THE HIGH COURT

[2024] IEHC 418

[Record No. 2022/592 JR]

BETWEEN

JAMIE LORDAN

APPLICANT

AND

THE MINISTER FOR SOCIAL PROTECTION, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

THE IRISH HUMAN RIGHTS AND EQUALITY COMMISSION

NOTICE PARTY

JUDGMENT of Ms. Justice Bolger delivered on the 9th day of July 2024

1. The applicant was in receipt of a disability allowance from the Minister for Social Protection, having established that his permanent disability renders him unable to work and satisfied the relevant means test. That disability allowance was stopped during various periods of time that the applicant was lawfully detained in prison. He sought a review of the decision to stop the payments during that time, which was refused by the Minister on 5 May 2022 on the grounds that during imprisonment, the applicant did not meet the qualifying criteria set out in s. 210(1)(ba) and (bb) of the Social Welfare Consolidation Act 2005 (hereinafter referred to as the 'Act of 2005') for payment of a disability allowance.

2. The applicant seeks *certiorari* of the Minister's decision. He also seeks a declaration of unconstitutionality in relation to s. 210(1)(ba) and (bb) on the basis (1) it involves non-judicial punishment contrary to Articles 34 and 38 of the Constitution; (2) it treated the

applicant unequally contrary to Article 40.1. He also seeks a declaration pursuant to s. 5 of the European Convention of Human Rights Act 2003 that s. 210(1) treated him contrary to the ECHR as the disability allowance must be administered without discrimination on grounds identified in Article 14 of the Convention. Finally, he seeks declaratory relief that he is entitled to reinstatement of his disability allowance upon his release from prison.

3. For the reasons set out below, I am refusing this application.

Disability Allowance

4. Section 210 of the 2005 Act provides for a disability allowance and the eligibility criteria that must be satisfied to obtain it. The relevant subsections are set out below:

> *"Entitlement to allowance.*
>
> *210. (1) Subject to this Act, an allowance ("disability allowance") shall be payable to a person—*
>
> > *(a) who has attained the age of 16 years but has not attained pensionable age,*
> >
> > *(b) who is by reason of a specified disability substantially restricted in undertaking employment (in this Chapter referred to as "suitable employment") of a kind which, if the person was not suffering from that disability, would be suited to that person's age, experience and qualifications, whether or not the person is availing of a service for the training of disabled persons under section 68 of the Health Act 1970,*
> >
> > *(ba) subject to subsection (10), the reason for whose substantial restriction in undertaking suitable employment is as a direct result of the person concerned being incapable of work and for no other reason,*
> >
> > *(bb) who, were it not for the substantial restriction, would be available to work in insurable employment or insurable self-employment, and*
> >
> > *(c) whose weekly means, subject to subsection (2), do not exceed the amount of disability allowance (including any increases of that allowance) which would be payable to the person under this Chapter if that person had no means.*
>
> *…*

(8) The conditions under which a person shall be regarded for the purposes of this section as being substantially restricted in undertaking suitable employment by reason of a specified disability shall be specified by regulations.

(9) A person shall not be entitled to disability allowance under this section unless he or she is habitually resident in the State.

(10) A person shall not be disqualified for receipt of a disability allowance while engaging in a prescribed course of education, training or development."

Section 210(1)(ba) - (bb) was inserted after the Supreme Court's decision in *P.C. v. Minister for Social Protection* [2017] IESC 63, which is considered further below.

5. In the past, disability allowance, or a portion thereof, was not paid to a person residing in certain State facilities, but since 2007, all qualifying persons are paid a full disability allowance regardless of their living arrangements.

6. Section 249, whilst not impugned in this application, does merit mention as it provides for an automatic disqualification of certain persons from certain benefits. Section 249(1), (1A) and (6) provide:

"Absence from State or imprisonment.

249. (1) Except where regulations otherwise provide, a person shall be disqualified for receiving any benefit under Part 2 (including any increase of benefit) for any period during which that person—

(a) is absent from the State, or

(b)is undergoing imprisonment or detention in legal custody.

(1A) A person shall not be regarded as undergoing detention in legal custody for the purposes of entitlement to disability allowance while the person is detained for treatment pursuant to –

(a) an admission order or renewal order made under the Mental Health Act 2001,

(b) an order made under section 38 of the Health Act 1947,

(c) an order made under section 4 or section 5 of the Criminal Law (Insanity) Act 2006,

…

(6) A person shall be disqualified for receipt of jobseeker's allowance, pre-retirement allowance, supplementary welfare allowance, disability allowance or farm assist (including any increase in such allowance or assistance) while he or she is—

(a) resident, whether temporarily or permanently, outside the State, or

(b) undergoing penal servitude, imprisonment or detention in legal custody."

7. Disability allowance was first introduced by s. 50 of the Health Act 1953 as a social welfare, means tested payment. It was amended by s. 4 of the 2019 Social Welfare Act and became what the Minister calls *"working age payments"* made to persons over the age of 16 and under the State pension age where their disability restricts them in undertaking suitable work. Similar arrangements were put in place for certain other social welfare payments including maternity, lone parents and illness. The Minister describes those statutory provisions as establishing qualification criteria rather than excluding people from cover as occurs with section 249. Those eligibility criteria for disability allowance are (1) the person has a disability and (2) they would be able to undertake suitable work were it not for their disability. The Minister says the purpose of the allowance is to support a person who cannot work because of their disability but that this does not apply during a period of incarceration in prison because the disabled person, at that time, is unable to work for a reason other than their disability and, therefore, they no longer qualify for disability allowance. Once they leave prison, they can reapply in accordance with the statutory eligibility criteria. The Minister has put an administrative arrangement in place whereby a person who was in receipt of disability allowance spends less than six months in prison is automatically put back on disability allowance upon their release, but a person who serves more than six months must reapply upon their release. The applicant condemns this as unlawful and seeks a declaration that a disability allowance must be reinstated upon the disabled person's release from prison.

Burden of proof

8. The applicant challenges the constitutionality of s. 210(1) of the 2005 Act, to which a presumption of constitutionality applies. The burden of proof rests on the applicant. The constitutionality of a statutory provision can be challenged by way of judicial review proceedings, even though the greatest suitability of a plenary hearing for such a claim has been recognised previously (as per my decision in *Z.G.& anor v Ireland & ors* [2024] IEHC 413). The limitations of judicial review when mounting a constitutional challenge can be

seen here in the brief affidavit evidence setting out the factual basis for the applicant's challenge to the lack of an automatic reinstatement of disability allowance upon a prisoner's release. The applicant was still in prison when the proceedings were instituted and the affidavits sworn. He had been released by the time the case came on for hearing, but the circumstances of his release were not on affidavit and were, properly, not relied on by his legal representatives. There was, therefore, very little factual basis for his challenge to his treatment upon his release. There was also a lack of clear evidence about the applicant's financial circumstances whilst in prison. The applicant stated on affidavit that he had no other means of financial support during his time in prison and that the legislation operates to deprive people in prison from receiving disability payments they need to survive. His written submissions claimed he had been left *"practically destitute"*. Those allegations were not challenged by the Minister. In the course of the hearing, and arising from questions raised by the court, it emerged that every person in prison receives a standard weekly gratuity of €11.90 regardless of whether they work during their time in prison or not.

9. Grounding a challenge to the constitutionality and consistency with the ECHR of legislative provisions on limited and unclear evidence is not helpful.

P.C. v. Minister for Social Protection

10. The applicant relied heavily on the decision of the Supreme Court in *P.C.*, particularly in challenging the denial of disability allowance during his incarceration as an unconstitutional extra-judicial punishment. The applicant in *P.C.* was entitled to State Pension Contributory ('SPC') because of the contributions he had made during his working life. Whilst in receipt of this pension, he was sentenced to a lengthy prison sentence. Pursuant to s. 249(1) of the 2005 Act, as it was then, a person was disqualified from receipt of SPC during a period of imprisonment, but not during time on remand or a sentence later set aside by reason of an acquittal. The original version of the legislation introduced by s. 3 of the 1908 Act had disqualified an imprisoned pensioner from receiving pension for a further period of ten years from the date of their release from prison, which had been removed by the time of the *P.C.* challenge. MacMenamin J., for the Supreme Court, described the pension (at para. 31) as *"a qualified entitlement derived from statute"* rather than a property right, and found its removal was a sanction *"not imposed by a court of law"* (at para. 48) and one which was *"originally intended to be punitive in purpose"* (at para. 57). In applying the criteria developed by the court in *Enright v. Ireland* [2003] 2 I.R. 321*,* by which punishment

within Article 38 that could only be imposed by an Article 34 court is to be determined, he found *"the provision is a penalty"* and *"a punishment which is not imposed by a court"* (at para. 57) but which is applied in addition to the punishment imposed by the court. He concluded, therefore, (at para. 65) that, *"the State may not operate a disqualification regime that applies only to convicted prisoners and, thereby, constitutes an additional punishment not imposed by a court dealing with an offender."*

11. The applicant relies on *P.C.* in arguing that s. 210(1), a different statutory provision to that at issue in *P.C.*, imposes an additional penalty on a person in receipt of disability allowance without any consideration by the sentencing court, and therefore contravenes Articles 34 and 38 of the Constitution and falls foul of the principle of the separation of powers. The Minister, in distinguishing the judgment in *P.C.*, emphasised the eligibility criteria of s. 210(1) as compared to the disqualification that applied in the statutory provisions struck down in *P.C.* The Minister also points to the different legislative history of the two statutory provisions and the two social welfare allowances. The disqualification of a pensioner who was imprisoned upon a criminal conviction had always been part of the legislative history of the SPC, applied in an even more onerous way in the past when the imprisoned pensioner's disqualification continued for ten years post-release. By contrast, the legislative history of the disability social welfare allowance had always made payment dependent on eligibility. The Minister also pointed to the means tested nature of disability allowance as versus the contributory nature of the SPC for which Mr. C had made contributions from his earnings throughout his working life.

12. The decision of the Supreme Court in *P.C.* does not require this court to condemn the ineligibility of a person in receipt of disability allowance during the period of incarceration in prison as an unconstitutional extra-judicial punishment. Section 210(1) requires an applicant for disability allowance, along with a number of other working age social welfare payments, to establish that they have a disability as a result of which – <u>and for no other reason</u> – they are restricted in undertaking suitable employment. The applicant's ineligibility was because his incarceration restricted him in undertaking suitable employment, in addition to his disability. Therefore, once he was sent to prison, he no longer qualified as his disability was not the only reason for his restriction in undertaking suitable employment. His removal from eligibility for disability allowance was not designed as a punishment to be endured in addition to whatever sentence was imposed on him by a court.

13. By contrast with the automatic statutory disqualification impugned in *P.C.*, s. 210(1) operates to render a person in prison, regardless of the nature of their imprisonment and whether they are later acquitted, ineligible for payment of a disability allowance that requires an inability to work due to a disability and no other reason. Section 210(1) does not render a person incarcerated in prison ineligible for disability allowance per se, but rather as a result of such a person being in a situation that renders them ineligible as they are now unable to engage in employment for a reason in addition to their disability by operation of the criteria set out in section 210(1). This is a legitimate legislative choice for the legislature to have made in enacting section 210(1). It does not morph into an unconstitutional extra-judicial punishment simply because a disabled prisoner can no longer satisfy the s. 210(1) criteria while they are in prison, as their ineligibility to receive the allowance is not because of their disability but because they are in prison. This is but one of the many consequences a lawful deprivation of liberty will have on a person who is required by law to spend time in prison.

14. The *Enright* criteria, neither cited nor relied on by the applicant, are not satisfied here, which lends further support to the clear distinction between the statutory disqualification struck down as unconstitutional in *P.C.* and the legitimate s. 210(1) ineligibility for receipt of a disability allowance due to a disabled person's inability to work for a reason in addition to their disability.

Constitutional equality: Article 40.1

15. The applicant's equality argument centres on the different treatment of a recipient of disability allowance who is no longer eligible for payment pursuant to s. 210(1) because they are in prison and unavailable for suitable work, as compared to a recipient of disability allowance who is detained for treatment pursuant to various legislative provisions. The difference in treatment of those two disabled persons arises from s. 249(1A), set out above, which allows the person who is *"detained for treatment"* to retain their disability allowance. This is very different to the applicant's detention pursuant to the imposition of a prison sentence which results in the loss of his disability allowance.

16. In order to ground an Article 40.1 constitutional right to equal treatment, the applicant should be able to show that they are in a relevant comparable situation to that of their chosen comparator. Whilst the applicant and his chosen comparator are both detained against their will and are both deprived of their liberty, the basis for their respective detentions are entirely different. The applicant's chosen comparator is *"detained for*

treatment", potentially, but not necessarily, for the same condition as renders them eligible for payment of a disability allowance. The applicant is detained by order of a court as a result of the various situations that can lead to prison detention, including having been convicted of a criminal offence or having been charged with an offence, denied bail and detained on remand. The Oireachtas has chosen to treat detention for treatment differently to detention of a person in prison, in relation to disability allowance. Both disabled persons are detained but on a different legal basis and are, therefore, in very different positions. This does not allow an Article 40.1 comparison to be made. The person detained for treatment had been found to be eligible for payment of disability allowance as their disability rendered them unable to undertake suitable employment. The fact that they are subsequently detained for treatment does not give rise to any new or additional reason why they are unable to undertake employment. They are still unable to work due to their disability and possibly (if the reason for their detention relates to a different medical condition) also due to a separate, but still medical, condition. That is an entirely different situation to the recipient of disability allowance who is now unable to undertake suitable employment due their detention in prison, in addition to being unable to work due to their disability and is, therefore, deemed ineligible for disability allowance. That is a legitimate legislative choice that the Oireachtas is entitled to make which falls well short of the test developed by the Supreme Court in *Donnelly v. Minister for Social Protection* [2022] IESC 31 and more recently endorsed by the Supreme Court in *O'Meara v. Minister for Social Protection* [2024] IESC 1, that sets out what is required for treatment to reach the level of unconstitutional inequality, namely *"discrimination that is based on arbitrary, capricious or irrational considerations"* (as per (i) of para. 188 of the judgment of O'Malley J.). Counsel for the applicant correctly condemns a *"facially neutral"* basis for invidious discrimination as unlawful, but no such underbelly of what is in fact unlawful discrimination is at play here. The legislative distinction drawn between disabled convicted criminals and disabled persons detained for treatment is not capricious, irrational or perverse and, therefore, does not engage the protection of Article 40.1 of the Constitution. There is no basis for finding s. 210(1) to be in breach of Article 40.1 of the Constitution.

Reinstatement of disability allowance upon release

17. In addition to challenging his ineligibility for disability allowance whilst incarcerated in prison, the applicant separately seeks to challenge what he says is the Minister's unlawful

requirement for him to reapply for disability allowance upon his release from prison. The Minister confirmed that a person who had been in receipt of disability allowance and who became ineligible due to being imprisoned, had to reapply for disability allowance upon their release. There is an operational exception made for a person who spent less than six months in prison who does not have to reapply. Anyone else has to reapply and establish their eligibility both in terms of their disability and their means, as of when they are released from prison. The applicant criticises this arrangement as lacking any rationale and asserts that it is invidious. He seeks a declaration that disability allowance must be reinstated to such a person upon their release from prison.

18. The Minister is not required to provide an explanation, beyond the administrative convenience referred to on affidavit, for allowing a person who serves a prison sentence of less than six months to be removed from what would otherwise be a requirement for them to reapply for disability allowance. The assistance given to a person serving a shorter sentence does not give rise to any legal, including constitutional, entitlements for the person serving a longer sentence. In any event, I am not satisfied that the Minister's policy, of which the applicant was unaware until it was referred to in a replying affidavit after the applicant secured leave to seek judicial review on the grounds he had identified, is something that was included in that leave.

19. The basis for this aspect of the applicant's challenge is unclear both in terms of the evidence and the law. The applicant seeks a declaration that is close to asking the court to direct the Oireachtas on what should be legislated for and how that should be done, which of course cannot be appropriate.

20. In any event, as I have declined to quash the Minister's decision that the applicant became ineligible for payment of disability allowance upon commencing incarceration in prison pursuant to s. 210(1), there can be no separate basis for contending any entitlement to automatic reinstatement of the disability allowance upon their release. The disability allowance was properly and lawfully stopped as soon as the applicant became ineligible in accordance with the statutory provisions. Upon release, he is free to reapply and seek to satisfy the Minister of his eligibility in relation to his disability and his means at that point in time. The applicant criticises this requirement to reapply as a failure to take account of his disability, which all parties acknowledge is permanent, but the fact of a qualifying disability does not of itself mean automatic eligibility as he must also satisfy a means test. His means

may have changed during his time in prison. There could also be changes to other qualifying factors such as an applicant's age. There is nothing unlawful in requiring him to establish his eligibility for the allowance at that point in time and having regard to any change in circumstances that may have arisen in the intervening time.

21. It is not unlawful for the Minister to require a disabled person who lost the disability allowance for which they had previously been found eligible due to being unavailable for work while in prison, to reapply for disability allowance upon their release from prison. Neither is there anything unlawful in the Minister's administrative arrangement that waives that requirement where a person has spent less than six months in prison. I find no basis to the applicant's claim for a declaration that his disability allowance was suspended and/or should be reinstated upon his release from prison.

The European Convention on Human Rights

22. The applicant contended that his treatment interferes with his convention rights including his property rights and, as a disabled person, his right to protection as a member of *"other status"* pursuant to Article 14. The applicant sought to rely on a dissenting decision of the Strasbourg court in *Belli and Arquier-Martinez v. Switzerland* (App. No. 65550/13, 11 December 2018) which condemned the disentitlement of a disability payment to a person without a permanent address in Switzerland as unlawful discriminatory treatment according to criteria irrelevant to their disability. However, the majority decision of the court upheld the impugned treatment on the basis that contributing or not contributing to the State scheme constituted an objective basis for the applicant's differential treatment. There was, therefore, no violation of Article 14. The court drew a similar conclusion in its decision in *P.C. v. Ireland,* (App. No. 26922/19, 1 September 2022) which was taken against the Irish State to the ECtHR when the Supreme Court refused to restore payment of the full pension that had been denied during Mr. C's incarceration. The ECtHR concluded that there had been no violation of Article 14 in conjunction with Article 1 of Protocol 1 and no discrimination because convicted prisoners were not in a relevant similar position to persons detained for treatment of mental illness. The court described the latter (at para. 85) as *"patients, not prisoners"*.

23. The applicant's case in relation to the ECHR is at variance with the clear jurisprudence of the Strasbourg court and I refuse the reliefs sought.

Conclusions

24. For the reasons set out above, I refuse the applicant's application. I will put the matter in at 10.30am on 23 July 2024 to deal with final orders including costs.

Counsel for the applicant: Patricia Brazil SC, Derek Shortall SC, Neil Rafter BL

Counsel for the respondents: Eileen Barrington SC, Douglas Clarke SC, Ellen Gleeson BL