

The following is an outline of the paper delivered by Anna Austin, Registry of the European Court of Human Rights, at the fifth in the Prison Law series of practice seminars for barristers and solicitors, 'Irish Prison Law and the ECHR', which took place on Monday March 22nd, 2010. The lecture series is co-hosted by the Irish Penal Reform Trust, the Irish Criminal Bar Association and the Dublin Solicitors Bar Association.

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Right to Health in Prison¹

Article 3 of the European Convention on Human Rights

A. The emergence of the right to health in prison

- *Kudla v. Poland*² and “conditions of detention compatible with human dignity”;
- a positive obligation to provide conditions which respect human dignity;
- the disappearance of the element of intent³ ;
- assessment in terms of human dignity arguably lowering the “severity threshold”⁴.

B. Elements of the right to health in prison

1. the obligation to treat a vulnerable individual

- those who are *ill* including chronic lymphocytic leukaemia⁵, congestive heart failure and diabetes⁶, dermatological illnesses⁷, tuberculosis⁸, Wernicke-Korsakoff syndrome⁹, hepatitis¹⁰, asthma¹¹, psoriasis¹², AIDS¹³, multiple sclerosis¹⁴, osteoarthritis¹⁵ and cancer¹⁶.

¹ Summary provided by Anna Austin, Registry of the European Court of Human Rights. Drawing on, *inter alia*, an Article (“*The right to health in prison: Developments in Article 3 of the European Convention on Human Rights*”) written by Françoise Tulkens, Judge, and Panayotis Voyatzis, Lawyer, of the European Court of Human Rights. Any views expressed are the authors own and do not bind the Court.

² *Kudla v. Poland* [GC], no. 30210/96, § 94, ECHR 2000 XI

³ *Peers v. Greece*, judgment of 19 April 2001, § 74

4. Compare *Kötalla v. the Netherlands* (dec.), 6 May 1978, DR 14, p. 242 and *Mouisel v. France*, judgment of 14 November 2002

5. *Mouisel v. France*

6. *Sakkopoulos v. Greece*, judgment of 15 January 2004.

7. *Nevmerzhitsky v. Ukraine*, judgment of 5 April 2005.

- those with psychosomatic symptoms such as heroin withdrawal¹⁷;
- those with psychological/psychiatric issues such as post-traumatic stress disorder¹⁸, claustrophobia¹⁹, schizophrenia²⁰ and psychotic suicidal behaviour²¹.

- those with physical disabilities such as tetraplegia²².

- those in situations which are objectively vulnerability (minors²³ and the elderly²⁴).

(a) *Capacity to serve the sentence (any obligation to release or not to re-detain)*

- no general obligation to release on the grounds of health²⁵;

- exceptionally where a prisoner's health is "totally inconsistent" with detention²⁶;

- serious physical²⁷ or psychological²⁸ illness and continued detention;

8. *Gorodnichev v. Russia*, judgment of 24 May 2007; *Alver v. Estonia*, judgment of 8 November 2005; *Melnik v. Ukraine*, judgment of 28 March 2006.

9. *Tekin Yildiz v. Turkey* and *Uyan v. Turkey*, judgments of 10 November 2005; and *Balyemez v. Turkey*, judgment of 22 December 2005.

10. *Testa v. Croatia*, judgment of 12 July 2007.

11. *Ostrovar v. Moldova*, judgment of 13 September 2005.

12. *I.I. v. Bulgaria*, judgment of 9 June 2005.

13. *Gelfmann v. France*, judgment of 14 December 2004 ; *Khudobin v. Russia*, judgment of 26 October 2006; *Legret v. France*, decision of 25 May 2000; *Ceku v. Germany*, decision of 13 March 2007.

14. *Serifis v. Greece*, judgment of 2 November 2006.

15. *Sarban v. Moldova*, judgment of 4 October 2005; *Popov v. Russia*, judgment of 13 July 2006.

16. *Saydam v. Turkey*, decision of 7 March 2006.

17. *McGlinchey and Others v. the United Kingdom*, judgment of 29 April 2003.

18. *Novak v. Croatia*, judgment of 14 June 2007.

19. *Rohde v. Denmark*, judgment of 21 July 2005.

20. *Drew v. the United Kingdom*, decision of 7 March 2006.

21. *Rivière v. France*, judgment of 11 July 2006; *Keenan v. the United Kingdom*, judgment of 3 April 2001.

22. *Price v. the United Kingdom*, judgment of 10 July 2001.

23. *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, judgment of 12 October 2006 (a five-year-old girl pending extradition)

24. *Papon v. France*, decision of 7 June 2001; *Farbtuhs v. Latvia*, judgment of 2 December 2004; *Sawoniuk v. the United Kingdom*, decision of 29 May 2001.

25. *Mouisel v. France*, judgment of 14 November 2002, § 40; *Matencio v. France*, judgment of 15 January 2004, § 78; *Rivière v. France*, judgment of 11 July 2006, §§ 62 and 74; *Gorodnichev v. Russia*, judgment of 24 May 2007, § 82.

26. *Rojkov v. Russia*, judgment of 19 July 2007, § 104.

- age and continued detention²⁹.

(b) *An obligation to provide medical care*

- the general principle³⁰;

- the obligation is to provide “the requisite medical assistance”³¹ and not the best standards available to the general public³² and not a prisoner’s preference³³.

(c) *Adaptation of the conditions of detention to the prisoner’s health*

- adaptation of the prison environment to a prisoner’s special needs³⁴;

- adaptation of measures of coercion imposed on a prisoner³⁵.

27. *Mouisel v. France*, judgment of 14 November 2002.

28. *Rivière v. France*, judgment of 11 July 2006, § 64; *Drew v. the United Kingdom*, decision of 7 March 2006.

29. *Sawoniuk v. the United Kingdom*, decision of 29 May 2001; *Papon v. France*, decision of 7 June 2001 and *Priebke v. Italy*, decision of 7 March 2002.

30. *Rivière v. France*, judgment of 11 July 2006, § 74; *Naumenko v. Ukraine*, judgment of 10 February 2004, § 112; *Farbtuhs v. Latvia*, judgment of 2 December 2004, § 51.

31. *McGlinchey v. the United Kingdom*, judgment of 29 April 2003, § 46; *Mouisel v. France*, judgment of 14 November 2002, § 40; and *Aerts v. Belgium*, judgment of 30 July 1998, §§ 64 et seq.

32. *Khudobin v. Russia*, judgment of 26 October 2006, § 93.

33. *Mathew v. Pays-Bas*, judgment of 29 September 2005, §§ 186-187.

34. *Price v. the United Kingdom*, judgment of 10 July 2001, § 29; and *Vincent v. France*, judgment of 24 October 2006, §§ 104-114; *Mathew v. the Netherlands*, judgment of 29 September 2005, §§ 190-191; and *Ostrovar v. Moldova*, judgment of 13 September 2005, § 85.

35. *Raninen v. Finland*, judgment of 16 December 1997, § 56 and *Mouisel v. France*, judgment of 14 November 2002, § 47; *Gorodnichev v. Russia*, judgment of 24 May 2007; *Mouisel v. France*, judgment of 14 November 2002; *Gorodnichev v. Russia*, judgment of 24 May 2007; *Istratii and Others v. Moldova*, judgment of 27 March 2007, § 57; *Naumenko v. Ukraine*, judgment of 10 February 2004, §§ 117-120

35. *Erdoğan Yağız v. Turkey*, judgment of 6 March 2007, §§ 45-47

2. Any secondary guarantees of health in prison

(a) *Preserving a prisoners' physical and psychological integrity.*

- when it is the cumulative effect of conditions which impacts on health³⁶ (temperature and lack of air in the cell³⁷, the quality of the meals³⁸ and the lack of physical exercise³⁹);

- when the impact on health of a particular issue is more tangible⁴⁰.

(b) *Anticipating fatal incidents.* The obligation to anticipate suicide or self-mutilation on the basis of what the authorities knew or, or ought to have known, and of what could reasonably have been expected from them in order to prevent *this risk*⁴¹.

(c) *Respecting a prisoner's personal autonomy*⁴². When prisoners are treated as a therapeutic necessity (force-feeding⁴³, the administration of psychotropic drugs and the infliction of electric shocks⁴⁴), the State must show *both* the need for the measure and its implementation in a way that complies with the dignity of the person concerned⁴⁵.

(d) *Provision of procedural guarantees.* The obligation to effectively investigate etc developed in the context of Article 2 of the Convention⁴⁶ can be extended to some extent to Article 3⁴⁷

36. *Kalashnikov v. Russia*, judgment of 15 July 2002, §§ 97-98.

37. *Peers v. Greece*, judgment of 19 April 2001, § 72.

38. *Moisejevs v. Latvia*, judgment of 15 June 2006, §§ 79-80.

39. *Poltoratskiy v. Ukraine*, judgment of 29 April 2003, § 145; *Sotiropoulou v. Greece*, decision of 18 January 2007, *Labzov v. Russia*, judgment of 16 June 2005, § 47; *Romanov v. Russia*, judgment of 20 October 2005, § 83; *Mayzit v. Russia*, judgment of 20 January 2005, § 42; *Alver v. Estonia*, judgment of 8 November 2005, § 56; *Trepashkin v. Russia*, judgment of 19 July 2007, § 94

40. *Melnik v. Ukraine*, judgment of 28 March 2006, §§ 104-106; *Štitić v. Croatia*, judgment of 8 November 2007, §§ 43-44; *Georgiev v. Bulgaria*, 15 December 2005, § 64

41. *Keenan v. the United Kingdom*, judgment of 3 April 2001; *Paul and Audrey Edwards v. the United Kingdom*, judgment of 14 March 2002; and *Tais v. France*, 1 June 2006

42. *Keenan v. the United Kingdom*, judgment of 3 April 2001, § 92.

43. *Nevmerzhtsky v. Ukraine*, judgment of 5 April 2003.

44. *Naumenko v. Ukraine*, judgment of 10 February 2004.

45. *Nevmerzhtsky v. Ukraine*, judgment of 5 April 2003, § 94; and *Naumenko v. Ukraine*, judgment of 10 February 2004, § 112.

46. *McCann and Others v. the United Kingdom*, judgment of 27 September 1995.

47. *Tekin v. Turkey*, judgment of 9 June 1998, § 66; *Assenov and Others v. Bulgaria*, judgment of 28 October 1998; *Selmouni v. France*, judgment of 28 July 1999; *Labita v. Italy*, judgment of 6 April 2000.