THE SUPREME COURT

[Appeal No. 94/20]

Clarke C.J.
O'Donnell J.
MacMenamin J.
Dunne J.
Charleton J.

BETWEEN:

McD

APPELLANT

V.

THE GOVERNOR OF X PRISON

RESPONDENT

Judgment of Mr. Justice John MacMenamin dated the 17th day of September, 2021

Introduction

1. This judgment concludes that the appellant's claim for damages for negligence against the Prison Governor cannot succeed, and would uphold the order of the Court of Appeal on that issue. However, for reasons set out in the second part, the judgment proposes there should be a declaration by this Court to the effect that the Irish Prison Service Complaints Policy Document, introduced in the year 2014, did not comply with the requirement to provide an effective complaints system in the case of the appellant, then a prisoner in X Prison.

2. In the year 2011, the appellant was sentenced to 12 years' imprisonment for very serious offences. Four years later, whilst still serving his sentence in X Prison, and in solitary confinement by his own choice, he went on a hunger strike in protest against two changes in the conditions under which he was being detained. Faced with an unusual and serious situation, the Governor of the prison initiated legal proceedings on the 16th February, 2015. He invoked the inherent jurisdiction of the High Court to seek guidance as to the scope of his constitutional and legal duties towards the appellant (*Governor of X Prison v. PMcD* [2016] 1 I.L.R.M. 116). Having heard what was a sensitive and complex case, the High Court judge (Baker J.) granted declarations to the effect that the appellant did have legal capacity to make autonomous decisions concerning his own life whilst on hunger strike, and that the Governor was entitled to give effect to his prisoner's stated decision to refuse medical and nutritional services. For brevity, that case will be referred to in this judgment as the "capacity proceedings".

3. On 30th March, 2015, on the third day of those capacity proceedings, the appellant's counsel indicated that it was his client's intention to gradually come off hunger strike. The present proceedings began by plenary summons on 8th April, 2015. In these proceedings, the appellant pleaded that the changed aspects of his imprisonment were a denial of his constitutional and Convention rights, and, in particular, that the failure to provide him with exercise facilities, and a system of food delivery which specifically identified and segregated the food to be delivered to him in his cell, were breaches of his rights under the Constitution and the European Convention of Human Rights ("ECHR" Act 2003. He claimed that the Governor had been negligent in not recognising a failure to monitor and consider the detrimental effects the change in regime would have on him. These unsuccessful pleas were raised on the basis that the appellant's fragile psychological state and borderline personality disorder, taken in conjunction with his voluntary

isolation in prison, had led to the consequence that the changes amounted to a failure to provide him with a safe and secure prison regime, which, in turn, had a detrimental effect on his psychological and mental, and physical health, thereby denying his basic human dignity. It is a long-established principle that a prisoner is not entitled to prison conditions of his own choosing. (*Nash v. Chief Executive of the Irish Prison Services & Ors.* [2015] IEHC 504, Kearns P., 4th August, 2015).

4. But, in addition to those claims, the appellant made the case that the Governor's failure to deal with two written complaints made in accordance with Rule 57B of the Prison Rules, as inserted by Rule 2 of the Prison Rules (Amendment), S.I. No. 11 2013, and *the failure to resolve his complaints* had led inexorably to the continuation of his hunger strike, which had serious detrimental effects on his well-being. He also sought declarations, discussed in more detail later. Baker J. dismissed the vast preponderance of the case. In the end, the appellant obtained just two reliefs in this matter, for brevity referred to as 'the negligence case'.

5. The two orders made by the High Court must be put in context. On the 16th June, 2014, the Irish Prison Service introduced "the Irish Prisons Complaints Policy Document". This set out a framework whereby prisoners could make complaints under a series of headings in categories of greater and lesser seriousness. The appellant began his hunger strike in protest against the two changes in his conditions on the 8th February, 2015. On the 9th and 10th February, on the advice of the Governor, the appellant availed of the complaints policy to set out his complaints concerning exercise facilities and food delivery. The prison authorities did not respond until the 27th March, 2015. This delay was never satisfactorily explained. The appellant contended this had the effect of prolonging the hunger strike. Baker J. concluded that there had been delay in responding to the two complaints, which had the effect of affirming the appellant's resolution to prolong the hunger strike for a more lengthy period, during which he had sustained additional suffering. She awarded damages for negligence in the sum of €5,000. She also granted a declaration, as sought in the pleadings, that, in his treatment of the appellant's two written complaints dated the 10th February, 2015, the Governor had breached the terms of the Irish Prison Service Prisoner Complaints Policy Document ([2018] IEHC 668).

6. The Governor appealed. In a judgment delivered on the 20th July, 2020, the Court of Appeal, (Noonan, Haughton and Murray JJ.), allowed the Governor's appeal on both orders.

Delivering judgment for that court, Noonan J. considered the issue of causation and duty of care referring to passages from the judgment of this Court in *Glencar Explorations plc. v. Mayo County Council (No. 2)* [2002] 1 I.R. 84, ("*Glencar*"). That court held that the complaints policy was simply aspirational in nature, and therefore could not in law provide a basis for holding there existed a duty of care or a relationship of proximity between the appellant and the respondent. The court also held that there were insufficient grounds for granting a declaration.

7. The appellant applied for leave to appeal to this Court. In a determination dated the 14th December, 2020, this Court granted leave to appeal ([2020 IESC DET 134). Two issues arise in this appeal therefore. These are whether the Court of Appeal was correct in its conclusion on the negligence issue, and on the declaration.

Submissions

8. On the negligence issue, counsel for the appellant submitted that the Court of Appeal fundamentally misunderstood the proceedings and findings of the High Court which followed a 15 day hearing. He contended that the issue was not to be seen in the context of a mere breach of the policy document, but, rather, having regard to the appellant's background and state of mind; the events leading up to and during the hunger strike; the prison's response to it; and the Governor's instruction or advice to the appellant to avail of the complaints system. Counsel contended that the Court of Appeal erroneously downgraded the policy document to being merely aspirational, the implementation of which could be disincentivised by imposing duties arising from it. He made the case that there was no evidence to support this conclusion, and that, on the contrary, the evidence from the respondent in the High Court had been that the policy document was an important component of prison management, and should have been properly implemented in line with international standards. Counsel referred the court to a number of authorities on causation and the scope of the duty of care, referred to later. Counsel for the respondents stood over the judgment of the Court of Appeal, contending that it had accurately set out the law, and that the learned High Court judge had erred in granting the two orders in question.

The Capacity Case

9. The findings in the first, "capacity case", are material to the two questions now in issue. In those, first, proceedings, the appellant himself, members of different sections of the prison staff,

including the Governor, psychologists and a number of psychiatrists all testified. Baker J. referred to the relevant jurisprudence, including *In re a Ward of Court (withholding medical treatment) (No. 2)* [1996] 2 I.R. 79; *P.P. v. HSE* [2015] 1 ILRM 324; *Fitzpatrick v. F.K.* [2009] 2 I.R. 7; *Fleming v. Ireland* [2013] 2 I.R. 417, as well as the persuasive authority of *Secretary of State v. Robb* [1995] 1 All. ER 67, where similar circumstances arose. It should be material there is some transatlantic authority to the effect that the right to self-determination in this context is not absolute, and that in each case a balancing exercise should be undertaken. (cf. McDermott, *Prison Law*, Round Hall (2000), p.312, *Thor v. Superior Court* [1995] 5 Cal. (4th) 725, 855 P.2d 375; *Re Caulk* [1984] 125 N.H. 226; *Re Attorney General of British Columbia and Astaforoff*, Unrep. British Columbia Court of Appeal, 14th July 1983).

10. Baker J. heard evidence from several psychiatrists on the appellant's mental capacity, all to the effect that he did have the capacity to make these life-threatening decisions, and that his capacity was not vitiated by any frailty arising either from his detention conditions, or from personality attributes. The judge accepted this evidence, and distinguished this case from other distinct decisions on the liability in tort of prison authorities where the circumstances were very different, such as instances where a prisoner sustained injuries in an attack by another prisoner, in circumstances which gave rise to liability for damages (*Creighton v. Ireland* [2010] IESC 50) or in a judicial review, seeking to quash orders restricting association between one prisoner and other prisoners. In general, the courts are cautious as to engaging or interfering with matters of prison administration (*Devoy v. Governor of Portlaoise Prison* [2009] IEHC 288), but in this case constitutional rights were in question. The judge held that, while the fact of imprisonment had deprived the appellant of his right to personal liberty, he had not thereby lost all his constitutional rights, and that he retained rights of personal autonomy, and bodily integrity. She concluded that, while the appellant did not have a right to commit suicide, he nonetheless held the right to elect to refuse food, provided that the choice was full, free, and informed. But to this she added an important proviso, observing that the fact that the appellant held such constitutional rights did not require others to assist him to achieve his ends, and that an important distinction had to be drawn between a positive right to directly end one's life, and, on the other hand, a capacity which flowed from the autonomy of the self to make choices which had the indirect effect that death would follow. That proviso has some relevance to the issues here.

The High Court Judgment

11. Now, in this case, those conclusions all bear on the questions concerning causation and duty of care. The appellant was exercising constitutional rights; but the exercise of these rights did not necessarily give rise to a duty to assist him. If these rights, as asserted, did not give rise to corresponding duties in constitutional terms, then the question arises as to the extent this bears on the existence and scope of the duties owed to the appellant in the context of this, a case in negligence.

12. What now follows is a rather detailed outline of the evidence and the findings of the High Court judge and the Court of Appeal. The explanation for this detail is, simply, that there are two issues in this case, the first whether there can be a finding of negligence, the second whether a declaration should be granted. For reasons explained later, I do not see the matter of a declaration as a mere after-thought, or "add on". What emerged regarding the operation of the prison system can be viewed as, in part, distinct from the issue of negligence.

The Facts

13. The appellant, a member of the Travelling Community, spent much of his younger life in the United Kingdom. He suffered physical and sexual abuse in childhood. He was placed in care when he was aged 10. His family travelled between the United Kingdom and the United States. He commenced taking soft-drugs when not yet a teenager. He was involved in a car accident as a young child, as a result of which he lost his spleen. This made him susceptible to infection. The diagnosis of a borderline personality disorder came with a history of self-harm, which continued into his prison life. All-in-all, by the time of this High Court hearing, he had spent some 30 years of his life in detention. By 2011, when he was sentenced to imprisonment in X Prison, he had little contact with any family members, and no real connection with any more distant relations living in Ireland. In prison he had few contacts with the outside world.

14. The offences with which the appellant was charged in 2011 were very serious. He was convicted of burglary, assault, and threatening to kill a 97 year old woman. When he was sentenced, he himself asked to serve his imprisonment subject to "Rule 63" conditions, as defined in the Prison Rules 2007. This meant that, at his own choice, he was kept in a segregated cell on his own, and locked up for 23 hours per day. He was entitled to one hour's exercise in one of the

prison yards. His reason for choosing this regime – effectively voluntary solitary confinement - apparently arose from his fear of being caught up in a feud between two families, members or associates of whom were also in the prison. But the Governor testified that, if the appellant had not made that choice, the authorities would very likely have made it for him in any case, as the appellant would have been at risk from other prisoners' reactions to the offences for which he had been sentenced.

15. As a consequence, it requires little imagination to conclude that even quite small changes to so stark a regime could become magnified in importance and might acquire a greater significance than would normally be the case. Baker J. described the appellant as sometimes an unreliable historian. While he characterised himself at some points as having been a good prisoner, this was not always so. He had faced a significant number of disciplinary charges while in X Prison. He had literally hundreds of interactions with the prison medical staff. The authorities had made a number of unavailing efforts to persuade him to engage in activities which might have assisted him both physically and mentally. Yet, clearly, he was able to give graphic evidence about his life, and the circumstances of his claim.

The Two Issues

(a) Exercise

16. In late Summer and early Autumn of 2014, the prison authorities introduced two changes to the regime due to what were variously described as "resource issues", or staffing problems. There was no criticism of the fact that these changes were made. Up to then, the appellant had taken exercise at lunch periods in one of the prison yards, when other prisoners were locked in their cells. But the authorities found it was not possible to continue this arrangement. They offered him recreation facilities in two other locations. Baker J. held there was some basis for his objections to one of these alternative locations, but the appellant objected to another location also. As a result, by the time the "capacity case" first came to court, he had been confined to his cell for 24 hours per day, for the previous 8 months. Clearly, this was a highly undesirable situation, but there was no evidence that the prison authorities were in a position to make any other viable alternative arrangements available to him.

(b) Food Delivery

17. The appellant's second concern was as to how food was delivered to his cell. Up to the Autumn of 2014, prison "kitchen hands" had brought food to him. However, for the same administration reasons, this proved no longer possible. From then on, other prisoners were tasked with delivering his meals. The appellant objected to this also. He told the authorities he was afraid that prisoners whom he distrusted, might contaminate his food. The administration sought to allay these fears. They suggested that his meals be brought in containers. But the appellant objected to this proposal. He felt that the containers would be easily identifiable. He also raised another objection. This was that it would be unhygienic for him to serve his own food from a food trolley, because of various surface wounds and bandages on his body caused by his self-harm. Baker J. concluded that, while the absence of an exercise regime was clearly undesirable, the prison authorities appeared to have tried a series of steps to address the appellant's complaints.

18. It is difficult to avoid the inference that there were times when the appellant seemed very disposed to identify a problem for every solution that was offered. The fact of imprisonment requires a degree of co-operation between prison staff and detainees. Effective administration of the entire prison, and all prisoners, must be a high priority. The appellant continued to make protests about these two changes up to Christmas 2014. He also made a number of written complaints under the system about other concerns. The High Court found that, unfortunately, other separate written complaints which he had made were dealt with either inadequately, slowly, or sometimes not at all.

The Policy Document

19. The policy document set out a framework of complaints-categories moving from A to F. Category C related to "service" complaints, such as visits, phone calls, and missing clothes. At para. 4.4.5 it stated that Category C complaints should be resolved as soon as possible - it was *expected* that a reply or acknowledgement could be provided within 24 hours - although resolution might not be possible within that time frame. The document stated "*The complainant should be kept aware of ongoing developments in relation to the complaint*". It provided that the Governor might delegate the investigation of Category C complaints to an officer not below the position of Class Officer. The document provided:-

"4.4.9 The Senior Chief Officer in the prison shall maintain constant oversight of the Category C complaints procedure and shall take immediate action to resolve any matters outstanding in excess of 48 hours."

But the document did not lay down time limits within which complaints were to be dealt with. While it is clear that the intention was to provide a response within a reasonably short timeframe, that is to be contrasted with the 6 week delay in dealing with the appellant's two complaints during his hunger strike, where no adequate explanation was ever forthcoming for what occurred.

The Complaints System

20. An effective complaints system is necessary in any situation, like a prison, where people are held in close confinement. Prisoners can sometimes be in a vulnerable situation, and should be in a position to confidentially communicate their concerns to the authorities. While the appellant's complaints were made on the 10th February, 2015, they were not categorised until the 25th February, 2015, when, at that late stage, the two were accorded Category C service level status. The capacity case first came before Baker J. on 25th March, 2015. The complaints were not eventually dealt with until the 27th March, 2015. It must be said the delay is noteworthy, not least because it took place during the time period when the capacity case was looming, and when it might be thought the authorities should have been paying close attention to any interactions with the appellant.

System Failure

21. The High Court judge observed that the Governor had agreed with Professor Kelly's conclusion that the limited range of the appellant's life meant that some factors acquired "salience" or importance which would not be found in other circumstances. She pointed out that the Governor had accepted Professor Kelly's evidence that, had the complaints been processed effectively, this would have had a "positive effect" on the appellant, then on hunger strike. She observed that the Governor had accepted in evidence there were failures in the complaints process, and that the prison authorities could not keep up with the complaints because of lack of personnel. But he had testified, with some under-statement, that it had been highly unusual for a prisoner to "*take matters into his own hands*" in the way the appellant had done. Baker J. found that the Governor was concerned with the appellant's wellbeing, and that he did have some contact with him on the eve

of the hunger strike, "*but that the system that he [the Governor] recommended him to use failed*". (para. 141 of the High Court judgment). The Governor acknowledged also that the offer of the Challenging Behaviour Unit Yard was not an acceptable alternative to comply with the entitlement of the appellant to exercise every day.

22. The complaints system provided for a Liaison Officer. Baker J. commented that the evidence of that officer was "unsatisfactory", and that the officer was unaware of the fact that, in 2016, the then Inspector of Prisons, Judge Michael Reilly, had been highly critical of the complaints system in his annual report. The judge commented that, by any standards, the officer's evidence was "noteworthy", as it touched directly on his area of responsibility, having accepted that the processing of the appellant's complaints was not satisfactory. Baker J. pointed out that the officer had given various reasons as to why it took so long to deal with the complaints. None of these was satisfactory. She pointed out that the appellant had made another complaint on the 13th February, 2015, which had taken 10 days to deal with. In this context, she noted the officer admitted that the references to self-harm in that complaint had not triggered any particular concern in his mind, and had not suggested that the complaint would require to be processed with some expedition. The officer accepted that both the then Governor and assistant Governor, had stressed the importance of the complaints process for dealing with grievances in prison. He sought to explain delays on the basis that he might have been on leave, but it was unclear whether there was any system provision for substitution - if the officer had been on leave. The officer accepted that he was the final decision-maker, and that the relevant chief officer in charge of complaints made findings of fact, but not ultimate determinations. The relevant chief officer in charge of complaints who also testified, could not explain the delays in the two complaints either, and accepted he could not be certain either that the appellant had been directly advised regarding the outcome of any earlier complaints, some, at least, of which had been successful.

23. The judge held:-

> *"148. The manner in which the plaintiff's complaints has been dealt with is much less than satisfactory, the failures being attributable to a failed system rather than to any individual failure of the persons engaged with the management of the complaints systems within the prison. This system is grossly under resourced, one person bears the responsibility for fact finding, and even he, the relevant Chief Officer in charge of*

complaints, was singularly unclear about the precise extent of his role. The system dealing with complaints was unsatisfactory and not compliant with basic levels of fairness or procedural correctness."

24. She went on to conclude, on the facts:-

"149. ... that the method of dealing with complaints in X Prison was considerably less than satisfactory, and [was] fortified ... by the report of the Inspector of Prisons, the late Judge Reilly, who came to a strong conclusion regarding the complaints procedures in X Prison in his 2016 report pursuant to Part 5 of the Prisons Act 2007 "Review, Evaluation and Analysis of the Operation of the Present Irish Prison Service Prisoner Complaints Procedure"."

25. She continued:-

"150. It is not for me to determine whether the complaints were valid or justified any intervention by the prison authorities, but I find, as a matter of fact, that the prison authorities did encourage the plaintiff to use the complaints process to resolve his grievances, that the plaintiff did take this advice in good faith, that the complaints procedure was one of the few "pro-social" methods of resolution available to the plaintiff having regard to his isolated status in the prison, and that the prison authorities actually knew that, on account of the plaintiff's particular vulnerability and his personality and cognitive distortions, he was likely to pursue with enthusiasm, if not a degree of obsessiveness, his complaints, and that a robust and functioning complaints process ought to have been put in place. I am satisfied that the process was not functional and that the plaintiff was poorly served at a time when his health and wellbeing were at serious and life threatening risk."

Having emphasised the importance of a complaints procedure within a prison, also considered in *McDonnell v. Governor of Wheatfield Prison* [2015] 2 I.L.R.M. 361, Baker J. went on to deal with other lapses in communication between the prison health and welfare staff, on the one hand, and the prison administration, on the other.

26. Turning to legal authorities, Baker J. considered the judgment in *Nash v. The Chief Executive of Irish Prison Services* [2015] IEHC 504, where Kearns P. set out the principle,

mentioned earlier, that one could not have a prison of one's choosing, and that the essence of such deprivation of liberty was that the day-to-day conditions of one's life were, and must be, directed by others. As a result, the day-to-day life of individual prisoners could legitimately differ from the conditions a prisoner might want. The judge held the appellant could not legitimately create the conditions in which it is impossible for him to enjoy normal facilities; and that, like any other institution or organisation, a prison requires co-operation all round for it to operate successfully. She pointed out that a prisoner who repeatedly breaches discipline and is subject to successive punishments cannot complain that he is being subjected to an unpleasant regime on an indefinite basis, because he has nobody to blame but himself.

27. The judge distinguished the case before her from other decisions where negligence had been considered (*Creighton v. Ireland* [2010] IESC 50); or constitutional rights arose, *S.F. & Ors. v. Director of Oberstown Children's Detention Centre*, Ní Raifeartaigh, [2017] IEHC 829, and the High Court judgment *Simpson v. Governor of Mountjoy Prison* [2017] IEHC 561, White J. (see now also Supreme Court [2019] IESC 81). Baker J. found that the appellant had come to prison a very damaged man, and for the most part had got on well with members of the prison staff, and, to an extent, they with him.

28. But on the issue of negligence, she noted that the appellant's argument was that the prison authorities had failed to take steps to prevent the escalation of matters to the point where he had engaged in a hunger strike for 50 days, and that the duty of care was breached in that respect. She held that the time period between 10th February and 20th February, 2015 was critical. This was when the appellant had sought a copy of his complaints, during all of which the appellant was on hunger strike.

29. The judge held that on:-

> *"... 20 February 2015, the appellant wrote what became known as a "disclaimer letter" to the prison authorities in which he said that, should he fall into coma or become otherwise incapable of making a decision regarding his own welfare, he was not to be medicated, or given nutritional therapy, or fed against his will".*

30. She continued:-

> *"I consider that it was on that date that he made the determination that his action was not mere food refusal, something he had done before in X Prison itself, in the United Kingdom, and in Cloverhill, but a different form of response to his conditions, both in quality and intent. This letter was written the day after he had sought copies of the complaints he had lodged ten days earlier. I consider that there was a direct connection between the failure of the authorities to deal with his two complaints and his determination expressed in that letter to continue the hunger strike, even should it cause his death. Thus, I consider that the circumstances escalated in a relatively short period from being a form of protest, which is not qualitatively different from others engaged by the plaintiff, to becoming a protest demanding a response of substance. Such response did not happen."* (para. 183).

31. These were the material findings made on causation. In passing, it might be noted that, in his letter of the 20th February, the appellant wrote to the medical staff that he had not been eating any food since the 8th February, 2015 "*and that's my choice*". He went on to state that he did not wish to be questioned about the situation by anyone. He stated that he was refusing the offer of weighing scales, blood pressure, "*kitto tests*", or "*anything else*". He stated that he did not want any help from any doctors or nurses, and that this was his choice, and "*that's what the situation will stay like*". This letter was addressed to the medical staff and to be treated as a disclaimer, so that should he "take sick" that he was not to be given any help. The letter did not, however, mention anything about the absence of response to his complaints made 10 days earlier.

<u>The Basis of the Findings on Negligence</u>

32. Baker J. held the authorities had "some responsibility" for the escalation of the protest. She considered the most likely explanation for their attitude to the hunger strike was that they believed the appellant was engaging in a form of protest of broadly the same type, and with the same intention as other protests he had engaged in in the past. In the initial stages they treated his refusal of food as if it was merely that. However, she concluded, the particular protest by the appellant was quite different in type, in that he continued on his hunger strike for 50 days with obvious risk to his health and wellbeing.

33. The High Court judge observed that it was common case this, a breach of the Prison Rules, was not itself actionable. But she concluded, on the facts, that "*the fine line between the proper regulation and management of the complaints procedure and negligence*" had been crossed, and that the prison authorities did bear "*some responsibility*" for the escalation of the appellant's protest, to a point where, in light of his very difficult personal and psychological make-up, it became impossible, or, at very least, very difficult for him to turn back, and "*this was a reasonably foreseeable consequence of the failure to deal with the appellant's written complaints"* (para. 187). She concluded that the negligent failure of the prison authorities to take his protest seriously, and to understand the extent to which it was different from other protests, accelerated and exacerbated the hunger strike to a point where it became not mere food refusal, but, by 20th February 2015, one which could have led to the appellant's death.

34. In awarding the sum of €5,000 damages, she stressed that the sum was not intended to do any more but mark damages in respect of a matter **for which the appellant was primarily responsible**, but where the inaction of the respondent led to the circumstances becoming far more grave and dangerous than those even intended in the early days of the hunger strike (para. 192). I emphasise the words in heavy type in the context of some *obiter* observations made later on the issue of causation.

The Court of Appeal

35. Although I find myself in large agreement with the Court of Appeal on the negligence issue, nonetheless I set out what that court held in some detail, in particular on the issues of causation, proximity, and foreseeability of injury, and damages. While it is sometimes thought the questions in *Glencar* are to be addressed sequentially, this will not always be so. Here, there is a considerable factual, and some legal, overlap between the headings or 'tests'. It is necessary to point out that the State respondents did not make any reference to *Glencar* in the High Court; the case as it evolved in the Court of Appeal, and ultimately acquired a quite different complexion as fell to be analysed in a different way. An assessment on each of the relevant issues now follows a description of the Court of Appeal findings, an outline of the appellant's submissions and conclusions.

Causation

36. Although also considering other issues in great detail, the Court of Appeal observed that, regardless of any issue on duty of care, the appellant would have faced what might appear to be an insuperable obstacle on causation. Even if the authorities had answered the appellant's complaints within 24 hours, could it then be said the Governor had been negligent? Noonan J. observed that counsel for the Governor had put forward a causation argument, contending that, if the Governor had not been negligent and dealt promptly with the appellant's complaints as required by the Policy Document, the outcome would have been the same. Thus, the Governor was contending that the cause of the appellant's injury was not the delay in dealing with his complaints, but the Governor's refusal to accede to his demands. The court referred to the fact that the Governor placed reliance on the evidence of Professor Kelly as contained in his report of the 18th March, 2015, commissioned in the context of the first proceedings concerning the appellant's capacity. At para. 2 of the Conclusions Section of that report, Professor Kelly had stated that the appellant had been clear that he would eat if he could reach agreement with the prison authorities in relation to the two issues he highlights, relating to the exercise yard and distribution of food at mealtimes. On this, Noonan J. made the important observation that the Governor contended that the delay in dealing with the appellant's complaints, which were ultimately declined, *"had no* ***material bearing*** *on his decision to commence, or continue, the hunger strike."* (Emphasis added). I return to these emphasised words in the assessment section. This judgment now sets out the Court of Appeal's findings on proximity, then foreseeable injury, and then damages.

Proximity

37. In *Glencar*, this Court held that in assessing whether to impute liability in a claim against the State authority for damages allegedly sustained by an ultra vires decision, there were four tests; (i) whether the damage (or injury) was foreseeable; (ii) the proximity of the relationship; (iii) whether there existed a countervailing policy consideration; and, (iv) whether it would be just and reasonable to impute a duty of care on the facts of the case. The Court of Appeal judgment in this case directly addressed test (ii) of proximity of relationship, which Keane C.J. described in *Glencar* as being a notoriously difficult question. The judgment prefaced this analysis with a general consideration of foreseeability. Thus, in *Muldoon v. Ireland* [1988] I.L.R.M. 367, the High Court (Hamilton P.) refused to allow the absence of searches every time prisoners moved from one part

of a prison to another to go to a jury given as an issue of negligence, when there was evidence that searches were carried out at other relevant times, and the attack by one prisoner on the plaintiff was unprovoked, unforeseeable, and could not have been prevented, even if there had been more officers in the yard where the attack took place. In *Bates v. Minister for Justice* [1998] 2 I.R. 81, a claim in negligence for an unprovoked and unforeseeable attack by one prisoner on another with hot water, a heavy object and a blade, similarly failed. Noonan J. pointed out that, if, in this case, the appellant had suffered a foreseeable injury as a result of, for example, tripping and falling on a hazard carelessly placed in his path by a servant or agent of the appellant, then he would be entitled to succeed in a claim for damages. Similarly, had he been subjected to unconstitutionally harsh conditions of detention, he may also be entitled to damages for any injury suffered as a result. The duty arising in such cases was clear and required no elaboration (para. 44).

38. Then addressing the evidential basis of the proximity issue, the Court of Appeal first considered the policy document. Noonan J. set out that there were, in fact, six categories of complaint, A to F. But not all of these were defined in, or by reference to the Prison Rules. Rather, with the exception of A, these were described only in the policy document, but not the Prison Rules contained in a statutory instrument. The judge then explained a significant distinction between one Category "A", and others. Category A dealt with serious complaints. He pointed out that the Prison Rules (Amendment) 2013 had amended another statutory instrument, the Prison Rules 2007, (S.I. No. 252/2007). That amendment provided for the insertion of two new rules, Rule 57A and 57B, which governed "Category A", complaints concerning grave matters, such as allegations of criminal or other serious misconduct. But Category C complaints were different. These related to basic "service level" matters. But that category did not figure in any statutory instrument, such as the Prison Rules.

39. The judgment explained that the High Court judge had accepted that even a breach of the Prison Rules, which are enacted by a statutory instrument, would not, in itself, be actionable. The Court of Appeal noted that counsel for the Governor had suggested that the judge's findings on the Prison Rules was inconsistent with the approach she had adopted to a breach of the Policy Document, which had no statutory force at all, and yet which had been found to give rise to a duty of care. In *Glencar*, the plaintiffs were granted prospecting licences by the Minister for Energy. After expending substantial sums, the County Council adopted a mining ban in the County

Development Plan. That ban was later held to be *ultra vires*. The question was whether the County Council owed a duty of care, and could provide a basis for an imputation of liability. Having outlined the facts of *Glencar*, and referred to passages from Keane C.J.'s judgment there, Noonan J. went on to observe that it was:-

> *"... sufficient to say that the mere fact that the exercise of a power by a public authority may confer a benefit on a person of which he would otherwise be deprived [did] not of itself give rise to a duty of care at common law."* (para. 47 of the judgment of the Court of Appeal; pp. 140-141 of *Glencar*)

Referring to the first test "foreseeability of injury", and then the second, "proximity of relationship" the position in law was, rather:

> *"... [The] facts of a particular case, when analysed, [which might] point to the reasonable foreseeability of damage arising from the non-exercise of the power and* ***a degree of proximity*** *between the plaintiff and the defendant which would render it just and reasonable to postulate the existence of a duty of care".* (para. 47 continued)

The Court of Appeal considered that the policy document lacked any legal basis to establish a relationship of 'proximity' which would render it "just and reasonable" to impose liability on the Governor. It explained the document was, rather, aspirational in nature. The appellant could have relied on no more than a "*general expectation"* that the Governor would act in accordance with the law, which was not sufficient to give rise to the existence of a duty of care. By contrast to *Glencar*, the prison policy document could not be equated with a statutory provision. In *Glencar*, even the *ultra vires* decision of a statute in the County Development Plan had been held not to give rise to a duty of care sounding in damages. The document which emanated from the Irish Prison Service was of no legal standing, and was simply a "*general statement of the policy adopted by that body towards complaints by prisoners in its care*", which sought to improve the lot of prisoners by providing a grievance procedure for their benefit, and provided a "*framework within which prisoners can make complaints which will be dealt with confidentially, properly investigated, and with procedural fairness*". These aims were identified in the document itself, which stated its purpose as being to provide prisoners with an accessible and effective means to make a complaint. The court, therefore, concluded that it was:-

"... difficult to see how, in adopting such a policy, the appellant could be said to be assuming a duty of care to the respondent. Indeed, if the appellant were held to owe a duty actionable via the law of negligence to operate its complaints procedure in a particular way, this would present a remarkable incongruity, with no liability at common law generally arising for a breach of the Prison Rules, but such a liability arising in respect of the functioning of the complaints process." (para. 50)

40. The judgment continued:-

"If the theory animating liability in negligence in this circumstance is not that of ***voluntary assumption of responsibility,*** *it is very hard to see what is. It does not arise from statute and has no obvious private law analogue. It is a liability that would arise on a basis specifically rejected by Keane C. J. in Glencar - that by reason only of their having adopted such a complaints process for the benefit of prisoners, the authorities have assumed a duty, the breach of which sounds in damages, to operate that process in a particular way."* (para. 50, emphasis added)

41. The judgment held that, as the policy document was aspirational in nature, it was dependent to a significant degree on having the resources available to implement it. While it could be said that prisoners were reasonably entitled to expect that the Prison Service would endeavour to adhere to its own policies, that was far removed from suggesting that a failure to do so could give rise to an action in damages at the suit of the prisoner concerned. Keane C.J. had pointed out in *Glencar* that the court was entitled to have regard to whether or not it is just and reasonable that a duty of care should be imposed in this case.

42. The judgment expressed the view, therefore, that to impose such a duty would potentially represent a significant disincentive to prison authorities against the voluntary adoption of policies, procedures and practices designed to improve and enhance the situation of prisoners in their care. The imposition of such a duty would thus not be in the interests of prisoners as a whole and indeed the wider public.

Foreseeable Injury

43. The focus then turned to whether there was evidence of foreseeable injury. Noonan J. pointed out that the appellant had not been able to identify any physical symptoms or evidence upon which a claim could be based. He continued that any assessment of injury or damages:-

> *"... would have been an extremely difficult, if not impossible, exercise for the court to undertake in the unusual circumstances of this case, particularly as the medical evidence, as far as it went, did not really assist this exercise. Viewed in this light, it might be suggested that the intention of the court was to award nominal damages where no actual damage was suffered. However, the court clearly concluded, and was entitled to conclude, that the hunger strike caused the respondent physical and psychological harm beyond that which would have ensued but for the appellant's negligence."* (para. 41)

Damages

44. The Court of Appeal pointed out that the assumption that the damages were intended to be non-compensatory might be borne out by the fact that, in awarding damages in the sum of €5,000, the trial judge had stressed that the sum in question was not intended to do any more but mark damages in respect of a matter for which the appellant had been *primarily responsible* (para. 40 of the Court of Appeal judgment). The award of damages must be seen in light of the fact that there was no evidence of injury caused by the negligence alleged. What was at stake in this case was a question of negligence, not a breach of constitutional rights.

The Appellant's Case

45. Addressing the concept of duty of care, counsel for the appellant referred the court to *Reeves v. Commissioner of Police for the Metropolis* [1999] 3 W.L.R. 363. There, the question was whether the act of a prisoner, in committing suicide, could be regarded as contributory negligence, thereby reducing the damages to which his estate would be entitled for an admitted breach of duty of care by the police to prevent the deceased from committing suicide whilst in custody.

46. In *Reeves*, the deceased, a Mr. Lynch, had been held in a police cell in the custody of the defendants' officers, who had been alerted to the risk that he might commit suicide. However, a

doctor who examined him soon after his arrival at the police station, had testified the prisoner had shown no evidence of any psychiatric disorder or clinical depression. But, thereafter, the deceased took advantage of the officers' inadvertence in opening a flap, or "wicket hatch", in the cell door. He moved his shirt through this spyhole to the outside of the door, affixing it on an outside handle, and thereafter unfortunately hanged himself.

47. In *Reeves*, Lord Hoffmann gave rather stark illustrations of the consequence of the duty which might be owed to a person engaging in a hunger strike. While it would mean that authorities were not under a duty to force-feed a prisoner such as the appellant, he expressed the view it also would have the consequence that prison authorities could be under a duty to assist the appellant if he had wished to end his own life. But, by contrast with such a situation, prison authorities would have been under a duty to control a prisoner's environment in non-invasive ways, with the intention of rendering any act of self-harm less effective, as this would not invade the principle of autonomy.

48. *Reeves* was decided on the basis of whether the deceased had been guilty of contributory negligence, which could be imputed to his estate. There, however, the House of Lords held that a deliberate and informed act, intended to exploit a situation which had been *created by the defendant*, that is, the authorities, did not negative causation. The case was decided on the basis that the authorities had complete control over the deceased, and *proceeded* upon the basis that there *had* been a breach of a *specific duty* imposed by law on the police to guard against that very event. This duty was that the police were under a duty to ensure that prisoners in their custody were to be protected for their own safety whilst detained, and applied whether a prisoner was of sound mind or not. But the basis of the decision in *Reeves* was that it was *acknowledged* from the outset of the appeal that the defendant had been in breach of duty. This is in contrast to the circumstances of this appeal, where the very question in dispute is whether it can be said that there was a duty of care based on a relationship created by a policy document, which was aspirational, and which did not create or set down duties in the case of these complaints. *Reeves* is not helpful to the appellant therefore. It is based on a presumption of a duty of care, the very existence of which is the matter in dispute.

49. The House of Lords speeches in *Reeves* describe situations where there may be a duty of prevention. This may arise in the case of custodians or persons owing a particular duty of care, such as hospital staff. But many of those cases concerned the issue of whether a court could make

a finding of contributory negligence against the estate of the unfortunate person who had decided to take their own life. This case is different from those considered in *Reeves*, as what is in question here is not the issue of contributory negligence deriving from a finding of negligence on the part of a defendant, but, rather, one where the question is whether there was negligence at all, where the appellant had insight into his decision. In the present case, it would have been unlawful to use force to compel the appellant to take food.

50. Counsel for the appellant referred also to *Butchart v. The Home Office* [2006] 1 W.L.R. 1155, a decision of the Court of Appeal of England and Wales. *Butchart* concerned a motion to strike out proceedings. There, the court simply concluded that, arguably, there could be a duty of care owed to a prisoner in a depressed and suicidal state who was placed in a cell with another prisoner, also known to be a suicide risk, whose body the plaintiff claimant found when the second prisoner actually later did commit suicide. The facts and principles applied in *Butchart*, especially on the question of duty of care, are entirely distinct from those which arise here. So, too, are the circumstances in other cases in this State, concerning reasonableness of conduct of prison authorities in carrying out searches, referred to earlier.

51. The Court was also referred to *UCC v. ESB* [2020] IESC 38, where the majority of this Court held that duties of care in a given case can be defined by reference to a test of reasonableness, the boundaries of which may not always be capable of being specified to an absolute level of precision. The majority observed that difficulty in identification would not, in itself, prevent a just duty of care being established, but went on to point out that, if the boundaries of that duty of care could not be specified with some reasonable level of clarity, then such a duty could not be held to exist. But the negligence case before this Court cannot be simply characterised as one concerning the boundaries as to the level of care due to *a prisoner* in abstract terms, but to *this* particular prisoner, at a particular time, in unique circumstances very different from those which normally pertain to the fact of imprisonment. The judgment in *UCC* is not helpful to the appellant.

Assessment on Causation

52. The emphasised words "*material bearing*" (cited earlier in para. 36) raise a question discussed in McMahon & Binchy in *Law of Torts* (4th ed. Bloomsbury). They observe that difficulties had arisen in the application of the "*but for*" test in negligence. They suggested the use of an alternative formula of asking whether a defendant's conduct was *the cause* of an event, in

the sense of inquiry, and if it was, was it a *material element*, or a *substantial factor in bringing it about*. (See McMahon & Binchy 2.124, and the note dealing with *Carey v. Minister for Finance* [2010] IEHC 247). I think the material element test is a very useful approach in determining whether there has been negligence.

53. The issue of causation can be dealt with quite shortly. I think the Court of Appeal was correct in its analysis. The evidence was that the hunger strike was caused by the Governor's refusal to accede to the appellant's demands. The *causa causans* was not the failure, or the delay, in responding to his complaints. Insofar as a question of prolongation of the hunger strike might be considered as a causative event, a response within 24 hours would have been the same as the delayed answers given 6 weeks later. The responses would not have differed. But, additionally, it could not be shown on any evidence that this had caused the appellant injury. Thus, any *nexus* between cause and injury, or damage, was broken. Thus, while I find myself in agreement with many of Baker J.'s observations on the fact of the ineffective complaints policy, I think that, as a matter of pure logic, the case in negligence faced an insuperable difficulty on causation.

Assessment on Proximity and Foreseeable Injury

54. In this section, the judgment deals with proximity and foreseeable injury together, as they are closely associated. As well as causation, there is also a further question on what is an emotive and historically charged issue. It is as to the circumstances in which it could be said there could be a duty of care sounding in damages to a person who embarks on a hunger strike? Here it is important to contextualise this case, acknowledging all the sensitivities. Seen now with the benefit of context, further legal argument and the Court of Appeal's analysis, the appellant's decision to begin a hunger strike can only be described as an autonomous act. It was his choice alone to embark on that course of action. It was in protest against two quite narrow changes. It was not suggested the prison authorities were unreasonable in making those changes. Nor was it ever suggested that the authorities were acting unreasonably in not reversing them, especially when faced with a hunger strike intended to put pressure on them. It is not hard to envisage other circumstances where there might be a duty to intervene, as in the case of a prisoner unable to make decisions with full capacity. But these considerations do not arise here. While prison authorities owe a range of duties of care to prisoners, these duties are limited by the principle of what is reasonable as a duty to be imposed on the authorities for this purpose from the point of view of objective third parties, as

opposed to the point of view of the appellant himself. It is not a general duty of care. It is not easy to see how the governor could owe a duty of care to prevent the appellant, a person held to be of sound mind, from embarking on this hunger strike, where he sought to place pressure on the authorities to agree to his demands, when this was inherently an autonomous decision. There are many situations in both private and public law where duties may indeed arise, but in the context of the law of negligence, with which this case is concerned, the premise is that a person of sound mind must be held be responsible for his or her own actions. Different considerations may, of course, arise in situations involving a vulnerable person, or a child, or an adult person insufficiently aware of a particular situation, where a duty may be imputed. But this is not such a case. Unlike *Reeves*, the position in this case evolved into one in which the respondents did not have "total control" over the appellant. (See *Orange v. Chief Constable* [2001] EWCA Civ 611, where the Court of Appeal distinguished *Reeves* on the facts.) By contrast to *Reeves*, the appellant, by his own choice, had taken matters into his own hands by engaging in what was quintessentially an autonomous choice and action, the nature of which meant that his consequent actions on foot of that choice were taken outside the realm of ones where it could be said the respondents had total control over him within that area of choice. The result was that no duty of the type suggested could be imputed to the respondents.

55. Always bearing in mind this is an action in negligence, the question is whether it can be said there is a duty owed which *is directed at the prevention* of the particular occurrence in question. Even honed down to the question of the delay in responding to the complaints, the case is predicated on imputing a status to the policy document, which it did not have, and on conduct, which did not give rise to an expectation sufficient to create a legal duty. The situation was created by the appellant's own autonomous decision to go on hunger strike; he was a person of sufficient capacity to be able to foresee the consequences of the course of action he had embarked on and its consequences.

56. There is considerable case law which establishes that many aspects of imprisonment do create a duty of care on prison authorities. These include protecting a prisoner's health, welfare and safety. In *Casey v. Governor of Midlands Prison* [2009] IEHC 466, Irvine J., in the High Court, noted that prison authorities were required to take all reasonable steps to avoid exposing prisoners to a risk of damage or injury, but the authorities were not required to guarantee that

prisoners do not suffer any injury. It is to be borne in mind that, in administering the prison, the Governor was exercising a function for the benefit of the public. Courts will necessarily be cautious in imposing a duty of care, where to do so might unnecessarily inhibit public authorities in their acts, choices and omissions, thereby rendering such authorities "hamstrung", and unable to discharge their functions without confidence or creativity. (McMahon & Binchy 6.78). Additionally, as the fact of imprisonment requires a significant degree of co-operation, a question must arise as to whether the nature of the relationship was altered by the appellant's own actions? In my view, it was clear the Governor continued to exercise a significant degree of *general* control over the appellant's life. But, at the relevant time, the appellant had chosen to exercise an autonomous decision in an area where, in effect, he sought to assert personal control over this vital aspect of his life and wellbeing. This was aimed at achieving his goals of reversing the two changes, in administrative practices, where there was no evidence that the authorities had acted unreasonably. The issue with regard to foreseeable injury is straightforward. There was no evidence that, as a result of the claimed acts of negligence, the appellant had actually suffered any identifiable injury caused directly and foreseeably by the respondent's conduct. Thus, the *nexus* of causation was broken.

57. Here it may be noted that courts have tended to lean against awards of damages in cases where there is no physical injury. This Court refused to award damages in a case where the plaintiff's psychiatric condition was solely on the basis of an unfounded fear of contracting a particular disease. (See *Fletcher v. Commissioners of Public Works* [2003] 1 I.R. 465). The appellant was simply not in a position to adduce any cogent evidence of either physical or psychological injury, *caused directly or foreseeably* by the appellant's conduct.

Assessment of Damages

58. The Court of Appeal pointed out that, in cases of tort which were actionable *per se*, nominal damages could be awarded, even where no actual damage had been suffered by a plaintiff. This is a correct statement of the law in situations which may, for example, arise in instances such as trespass to the person, or trespass to land. (McMahon & Binchy, para. 44.03). By way of contrast to contemptuous damages, such words do not indicate moral obloquy regarding a plaintiff. However, the Court of Appeal pointed out that nominal damages might not be awarded for the tort of negligence. This, too, is correct (cf. McMahon & Binchy, para. 5.05).

59. I think the Court of Appeal's analysis was correct on the damages issue. In short, it appears the award was on a non-compensatory basis in an action for negligence, which is not actionable *per se*, and for which, at present, no other basis exists in law, such as vindicatory damages.

Just and Reasonable

60. But, when all the issues are considered together, under the rubric of "just and reasonable", the claim in negligence faces insurmountable difficulties. In so concluding, however, I also think a number of the observations in the judgment of the Court of Appeal on the duty of care require some qualification. The Court of Appeal held that to hold that a duty of care should be imposed would not be "*in the* ***interests*** *of prisoners as a whole*", or indeed the general public. I agree with that statement, only in the strict sense– that is, in the context of whether or not a court should conclude there was a duty of care. But the introduction of an *effective* comprehensive complaints policy would, undoubtedly, be in the interests of prisoners as a whole, and, I think, the general public. This raises a question as to the extent to which the facts go beyond this one case. I would also have similar reservations about too broad an application of the statement that to impose a duty of care in the circumstances might be a "*disincentive to prison authorities*". I think this is also too wide, if it were understood as a basis for refusing to engage in an initiative which would be in furtherance of effective prison administration.

A Declaration

61. In this case, while the appellant did have a cause of action, it was ultimately a case where there were insuperable difficulties on causation and duty of care. This was a *lis inter partes*. I turn, therefore, to the question of declaratory relief. In declining to grant a declaration, the Court of Appeal cited *Omega v. Barry* [2012] IEHC 23, where Clarke J. (as he then was) identified four factors which a court must bear in mind when considering whether to grant such relief. First, the court must be satisfied there was good reason for so doing. Second, there must be a real and substantial, and not a merely theoretical question to be tried. Third, the party with carriage of the proceeding must have sufficient interest to raise that question. Finally, there must be a proper contradictor.

62. This was a succinct summary of the observations in *Transport Salaried Staff's Association v Córas Iompair Éireann* [1965] I.R. 180, where Walsh J. observed:

"In modern times the virtues of the declaratory action are more fully recognised than they formerly were and English decisions and dicta in recent years have indicated a departure from the conservative approach to the question of judicial discretion in awarding declarations. A discretion which was formerly exercised 'sparingly' and 'with great care and jealousy' and 'with extreme caution' can now, in the words of Lord Denning in the Pyx Granite Co. Ltd. [reference cited] be exercised 'if there is good reason for so doing', provided, of course, that there is a substantial question which one person has a real interest to raise and the other to oppose. In Vine v. The National Dock Labour Board,79 Viscount Kilmuir L.C. at p. 112 cites with approval the Scottish tests set out by Lord Dunedin in Russian Commercial and Industrial Bank v. British Bank for Foreign Trade Ltd.80 who said, at p. 448:-

> *'The question must be a real and not a theoretical question; the person raising it must have a real interest to raise it; he must be able to secure a proper contradictor, that is to say, some one presently existing who has a true interest to oppose the declaration sought. It is also to be observed that the fact that the declaration is needed for a present interest has always been a consideration of great weight."* (p. 202)

63. I have had the advantage of reading the judgment to be delivered today by my colleague Charleton J. That judgment contains an important discussion of the origins of declaratory proceedings. The issues raised there are worthy of consideration in themselves, and in great detail. Charleton J. correctly draws attention to what is said in Halsbury (5th ed. para. 12-14) on the question of declarations. The 6th edition does not contain anything different. What is important is the observation that the jurisdiction to grant a declaration is 'unfettered'. The footnote to the passage in Halsbury referred to refers to a judgment by Neuberger J., then a High Court Chancery judge, in *Financial Services Authority, Claimant* v. *John Edward Rourke (Trading as J.E. Rourke & Co.), Defendant* (Chancery Div. 19th October, 2001) ("*Rourke*"). There, Neuberger J. had to deal with the question of whether he should grant declarations sought by the claimant on factual issues, as to the falsity of various statements made by the defendant. He referred to the UK Civil Procedure Rules ("CPR") (40.20) to the effect that a court may make binding declarations, whether or not any other remedy is claimed. He went on to observe that as far as the CPR was concerned,

"*the power to make declarations appears to be unfettered*". This statement must, of course, be read in context. The power must be exercised within the confines of the case at hand. Neuberger J. stated that as between the parties to the proceedings, it seemed to him that the court could grant a declaration as to their rights, "*or as to the existence of facts, or as to a principle of law, where those rights, facts, or principles have been established to the court's satisfaction."*. He continued, "*The Court should not, however, grant any declarations merely because the rights, facts or principles have been established and one party asks for a declaration. The court has to consider whether in all the circumstances, it is appropriate to make such an order*." He cited *Patten v. Burke* [1994] 1 W.L.R 541, where Millet L.J. said the courts' duty was to "*do the fullest justice to the claimant to which he is entitled"*, holding that there was no rule of law preventing a declaration of fraudulent conduct. Neuberger J. also quoted Lord Woolf in *Messier-Dowty v. Sabena* [2001] 1 All E.R. 275, to the effect that at least in commercial disputes, the use of declaratory relief should not be constrained "*by artificial limits wrongly related to jurisdiction. It should instead be kept within proper bounds by the exercise of the courts' discretion.".* Thus, Lord Woolf held that in considering whether to grant a declaration, a court should take into account the question of justice to the claimant, the defendant, whether the declaration would serve a useful purpose, and whether there were any other special reasons for why or why not the court should grant the declaration. What emerges from this consideration therefore, is not whether the question of granting a declaration in this case is one of jurisdiction, provided it relates to issues which emerged in the case. The question is rather, one of judicial discretion; a matter which I discuss later.

64. *Rourke* is a judgment of the High Court of England and Wales. But, bearing in mind its author, it may be said this is a judgment of more than usual persuasive authority. It indicates the extent to which is the declaratory judgment has evolved in the neighbouring jurisdiction. Whether the Court should grant a declaration is not a question of jurisdiction but of judicial discretion. It is obvious that such discretion cannot be said to be entirely unfettered and must arise from the facts of the case in hand, having regard to the criteria stated in *Omega*. In the instant case, the Court of Appeal observed that one of the factors weighing against a declaration was that the appellant had, by then, served his sentence, rendering the question moot.

65. In the neighbouring jurisdiction, courts have, on occasion, utilised the declaration in 'public interest' actions in more recent years, where it serves a claimant's purpose at least as well as any

other remedy, even where such an order only declares what the legal position of the parties, does not change their legal position or rights, and is non-coercive in nature. A declaration cannot be awarded where a court would have no power to award a primary remedy – that is a matter of jurisdiction - but can be awarded when no other remedy is available. (See *Administrative Law in Ireland* (5th ed.), Hogan, Morgan, Daly (para.18.28) and *Civil Proceedings and the State* (3rd ed.) (Thompson Reuters) para 5.66-5.68.) Judgments of persuasive authority, such as those cited earlier, have indicated a judicial willingness to make a declaration, even though by the time a matter came to an appeal, there was no continuing *lis* between the parties which would directly affect the rights and obligations of the parties *inter se*. It is true that the discretion to hear disputes on matters of law should be exercised with caution, appeals which are academic between the parties will generally not be heard unless there is good reason in the public interest to do so. (Discussed in *R v. Secretary of State for the Home Department, Ex p. Salem* [1999] 1 AC 450; *Rusbridger v. Attorney General* [2004] AC 357.)

66. Should the Court exercise its discretion to grant a declaration in this case, concerning facts which emerged in the High Court? At its simplest, I consider the High Court judgment demonstrated the importance, indeed necessity, of an effective prison complaints system, and the fact that the system in X Prison was not functional. By its nature, a prison is a confined environment. Interpersonal issues can become vastly magnified in significance. This can lead to entirely disproportionate conduct. Some prisoners are vulnerable people; others may be volatile or prone to violence, or other anti-social actions or behaviour. A prisoner may be the subject of threats, victimisation, or intimidation. It is unfortunately a fact that in the past, some prisoners have come to serious harm at the hands of other prisoners. In my view, that there should be an effective, confidential complaints system in a prison is self-evident.

67. But, what clearly emerged in the evidence, was that the complaints system in this prison was not functioning. This was not simply an *inter partes* issue. To my mind, it is, or should be, a question of more general concern, although it arose during the course of the High Court hearing. I think these considerations underlay the High Court judge's thinking. Of course, matters such as this might be the subject of a passing observation in the course of a judgment, but I am not convinced that this would be sufficient in this case. Even though I and my colleagues are in

agreement that no duty in negligence can be found, the issues of prisoners' personal rights still lies in the background of this case.

68. My colleague, O'Donnell J., correctly observes that the form of declaration which I now propose was never sought by the appellant. This is of course true. In the proceedings, the appellant sought, rather: "*VI. A declaration that the defendant has breached the terms of the Irish Prison Service Prisoner Complaints Policy Document in his treatment of the plaintiff's written complaints dated the 10th February, 2015*." I agree that the declaration which I propose later in this judgment differs from that sought by the appellant. One of the reasons for the distinction drawn is that I think a declaration in the terms granted by the High Court would be less than fair to the Governor whose humane conduct towards the appellant was not criticised, but rather recognised. Additionally, I think the term 'breached' goes too far. A declaration against the Governor would do him less than justice in the circumstances. A court is entitled to vary the terms of a declaration sought.

69. Insofar as it might be said that the respondents were not on notice of the proposed form of declaration, it cannot be said that the facts giving rise to the proposed declaration can be a surprise to the respondents. A declaration in more direct terms was granted in the High Court. I do not think the fact the High Court granted a declaration can be a material consideration now. The Court of Appeal set aside the declaration as well as disallowing damages.

70. I should mention here that the United Nations Revised Standard Minimum Rules for the Treatment of Prisoners (The Nelson Mandela Rules) were specifically referred to in Judge Reilly's 'Review, Evaluation and Analysis of the Operation of the present Irish Prison Service Prisoner Complaints Procedure of April 2016'. So too, were the European Prison Rules. Both can be found referred to and quoted at p. 51 of Judge Reilly's Report).

71. Insofar as a question arises as to the source of the obligation to provide an effective complaints system, relevant constitutional and Convention authorities are referred to later. Judge Reilly's Report which deals with those obligations was undoubtedly a significant part of the High Court judge's thinking. The evidence adduced in the High Court speaks for itself.

72. To my mind, the test is not simply whether the appellant would derive a benefit from a declaration, but as the authorities referred to earlier make out, whether a declaration- albeit in this private action- would serve a useful purpose. For the reasons outlined earlier, I think a declaration

fulfils all those criteria. In *Transport Salaried Staff's Association*, Walsh J. referred to jurisprudence on declarations as evolving. That is still so. The nature of the jurisdiction is referred to in the Court's recent judgment in *Fox v. The Minister for Justice and Equality* [2021] IESC 61 as being a "*broad one*" albeit subject to limits. I consider that this is a case where a court should not refrain from pointing out that a complaints system which is essential to the effective running of a prison was non-functioning. Whether a declaration may have other consequences, such as in costs, whether in whole or in part, may well be a consequence, but this is a matter for the court to determine in accordance with law.

73. Order 19, rule 29, provides that no action or pleading should be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the court may, if it thinks fit, make binding declarations of right, *whether any consequential relief is, or could be, claimed or not*. To obtain an order, therefore, it is not necessary for a moving party for a declaration to establish that he or she has an independent cause of action. Nor is it necessary to show, in a strict sense, that rights had been violated or infringed.

74. The question in this case is whether it can be said that the parties had sufficient *interest* in a declaration. In *Transport Salaried Staffs' Association,* Walsh J. was prepared to grant a declaration on the basis that the plaintiffs had a substantial interest, even though that interest was aimed at preventing a unilateral breach of an agreement simply to which they were parties. In *O'Brien*, the court was prepared to hold the issues were not moot, because of the Board's continuing interest in determining the levels of its powers. In *M.C.*, the court held that, even though the applicant had been discharged from detention, there remained issues of central importance to the constitutional and Convention order. The instant proceedings did not raise matters which were *non-justiciable,* but, rather, where the law simply leads to the conclusion that there was not negligence, and no duty of care existed. But the issue was nonetheless one capable of litigation in the courts of this country. (See *McDonald v Bord na gCon* [1965] 1 I.R. 217.)

75. Here, the issues between the parties have actually only now been finally determined by this Court in the judgments delivered. But, in my view, there remains an issue of public significance between the parties, and arising from the case as pleaded, in which it can be said that the appellant had an interest sufficient for a declaration, and, whether willingly, or not, the State has an interest not only because of compliance with international standards on prison conditions,

but in the interest of the effective administration of a prison under its care. Any questions of mootness and discretion must, too, be placed against what emerged in the evidence regarding the complaints process. The system was, as Baker J. found on ample uncontested evidence, "not functional". The method of dealing with complaints was "less than satisfactory", and did not comply with basic levels of fairness and procedural correctness. These findings were made five years after the Inspector of Prisons had proposed the introduction of a complaints policy. (cf. Guidance on Best Practice relating to Prisoners Complaints and Prison Discipline, 2010). By April, 2016, Judge Reilly stated, in terms in a further report, that "*there was a perceived lack of accountability at all levels*", and that he was "*satisfied that, as presently operating, the Irish Prison Service does not seem capable of exercising operative control of a complaints system which should be robust, fair and have the confidence of staff, prisoners, and the general public*". His report described a "*litany of failures*" which had rendered the process "*ineffective*", and that there was an absence of any independent person to whom complainants could resort, if their complaints were not dealt with in time. (cf. Report, Evaluation and Analysis of the operation of the present Irish Prison Service complaints procedure by Judge Michael Reilly, Inspector of Prisons, April, 2016).

76. Baker J. observed that, while the policy document was formally introduced in 2014, the necessary element of independence in the complaints system, for which the then Inspector of Prisons called for, was not included. Judge Reilly went so far as to describe the function to investigate complaints given to the Inspector as being a "hollow power". (para. 2.18 of "Review, Evaluation and Analysis of the Operation of the Irish Prison Service, Prisoner Complaints Procedure", Report by Judge Michael Reilly, Inspector of Prisons, published in April, 2016). In this State there are some 3,700 prisoners. The issues raised by the absence of an effective complaints policy, therefore, have a significance which goes far beyond this case.

77. This Court has, on a number of occasions, held that, even though an issue may be moot, a declaration may yet be appropriate. In *O'Brien v. The Personal Injuries Assessment Board (No. 2)* [2007] I.R. 328, the applicant had been granted a declaration by the High Court, that the respondent, in refusing to accept or act upon an authorisation signed by the applicant which requested that the respondent deal with his solicitor, was acting in breach of s.7 of the Personal Injuries Assessment Board Act, 2003, or without any authority under any provision of the Act. After the proceedings were determined by the High Court, and the filing of an appeal, the applicant

received an authorisation from the respondent pursuant to s.17(6) of the same Act. This permitted him to institute court proceedings in respect of his claim for personal injuries against the employer. The applicant brought proceedings claiming that, as his claim now fell outside the control of the respondent, the question of the lawfulness of the respondent's practice in refusing to communicate with the solicitors was moot, and the appeal should not proceed to hearing. In dismissing the application, this Court, (Murray C.J., Denham and Fennelly JJ.), held that the *respondent*, the Assessment Board, continue to have a real interest in the issues pending on appeal, in that they related to the exercise of its statutory powers, and a substantial question of costs. The Court went on to hold that, where a party had a *bona fide* interest in appealing against a declaratory order of the High Court, the effect of which was not confined to past events, *peculiar to the particular case*, the court should be reluctant to deprive it of its constitutional right to appeal. In *O'Brien*, the Board continued to be constrained in the exercise of its powers under statute by virtue of the declaration granted by the High Court. This Court observed that, as there was a real possibility that the applicant would have to institute proceedings at some point in the future, and would seek to rely on the judgment of the High Court, the matter could not be said to have no further importance for the applicant either. Murray C.J. observed that:-

> *"As a result of the proceedings initiated in the High Court by the applicant the respondent has been sanctioned or disadvantaged by a High Court finding that the practice which it seeks to follow is unlawful and by an order for what would be undeniably a substantial amount of costs. Obviously the respondent has a wider interest than the applicant insofar as the conclusion and Declaration of the High Court affects the manner in which it exercises its statutory functions, not only vis-à-vis the applicant but with regard to some thousands of other applications made to it. This situation has been arrived at by virtue of the fact that the High Court determined the obligations of the respondent to the applicant in the exercise of its statutory powers. It is acknowledged that none of these issues could be considered to have become moot prior to 26th January, 2006, the date when the applicant was authorised to bring legal proceedings and no longer had to deal with the respondent."* (para. 17)

78. Having cited United States authority, to the effect that proceedings may be said to be moot when there is no longer any legal dispute between the parties, Murray J. went on to point out that:-

"While the reluctance or refusal of courts to try issues which are abstract, hypothetical or academic, and thus fall within the notion of mootness is common to most systems of law, the breadth of that concept, its rigid or discretionary application, … is often informed by national judicial policy. It may also be influenced by the jurisdiction of the court concerned and the nature of the remedies sought. …" (para. 20)

79. Speaking of the respondent's right to appeal, Murray J. pointed out further that:-

"Where, as in this case, a party has a bona fide interest in appealing against a declaratory order of the High Court which is not confined to past events peculiar to the particular case which have been resolved in one way or another the Court should be reluctant to deprive it of its constitutional right to appeal." (para. 22)

80. Thus, he held it could not be truly said that a decision on the appeal would not have the effect of resolving further "*some controversy affecting or potentially affecting the rights of the parties*". Nor did he consider that the passage of time had caused these proceedings to "completely lose 'its character as a present, live controversy'". In fact, both parties, although in different forms, had an interest in the outcome of the appeal.

81. In *MC v. The Clinical Director of Central Mental Hospital* [2020] IESC 28, this Court, (Clarke C.J., McKechnie, MacMenamin, Charleton, Baker JJ.) was prepared to grant a declaration on the basis that an important question remained to be determined, even though the applicant had been discharged from the Central Mental Hospital. A subsisting issue regarding the administration and interpretation of procedures was not only subjectively important from the point of view of the applicant, because of embarrassment and humiliation which she had suffered, but also because of the central importance of the rights invoked in the constitutional and Convention legal order. (para. 52). Baker J., by now speaking for this Court, referred to *Biržietis v. Lithuania*, Application No. 49304/09 (2016) where the European Court of Human Rights ("ECtHR") held that, although the prisoner applicant had been released from prison, absent an acknowledgement either express or in substance that there had been a breach of the Convention, and an offer of redress, that the applicant had not lost his status as a "victim" under the Convention, for the purposes of admissibility. She observed that, while the ECtHR was applying a test for admission of a complaint, a test that has regard to an applicant's subjective perceptions, and what was objectively at stake, was a "useful approach" to the argument that the proceedings in a given case were moot (para. 49).

82. This appeal concerns only the finding of negligence and the declaration. The appellant did not cross-appeal Baker J.'s decision to dismiss the preponderance of the appellant's constitutional and Convention claims. This Court has repeatedly made clear that principles identified in Strasbourg jurisprudence are not to be adopted or applied so as to provide a basis for claims under the Constitution, sometimes seeking significant awards of common law damages levels. (cf. *Simpson v. Governor of Mountjoy Prison* [2019] IESC 81. But there are circumstances where the law of tort can serve as an important tool for the vindication of constitutional rights, and there is no authority for the proposition that tort law is concerned exclusively with the allocation of damages, and no other form of remedy. (*Grant v. Roche Products Ireland* [2008] 4 I.R. 679, at 701, Hardiman J.).

83. My colleague O'Donnell J. fairly raises the question of the derivation or provenance of the authority that prisoners have a right derived from Article 40.3 of the Constitution to communicate, albeit qualified by the exigencies of the fact of imprisonment. (*Kearney v. Minister for Justice* [1986] I.R. 116). *Kearney*, of course, concerned a failure on the part of the prison officer to ***deliver*** *letters to a prisoner*. (See also *Silver v. United Kingdom* [1983] 5 EHRR 347.) In *Vlasov v. Russia* Application. No. 78146/01 (2008), the ECtHR found a violation of Article 8 ECHR when a prisoner's correspondence was stopped for raising complaints about prison matters. (See also, in particular, *P v. United Kingdom*, App. 1529/10 (2013) cf. Rogan, *Prison Law*, para. 1.15 – 1.16, and 3.54 – 3.57; but also *Ceesay v. Austria* Application. No. 72126/2014 (2017).)

84. I do not think the issues which emerged in this case regarding a complaints system which was so deficient should go unremarked, or without a form of remedy. As I have observed, the existence of an effective prison complaints procedure is not simply an issue *inter partes*; actually it can be seen as transcending the circumstances of this one case. As long ago as 2014, the question was the subject of inquiry was before the Human Rights Committee of the United Nations. In the course of written submissions, counsel for the appellant drew attention to the fact that a new Irish Prison Service Complaints Policy was due to be introduced by the Irish Prison Service by the end of November, 2020. This new system is to involve a categorisation of complaints into serious and less-serious types, with an independent complaints unit, staffed by three officials, to deal with these questions. Additionally, it was anticipated that, by late 2021, the Ombudsman would be expected to have a role in the management of prisoner complaints. (See "No Prisoner Ombudsman

Until late 2021", Irish Examiner, 6th November, 2020, available at https://www.irishexaminer.com/News/courtand crime/arid-40077377. html.) It would be understandable if these plans had been affected by present circumstances. But it is to be hoped that the obligations will soon be realised.

85. While the appellant has not established that he is entitled to damages for negligence, this is a case where a declaration would serve a significant public purpose. It is not a theoretical question. The issue was not in any sense moot when the High Court order was made, and the appellant was serving his sentence. It has not been said that a revised and effective complaints system has now been put in place, despite the elapse of time since the hearing at first instance. This case, therefore, provides a means whereby there could be adequate scrutiny, and a means whereby the system-failings can be highlighted. The Second General Report of the European Committee for the Prevention of Torture explained the importance of an effective grievance procedure as a fundamental safeguard against ill-treatment in prisons (para. 54). The United Nations Standard Minimum Rules for the Treatment of Prisoners (Rule 57); the European Prison Rules 2020, (para. 70.6) both make observations to similar effect.

Form of Proposed Declaration

86. I would propose, therefore, a more limited form of declaration, which goes no further than the evidence and findings. The purpose of this is to mark that the policy and system did not function in this case. Hopefully a declaration will be a further spur to the introduction of an effective complaints process. For the reasons set out, I would, therefore, propose to uphold the judgment of the Court of Appeal on the negligence issue, but set aside that judgment on the question of a declaration, holding that there should be a declaration to the effect *that the administration of the Irish Prison Complaints Policy Document, introduced in the year 2014, did not comply with the requirement to provide an effective complaints system in the case of the appellant*.

Conclusion

87. While this appeal was pending, the Court was informed that the appellant had unfortunately died. This is indeed a sad case. The appellant's background and life experience speak for themselves. Regrettably his actions inflicted pain and fear on himself and others. As indicated

earlier, I would uphold the judgment of the Court of Appeal on the negligence issue, but I consider the facts of this case speak strongly in favour of this Court making a declaration in this judgment.