



**AN CHÚIRT UACHTARACH  
THE SUPREME COURT**

**[S:AP:IE:2017:000170]**

**Clarke C.J.  
O'Donnell J.  
McKechnie J.  
MacMenamin J.  
O'Malley J.**

**BETWEEN/**

**GARY SIMPSON**

**PLAINTIFF/APPELLANT**

**AND**

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

**DEFENDANTS/RESPONDENTS**

**Judgment of O'Donnell J. delivered the 14th day of November 2019.**

1. I agree with the judgment about to be delivered by MacMenamin J. in this matter, and add these observations only because certain arguments made in this case have touched on issues which may require further consideration in future cases.
2. Given the extent to which prison conditions have been the subject of consideration by the European Court of Human Rights ("ECtHR"), it is, perhaps, understandable that the appellant's case here was, broadly speaking, that the conditions to which he was subjected violated an unenumerated right not to be subjected to inhuman or degrading treatment, in terms and scope identical to the area protected by Article 3 of the European Convention on Human Rights ("ECHR"). In these proceedings, the appellant's argument seeks to couple the detailed jurisprudence of the ECHR together with a claim in the nature of a constitutional tort, seeking to recover damages in Irish law, implicitly on a scale more generous than that provided in claims before the ECtHR, for the breach of the unenumerated right.
3. I agree with MacMenamin J. that this reasoning cannot be accepted. At first sight, it may appear both unremarkable and unobjectionable. Who, after all, can possibly be heard to question a right not to be subjected to torture or inhuman or degrading treatment? It is also fair to observe, that in one of the earliest prison condition cases in this jurisdiction,

*The State (C.) v. Frawley* [1976] I.R. 365 accepted that the unenumerated right to bodily integrity included a right to freedom from torture and inhuman and degrading treatment, although the right in that case was not found to have been breached, and there was little focus therefore on the derivation of the right. Furthermore, since the coming into force of the European Convention on Human Rights Act 2003 it is possible to claim damages for a breach by the State of its obligation under section 3 to perform its functions in a manner compatible with the State's obligations under the Convention provisions (subject to any statutory provision or rule of law) if no other remedy in damages is available. It might appear, therefore, that debate about the route is superfluous when the correct destination is reached.

4. While nothing may turn in this or indeed in many cases, it is important to consider the line of reasoning asserted on behalf of the appellant, since if correct, it may be adopted uncritically in many cases where ECHR jurisprudence is relevant. There are, or may be, differences in the nature of the claims that may be made, the defendant against whom such claims can be brought, and perhaps the approach to damages. It is important therefore to pay attention to, and scrutinise carefully, the pathway toward any claim to damages in this case.
5. I have no doubt that the Irish Constitution prohibits, and has always prohibited, conduct which is also outlawed by Article 3 of the ECHR. However, I consider it wrong in principle to seek to introduce the language and jurisprudence of the ECHR into the Irish Constitution through the vehicle of unenumerated rights protected under Article 40.3.2° of the Constitution, and in this case the unenumerated right to bodily integrity.
6. First, the Constitution makes no express or implied reference to any such right as so formulated. There are, of course, obvious historical reasons why the drafters of the ECHR felt it necessary to include an express and absolute prohibition on torture and inhuman and degrading treatment in the new Convention. But, it strains credulity to suggest that the Irish Constitution anticipated this development and not only did exactly the same thing in the same terms, but achieved this object without any express reference in the text. The terms and structure of the ECHR has meant that the interpretation of Article 3 has developed in a particular fashion and into new areas. As the extensive case law surveyed in the judgment of MacMenamin J. shows, it has, for example, become the vehicle for attempts to improve, among other things, prison conditions throughout the contracting states. Furthermore, the ECtHR has adopted an "evolutive interpretation" which has the effect of discovering new rights or expanding the protection of existing rights. This is of course a matter for the jurisprudence of that Court, and indeed may be appropriate in the terms of an international convention that is not easily amended. Again, however, it strains credulity to maintain that the Irish Constitution, through the medium of an unenumerated right, adopted the self-same prohibitions which moreover developed in precisely the same way. In any event, the function of the Irish Courts is to uphold the Constitution, and that duty cannot be performed if the scope of rights protected under the Constitution is to be determined by the jurisprudence of a court which is not established under the Constitution and has no obligation to uphold it. While it is to be expected that

the two instruments guaranteeing rights considered fundamental would tend to cover much of the same ground, and the interpretation of one is often helpful in understanding similar provisions contained in the other, they are different instruments and there will be many areas, particularly at the margins (which are often the subject to litigation) where the approach, or substance, may be different.

7. While it is perhaps understandable, therefore, that a plaintiff would seek to blend the established ECHR jurisprudence on prison conditions with a claim for damages for breach of an Irish constitutional right, this is not, in my view, a permissible course, at least in the way advanced in this case. It is a noteworthy feature of this case that there is a simple assertion or, perhaps more accurately, assumption, that there is an unenumerated right to freedom from inhuman or degrading treatment protected by the Irish Constitution, without offering any explanation as to why that is so.
8. As observed already, I have no doubt that the treatment, which at least in general terms, would fall foul of Article 3 of the Convention is also prohibited by the Constitution. Torture, for example, is outlawed in Irish law because of the specific protection given to the person in Article 40.3 (and without the need to look to other provisions of the Constitution), a right which also clearly extends beyond a prohibition of treatment which can be characterised as torture. Similarly, the Irish Constitution is plainly relevant to the issue of prison conditions. Indeed, it is noteworthy that more than 40 years ago, in the specific context of prison conditions, it had been decided that, in principle at least, if prison conditions were so bad they could, in an extreme case, render a detention unlawful and require the release of the prisoner (*State (McDonagh) v. Frawley* [1978] I.R. 131). A citizen can be deprived of liberty in accordance with law, but a law which itself upholds and is consistent with the Constitution and the values it espouses. However, to assert an unenumerated right to freedom from inhuman or degrading treatment in those terms is to argue backwards from a desired result, rather than forward from the text of the Constitution, and what is to be deduced from it, and the jurisprudence of the Irish courts interpreting it.
9. Advocate General Hogan, writing extrajudicially, has pointed out that it is often unnecessary to speculate on the existence of an unenumerated right when there are clearly enumerated rights addressing the same subject. For example, the unenumerated right of bodily integrity could be said to be encompassed or capable of being deduced from the express guarantee in Article 40.3.2° that the State is obliged to vindicate the "person" of the citizen (see Hogan, "Unenumerated personal rights: the legacy of *Ryan v The Attorney General*" in Cahillane, Gallen and Hickey (eds.), *Judges, Politics and the Irish Constitution* (Manchester University Press, 2017), pp. 49-63. Others have expanded upon this theme. See, for example, Kenny 'Recent Developments on the Rights of the Person in Article 40.3: *Fleming v Ireland* and the Spectre of Unenumerated Rights' (2013) 36(1) D.U.L.J. 322, and Doyle and Hickey, *Constitutional Law: Text Cases and Materials* (2nd ed., Clarus Press, 2019), Chapter 15.

10. The right of the person, as it has been described, clearly entails more than a prohibition of physical intrusion. Indeed, both the civil and criminal law of assault, which is one of the ways in which the State gives effect to the guarantee to protect the person of the citizen, is not limited to physical touching of the body of the person, and there is no reason to consider the enumerated right as limited in this way. On the contrary, it is, I think, possible to consider that it goes further, and protects the personal space and psychological well-being of the individual. It is clearly implicated when a person is confined by the State in cramped overcrowded and unsanitary conditions with little possibility of exercise. In understanding the extent of the right of the person, it is, I think, useful to have regard to the right of privacy, identified in *McGee v. The Attorney General* [1974] I.R. 284 as a right deduced from a series of enumerated rights and the social order contemplated by the Constitution. Privacy obviously has a physical element, but also clearly extends beyond it, and it contains aspects of autonomy. When both rights are read as they must be, which is in the light of the value of dignity espoused in the preamble to the Constitution, it is not difficult to understand why torture, or inhuman or degrading treatment, or indeed severely substandard prison conditions, can be an infringement of the constitutional rights of the individual. The fundamental rights, including the personal rights contained in Article 40, were adopted "so that the dignity and freedom of the individual may be assured" and must be interpreted in that light.
11. When the Constitution is viewed as a whole, then it seems clear that the guarantee of protection of the person in Article 40.3.2° must mean that, while the State may lawfully deprive a citizen of liberty in accordance with law, it may not do so by a means which, far from assuring the dignity of the individual, falls below a standard that could be considered minimally acceptable. It is not suggested here that the conditions in which the appellant was held can be justified or excused either by exigency or emergency or some contravening weighty consideration.
12. Accordingly, I agree with MacMenamin J. that the constitutional rights of the appellant, and in particular the right of the person protected by Article 40.3.2° were breached in this case.