intended to provide an option to avoid litigation and resolve claims on a low-cost basis in accordance with figures calculated under the terms of the Scheme. While the Scheme does not provide for enhanced damages, there is no impediment to the State departing from the terms of the Scheme in offering more favourable terms on the facts of a given case to settle any claim in the normal way should they choose to do so. Such a compromise would fall outside the terms of the Scheme currently administered by the Third Named Respondent.

23. There is no doubt but the Scheme is a blunt instrument. The Scheme is inflexible in its terms and is designed in this way. I consider it to be unarguable that there is no obligation on the State to offer settlement terms in every claim. It seems to me that it cannot be contended

that an unlawfulness flows from this lack of flexibility because the Scheme is not the only remedy available and is merely one non-compulsory option. A remedy remains open to the Applicants to pursue a civil claim before the Courts where the "*one size fits all*" approach (or in the case of the Scheme three sizes in that it provides for three types of claim) is not acceptable to them. Just as I consider it to be unarguable that there is no obligation on the State to offer settlement terms in every claim, it is also unarguable that there is no obligation on any party to make application under the Scheme or to accept the sum offered.

24. The availability of an option to proceed before the Courts means there is no impediment to the Applicants advancing their claims based on their individual circumstances including the fact that slopping out occurred in their cases post the judgment in *Simpson* in a manner which grounds a claim for aggravated or exemplary damages not provided under the Scheme. I am quite satisfied that an effective remedy remains available to the Applicants through litigation by pursuing proceedings before a court of competent jurisdiction. This remedy is entirely unfettered and capable of fairly and properly assessing the Applicants' claims. In my view this provides a full answer to the Applicants' complaints that the Scheme does not provide for fair compensation on the facts of their cases. An arguable basis for contending otherwise has not been demonstrated on this application.

25. A separate issue arises, however, in relation to the competence of the State Claims Agency to administer the Scheme on behalf of the State. As a creature of statute, the Agency is limited by the provisions which vest it with authority. It seems to me that it is arguable that insofar as a claim such as that maintained by the Applicants is one for constitutional torts, then it falls outside the scope of a claim as defined under s. 7 of the 2000 Act which may properly be delegated to the Third Named Respondent pursuant to s. 9 of the 2000 Act. Under s. 7 a claim is defined as:

> *"claim" (other than in section 12(4)) means a claim, other than one involving a question as to the validity of any law having regard to the provisions of the Constitution, that is wholly, or in the opinion of the Minister is mainly, one for compensation or damages for loss of life or personal injury, or loss of or damage to property, occasioned by an act, omission or other matter constituting a cause of action made against any one or more State authorities either alone or with any other person, but does not include—*
>
> *(a)...*

(b) a claim against the Minister for Justice, Equality and Law Reform, the Commissioner of the Garda Síochána and the Governor of a prison or any of them in respect of an alleged assault upon the claimant by a member of the Garda Síochána or a prison officer of a prison, or

(c) a claim under the scheme administered by the Minister for Justice, Equality and Law Reform providing for compensation for personal injury criminally inflicted on prison officers of a prison,

and cognate words shall be construed accordingly;"

26. The claim is this case does not neatly fit within this definition. It was characterized in *Simpson* as a claim for breach of constitutional rights and in the subsequent decision of the Supreme Court in *McGee v. Governor of Portlaoise Prison & Ors.* [2023] IESC 14 as a claim for *Meskell*-type based on a breach of constitutional duty and therefore to be characterized as "*founded on tort*". It was not treated in either *Simpson* or *McGee* as a claim for personal injuries. As a question arises as to whether the Applicants' claims arising from a breach of constitutional rights occasioned by a practice of slopping out come within the definition of a claim in s. 7 of the 2000 Act, it is arguable that claims may not be claims properly delegable to the Third Named Respondent pursuant to s. 9 of the 2000 Act.

27. I accept that an issue may arise in respect of the Applicants' standing to complain as to the *vires* of the Third Named Respondent having made an application under the Scheme they now seek to challenge as ultra vires. In seeking to resolve their claims without recourse to litigation the Applicants have, however, been consistent in maintaining that the compensation available under the Scheme is inadequate. It seems to me therefore that the fact that an application has been made under the Scheme does not operate to necessarily preclude the claim that the Scheme is *ultra vires* and unlawful from being maintained. It is arguable that the Applicants are potentially impacted in the maintenance of a civil proceedings by the existence of the Scheme even without making an application under it or in refusing an offer made because the Scheme operates as a form of open offer with potential implications for costs in civil litigation.

28. Accordingly, it seems to me on the modest threshold applying at leave stage, that it is arguable the Applicants have standing to challenge the lawfulness of the Scheme as administered by the Third Named Respondent on the basis that they are affected by the

existence of the Scheme and, indeed, have made application under it albeit on the basis of a claim for enhanced terms falling beyond the scope of the Scheme.

29. The Applicants also advance a claim for damages in these proceedings. Damages claims may be pursued in judicial review proceedings where properly linked with the claim advanced in a manner which makes it appropriate for the damages claim to travel together with the primary relief sought by way of judicial review. The primary relief in these judicial review proceedings for which I propose to grant leave relates to the lawfulness of the Scheme administered by the Third Named Respondent. The lawfulness of the Applicants' conditions of detention is no longer an issue in the proceedings, save to the extent that it underpins the claim for damages. A damages claim might therefore be seen as entirely separate and distinct from the judicial review claim. Such a view ignores the fact that whether the Applicants accept an offer under the Scheme rather than pursue a claim in damages through litigation may be impacted by an ultimate decision as to whether the Scheme is lawful or not.

30. If the Applicants are successful in these proceedings in establishing that the Scheme is unlawful having been permitted to pursue a claim in damages, that claim might be remitted for plenary hearing to a court of appropriate jurisdiction presuming that the Applicants elect to pursue the claim by litigation. This is not the only potential outcome. There is, for example, always the possibility that an alternative scheme would be introduced obviating a necessity to pursue a claim in damages. On the other hand, if the Applicants are unsuccessful on their primary case, a claim in damages would remain extant and might then be pursued.

31. On either outcome, the damages claim, if pursued, would require to be determined in a plenary process based on evidence adduced. If a claim were pursued it seems to me that when regard is had to the compensation awarded in *Simpson* that it is reasonably likely that any such claim would not proceed in the High Court absent special and compelling evidence, notwithstanding a claim for aggravated or exemplary damages, and would require to be remitted in much the same manner as occurred in *Goulding v Governor of Mountjoy Prison* [2021] IEHC 293 (albeit that case commenced by way of plenary proceedings, not judicial review). The requirement to remit, should it arise, would give rise to additional costs but so too does the requirement to institute separate proceedings.

32. On balance, I have decided that even though it remains open to the Applicants to

institute a claim for damages in plenary proceedings before a court of appropriate and competent jurisdiction and to seek to adjourn those proceedings pending the determination of these proceedings by way of judicial review, any such plenary proceedings are liable to be impacted by the outcome of these proceedings. Given that the Applicants' decisions on whether to pursue a claim in damages or accept an offer under a scheme stand potentially affected by the outcome of these proceedings, sufficient basis exists for linking the claims at this juncture. Should either Applicant elect to pursue a damages claim following the determination of the primary judicial review issue in these proceedings, namely the lawfulness of the Scheme, it will be necessary at that stage to determine the form of proceedings and court jurisdiction in which they should be pursued. There may be costs consequences arising, but this does not preclude the grant of leave at this juncture and is a matter for future consideration.

CONCLUSION

33. The draft Amended Statement of Grounds prepared in each case following the hearing before me are largely identical. For the reasons set out above, I grant leave to seek the reliefs sought at D(v), D(viii) limited to an order setting aside the Settlement Scheme, (ix) and (x) on the Amended Statement of Grounds dated the 7th of February, 2024 in each case. I further give liberty to file a further Amended Statement of Grounds in each case in which an extension of time to proceed by way of judicial review is sought, if necessary and give leave to seek such an extension of time. Leave to seek these reliefs is granted on the combined factual and legal grounds set out in the *Collopy* case at E (1), E(2), E(3), E(4), E(5), E(6), E(7), E(8), E(9), E(10), E(11), E(12), E(13), E(14), E(17) and E(20). I grant leave to seek an extension of time having regard to the matters averred to by Matthew Byrne, Solicitor in an Affidavit sworn on the 8th of February, 2024. I make an identical order in the *Coffey* case save that I refuse leave to seek relief on the grounds advanced in the second sentence of E(17) of the draft Amended Statement of Grounds in that case where a distinct plea is advanced (in a manner not replicated in *Collopy*) that the Scheme operates to fetter the Third Named Respondent's discretion. The costs of the application stand reserved to the substantive hearing.