Chapter 11

PRISONERS' RIGHTS

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INTRODUCTION

11.1 In the period following the foundation of the State, prison was used sparingly, and as a form of incarceration was of less social significance than psychiatric detention and the detention of children in industrial and reformatory schools.[1] This low level of imprisonment was related to an unusually low rate of crime in Ireland and contributed to a general lack of attention to prisons by policy makers and legislators during the twentieth century.[2] After this prolonged period of official indifference, the Irish prison system is currently undergoing significant reform. The Irish Prison Service was established as a separate administrative body from the Department of Justice, Equality and Law Reform in 1999.[3] The 1947 Prison Rules for the governance of prisons were finally replaced in 2007[4] and in that year also the office of the Inspector of Prisons, which had been in existence since 2002, was placed on a statutory basis. These are all welcome developments and have the potential to stimulate reform and greater transparency in the prison system. The Irish Prison Service also currently has an ambitious prison building programme to replace some of the older and more dilapidated prison buildings with large new prisons at Thornton Hall in Dublin and Kilworth in Cork and while these

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1 For an analysis of the uses of different forms of coercive confinement or incarceration in Ireland in the period since independence, see Kilcommins, O'Donnell, O'Sullivan and Vaughan *Crime, Punishment and the Search for Order in Ireland* (Institute of Public Administration, 2004).

2 Aylward 'The Irish Prison Service, Past Present and Future – A Personal Perspective' in O'Mahony (ed) *Criminal Justice in Ireland* (Institute of Public Administration, 2002), p 573 where he refers to Ireland having 'virtually the lowest crime rate in the developed world' during the period 1922–1970. Aylward also refers to the findings of the Report of the Committee of Inquiry into the Penal System (Whitaker Inquiry) in 1984 which was particularly critical of the lack of capital investment in prison infrastructure and the lack of a modern management system, p 577.

3 Prisons and places of detention are under the responsibility of the Irish Prison Service (IPS) which is an executive office of the Department of Justice, Equality and Law Reform and under the Public Service Management Act 1997 the Director General of the IPS is empowered to run the prison service on a day to day basis and he reports to the Secretary General of the Department of Justice. A Prisons Authority Interim Board has also been established but as yet is not a statutory body.

4 SI No 252 of 2007.

plans have some problematic elements, not least the scale and location of what is proposed, the new prisons should bring improved conditions for those detained there.

11.2 The enactment of the European Convention on Human Rights Act 2003 means that at a time of dramatic change in the prison system new light is being thrown on some longstanding legal difficulties within what is an antiquated system. As we shall see, the period of the past ten years has also seen a significant expansion in the activity of the European Court of Human Rights (ECtHR) in the area of prisoners' rights. All of this makes an assessment of the potential application of the European Convention on Human Rights (ECHR) in the Irish prison especially timely.

11.3 The main purpose of this chapter is to provide an analysis of Irish prison law from the perspective of the ECHR, highlighting the areas in which the ECHR Act 2003 might be expected to have a real impact in the Irish courts. In the first part of the chapter we will look at an overview of Irish prison law as it has developed to date, highlighting how the Irish courts have traditionally adopted a non-interventionist approach to the scrutiny of prison matters. The second part of the chapter will look at how the international and European human rights systems have approached the particular issues presented by imprisonment providing a conceptual framework for understanding the importance attached to the vindication of prisoners' rights. The main and third part of the chapter will assess some of the key areas of ECtHR jurisprudence in order to highlight how the ECHR might be used in an Irish context. Matters of particular importance in the Irish context are the duty to protect prisoners' accountability and investigation in prison; prison conditions; prisoner health; and correspondence and privacy issues.

OVERVIEW OF IRISH PRISON LAW

11.4 The Prisons Act 2007 represents the most extensive piece of legislation in relation to prison policy in several decades; however it does little to place the legal rights and entitlements of prisoners on a statutory footing. Large parts of the Act relate to administrative issues such as the provision of prisoner escort services and the planning arrangements for the construction of new prisons. The more substantive parts of the Act relate to prison discipline and the placing of the Inspector of Prisons on a statutory footing, but it is regrettable that the opportunity was not taken to place the larger part of the Prison Rules in the form of primary legislation.

11.5 Section 35 of the 2007 Act provides that the Minister for Justice, Equality and Law Reform may set rules in a number of specified areas, including: the duties and conduct of the governor and staff; the classification and treatment of prisoners, including their diets, clothing and maintenance; the provision of facilities and services to prisoners; prison discipline; remission; and drug and alcohol testing of prisoners. Following on from the enactment of

the Act, the Minister for Justice, Equality and Law Reform introduced the Prison Rules 2007 replacing the 1947 Prison Rules.[5] The Rules address many issues of relevance to the rights of prisoners.

11.6 When compared to the significant body of case-law that has emerged in England and Wales in recent years, Irish prison law scarcely exists as a discrete area of academic interest or practice. McDermott's 2000 text was a seminal development in presenting the divergent legal issues that arise in the carceral setting as a cohesive body of law. However, McDermott acknowledges that Irish prison law is 'still in an early stage of development'.[6] The low numbers of cases in the intervening years suggest that the prison is still not a fertile site for litigation.

11.7 A number of possible explanations for this level of underdevelopment can be posited. First, the most obvious distinction between Ireland and our nearest neighbours is one of scale. The Irish prison population is small by international comparison with a rate of imprisonment at the lower end of the European spectrum which inevitably reduces the range of fact scenarios likely to be raised before the courts.[7] It might also be contended that the scarcity of cases is due to a general respect for prisoner rights and an absence of abuses within the Irish system, although it should be borne in mind that few cases of any kind have come from Ireland to Strasbourg even in areas of law where apparent tension between Irish law and the European Convention on Human Rights (ECHR) exists.[8] More probably the low number of prisoner cases can be explained by a combination of a number of other factors including difficulties of access to legal representation by prisoners, a degree of passivity on the part of the legal professions and a resistance on the part of the judiciary to entertain prisoner cases. McDermott identifies an unwillingness on the part of the judiciary 'to take full responsibility for the protection of prisoners from poor conditions and unlawful treatment' and suggests that this may be partly explained by an understandable reluctance to assist those who have inflicted crimes on society, but also partly by the fact that prison law is concerned primarily with the lower socio-economic groups in society.[9] He also cites the analysis of Tettenborn in this regard who explains the international experience of non-interventionism by a 'zeal to defeat the unmeritorious and perhaps vexatious litigant in prison' which has the dangerous potential to inadvertently also frustrate the meritorious and vulnerable.[10]

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5 The Prison Rules 2007 were introduced by Statutory Instrument 252 of 2007 and came into effect on 1 October 2007.

6 McDermott *Irish Prison Law* (Round Hall Sweet and Maxwell, 2000), p vii.

7 As of 26 October 2007 Ireland's prison population was 3,325 representing a rate of imprisonment of approximately 76 per 100,000 of the population which places Ireland 43rd out of 56 European states, compared to a rate of 145 for Scotland and 152 for England and Wales (statistics from International Centre for Prison Studies at Kings College London http://www.kcl.ac.uk/schools/law/research/icps).

8 For an overview see O'Connell, chapter 1 in this volume.

9 McDermott, above, p vii.

10 Ibid.

11.8 What is surprising about the dearth of prison cases before the superior courts is the apparent potential of the fundamental rights provisions in the Constitution for prisoners. However, the approach of the courts to interpreting these rights can be generally characterised as non-interventionist. In contrast with the legal principles prescribed by the European Prison Rules[11] (and the case-law of the European Court of Human Rights), the Irish Courts have ruled that prisoners' rights are *necessarily* diminished by virtue of their imprisonment.

11.9 The leading case in this regard is that of *State (McDonagh) v Frawley*[12] which concerned a severely psychiatrically ill prisoner who required treatment in a specialised unit which did not exist in Ireland. The Supreme Court refused to direct the building of such a unit on the grounds that it was not for the court to get involved in such policy matters, invoking the principle of separation of powers. However, in that case the court also found that certain rights are placed in abeyance for the period of imprisonment noting that, (see comment below):

> 'While so held as a prisoner pursuant to a lawful warrant, many of the applicant's normal constitutional rights are abrogated or suspended. He must accept prison discipline and accommodate himself to the reasonable organisation of prison life laid down in the prison regulations.[13]'

11.10 Similarly in *Gilligan v Governor of Portlaoise Prison*,[14] McKechnie J outlined that a convicted person must understand that his loss of personal liberty, legally provided for, inevitably attaches to it the abolition, albeit temporary, of some rights and the curtailment and restriction of others.[15] The learned judge did, however, note that there was 'no iron curtain between the Constitution and the prisons in the Republic either' holding that prisoners continue to enjoy a number of constitutional rights, including the right of access to the courts. This approach, albeit not advocating a permanent loss of these rights, echoes the feudal notion of 'civil death' whereby prisoners forfeit certain rights such as property rights *in addition to their liberty* upon conviction.[16]

11.11 The judgment in *McDonagh* resonates with a wider constitutional pattern where the Irish courts have afforded great weight to the constitutional principle of 'separation of powers', or at least to a particularly narrow Irish

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[11] The European Prison Rules (EPR) are contained in a recommendation of the Committee of Ministers of the Council of Europe and constitute a blueprint for designing and administering a prison system compatible with human rights standards. The original European Prison Rules were set out in Committee of Ministers Recommendations Rec (1987) 3. These rules have now been replaced by a 2006 revision contained in Committee of Ministers Recommendations Rec (2006) 2. See further below.

[12] [1978] IR 131.

[13] Ibid, at 135.

[14] (Unreported) 12 April, 2001, High Court, McKechnie, J.

[15] Ibid, para 8.

[16] For a discussion of this concept in relation to voting rights see Easton 'Electing the Electorate: The Problem of Prisoner Disenfranchisement' (2006) 69(3) *Modern Law Review* 443–452.

interpretation of this principle whereby the Irish Courts have rigidly refused to intervene to vindicate citizens' rights where to do so would compel the expenditure of resources.[17] However, it is submitted that any assessment by a court of the nature of the resource or security challenges presented in vindicating prisoners' rights will contain a subjective element related to the seriousness by which courts view their role in vindicating the rights of the prisoner. Hamilton and Kilkelly have used the example of the issue of prisoner voting as illustrating the very different prioritisation of issues in the approaches taken by the Irish courts and the ECtHR in this regard.[18]

11.12 In relation to protecting the rights of vulnerable prisoners, it is important to bear in mind that Ireland has of yet no independent complaints mechanism such as a prison ombudsman. The Council of Europe Committee for the Prevention of Torture has repeatedly called on the State to consider establishing such a body and has also expressed concern about the lack of vigour with which allegations of ill-treatment in custody are pursued by the Garda.[19] In this context, it can be argued that the oversight role of the courts in examining what happens within the prison walls takes on added importance, and the reluctance of the Irish Courts to take on that role leaves an acute gap.

HUMAN RIGHTS AND IMPRISONMENT

11.13 Based on the slow pace of development of domestic prison law the Irish prisoner and his/her lawyer are naturally drawn to invoke international law standards. Throughout the history of the development of international human rights law, the various treaty monitoring bodies and other institutions have taken a special interest in what happens in prisons. In 2008, the UN High Commissioner for Human Rights identified the rights of detained persons as a

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[17] For recent examples of the Irish Supreme Court's interpretation of the principle of the separation of powers, see the cases of *TD v Minister for Education*, [2001] IESC 101, [2001] 4 IR 259 and *Sinnott v Minister for Education* [2001] 2 IR 545. For an analysis of Irish constitutional jurisprudence in this area see Whyte *Social Inclusion and the Legal System: Public Interest Law in Ireland* (Institute of Public Administration, 2002), pp 340–364.

[18] Hamilton and Kilkelly 'Human Rights in Irish Prisons' 2 *Judicial Studies Institute Journal* (2008) 58–85. McDermott has noted that an alternative and more progressive approach to prisoners' rights had been indicated in a dissenting judgment by Meredith J in the case of *O Conghaile v Wallace* [1938] IR 526 at 574.

[19] Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to Ireland from 2 to 13 October 2006, Council of Europe document CPT/Inf (2007) 40, paras 35–36 available at www.cpt.coe.int. In relation to accountability structures within the prison system, it should also be noted that Ireland has signed and expressed its intention to ratify the Optional Protocol to the UN Convention Against Torture (OPCAT), which will require the State to review the accountability and oversight structures in place to prevent mistreatment of all categories of detainees.

main priority of her campaign to mark the 60th Anniversary of the Universal Declaration of Human Rights (UDHR), the founding document of the human rights movement.[20]

11.14 One of the main reasons why prison is so important from the perspective of human rights law lies in the principle of universality, as experience shows that the walls of prison and other places of detention provide one of the greatest obstacles to the universal reach of human rights standards. Imprisonment is based on physical restraint and control and the central role of force in the prison system inherently also increases the risk of violations of prisoners' core human rights, ie those rights connected to human dignity such as the right to life and the right to freedom from inhuman and degrading treatment. The particular importance attached by international human rights law to imprisonment is also reflected in specialist human rights instruments on the rights of prisoners adopted by the United Nations and the Council of Europe. Prominent among the specialist UN instruments in this area are the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) which is predominantly concerned with places of detention and its Optional Protocol which requires the establishment of an independent complaints mechanism at national level. Among the most important non-binding standards are the UN Standard Minimum Rules (SMR) for the Treatment of Prisoners.[21] In addition, Article 10(1) of the International Covenant on Civil and Political Rights (ICCPR) recognises the special position of detained persons and requires that: 'All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person'. The special concern of the international human rights system with the position of the detained person is expressed in Rule 2 of the European Prison Rules which states that 'Persons deprived of their liberty retain all rights that are not lawfully taken away by the decision sentencing them or remanding them in custody' – the principle of imprisonment as punishment not for punishment.

11.15 Human rights standards are also concerned with the possible secondary effects of imprisonment. Rule 5 of European Prison Rules states that: 'Life in prison shall approximate as closely as possible the positive aspects of life in the community' and Article 10(3) of the ICCPR provides that: 'The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation'. The circumstances of imprisonment can also inhibit the enjoyment of certain rights which are widely

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[20] Deputy High Commissioner for Human Rights Kyung-wha Kang in an address to the International Coordinating Committee of National Human Rights Institutions in Geneva, 17 April 2008.

[21] In his work, *The Treatment of Prisoners under International Law*, Professor Nigel Rodley (1999: 281) has noted: 'Although not every rule may constitute a legal obligation, it is reasonably clear that the SMR can provide guidance in interpreting the general rule against cruel, inhuman, or degrading treatment or punishment. Thus, serious non-compliance with some rules or widespread non-compliance with some others may well result in a level of ill-treatment sufficient to constitute violation of the general rule.'

respected and enjoyed outside the carceral setting, such as the right to access legal representation and advice, the right to vote, and the right to respect for private and family life.

IMPRISONMENT AND THE ECHR

11.16 Against the backdrop of the special interest of human rights law in prisons, it is unsurprising, then, that the prisons of Europe have been prominent in the development of the jurisprudence of the European Court of Human Rights.[22] In 2000 McDermott took the optimistic view that, following the significant impact of the ECHR on the rights of prisoners in the United Kingdom, the Irish tradition of non-intervention might be challenged by the Convention being given legal effect in this jurisdiction. While, to date this does not appear to have been the case[23] this chapter will contend that the potential use of the Act and the Convention is rich, if untapped. There are a number of areas where recent developments in Strasbourg and in the United Kingdom courts have mapped out possible rich veins for the enterprising and creative prison lawyer in the Irish courts.

11.17 In many ways, what distinguishes the European and UN approaches to prisoners' rights is the central role of the ECtHR, the jurisprudence of which will be examined in detail below.[24] However, the development of law by the ECtHR has been supplemented by other more specific standards. Inspired by Article 3 of the ECHR, in 1987 the Council Europe agreed the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, which establishes a non-judicial preventive machinery to protect detainees. It is based on a system of visits to places of detention within Contracting States by an independent committee of experts, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT). Over the years, the recommendations and reports of the Committee's visits have developed into a detailed body of standards for conditions and management of detention and their use by the ECtHR as an interpretative aid and source of facts has become well

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22 See generally Livingstone (deceased), Owen and McDonald, *Prison Law* (Oxford University Press, 4th edn, 2008).

23 O'Connell et al *ECHR Act 2003 A Preliminary Assessment of Impact*, a study compiled by the Law Society and the Dublin Solicitors Bar Association, presents a comprehensive analysis of the cases coming before the courts under the Act up to October 2006. See further O'Connell, chapter 1 in this volume.

24 Murdoch contends that the European human rights system's protection of prisoners' rights can be distinguished from the UN system in that for European prisoners the general human rights charter of the Convention is the dominant source of relevant human rights standards, whereas under the UN system the focus has been on the development of specific standards in relation to detainees (such as the Convention Against Torture) in response to the failure of the international system to produce effective enforcement mechanisms. Murdoch *The Treatment of Prisoners: European Standards* (Council of Europe Publishing, 2006), p 20.

established.[25] The European Prison Rules (EPR) have also played an increasingly important role in the development of human rights standards relating to detention.

11.18 ECtHR jurisprudence relevant to prisoners, supplemented by the CPT and the EPR, falls into two broad categories. Towards the end of the chapter, we highlight discrete issues such as prisoner correspondence and prisoner voting where the court has adopted what can be described as a problem solving approach, applying clear human rights standards, which are relatively uncontroversial, to the particular context of imprisonment. The greater part of this chapter on the other hand demonstrates how the court, and in some cases national courts applying the Convention, have tackled what it is submitted are more substantive human rights issues concerned specifically with the experience of imprisonment – questions relating to the duty of national prison authorities to protect and respect the human dignity of prisoners in relation to matters such as the physical conditions of cells, the duty to prevent violence or suicide and the required level of medical services that must be provided to inmates. These issues are focused on Articles 3 and 8 of the ECHR.

11.19 While imprisonment is by definition a legal form of deprivation of the right to liberty of the person, nevertheless issues related to the regulation of detention in prison have arisen under Article 5 of the ECHR. These are largely addressed by Hamilton in chapter 9 in this volume. Disciplinary and other proceedings within the prison context have given rise to a number of issues under the remit of Article 6 of the ECHR and other provisions that have given rise to litigation include Article 8 (prisoner correspondence and respect for family life) and Article 3 of Protocol No 1 (prisoner voting). As we shall see, in relation to many of these issues, equivalent Irish constitutional rights provisions exist but the European Court's approach to such cases has been somewhat more expansive than that of the Irish courts.

DUTY TO PREVENT DEATHS AND SERIOUS INJURY IN CUSTODY

11.20 Article 2 of the ECHR contains a general protection of the right to life of all persons, but it speaks with particular force to those charged with administering prisons and places of police detention. The text of Article 2 contains three separate elements:

(1) the negative obligation to desist from causing unlawful deaths;

(2) the positive obligation to take preventive action in relation to avoidable deaths; and

[25] For a full consideration of how the status of the CPT and its reports in the work of the ECtHR, see Murdoch Ibid.

(3) the positive obligation to investigate certain categories of deaths.[26]

Each of these three categories of obligation has particular relevance to prisoners.

Negative obligation

11.21 The traditional understanding of the text of Article 2 imposes a negative obligation on states not to take life intentionally or negligently. The negative obligation may be breached in circumstances of an unnecessary or excessive use of force by agents of the State.[27] Obviously, in all ECHR states the criminal law performs the function of prohibiting homicide, but the power to use lethal force that is vested in certain state authorities such as police officers, military and prison officers may raise issues. In recent years, there do not appear to have been any instances in this jurisdiction where a prisoner's death has been directly attributed to state officials exercising lethal force, although significant concerns have been raised about the regulation of the use of lethal force on the part of An Garda Síochána.[28] Concerns about the capacity of the Garda to investigate allegations of mistreatment by prison staff also give rise to concerns about how any case in which lethal force was used in prison might be investigated.[29]

Positive obligation to prevent death

11.22 The first positive obligation created by Article 2 requires state authorities to take steps to protect the lives of individuals that are actually known, or ought to be known, to be at risk. The nature of this obligation was first set out in the case of *Osman v United Kingdom*[30] which related to the obligation of the police to take appropriate preventive steps where a family had been threatened by an apparently unstable individual who subsequently killed a member of that family. From *Osman*, the positive obligation to prevent deaths may be breached in circumstances where the authorities fail to take reasonable measures within the scope of their powers to avert the risk. In his survey of both UK and Strasbourg case-law in this area, Foster stresses the cautious approach adopted by both jurisdictions when the victim of a fatal assault is a prisoner, noting that:

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[26] On the implications of Article 2 for certain aspects of policing see O'Neill, chapter 10 in this volume.

[27] See *McCann and Ors v UK* (1991) 26 EHRR 97.

[28] The issue of the use of lethal force by members of An Garda Síochána was at the centre of the work of Barr Tribunal of Inquiry into the '*The facts and circumstances surrounding the fatal shooting of John Carthy at Abbeylara, Co. Longford on 20 April 2000*'. John Carthy was shot dead by members of the Garda Emergency Response Unit. The Tribunal of Inquiry reported in July 2006.

[29] See further below.

[30] *Osman v UK* (2000) 29 EHRR 245.

> '[i]n cases involving attacks by fellow prisoners, the prisoner is still battling against the truism that prisons are inherently dangerous places …'[31]

However, it can be argued that, given the relationship of care that exists between the State and those in its custody, the State bears an acute responsibility to provide protection to an individual in custody against whose life there is a threat including where the threat comes from a third party, such as a cellmate,[32] or from the detainee himself.[33] In the case of *Edwards v United Kingdom*[34] the Strasbourg Court upheld a complaint under Article 2 from the parents of a prisoner who was killed by another, mentally ill prisoner where the 'protective mechanisms' had all but broken down. The applicants' son had been placed in a cell with a prisoner who had a history of violent outbursts and assaults and who had been diagnosed with schizophrenia. The ECtHR found that the state authorities 'ought to have known' of the significant risks that the killer posed because they had information identifying him as violent. In *Edwards* a key factor in the court's deliberations was the failure to pass on relevant information to prison authorities making decisions in relation to prisoner placement. The police, prosecution authorities and the court systems were all aware that the perpetrator was dangerous and prone to violence, but no formal warning was passed on to the prison, nor was any information made available about his past criminal or medical records. The ECtHR found that the positive obligation imposed by Article 2 to prevent deaths rested on all of the relevant public authorities acting together, medical profession, police, prosecution and court, and found that the man's death could be attributed to a systemic failure to exchange appropriate information.[35]

11.23 This preventive obligation is not unlimited however. Particularly in cases relating to suicide the European Court has held that Article 2 will be breached only in circumstances where the authorities knew or ought to have known that the detained person posed a real risk of suicide. A death will not result in a breach of Article 2 where the authorities have taken reasonable steps to protect a detainee, having regard to the nature of the risk, or where there is no indication that the detainee is at risk of suicide. Inadequate treatment that might contribute to a suicide will not in itself necessarily create liability for that death. Rather, an objective test of foreseeability applies. In the case of *Keenan v United Kingdom,*[36] the European Court indicated that it will require cogent evidence of fault in this area if it is to find a breach of Article 2. The facts of *Keenan* were that a mentally ill prisoner committed suicide subsequent to being placed in segregation and receiving an additional 28 days imprisonment as punishment for an attack on two prison officers. The ECtHR found that while inadequate care was provided, there was no information before the authorities

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31 Foster 'The Negligence of Prison Authorities and the Protection of Prisoner's Rights' (2005) 26 *Liverpool Law Review* 75, p 99.

32 *X v FRG* (1985) 7 EHRR 152; *Rebai v France* 99-B DR 72. See also the English case of *R (ex parte Amin) v Secretary of State for the Home Department* [2004] 1 AC 653.

33 *Keenan v UK* (2001) 33 EHRR 38.

34 *Paul and Audrey Edwards v UK* (2002) 35 EHRR 487.

35 Ibid, para 64.

36 (2001) 33 EHRR 38.

which should have alerted them to the fact that Mr Keenan was an immediate suicide risk, nor was his behaviour prior to the attempt indicative of his state of mind.

11.24 The duty to protect life must be viewed in conjunction with the overall scheme of the ECHR. In particular, the Article 2 substantive positive obligation will not justify extreme or disproportionate measures of control intended, for example, to deprive the individual of any opportunity to self-harm.[37] This is in keeping with the proportionality test frequently employed by the court, ie whether the restriction of rights is necessary to achieve a legitimate aim and is proportionate in the circumstances. As with the case where death occurs in custody, the State is also presumed to be responsible if detainees are subjected to treatment considered to be in breach of Article 3.[38] Hence, the State may be in breach of Article 3 in circumstances where the death of a person in custody results from the inadequate provision of medical, mental health or drug detoxification treatment.[39] In *Keenan's* case, the suicide of a mentally ill prisoner in circumstances where there had been a lack of sufficient psychiatric assessment or monitoring of his condition and where he had been inappropriately detained in a punishment block, resulted in a breach of Article 3 by reason of neglect. The court imposed on the United Kingdom authorities a general 'duty to protect' the well-being of people in detention, beyond protecting the right to life.[40]

11.25 In the most recent single year for which there are statistics (ie 2006), there were 12 deaths in Irish prisons, the majority of which were drug-related in one way or another.[41] Homicide is an increasing problem within the prison system with three prisoners having been killed by fellow inmates in recent years.[42] These killings can be seen as symptomatic of a general rise of violence in the prison system (see section on Article 3 below). Perhaps the most troubling of these incidents concerned the violent death of a young inmate, Gary Douch, in Mountjoy Prison on the night of the 31 July 2006 at the hands of another inmate. The circumstances of the death appear to have been broadly similar to those of the *Edwards* case and led to the establishment of a Commission of Investigation headed by Ms Grainne McMorrow SC, whose report is yet to be published.[43]

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37 *Keenan v UK*, para 92.

38 *Tomassi v France* (1993) 15 EHRR1.

39 *McGlinchey v UK* (2003) 37 EHRR 41.

40 *Keenan v UK* above, para 91.

41 See Drug Policy Action Group, 'Key Issues for Drug Policy in Irish Prisons' 2008, p 3.

42 Derek Glennon was stabbed to death in June 2007. Gary Douch was beaten and strangled to death in August 2006 whilst under 'protection' in a holding cell. Alan Green was stabbed to death in January 2004. All killings occurred in Mountjoy Prison.

43 The Commission of Investigation into the Death of Gary Douch was established under the Commissions of Investigation Act 2004 on 23 April 2007. The Commission followed on from an internal investigation into the circumstances surrounding the death which has not been made public. The trial of a man for Gary Douch's murder will take place in 2009.

11.26 Quite apart from the positive obligations imposed by the ECHR, *Bunreacht na hÉireann* contains an express protection of the right to life under Article 40.3.2. In *McGee v AG*,[44] Walsh J held that the State has a positive obligation to ensure by its laws that the plaintiff's life was not put at risk. However, in relation to the preventive obligations of the State, negligence actions taken to date against the Irish prison authorities in respect of attacks by fellow inmates have not met with success.[45] In light of the *Douch* case and the rising levels of violence in some Irish prisons, it is worth referring again to the judgment of the Strasbourg Court in *Edwards*. In that case, the ECtHR found that prison officers knew of a real risk posed by the prisoner in question and that the only reason given for placing both men together was to free a cell for other detainees. In *Edwards*, the European Court summarises in detail its jurisprudence on the nature of the State's positive obligations:

> 'For a positive obligation to arise, it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk'.[46]

It is submitted that the ruling in *Edwards* may yet have a significant impact on how risk is assessed and managed within the Irish prison system; it provides a standard against which practice in cases such as the *Douch* case can be measured.

Positive obligation to prevent ill-treatment

11.27 Recent years have seen a marked increase in the number of violent incidents in the main prisons, with this phenomenon being attributable to many factors such as the use of drugs, gang culture, overcrowding, poor material conditions and a failure to adequately assess prisoners on committal to prison. It was striking that the CPT, following its visit to Ireland in 2006, categorised three Irish prisons, namely Mountjoy Prison, Limerick Prison and St Patrick's Institution, as 'unsafe' for both prisoners and prison staff.[47] It recommended a number of measures to address this problem, namely the implementation of an individualised risk and needs assessment, staff training in the management of inter-prisoner violence and a general improvement in regime. It is now well established that the CPT's findings are used in ECtHR judgments and so these findings could also have a significant impact on any litigation in the Irish courts invoking Article 3.

11.28 In relation to the balance of rights that may be involved in protecting prisoners at risk, the position of prisoners who are considered to be in need of

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44 [1974] IR 284.

45 See McDermott *Prison Law* (Round Hall Sweet and Maxwell, 2000), pp 232–242.

46 *Edwards v UK* above, para 55.

47 *Report to the Irish Government on the visit to Ireland carried out by the CPT from 2 to 13 October 2006*. CPT/Inf (2007) 40, para 38.

protection also gives rise to concerns. In 2006, the CPT noted a significant increase in the number of inmates on protection in Irish prisons, and the frequent use of segregation for such prisoners raises serious questions in relation to humane treatment. According to current practice, such prisoners can be restricted to their cell for up to 23 hours a day with little activity or interaction. The Committee considered that this group required an improved regime, increased medical and psychological assistance as well as regular reviews of their situation.[48] The austerity of this regime in terms of its psychological effects should not be underestimated. The case-law of the European Court is not strong on this point and a recent High Court challenge taken by a prisoner in Wheatfield Prison subject to a 23 hour segregation regime on the grounds that it constituted cruel, inhuman and degrading treatment was rejected by Murphy J.[49] In that case, the court accepted arguments advanced by the Prison Governor that the applicant was being segregated for his own safety following real and credible threats to his life. It was understood that the Governor had a duty to protect inmates. Given the development of the case-law of the ECtHR in relation to Article 3, such security justifications may be open to closer scrutiny in future cases.

11.29 Again the special nature of Article 3 is relevant here. Whereas with other articles of the ECHR a proportionality test may apply to determine whether interferences with rights such as the right to freedom of expression may be justified, in relation to Article 3 no interferences can be justified. The provision provides absolute protection from inhuman and degrading treatment or punishment, and once treatment meets the minimum level of severity required to fall within the remit of Article 3, the provision will be found to have been breached. In determining whether the threshold has been reached, the whole circumstances of the treatment in question and the individual involved are taken together.[50]

11.30 The first detailed consideration of the nature of the obligations arising for states from Article 3 occurred in the interstate case of *Ireland v United Kingdom*.[51] That case concerned the use of certain interrogation techniques in Northern Ireland during the 1970s which the ECtHR found to constitute inhuman treatment (though not meeting the threshold of severity to be considered as torture). The ECtHR emphasised in its judgment that the text of Article 3 does not allow for any justification or exception to the general prohibition and that under Article 15(2) of the ECHR, which allows for derogations from some provisions of the ECHR at times of national emergency, there can be no derogation from Article 3, further reinforcing the importance of the prohibition on torture. The history of this Article has been dominated from the outset by the spectre of torture or serious ill-treatment of detainees, whether in police, army or prison custody. The landmark Greek

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48 Ibid, paras 62–66.

49 'Prisoner's Claim of Cruel Punishment Rejected' *Irish Times*, 19 May 2007.

50 On this point see the approach to interpreting and applying Article 3 set out by the Court in *Tyrer v United Kingdom* (1979–1980) 2 EHRR 1, a case concerning corporal punishment.

51 Series A, No 25, p 65, para 163.

case,[52] the Irish-British interstate case[53] and the range of Turkish cases concerning treatment in custody[54] mark staging posts not only in the evolution of a system of law but in the crystallisation and bedding down of democracy and the rule of law in the Council of Europe area.

Positive obligation to carry out effective investigations of deaths

11.31 The second (procedural) positive obligation imposed by Article 2 on state authorities is a duty to carry out an effective investigation following any death occurring in the custody of the State. The requirements for an effective independent investigation are set out in the case of *Jordan v United Kingdom* and entail that it must:

(1) be on the State's own initiative;

(2) be capable of leading to a determination of responsibility and the punishment of those responsible;

(3) be independent both institutionally and in practice;

(4) be prompt;

(5) allow for sufficient public scrutiny to ensure accountability; and

(6) allow the next-of-kin to participate.[55]

11.32 Although the *Jordan* case concerned the use of lethal force by police officers, the House of Lords has approved the applicability of these principles in a case concerning a death in custody resulting from state negligence in the *Zahid Mubarek* case.[56] That case concerned the death of a 19-year-old who was bludgeoned to death by a violent and racist prisoner; there was a claim that the Secretary of State had failed to hold an open and public investigation into the circumstances of the death. The High Court found that internal inquiry by the

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[52] The 'Greek case' refers to a set of proceedings brought by members States against Greece during a military dictatorship in that country known as the 'Regime of the Colonels' and concerning torture by police and army officials. Following investigations in Greece, the Commission found that the allegations of officially sanctioned and widespread mistreatment of prisoners were substantiated. Ultimately the cases never came before the Court as Greece withdrew from the Council of Europe and denounced the ECHR. *The Greek Case* Report of 5 November 1969 (1969) 12 *Yearbook* 186–510.

[53] *Ireland v UK* (1976) Yearbook 512.

[54] A large number of cases have come before the ECtHR relating to allegations of violations of Article 2 and 3 against Turkey. A significant proportion of these cases relate to internal political conflict in southeast Turkey during the 1980s and 1990s. Among these cases is *Aksoy v Turkey* (1997) 23 EHRR 553, the first case in which a State was found guilty of torture. Other leading Turkish cases include *Aydin v Tukey* (1998) 25 EHRR 251 involving allegations of rape, isolation and water torture, and *Salman v Turkey* (2002) 34 EHRR 425 involving allegations of severe beatings while in police custody.

[55] See *Jordan v UK*, above, paras 104–109. See also O'Neill, chapter 10 in this volume.

[56] *R on the application of Amin v the Secretary of State for the Home Department* [2004] 1 AC 653.

Prison Service and the criminal trial of the assailant did not constitute an effective investigation for the purposes of the procedural obligation under Article 2, principally as it did not establish why on that night Zahid Mubarek was sharing a cell with his assailant. In overturning a Court of Appeal decision and following *Edwards v United Kingdom*, the House held that systemic failures leading to deaths called for *even greater* levels of scrutiny than would apply in relation to deaths in custody generally.

11.33 In *Edwards* also, the European Court found that the lack of power to compel witnesses and the private character of the inquiry into the death, from which the applicants were excluded save when they were giving evidence, failed to comply with the requirements of Article 2 to hold an effective investigation.[57] A further requirement of an effective and independent investigation into a death is that it be prompt. In this regard, it is worth noting that in *Edwards*, a delay of three and a half years between the death and the report of the resulting inquiry was deemed to be acceptable, and here the court compared the delays in some of the Northern Ireland cases such as *Kelly and Others* (8 years) and *Jordan* (4 years and one month). The comparison with *Jordan* may be taken as indicating where the ECtHR sees the limit of promptness to lie. Separately from this procedural obligation, where a death occurs in state custody, there is a burden on the detaining authorities to provide a satisfactory and convincing explanation for the death. In the absence of such explanation, Article 2 is breached.[58]

11.34 Under Irish law the obligation to hold an effective investigation into the death of a prisoner will fall traditionally on the office of the coroner. The primary legislation governing the operation of the coroner inquest remains the Coroner's Act 1962, with an amending Coroner's Bill 2007 currently before the Seanad.[59] The Explanatory Memorandum to the Bill states that one of its primary purposes is 'to comprehensively reform the existing legislation relating to coroners by replacing the Coroners Act 1962 with modern updated provisions taking into account the jurisprudence of our courts and the European Court of Human Rights'. The Explanatory Memorandum also states that the Bill will provide a statutory framework widening the scope of the inquest from investigating the proximate medical cause of death, to establishing in what circumstances the deceased met his/her death, providing much more detail on 'how' the person died.

11.35 Section 43 of the Bill provides that a coroner must hold an inquest in relation to any death in custody including in prison. However, it is notable here that the lack of a specialised agency to investigate incidents in prisons lies in contrast to the statutory role of the Garda Síochána Ombudsman Commission, who must investigate all deaths in police custody.[60] In this regard,

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57 *Edwards v UK* above, para 87.

58 *Salman v Turkey*, above; *Anguelova v Bulgaria* (2004) 38 EHRR 31.

59 The Bill which was introduced in the Seanad has passed Second Stage in that House and referred to the Committee Stage in October 2007.

60 Garda Síochána Act 2005, s 102.

the continuing failure to establish a Prison Ombudsman is striking. It is to be anticipated that the McMorrow Inquiry may make significant recommendations both in relation to the preventive measures and appropriate investigations structures for deaths in custody.

11.36 In relation to more general investigations of ill-treatment, the absence of an independent complaints mechanism leaves prisoners without any independent avenue of redress.[61] The Prisons Inspectorate, established on a statutory basis by the Prisons Act 2007, does not have this function. Section 31 of the Act provides the Inspector with the power to inspect prisons and the office also has a limited power of 'investigation' applicable in certain circumstances, but this is a power to 'investigate any matter arising out of the management or operation of a prison' and its purpose is to submit a report to the Minister. This has not been used to date.[62] The fact that this body does not have the power to respond to individual complaints of abuse by prisoners means that prisoners must access the courts in order to seek redress.

PRISON CONDITIONS

11.37 As already outlined above, when assessing an alleged violation of Article 3 the ECtHR will look at all of the circumstances of the imputed treatment, including the position of the alleged victim and the overall impact of the treatment in question on him/her. It is well established in the jurisprudence of the Strasbourg Court that seriously deficient physical conditions in prisons may raise an issue under Article 3.[63] While the ECtHR has traditionally been reluctant to declare prison conditions inhuman or degrading in the absence of proof of the deliberate infliction of suffering, the court has recently taken a more robust approach in this area. In the recent case of *Kalashnikov v Russia*, the ECtHR summarised its approach to determining whether conditions attained a minimum threshold of severity to engage Article 3:

> 'The assessment of this minimum is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim … When assessing conditions of detention, account has to be taken of the cumulative effects of those conditions, as well as the specific allegations made by the applicant.'[64]

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61 The Prisons (Visiting Committees) Act 1925 and Prisons (Visiting Committees) Order 1925 established prison visiting committees in each prison, which can inter alia hear complaints from prisoners. However, membership of these committees is by government appointment and they have no powers to resolve complaints and this means that they cannot in any sense be described as an independent complaints mechanism. See International Covenant on Civil and Political Rights, Third Report by Ireland on the Measures Adopted to Give Effect to the Provisions of the Covenant available at www.foreignaffairs.gov.ie, para 208.

62 This attracted the criticism of the Inspector of Prisons and Places of Detention, Mr Justice Dermot Kinlen in his Fifth Report, 2006–2007, pp 11–12.

63 *Peers v Greece*, above.

64 *Kalashnikov v Russia* (2003) 36 EHRR 34, para 95.

11.38 In *Kalashnikov*, following a detailed examination of the conditions of detention, the Court found that the applicant's conditions of detention, in particular the severe levels of overcrowding combined with an insanitary environment that included infestation by insects and the demonstrated detrimental effect on the applicant's health and well-being, amounted to degrading treatment.[65] An example of how the particular circumstances or vulnerability of the individual prisoner are assessed by the ECtHR can be seen from the case of *Price v United Kingdom* which concerned a woman, who was four-limb deficient as a result of phocomelia due to thalidomide, committed to prison for seven days for contempt of court.[66] In that case the ECtHR found that, while there was no evidence of any positive intention to humiliate or debase the applicant, to detain a severely disabled person in conditions where she is dangerously cold, risks developing sores because her bed is too hard or unreachable, and is unable to go to the toilet or keep clean without the greatest of difficulty, constitutes degrading treatment contrary to Article 3 of the Convention.[67]

Slopping out

11.39 One particular issue that has given rise to much focus in recent years has been the absence of proper in-cell sanitation in prisons. In the Scottish case of *Napier v Scottish Ministers*[68] the Scottish Court of Session, in applying the UK Human Rights Act 1998, held that the conditions in Scottish prisons −specifically a combination of overcrowding, 'slopping out' and particular medical problems suffered by the applicant that were exacerbated by the physical conditions of detention−were contrary to human dignity under Article 3. This places the decision in the context of decisions such as *Price v United Kingdom*. The case resulted in urgent measures being taken to eliminate the practice throughout the Scottish prison estate.

11.40 In four Irish prisons (Mountjoy, Cork, Limerick and Portlaoise prisons), sanitation facilities are inadequate and prisoners are still required to 'slop-out' every morning. They eat in proximity to the chamber pots, a practice that is particularly degrading in shared cells. In other prisons, prisoners have to eat in proximity to a toilet that is not adequately partitioned. Following *Napier*, a group of prisoners from Cork, Mountjoy and Portlaoise prisons launched an unsuccessful legal challenge over the lack of adequate in-cell sanitation.[69] The prisoners claimed the conditions were in breach of their rights to privacy and bodily integrity under both the Constitution and the ECHR. It is likely, given that prison conditions have not substantially improved, that further cases will follow and in considering the application of the case-law in an Irish context, it is important to note that in *Napier* the Court was influenced by the fact that the

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65 Ibid, paras 96–103.
66 *Price v UK* (2002) 34 EHRR 1285.
67 Ibid, para 30.
68 [2005] IESC 307.
69 O'Brien 'Prisoners who have to slop out claim rights violation', *The Irish Times* 17 August 2004.

applicant had been kept in a cramped, gloomy cell which he shared with another cellmate for 20 hours a day and had little by way of structured activity.

11.41 In this context also it is important to note that in reaching its decision in *Napier*, the Scottish Court laid emphasis on the trend towards stricter standards imposed by the European Court in relation to Article 3.[70] 'Evolving standards of decency' in this area mean that conditions which may be currently considered to be merely unsatisfactory may in the future be deemed degrading.[71] The Court was also influenced by the persistent failure of the domestic authorities to address what was clearly an ongoing problem and the detailed reports of the CPT's latest visit to the prison in question, including the conclusion that the subjection of prisoners to the vices of overcrowding, inadequate lavatory facilities and poor regime activities amounted to inhuman or degrading treatment.[72] The CPT has also repeatedly condemned as 'degrading' and 'humiliating' the continuing use of slopping out in the Irish prison system adding that it also debased the prisoner officers who supervised it. In 2006, the Committee considered that the regimes in all prisons save Wheatfield were deficient, and reiterated its view that the lack of in-cell sanitation in the relevant prisons was degrading and humiliating for prisoners.[73] The issue of overcrowding is also a feature of the Irish prison system, with some prisons such as Mountjoy, Cork and the Dóchas Centre consistently experiencing high levels of occupancy well above design capacity.[74]

PRISON HEALTH[75]

11.42 As we have seen above, in the case of *Edwards*, the failure of the State to provide medical care and health screening systems in prison was found to violate Article 2 of the Convention. A violation of the right to life was also found in the case of *Tarariyeva v Russia,* where a prisoner died from post-surgical complications after being transferred back to prison from a public hospital.[76] However the ECtHR has extended the principle of a duty to provide appropriate healthcare to prisoners to create much more far-reaching obligations. In this section we will look at the recent development of the

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70 *Napier*, paras 64–73.

71 Van Zyl Smit 'Humanising Imprisonment: A European Project?' (2006) 12(2) *European Journal on Criminal Policy and Research* 107, p 112.

72 *Napier*, para 54.

73 CPT Report, paras 42–56.

74 *Shadow Report to the Third Periodic Report by Ireland under the ICCPR*, a joint report by the Irish Council for Civil Liberties, the Free Legal Advice Centres and the Irish Penal Reform Trust, June 2008, p 60.

75 For an in-depth analysis of the full range of human rights standards that directly relate to prisoner health issues, see Lines 'The right to health of prisoners in international human rights law' *International Journal of Prisoner Health,* 2008 4(1): 3–53. For the analysis of the case-law of the European Court in this section, I am heavily indebted to Lines' work.

76 *Tarariyeva v Russia* 14 December 2006, para 87.

jurisprudence of the ECtHR in applying this principle of positive duties in relation to prison medicine, highlighting some of the issues that may be of interest in an Irish context.

Duty to provide basic medical treatment

11.43 In the case of *Pantea v Romania* the applicant was assaulted in custody by his fellow-prisoners. Suffering from multiple fractures, he was transferred to hospital in a railway wagon for a period of several days, and when the applicant was taken into hospital he was not seen or treated by the surgery department. In those circumstances, the ECtHR considered that the treatment suffered by the applicant was contrary to Article 3 of the Convention and the authorities had failed to discharge their positive obligation to protect his physical integrity. In describing the nature of that positive obligation the Court held that Article 3 imposes a duty to 'do everything that could reasonably [be] expected … to prevent the occurrence of a definite and immediate risk to [a prisoner's] physical integrity, of which [the authorities] knew or should have known'.[77] The State's positive obligations to protect the well-being of detainees are heightened when a prisoner is at increased vulnerability due to severe health concerns such as physical disability and in such 'exceptional cases' has determined that prisoner may need to be released. This was the approach taken in *Price v United Kingdom*, in which the applicant was severely disabled[78] and in *Mouisel v France*, in which the prisoner was suffering from leukaemia.[79]

11.44 In the case of *Rohde v Denmark,* the Court found that the lack of appropriate medical care may amount to treatment contrary to Article 3, specifically in the context of the need to effectively monitor the mental health of a prisoner who was in solitary confinement.[80] In *Rohde*, the Court referred to existing CPT reports on visits to Denmark where concern had been expressed about the possible detrimental effects of extended periods of solitary confinement on mental health.[81] However, in the case of *Kudla v Poland*, the Court found that the medical treatment in question was adequate even where the applicant had attempted suicide on a number of occasions and where the Commission on Human Rights had found a violation of Article 3.[82]

11.45 The European Court of Human Rights has also made clear that a failure to provide timely medical assistance when needed may violate the Convention. For example, the Court found an Article 3 violation, in part, where a prisoner had not seen a doctor for 18 months, even after taking part in

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77 *Pantea v Romania* (2005) 40 EHRR 26, paras 189, 190.

78 *Price v United Kingdom*, above.

79 14 November 2002.

80 *Rohde v Denmark* 21 July 2005. In that case the Court found that an extended period of solitary confinement did not constitute a violation in itself and that there had been effective monitoring of the applicant's medical condition. See also *Melnik v Ukraine* 28 March 2006.

81 At para 80.

82 *Kudla v Poland* (2000) 35 EHRR 11.

a hunger strike.[83] In *McGlinchy and Others v United Kingdom*, the Court found a violation based on a much shorter delay in treatment, when 'a gap in the monitoring of [the prisoner's] condition by a doctor over the weekend' resulted in a rapid decline of her health status, and later death.[84] The European Court has also found that, where a prisoner has a serious medical condition, timely medical care can include regular access to specialised diagnostic care[85] and that timely medical attention in the European Court's jurisprudence also covers any interruption of the treatment once it had been initiated.[86]

Spread of contagious disease

11.46 States are under an obligation to prevent the spread of disease in prisons. In a number of cases the failure to take adequate steps to prevent the spread of diseases such as tuberculosis can constitute a violation of Article 3 in itself,[87] and in other cases the contracting of disease while in detention may also be judged as evidence that the overall prison regime is inhuman or degrading.[88] In *Benediktov v Russia*, the European Court found it 'most probable' that the applicant was infected with hepatitis C while in prison. While this did not constitute a violation of Article 3 of itself, particularly as the prisoner was given effective treatment, the Court considered it a contributing factor to its finding that the overall conditions of confinement were degrading.[89] In other similar cases where prisoners have developed skin and fungal infections while incarcerated this was an element cited by the Court in finding the State in violation of Article 3.[90]

Information about health status

11.47 The disclosure of an individual's medical information can also cause difficulties in the context of Article 8, which guarantees respect for private and family life. In *TV v Finland*,[91] the Commission held that the disclosure that a prisoner was HIV-positive to prison staff directly involved in his custody and who were themselves subject to obligations of confidentiality was justified as being necessary for the protection of the rights of others. However, the Court took a much stronger line in *Z v Finland*[92] and placed particular emphasis on

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83 *Nevmerzhitsky v Ukraine* 5 April 2005, para 105.

84 *McGlinchy and Others v UK* (2003) 37 EHRR 41, para 57. See also *Iorgov v Bulgaria* 11 March 2004, para 85.

85 In the case of *Popov v Russia* 13 July 2006, where the prisoner had a history of bladder cancer and had previously undergone chemotherapy, the Court concluded 'that the minimum scope of medical supervision required … included regular examinations by a uro-oncologist and cystoscopy at least once a year', para 211.

86 *Paladi v Moldova* 10 July 2007, paras 81, 85.

87 *Melnik v Ukraine* 28 March 2006 and *Staykov v Bulgaria* 12 January 2007.

88 For example, *Nevmerzhitsky v Ukraine,* para 87; *II v Bulgaria,* 9 June 2005, para 76; *Alver v Estonia* 8 November 2005, para 54.

89 *Benediktov v Russia* 10 May 2007, para 40.

90 *Kalashnikov v Russia*, para 98 and *Nevmerzhitsky v Ukraine*, para 87.

91 (1994) 76A DR 140 at 150–151.

92 (1998) 24 EHRR 371, paras 94–114. See also *MS v Sweden* (1999) 28 EHRR 313 and *Panteleyenko v Ukraine* 29 June 2006.

the confidentiality of health data, its relationship with the individual's right to privacy and overall confidence in both the medical profession and health services generally. In that case, the applicant complained that her medical data, including details of her HIV status, had been disclosed during the course of a criminal trial in breach of her Article 8 rights. According to the Court, '[i]n view of the highly intimate and sensitive nature of information concerning a person's HIV status, any state measures compelling communication or disclosure of such information without the consent of the patient call for the most careful scrutiny on the part of the Court, as do the safeguards designed to secure an effective protection'.[93]

11.48 It has been argued that the denial of access to sterile syringes creates conditions necessitating the sharing and re-use of contaminated injecting equipment among drug dependent prisoners, and that the mental anguish, fear, humiliation and loss of dignity inherent under such conditions in and of itself meets the threshold of degrading treatment under Article 3.[94] In the case of *Shelley v United Kingdom*, an attempt by a prisoner to compel prison authorities to provide access to sterile injecting equipment such as syringes to prevent the spread of HIV was dismissed by the Scottish authorities and the European Court reached the same finding.[95] However, given the incremental development of the ECtHR's jurisprudence in relation to prisoners' health rights generally, it is quite possible that this issue may be approached with greater levels of scrutiny by the ECtHR in the future.

Drug using prisoners

11.49 It is clear that for the purposes of Article 3, the prison authorities are viewed as having enhanced responsibilities towards drug-addicted inmates generally. In the case of *McGlinchey v United Kingdom*,[96] for example, the European Court held there had been a breach of Article 3 in circumstances where a prisoner had not been given proper treatment for symptoms of heroin withdrawal. Although the facts of the case were undoubtedly extreme, involving the prisoner's death, the case extends to those prisoners with drug problems the special duties owed by the authorities in relation to prisoners with physical or mental disabilities.

11.50 The CPT's most recent report highlights the endemic nature of the drug problem in Irish prisons and identifies the drug trade as a causative factor in inter-prisoner violence.[97] However, the drug problem in the prison system also represents a significant public health issue. High-risk behaviours for transmission of HIV and Hepatitis C such as needle sharing are widespread in

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93 *Z v Finland* (1998) 25 EHRR 371, para 96.

94 Lines 'Injecting Reason: Prison Syringe Exchange and Article 3 of the European Convention on Human Rights' (2007) 1 EHRLR 66–80.

95 *Shelley v The Secretary of State for the Home Department* [2005] EWCA Civ 1810; *Shelley v UK* 8 January 2008.

96 (2003) 37 EHRR 41.

97 CPT report, para 38.

Irish prisons, with the rate of HIV infection among Irish prisoners more than ten times higher than that in the general Irish population, and the rate of Hepatitis C infection more than 100 times higher.[98] The importance of access to preventive measures was recognised by the CPT in its recent report in which it encouraged the Irish authorities to take harm reductive measures to reduce the transmission of blood-borne viruses.[99]

11.51 In relation to the issue of preventive measures taken by the state authorities, it is worth noting that *Shelley* concerned a claim that the provision of disinfectant tablets was an inadequate substitute for a needle exchange programme, whereas in Ireland no such system of tablet provision exists. Therefore it could well be argued that the health and other risks posed by intravenous drug use in prison may well be worse in this jurisdiction.

11.52 The general principle set out in *McGlinchey* in relation to access to drug treatment has recently been raised before the Irish courts where Article 3 was relied upon in an application before the High Court concerning a prisoner's five-month delay in accessing a methadone programme. The prisoner was a heroin user and had hepatitis C and he recommenced taking drugs on entry to prison. Although O'Neill J was not required to rule on the issue as the State found a place for the prisoner, it is of note that the learned judge found it 'inexplicable [how] a lack of resources was the reason why a person with a "serious illness" should have to wait so long before being put on a programme'.[100] This may yet prove to be useful in future litigation.

Mental health and the use of padded cells

11.53 The prevalence of prisoners with mental health difficulties in the Irish prison system means that the Convention may be of particular use in this context. For example, one study found that 48% of male and 75% of female prisoners may be in need of psychiatric treatment.[101] Those with mental illness are a particularly vulnerable group in the penal system and in relation to its treatment of this group of prisoners the state is currently defending a constitutional challenge.[102] The case concerns two prisoners, one of whom was placed in a padded cell in Mountjoy prison for two weeks pending the

[98] Allwright, et al *Hepatitis B, Hepatitis C and HIV in Irish Prisoners: Prevalence and Risk* (The Stationery Office,1999); Long et al, *Hepatitis B, Hepatitis C and HIV in Irish Prisoners, Part II: Prevalence and risk in committal prisoners 1999* (The Stationery Office, 2000). See also O'Mahony *Key Issues for Drugs Policy in Irish Prisons*, a Drugs Policy Action Group Policy Paper, June 2008.

[99] *Report to the Irish Government on the visit to Ireland carried out by the CPT from 2 to 13 October 2006*. CPT/Inf (2007) 40, para 81.

[100] 'Prison Criticised Over Methadone Delay', *Irish Times*, 22 March 2007.

[101] Hannon, Kelleher & Friel *General Healthcare Study of the Irish Prisoner Population*. (Government Publications, 2000).

[102] *Irish Penal Reform Trust, Sefton, Carroll v Governor of Mountjoy Prison*, (unreported) 2 September 2005, High Court, Gilligan J. In April 2008, the Supreme Court held that the locus standi issue should be considered together with the substantive issue; it quashed the order of the High Court and returned the matter to the High Court. See further Irish Penal Reform Trust, *Out of Mind, Out of Sight: Solitary Confinement of Mentally Ill Prisoners*, April 2001.

availability of a bed in the Central Mental Hospital, and another who was detained in a cell for several days naked and covered in his own excrement. Both claim that they were not adequately monitored by psychiatric professionals and argue that such conditions are both unconstitutional and contrary to Article 3 of the ECHR. While improvements have been made to the condition of these cells, the CPT has pointed out that prisoners continue to have difficulty accessing counselling following acts of self-harm or attempted suicide.[103] There is clearly scope for the application of Article 3 in litigation challenging the treatment of those with mental health difficulties in the prison system.[104]

PRISONER CORRESPONDENCE AND PRIVATE LIFE

11.54 The European Court has been particularly active in protecting the rights to respect for private and family life in the context of prisoners' correspondence. The right to private correspondence is of great importance to prisoners because it is their principal method, in addition to visits, to have contact with the outside world. Unlike Article 3 of the ECHR, Article 8 is structured in the form of a general right to respect for private and family life and a specified number of legitimate interferences with that right, which will be scrutinised by the ECtHR. The protection provided by Article 8 is about the means of communication rather than its content (which will ordinarily fall to be considered under Article 10).[105] However, the content of a communication may be relevant to determining the limits of the right of the State to interfere with a letter or telephone call, particularly where legally privileged correspondence is involved. Equally, the identity of the sender or consignee of correspondence will play a part in determining what is required by Article 8.

11.55 The leading case in relation to prisoner correspondence is *Golder v United Kingdom*,[106] which concerned letters from a prisoner, who was subject to internal prison disciplinary proceedings, to his lawyer being stopped. As with many cases under Article 8, the issue of whether there had been an interference with the applicant's rights was clear cut and not contested and the case turned on whether that interference was 'necessary in a democratic society'. Given the importance of access to the law in protecting the rights contained in the ECHR generally, and Article 6 in particular, the Court found that there was no justification for restricting the applicant's right to communicate with his lawyer. The ECtHR has been particularly solicitous in protecting letters between detained persons and their lawyers, and even more so with respect to prisoners' correspondence with the Court itself. Subsequent reform of the law in the UK sought to distinguish between correspondence with legal advisers about legal

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[103] *CPT Report*, para 83.

[104] See further Hamilton and Kilkelly, above.

[105] In *A v France* (1993) Series A, No 277-B, paras 34–37, the Court rejected the government's claim that telephone conversations about criminal activities fell outside the scope of Article 8.

[106] (1979–1980) 1 EHRR 524.

proceedings already instituted (which was privileged) and other correspondence, including that about prospective legal proceedings (which could be opened and read). This was also found to infringe Article 8 in *Campbell v United Kingdom*,[107] where the Court held that the 'general interest' required that consultations with lawyers should be in conditions 'which favour full and uninhibited discussion'. Moreover, *all* letters to and from legal counsel were privileged, including correspondence on civil matters unrelated to imprisonment, which meant that 'reasonable cause' must be shown by the State for suspecting that a particular letter contained illicit material before it could be opened. Similarly, the court has staunchly defended the individual's right to communicate with the court itself and demonstrated a very low tolerance to interference with and screening of its correspondence with those in detention, regardless of the offences with which they have been charged.[108]

11.56 For people in detention, the possibility of corresponding with others will often depend on the provision of facilities by the authorities and in this regard it is significant that Article 8 may involve positive obligations to facilitate prisoner correspondence.[109] Overall, it is clear that the authorities have an active role in maintaining the prisoner's right to respect for private and family life and the court stresses the importance of giving sufficient weight to the competing interests of security and order in the prison on the one hand, and the rights of the individual prisoner on the other.[110]

11.57 As already outlined, in most of these cases the question of whether or not there has been an interference with Article 8 in relation to prisoner correspondence is not at issue, rather the principal issues in these cases has been the 'legality' and 'necessary' requirements under Article 8(2). Prior to the enactment of the ECHR Act 2003, the issue of the stopping of or interference with prisoners' correspondence and communication had been identified as one in which Article 8 of the Convention might have an early impact, given the well established case-law on the issue. McDermott had suggested that following the *Campbell* decision, Rule 63 of the 1947 Prison Rules which had allowed a Prison Governor to read every letter to or from a prisoner, presented a clear breach of the Convention.[111] Hamilton and Kilkelly note that the 2007 Prison Rules improve on this position considerably setting out specific grounds for interference (where the letter is threatening, may facilitate the commission of a

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[107] (1993) 15 EHRR 137, para 48.

[108] See *Rehbock v Slovenia*, 28 November 2000; *Peers v Greece* (2003) 33 EHRR 51 and *Karalevičius v Lithuania* 7 April 2005.

[109] See further Harris, O'Boyle and Warbrick (eds) *Law and Practice of the European Convention on Human Rights* 2nd Ed (Oxford University Press 2009).

[110] *Erdem v Germany* (2002) 35 EHRR 383 on the application of this principle in the terrorism context.

[111] McDermott *Prison Law*, above. He suggests that this is so despite the decision of the High Court in *Kearney v Minister for Justice* [1986] IR 116 in which Costello J held that the power contained in Rule 63 was within the reasonable requirements of the prison service and therefore not unconstitutional. Indeed, he points out that the European Commission of Human Rights has already made clear its view that this decision was incorrect and that it expects it to be overruled, pp 121–123.

criminal offence, cause serious distress to the recipient). However, allowing correspondence to be examined where 'it is contrary to the interests of the security, good order and government of the prison' will need to be strictly interpreted in recognition of the prisoner's right to maintain contact with the outside world.[112] Strict adherence to these rules in practice will clearly bring the situation closer in line with ECHR requirements here.

11.58 The 2007 Prison Rules also deal with correspondence between prisoners and their solicitors and other authorities. In particular, Rule 44 distinguishes between incoming and outgoing mail, providing that outgoing mail to solicitors and complaints bodies will not be opened before being dispatched while incoming mail will only be opened to the extent necessary to determine that it is indeed correspondence from legal advisors. The Rules also require that if any letter is to be examined it must be opened in the presence of the prisoner addressee and this is clearly in line with the position adopted by the ECtHR in *Campbell* where it was held that such practice offers a suitable safeguard to ensure the letter is not read. These rules came into operation on 1 October 2007.[113]

RESPECT FOR FAMILY LIFE

11.59 The State has an obligation to assist serving prisoners to maintain contact with their families,[114] although only in exceptional circumstances will that duty extend to transferring a prisoner from one jail to another.[115] The duty may be more extensive between prisoners and their children than between prisoners and their spouses, who can ordinarily be expected to travel more easily to visit a prison.[116] In *McFeeley v United Kingdom*,[117] the Commission underlined the importance of relationships with others, concluding that private life applied to prisoners and required a degree of association for persons imprisoned. The ECtHR has recognised that the authorities have an active role in maintaining the prisoner's right to respect for private and family life and the case-law stresses the importance of giving sufficient weight to the competing interests of security and order in the prison on the one hand, and the rights of the individual prisoner on the other.

11.60 The demands of this approach are evident from *Dickson v United Kingdom*,[118] where the prisoner sought to challenge the policy on access to assisted reproduction services in prison, which was reserved to exceptional

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[112] See Hamilton and Kilkelly, above.
[113] Ibid.
[114] *X v UK No 9054/80* 30 DR 113 (1982) and *McCotter v UK No 18632/91* 15 EHRR CD 98 (1993).
[115] *Campbell v UK Nos 7819/77*, 6 May 1978, paras 30–32.
[116] *Ouinas v France* 65 DR 265 at 277 (1990). See also *Wakefield v UK* 66 DR 251 (1990).
[117] 20 DR 44 at 91 (1980). See also *Botta v Italy* (1998) 26 EHRR 241, para 28.
[118] *Dickson v UK* [GC] 4 December 2007. See also Codd 'Regulating Reproduction: Prisoners' Families, Artificial Insemination and Human Rights' [2006] EHRLR 39.

cases only. According to the Court, the UK policy breached the duty to respect private and family life under Article 8 as it had failed to strike a fair balance between the prisoner applicant's interest in having children and the public interest *inter alia* in ensuring confidence in the prison system. More generally, the limit of the State's obligation to ensure a prisoner's family life is respected during his/her detention has not yet been fully tested and it may well require facilitating frequent visits, perhaps conjugal, between family members. It is also possible that the Article 12 right to marry and found a family may be invoked by prisoners. In the very early case of *X v Federal Republic of Germany*,[119] national legislation which prohibited remand prisoners from marrying was found to be acceptable. It is highly unlikely that this conclusion would be reached now.

11.61 The issue of solitary confinement and the isolation of prisoners for security reasons has been examined most prominently in a number of cases relating to the detention of Abdullah Ocalan, leader of the PKK (Workers' Party of Kurdistan) who was convicted of serious terrorist offences. So far these cases have not found the conditions of detention to infringe on the standards of Article 8 or Article 3,[120] but applications forthcoming in this area may well shed more light on this issue.

11.62 Given the small size of the jurisdiction, issues of obstacles to visits are unlikely to present significant issues in an Irish context with the exception of juveniles in detention who are detained in a number of locations in Dublin. For young people from other parts of the country, visits are costly and difficult and in light of the importance for children to have contact with their families (see also Article 37 of the Convention on the Rights of the Child) there might be a case to answer here. There would also appear to be relatively little scrutiny at present of solitary confinement regimes or restrictions on visits as a disciplinary matter and again, this may present some fertile ground for ECHR challenge. At present there would appear to be no plans to introduce either conjugal visits or any support for prisoners who may wish to access fertility treatments. Developments at the European level may be instructive in the coming years.

CONCLUSION

11.63 This chapter has highlighted a number of areas where the ECHR is likely to make a real impact on Irish prison law in the years to come. The expanding jurisprudence of the Court in Article 2 and Article 3 is at the centre of things in this regard, running as it does to the heart of the nature of the State's duty for care to the inmates of its prisons. The ECtHR has also set demanding standards in relation to issues such as prisoner correspondence and related private and family life issues.

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[119] (1961) 4 Yearbook 240.

[120] *Ocalan v Turkey* 12 May 2005, paras 191–197; and 12 March 2003, paras 234–236.

11.64 Whether change happens at the statutory level or through litigation in the Irish courts is a matter of conjecture at this point. However, a number of structural obstacles remain to prisoner litigation, not least the limitation in the legal aid system, the restrictive approach of the courts to *locus standi,* and the continuing absence of an effective system of prison accountability such as a prison ombudsman. As a result there are few potential champions for prisoners rights who are in a position to raise the significant ECHR arguments outlined above and, given the traditional reluctance of the courts to intervene in this area, it remains to be seen how the potential of the ECHR Act will be embraced by the superior courts. Accountability of the prison system itself is universally acknowledged as a critical element in ensuring that rights standards are respected. There is an urgent need to establish an ombudsman, not least in the face of Ireland's proposed ratification of the Optional Protocol to the UN Convention Against Tortoure. In relation to deaths in custody, we can reasonably assume that the report of the McMorrow Inquiry will make significant recommendations for reform, but it will remain for Government to act on them.

11.65 In relation to the legislature, the new Prison Rules and the Prison Act 2007 have stopped short of placing comprehensive rights-based standards in legislative form. However, based on the experience of the work of HM Inspector of Prisons in England and Wales, there is great potential for the Inspector of Prisons here to set binding standards across all areas of prison administration and management which might prove instrumental in benchmarking respect for rights, particularly in relation to prison conditions and prisoner health.