
ACCOUNTABILITY STRUCTURES AND THE LAW REGULATING IRISH PRISONS

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ACCOUNTABILITY STRUCTURES AND THE LAW REGULATING IRISH PRISONS

This publication seeks to raise awareness of prison law and prisoners' rights jurisprudence amongst legal professionals, and to increase their research capacity in these areas. It is part of a series of three papers, one of which examines the law on aspects of prison conditions; the other explores practical matters surrounding the taking of prison law cases.

The topic of this paper is 'accountability structures and the law regulating Irish prisons'. It examines the aspects of the law regarding how decisions are made in prisons and the requirements for accountability for deaths and other serious incidents in custody.

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This paper seeks to state the law as of June 2012. No liability is accepted for any errors or omissions or for how this document is used. It is intended as a form of research assistance for legal practitioners and not to act as a substitute for legal advice. All errors and omissions are the responsibility of Dr. Mary Rogan. Those using this document are encouraged to submit any corrections and/or supplementary information Dr. Mary Rogan at mary.rogan@dit.ie.

The full text of relevant international legal instruments on prisons and prisoners' rights, along with reports of the Council of Europe's Committee for the Prevention of Torture, the Inspector of Prisons, and other bodies, can be found at www.iprt.ie/prison-law.

STRUCTURE OF THE PAPER

This paper discusses the legal status of the Prison Rules, 2007. It then examines the legal basis under which prisoners may make complaints about aspects of their detention to the prison authorities. The paper also explores international human rights principles governing complaints mechanisms for prisoners. The issue of the denial of visits to prisoners is discussed in particular detail. Finally, the requirements of the European Convention on Human Rights to carry out effective investigations into possible breaches of Articles 2 and 3 (the right to life and the right to freedom from torture or inhuman and degrading treatment respectively) are discussed. Caselaw on the requirements for the effective investigation of deaths in prison and incidents of 'near-suicides' or serious self-harm is presented.

This paper focuses on the law regulating how prisoners can take complaints and the investigative structures for deaths in prison or other serious incidents. Other matters concerning accountability in the prison system such as those around decisions on early release, are not examined here.

THE PRISON RULES 2007

The Prison Rules 2007¹ are the main statutory basis for the treatment of prisoners. They lay out what prisoners are entitled to and what they can expect in terms of their treatment. The Rules provide for matters such as accommodation, food, hygiene, and discipline.

The Rules were made by Statutory Instrument, under the power given to the Minister for Justice under section 35 of the Prisons Act 2007. The status of the predecessor of the 2007 Rules has been examined in caselaw. In *State (Walsh and McGowan) v. Governor of Mountjoy Prison*² O'Higgins CJ described the 1947 Rules as having statutory effect. As McDermott notes "there is no doubt that the Prison Rules are justiciable in the sense that breaches of them may give rise to judicial review proceedings". It is not clear, however, if a breach of them is considered also breach of statutory duty.³ It is not possible to pursue a claim for breach of statutory duty under the Prison Rules in England and Wales. It was held in *R v. Deputy Governor of Parkhurst Prison, ex parte Hague and Weldon*⁴ that the Prison Act 1952 was concerned with the management and administration of prisons and prisoners and it could not be concluded that Parliament had intended to confer any private law rights of action in respect of the rules. Lord Bridge, however, disagreed, holding that the provisions of the rules regarding the treatment of prisoners was broad enough to allow for the enactment of rules which did give rise to a cause of action for breach of statutory duty. None of the Rules did provide for this so the matter was moot.

It should be noted that many of the Prison Rules 2007 contain the saviour 'so far as practicable', giving wide discretion to the prison authorities in the implementation of the Rules. *Devoy v. Governor of Portlaoise Prison*,⁵ however, recognised that the manner in which the Rules are applied must be in compliance with the Constitution, save in emergency situations of extraordinary and excusatory circumstances of the type referred to in *DPP v. Shaw*.⁶

1 S.I. No. 252/2007.

2 Unreported, High Court, December 12 1975.

3 See further, McDermott, *Prison Law (Dublin, Round Hall, 2000)* at pp. 13–14.

4 [1992] 1 AC 58; [1991] 3 WLR 340.

5 [2009] IEHC 288.

6 [1982] IR 1.

When assessing a prisoner's cause of action, examining the relevant provisions of the Prison Rules can assist in determining if the impugned action is grounded in law, and if any such rule is clear.

The Prison Rules cover, inter alia, the following areas:

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1. Reception and registration (including searches on arrival, photographing, medical examinations, explanation of rights);
 2. The treatment of prisoners (including provision for when there is insufficient prison accommodation, clothing, food and drink, sanitary and washing facilities, out-of-cell time, health, visits, telephone calls, transport, searches of property, grievance procedures, remission);
 3. Control, discipline and sanctions (the use of special observation cells, the use of restraints, breaches of discipline);
 4. Young prisoners;
 5. Prisoners not serving a sentence;
 6. Healthcare (duties of the prison doctor, records);
 7. Education and vocational training.
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The full text of the Rules, along with other prison law materials, is available on www.iprt.ie/prison-law.

PRISONERS MAKING COMPLAINTS

Prisoners who have a complaint about aspects of their detention and/or the non compliance by the prison authorities with the Prison Rules may make a complaint through the internal complaints mechanism. The Prison Rules 2007 formally govern this internal procedure. At present, the policies on making complaints are being, though it is not clear if there will be changes made in law.

The system by which a complaint can be made may differ from prison to prison. The difficulty for practitioners is that, unlike England and Wales, internal prison policy documents are not freely available publicly. The Prison Rules gives limited detail on what the complaints mechanism should be like. This may be relevant when assessing whether any such system has foundation in statute.

The Prison Rules 2007 state:

55. (1) The Governor shall, as soon as is practicable, meet with a prisoner where the prisoner so requests.

(2) Where at a meeting to which this Rule applies, the prisoner makes a complaint to or request of the Governor, or brings to the Governor's attention any other matter relating to the prisoner in respect of which a decision by the Governor is warranted, the Governor shall, upon making a decision in relation to any such complaint, request or matter, notify the prisoner as soon as is practicable thereafter.

(3) The Governor shall record the date and time on which a meeting under this Rule took place, the name of the prisoner concerned, the nature of any request, complaint or matter brought to the Governor's attention during the meeting and the decision (if any) of the Governor in relation thereto.
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57. (1) A prisoner may make a request, in writing, to the Governor to meet with an officer of the Minister (other than the Governor, a prison officer or any other person working in the prison) and the Governor shall, upon receipt of such request, forward the request without undue delay to the Director General.
- (2) An officer of the Minister, designated by the Director General, shall, as soon as is practicable, visit the prisoner and hear any request or complaint which the prisoner may wish to make.
- (3) Subject to the requirements of security, good order and the government of the prison, a meeting between a prisoner and an officer of the Minister attending the prison pursuant to this Rule shall take place within the view, and except where the prisoner or officer of the Minister requests otherwise, out of the hearing of a prison officer.
- (4) Where at a meeting to which this Rule applies the prisoner makes a complaint to or request of the officer of the Minister concerned, or brings to his or her attention any other matter relating to the prisoner in respect of which a course of action by the Governor is warranted, or appeals against any decision made by the Governor, the officer of the Minister may –
- (a) make a recommendation to the Governor, or
 - (b) recommend to the prisoner that he or she make the complaint or request to the Governor or bring the matter to the attention of the Governor, and the officer may, before making a recommendation under this paragraph, seek the views of the Governor in relation to the request, complaint or other matter, as the case may be.
- (5) Where the Governor fails or refuses to give full effect to a recommendation of an officer of the Minister under paragraph (4)(a) the Director General may give a direction to the Governor in relation to the complaint, request or other matter concerned and the Governor shall comply with the direction.
- (6) The Governor shall record –
- (a) the prisoner's name,
 - (b) the date on which a request under this Rule was made,
 - (c) the date on which it was forwarded under this Rule,
 - (d) the date on which a meeting under this Rule took place,
 - (e) a recommendation made or direction given under this Rule, and
 - (f) any action taken or decision made by him or her pursuant to such recommendation or direction.
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These provisions are separate to the disciplinary procedures for prisoners, which are not dealt with in this paper.

The Inspector of Prisons has set out the general procedure followed when prisoners make complaints.⁷ The procedure as noted by the Inspector is as follows. The prisoner receives a prisoner complaint form which s/he uses (if able to) to write out the nature of the complaint. This form is given to the Governor who delegates the investigation of the complaint to a prison officer of rank not below Chief Officer. A photocopy of the complaint form is given to all prison officers referred to in the complaint made by the prisoner or those who are rostered for duty in the area referred to in the complaint form. These officers are asked for their observations. No time limit is placed on their reply.

There is the possibility that other prisoners may be asked to provide statements if they witnessed an incident. The Chief Officer may view CCTV if available. When the Chief Officer has taken the evidence, s/he completes a report of the investigation. Usually this will include the Chief Officer's own assessment of the complaint and a recommendation. This, along with the original complaint form, statements and other evidence are sent to the Governor.

The Governor will make a decision on the complaint. According to the Inspector of Prisons' report, in most cases this is done without taking oral evidence or directing other inquiries. The prisoner does not usually have a right of rebuttal.

The prisoner is informed of the determination of the complaint by a nominated prison officer. The prisoner receives the completed complaint form back which advises the prisoner that it is possible to appeal the decision of the Governor.

DOMESTIC AND INTERNATIONAL HUMAN RIGHTS LAW ON PRISONER COMPLAINTS MECHANISMS

This section examines caselaw and international human rights principles on how prisoners complaints should be dealt with. It indicates some ways in which current Irish procedures may be deficient.

AWARENESS OF RIGHTS

Rule 13 of the Prison Rules 2007 states that each prisoner on admission should be given an explanatory booklet outlining his or her entitlements, obligations, and privileges under the Rules. Each prisoner who was admitted to prison before the commencement of the Rules should also receive such a booklet. A full copy of the Rules should also be available for examination by prisoners. Such booklets should be provided to foreign prisoners in a language they understand; if not, reasonable efforts must be made to ensure that the said contents are explained to him or her in a language that he or she understands. Where a prisoner is unable to read or is unable to understand the contents of the booklet, the Governor should take all reasonable measures to ensure that the prisoner's entitlements, obligations, and privileges under the Rules are explained to him or her as soon as is practicable.

⁷ *Inspector of Prisons, Guidance on Best Practice relating to Prisoners' Complaints and Prison Discipline (Nenagh, Inspector of Prisons, 2010)*, available at: <http://www.inspectorofprisons.gov.ie/en/IOP/Pages/PB10000003>.

Rule 30 of the European Prison Rules provides that when a person is admitted to prison s/he should receive a copy of the rules governing the prison, which should set out their rights and duties and the operation of the complaints process in a language the prisoner can understand. Rule 30(1) states that if a person is unable to read, s/he should be informed of his or her rights orally. The Rules also state that each prison should have a designated person to assist prisoners to make complaints. Rule 35 of the UN Standard Minimum Rules for the Treatment of Prisoners make similar provision. Separately, it should be noted that Rule 70.4 of the European Prison Rules states that prison authorities should ensure that prisoners are not disadvantaged for exercising their right to make a complaint.

The European Court of Human Rights in *Ciorap v. Moldova*⁸ took the failure of the prison authorities to give the prisoner concerned information about his rights into account in finding breaches of Article 3 and Article 8. The applicant had argued that the failure to give this information amounted to a breach of Article 10 (the right to freedom of expression). The Court felt it was not necessary to examine the complaint under Article 10 because of its findings under Articles 3 and 8.

THE NATURE OF THE COMPLAINTS PROCEDURE

The European Prison Rules, which the European Court of Human Rights has taken into account in examining applications by prisoners to it, give guidance on the structure of an internal complaints procedure. Rule 70 states that a prisoner should have sufficient opportunity to make a request or a complaint to prison management. All such requests should be dealt with promptly and the prisoner informed of the outcome. Mediation is favoured by the Rules and formal proceedings should only go ahead when this fails. The CPT also states that access to the director of the prison or any other competent authority must be confidential.⁹

The Rules also state that a prisoner should have the right to appeal decisions by prison management to an independent body. If the prisoner withdraws a complaint, the reasons for this withdrawal should be investigated. Rule 36 of the UN Standard Minimum Rules contains similar provisions. These rules provide that each weekday every prisoner should have the opportunity of making a request or complaint to the director of the prison or an authorised officer.

Rule 70(5) of the European Prison Rules also state that a prisoner's legal advisor or a family member shall be entitled to make a request or complaint regarding the prisoner's treatment to the prison authorities. Under Rule 70(7) prisoners are entitled to seek legal advice about complaints and appeals procedures and to legal assistance when the interests of justice require.

In its second *General Report*, the Committee for the Prevention of Torture stated that "effective grievance and inspection procedures are fundamental safeguards against ill-treatment in prisons. Prisoners should have avenues of complaint open to them both within and outside the context of the prison system".¹⁰

⁸ 19 June 2007, no. 12066/02.

⁹ Committee for the Prevention of Torture, 2nd General Report, CPT/Inf (92) 3, available at: <http://www.cpt.coe.int/en/annual/rep-02.htm>.

¹⁰ Committee for the Prevention of Torture, 2nd General Report, CPT/Inf (92) 3, available at: <http://www.cpt.coe.int/en/annual/rep-02.htm>, at paragraph 54.

CASELAW ON COMPLAINTS PROCEDURES

The nature of complaints procedures has been litigated on a few occasions before the European Court of Human Rights.

Though this point has yet to be decided, it may be that a future case could consider the absence of an independent complaints mechanism as an aspect of the failure to take steps to prevent harm as required under Articles 2 and 3 of the Convention. The Court has already made it clear that Article 2 and Article 3 require effective investigations where there are concerns regarding breaches of these provisions. This caselaw is explored later in this paper.

The European Court of Human Rights has also held that the Convention imposes positive obligations on states to take steps to prevent breaches of Convention rights. For example, *Z v. United Kingdom*¹¹ concerned the provision of adequate child protection arrangements. The Court recognised a positive obligation arising out of Article 3. It held:

[Article 3] prohibits in absolute terms torture or inhuman or degrading treatment or punishment. The obligation on High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken in conjunction with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment, including such ill-treatment administered by private individuals. These measures should provide effective protection, in particular, of children and other vulnerable persons and include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge.¹²

While the absence of an effective complaints mechanism may be a facet of a claim regarding the failure to prevent harm under Articles 2 or 3, the right to an effective remedy under Article 13 of the Convention is also engaged. Article 13 entitles everyone to an effective remedy where their rights and freedoms under the Convention have been breached.

It is not clear what the European Court of Human Rights would consider to be a satisfactory system of complaints. The Committee for the Prevention of Torture and the European Prison Rules have, however, laid emphasis on the need for independence from the prison administration in any such system.¹³

The case of *Silver and others v. United Kingdom*¹⁴ (hereinafter *Silver*) involved a complaint by prisoners regarding the control of their mail by the prison authorities. This was argued to be a breach of their rights to respect for correspondence under Articles 8 and 10 of the Convention. They further alleged that no effective domestic remedy existed for these breaches, contrary to Article 13. At the time, prisoners in England and Wales could make complaints to the Board of Visitors (akin to our Visiting Committees) and make petitions to the Home Secretary, as well as complain to a prison officer. Prisoners could also complain to the then Parliamentary Commissioner for Administration, a precursor to the now Prisons and Probation Ombudsman, and apply to the courts.

11 (2002) 34 EHRR 97.

12 (2002) 34 EHRR 97, at paragraph 73. Internal citations omitted.

13 See further van zyl Smit and Snacken, *Principles of European Prison Law and Policy* (Oxford, Oxford University Press, 2009) at p. 310.

14 (1981) 3 EHRR 475.

On the facts, the Court considered that neither a complaint to the Board of Visitors nor to the Parliamentary Commissioner for Administration constituted an effective remedy. The Board of Visitors could not entertain applications from individuals who were not currently in prison, and thus could not deal with past complaints. The Commissioner had no power to render a binding decision granting redress.

As for the Home Secretary, the Court held that “he could not be considered to have a sufficiently independent standpoint to satisfy the requirements of Article 13... as the author of the directives in question, he would in reality be judge in his own cause”.¹⁵ The situation would, however, be different if the complainant petitioned the Home Secretary on the basis that one of the directives had been misapplied. If that was so, the Court considered such a petition could in general be effective to secure compliance with the directive. The Court noted also that, in the past, there were restrictions on the ability to make such a complaint e.g. with certain exceptions a prisoner could not petition if and so long as he was awaiting a reply to an earlier petition.

Regarding applications to the English courts, the Court noted that the jurisdiction of the domestic courts was limited to determining whether or not the powers of the prison authorities have been exercised arbitrarily, in bad faith, for an improper motive or in an *ultra vires* manner. At the time, moreover, the UK had not incorporated the Convention. In this case, the applicants were not alleging that the interferences with their correspondence were contrary to English law, but rather that they breached the Convention. As such, the Court held that insofar as the norms were incompatible with the Convention, there could be no effective remedy under Article 13. Regarding those norms which were compatible with the Convention, the petition to the Home Secretary and applications to the English courts were sufficient to comply with Article 13.

The partial incorporation of the Convention in Ireland goes some way to addressing this last point in *Silver*. Prisoners may write directly to the Central Office of the High Court in order to petition the court concerning their detention. The High Court may decide to make a recommendation under the Attorney General’s scheme, for example, when a prisoner is seeking an order of *mandamus* in relation to his or her conditions.¹⁶ Regarding the informal petition to the High Court, Charleton J stated in *Walsh and others v. Governor of the Midlands Prison* that:

¹⁵ (1981) 3 EHRR 475, at paragraph 116.

¹⁶ For example, in *McCarthy v. The Governor of Mountjoy Prison* [2009] IEHC 513, Edwards J granted a recommendation under the Attorney General’s Scheme for solicitor and one counsel in circumstances where the prisoner was alleging he had not received the educational assistance which had been directed by the sentencing judge. The prisoner was unable to read or write and would require assistance in taking the proceedings.

The applicant also takes issue with the informal system whereby any prisoner in the State may write to the Central Office of the High Court and make a complaint. Sometimes these complaints are serious. Each such complaint is investigated and where necessary a report is sought from the Governor of the relevant prison. A ruling is then made on the complaint in open court. This is a highly effective means of ensuring that prisoners are not isolated and that they have an ultimate authority to which to turn on matters of law. The informality of the system is of core benefit to its administration. Nothing about that informal procedure disables any form of judicial review under Order 84 of the Rules of the Superior Courts. Nor could that system undermine the entitlement of an interested party to apply for *habeas corpus* by way of an application to a judge of the High Court in the ordinary course. The procedure is in addition to other rights and procedures. It amounts to an exceptional means of access to the High Court that is for the benefit of prisoners.¹⁷

However, the matter may not necessarily end there.

In this regard, the case of *McFarlane v. Ireland*¹⁸ on delay in criminal prosecutions may be instructive. There, the Government argued that the applicant would have an effective domestic remedy through taking a constitutional action for damages. The Court considered the very long delays involved in taking such challenges, as well as the burden of legal costs and expenses. The Court reiterated that excessive costs could constitute an unreasonable restriction on access to an effective remedy.

The Court held:

While legal representation is not obligatory, as noted above, the remedy would be legally and procedurally complex. A judicial review action would not be covered by criminal legal aid, an action in damages would not appear to be covered by the Attorney General's *ex gratia* scheme and the applicant would have to obtain the agreement of the Civil Legal Aid Board that the remedy had merit before legal aid would be granted. The action would, at least initially, be novel and uncertain: should an applicant be unsuccessful, there was a risk of a costs order against him or her; and, even if damages were pursued as an alternative claim in the prohibition action, there would be separate costs attributable to the damages claim (notably, those of the Attorney General who would be a respondent) and thus any costs' exposure could be high. The Court considers that the Government have not demonstrated that, in such circumstances, an applicant would not be unduly hampered in taking an action for damages for a breach of the constitutional right to reasonable expedition.¹⁹

In the circumstances, the Court found a breach of Article 13 in conjunction with Article 6(1).

The absence of a general legal aid scheme for prisoners wishing to challenge decisions of the prison authorities or the refusal of particular requests, particularly in the context of plenary proceedings, could be an answer to any suggestion that application to the domestic courts constitutes an effective remedy in this context. The requirement of the courts in Ireland for a prisoner to establish 'evil intent' on the part of the prison authorities in order to prove a breach of constitutional rights, as discussed in the first paper in this series, may also be pertinent.

¹⁷ [2012] IEHC 229.

¹⁸ 10 September 2010, no. 31333/06.

¹⁹ 10 September 2010, no 31333/06, at paragraph 124. Internal citations omitted.

van zyl Smit and Snacken argue that:

There is considerable merit in providing such legal advice free of charge to the majority of prisoners who cannot afford to pay for their own lawyers. This applies to the more demanding forms of legal assistance which the interests of justice require in any complaint-related procedures that raise issues of any complexity”.²⁰

*Rodic v. Bosnia and Herzegovina*²¹ shows that the Court will examine the theory and reality of any complaints procedure in terms of its compliance with Article 13. It held there that the presence of prison inspectors did not provide an effective remedy as, in practice, they had never once intervened to support a prisoner.

The possible approach of the European Court of Human Rights to the complaints mechanism and the process by which applications may be made to the Courts is uncertain. However, the lack of an independent complaints mechanism, coupled with the difficulties of obtaining legal redress in Ireland, at least raises concerns under Article 13.

CORRESPONDENCE WITH LAWYERS

The Prison Rules 2007 provide under Rule 44 that a letter intended by a prisoner for his or her legal advisors should be sent without delay and not opened before it is sent. A letter to a prisoner from his or her legal advisors must be given to the prisoner without delay and not be examined to any greater extent than is necessary to determine if it is such a letter. If the letter is to be examined, it is only to be opened in the presence of the prisoner to whom it is addressed.

The European Court of Human Rights in *Campbell v. UK*²² upheld a prisoner’s complaint that his correspondence to his legal advisors had been interfered with. The Court stated that a prisoner’s right to correspond with the authorities should only be interfered with in exceptional circumstances. Where it was necessary to open correspondence to verify the identification of the person or body being corresponded with, this should be done in the presence of the prisoner.

DENIAL OF VISITS

This section looks at the issue of the denial of visits to prisoners from family members. It examines Irish and European Court of Human Rights caselaw on the topic.

*Foy v. Governor of Cloverhill Prison*²³ concerned a prisoner who was on remand at the relevant time. He received visits with his family which were screened, preventing any physical contact. Mr. Foy claimed that depriving him of physical contact with his family breached his rights under Article 41 of the Constitution and under Article 8 of the Convention.

²⁰ *van zyl Smit and Snacken, Principles of European Prison Law and Policy (Oxford, Oxford University Press, 2009), at p. 12.*

²¹ *27 May 28, no. 22893/05.*

²² *14 October 1982, nos. 7819/77, 7878/77.*

²³ *[2010] IEHC 529.*

Charleton J held that the Prison Rules 2007 give discretion to a prison Governor to implement the Rules which is “untrammelled provided he does not, by his management, overturn the Prison Rules”.²⁴

Charleton J emphasised that prisoners are subject to restrictions on their rights by virtue of the fact of imprisonment and the importance of respecting the opinion of the Governor. Regarding the prohibition on visits, Charleton J held that unreasonable conduct on the part of the Governor had not been proven. Furthermore, the possibility of physical contact with a family member was necessarily limited by virtue of imprisonment. It was for the Governor to balance the upholding of rights with good order and a decision to prohibit contact visits on a general basis was a decision within the realm of the measure of appreciation which a Governor should be afforded.

Charleton J further held that there was no material before him beyond the expression of an opinion showing that “physical contact between an imprisoned father and minors is essential to the authority of the family”.²⁵ The High Court held, however, that “the case presented might... be stronger were it to be the case that, without good reason, an individual prisoner were restricted permanently from any physical contact with any relative or friend outside a prison”.²⁶ Charleton J reiterated the importance of deferring to the decisions made by a prison Governor and the application was refused.

This approach can be contrasted with that of the European Court of Human Rights in a number of cases. In *Messina v. Italy (No. 2)*²⁷ the Court noted the importance of prisoners being able to maintain their ties with people outside prison in order to facilitate their social rehabilitation and return to the community after release. The European Prison Rules also contains a statement of this principle in Rule 99.

In *Kučera v. Slovenia*²⁸ the applicant’s wife was a co-accused and visits between the two were banned for a period of 13 months. The Court found this ban was not justified under Article 8 on the basis of the length of time involved and the fact that it was possible to impose security arrangements if there were concerns about collusion in any particular meeting. In *Lavents v. Latvia*²⁹ a prisoner was barred from having family visits for periods up to 19 months. This was considered by the Court to be unnecessary to prevent collusion or interference in the investigation into the alleged offences and was a breach of Article 8.

Messina v. Italy (No. 2),³⁰ by contrast, involved members of the mafia in prison. There, the prisoner was allowed only one visit or phone call per month over long periods. This was considered by the Court to be justified because of the special security needs posed by such prisoners and the serious nature of the offences. The authorities relieved the restrictions intermittently, which the Court took as showing their willingness to assist the prisoner to maintain links with family. Similarly, in *Enea v. Italy*³¹ restrictions on visits were justified, as they were also in *Kalashnikov v. Russia*.³² In *Kalashnikov v. Russia*, the prisoner was on remand and visits with his family were restricted and, when allowed, subject to supervision.

24 [2010] IEHC 529, at paragraph 13.

25 [2010] IEHC 529, at paragraph 24.

26 [2010] IEHC 529, at paragraph 24.

27 28 September 28 2000, no. 25498/94.

28 17 July 2007, no. 48666/99.

29 28 February 2003, no. 58442/00. Translated from the French by the author.

30 17 July 2007, no. 48666/99.

31 17 September 2009, no. 74912/01.

32 18 September 2001, no. 47095/99.

The Court held this was justified in circumstances where the charges were very serious and there was a risk of collusion and/or interference in the investigation of the offences.

There must, however, be a plausible security concern to justify such restrictions on visits. In *Krawczak v. Poland*³³ the prisoner was unable to have physical contact with his partner and children because of a partition. This was found to breach Article 8 in circumstances where the use of the partition was arbitrary. The Court considered that the continuing presence of a security concern required demonstration and there must be a coherent policy in place concerning the denial of visits, with due regard paid to other methods which might assist in preventing breaches of security.

The issue of whether a breach of Article 8 has been in accordance with law has been discussed the prison context in the case of *Ostrovar v. Moldova*.³⁴ In that case, a prisoner had been denied correspondence with his mother. A domestic law on pre-trial detention was cited by the authorities as the legal ground for this denial. The Court recalled that the expression “in accordance with law” relates not only to the presence of a law, but also its quality. The domestic law must indicate with reasonable clarity the scope and manner of exercise of the relevant discretion conferred on the public authorities so as to ensure to individuals the minimum degree of protection to which citizens are entitled under the rule of law in a democratic society. In *Ostrovar* the Court held it was:

satisfied that this provision met the requirement of accessibility. However, the same is not the case in respect of the requirement of foreseeability. The provision did not draw any distinction between the different categories of persons with whom the prisoners could correspond. Also it did not lay down any principles governing the grant or refusal of authorisation, at least until 18 July 2003, when the provision was amended... It is also to be noted that the provision failed to specify the time-frame within which the restriction on correspondence could apply. No mention was made as to the possibility of challenging the refusal to issue an authorisation or as to the authority competent to rule on such a challenge.

In the light of the foregoing considerations, the Court concludes that Article 18 of the Law on Pre-Trial Detention did not indicate with reasonable clarity the scope and manner of the exercise of discretion conferred on the public authorities in respect of restrictions on prisoners’ correspondence. It follows that the interference complained of was not “in accordance with the law” within the meaning of Article 8.

The Court therefore found a violation.

33 31 May 2011, no. 24205/06.

34 13 September 2005, no. 35207/03.

FAIR PROCEDURES

The European Prison Rules, under Rule 70(2), state that a prisoner should receive reasons if a request is denied or a complaint is rejected and the prisoner shall have a right of appeal to an independent authority. Moreover, it could be argued that actions are taken 'not in accordance with law' if there is no statutory basis for them, or if the statutory basis is very unclear.

It should, however, be noted that the Irish courts have regularly cited the wide discretion afforded to a prison Governor in performing his duties. For example, the High Court in *Foy v. Governor of Charleton J* held:

It is only possible to mount a challenge to the decision of a Governor where it is shown to both infringe a right and, as to the balance of the exercise of that right with the duty of the Governor to ensure proper order within the prison, to fly in the face of fundamental reason and common sense. Such cases are, of their nature, difficult to prove. A prison Governor is entitled to some measure of latitude in judgment as to the decision which he or she makes.³⁵

The question of the duty to give reasons and the generally applicable principles of fair procedures to administrative actions has not been examined extensively in the prison context by the Irish courts. The argument could well be made that the prison service, as a public body, should give reasons for its decisions especially when matters of fundamental rights are involved. In *Meadows v. Minister for Justice*³⁶ Murray CJ held that, while the duty to give reasons varied depending on the nature of the impugned decision,:

An administrative decision affecting the rights and obligations of persons should at least disclose the essential rationale on foot of which the decision is taken. That rationale should be patent from the terms of the decision or capable of being inferred from its terms and its context. Unless that is so then the constitutional right of access to the courts to have the legality of an administrative decision judicially reviewed could be rendered either pointless or so circumscribed as to be unacceptably ineffective.³⁷

ACCOUNTABILITY FOR DEATHS IN PRISON

This section examines caselaw on the duty to investigate deaths of those in prison custody. It explores the position of the European Court of Human Rights on what is an effective investigation into such deaths for the purposes of Article 2 of the Convention. It also indicates some ways in which current procedures for investigating deaths in prison custody in Ireland may not be in compliance with the Convention.

The European Court of Human Rights has recognised that the State is under a duty to protect the lives of those in its custody.³⁸ This means the State must take reasonable steps to prevent risks to life, whether they come from prison staff, the prison itself, other prisoners, or a prisoner him or herself.

35 [2010] IEHC 529.

36 [2010] 2 IR 701.

37 [2010] 2 IR 701 at p. 732.

38 *McCann v. United Kingdom*, 27 September 1995, no. 18984/91; *Keenan v. United Kingdom*, 3 April 2001, no. 27229/95; *Edwards v. United Kingdom*, 14 June 2002, no. 46477/99; (2002) 35 EHRR 487.

In addition, Article 2 imposes an obligation on states to provide an effective system to hold those liable for deaths in custody to account. The case of *Salman v. Turkey*³⁹ held that when a person dies in custody, there is an important obligation on the authorities to account for the person's treatment while detained. This applies whether or not the death was caused by the agents of the State.⁴⁰ An effective investigation is necessary in order to ensure that failings which gave rise to a death are subject to public scrutiny and remedy. An English case summed up the need for investigations well: "the procedural obligation introduced by article 2 has three interlocking aims: to minimise the risk of future like deaths; to give the beginnings of justice to the bereaved; and to assuage the anxieties of the public".⁴¹ The European Court of Human Rights has said that the right to life under Article 2 of the Convention requires that there be an investigation into a death in custody which fulfils certain minimum requirements.

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- It must be started by the State (i.e. not taken through, for example, a legal case instigated by the deceased's family);
 - It must be independent of those implicated or who might be responsible for the death. It should be carried out by somebody outside the prison system and be independent in its actions and procedures;
 - It should be prompt;
 - It should be open to public scrutiny;
 - The investigation must be capable to giving rise to a finding of responsibility and to enable the eventual prosecution of those responsible through obtaining relevant evidence;
 - Finally, the next of kin of the deceased must be given an opportunity to participate and be involved to the extent necessary to safeguard their legitimate interests.⁴²
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It is for the State to prove that it undertook an effective investigation and to provide a satisfactory and convincing explanation for a death in prison.⁴³

At present in Ireland, investigations into deaths in prison custody usually involve an inquest and an internal prison investigation. There may be a trial or a sentence of an individual directly responsible for the death. In April 2012, it was announced that the Inspector of Prisons will now also investigate all deaths of those in the custody of the Irish Prison Service, whether the individual was physically within a prison or not. At the time of writing it was not clear, however, what powers the Inspector would have, e.g. if the Inspector will be able to compel witnesses to provide information. On one occasion, a commission of inquiry under the Commission of Inquiries Act 2004 was established to examine the death of a prisoner in Mountjoy prison.

39 *27 June 2000, no. 21986/93.*

40 *Salman v. Turkey, 27 June 2000, no 21986/93, at paragraph 105.*

41 *R (on the application of Khan) v. Secretary of State for Health [2003] EWCA Civ 1129.*

42 *Edwards v. United Kingdom 14 June 2002, no. 46477/99; (2002) 35 EHRR 487; Kats and others v. Ukraine, 18 March 2009, no. 29971/04.*

43 *Salman v. Turkey, 27 June 2000, no 21986/93, at paragraph 100.*

The European Court of Human Rights has stated that no particular model of investigation is required by Article 2. However, any such investigation must fulfil the conditions noted above. Some of these requirements have been discussed by the European Court of Human Rights and domestic courts interpreting the Convention.

As will be seen below, there is some doubt as to whether our current system of investigating deaths in prison complies with Article 2.

PARTICIPATION OF THE NEXT OF KIN

The case of *Edwards v. United Kingdom*⁴⁴ concerned the death of a prisoner by another prisoner, Richard Linford, who was suffering from mental illness. The deceased, Christopher Edwards, had been placed in a cell with this prisoner because of a shortage of space. That evening, the call button in the cell was pressed. A prison officer who responded noticed that the buzzer which should have been ringing was not working. Later in the night, a prison officer heard a buzzer but did not see an emergency red light on the wing in which Mr Edwards and Mr. Linford were in custody. Later again, a prison officer heard continuous banging on a cell door. On investigating this, he discovered a green call light on outside Mr Edwards and Mr. Linford's cell. Inside, Mr. Linford was holding a bloodstained plastic fork and there was blood on the floor and on his feet. A five minute delay ensued in which prison officers put on protective clothing. When they entered the cell, they found Mr. Edwards dead, having been stamped and kicked by his cellmate. The wing on which the cell was located had been patrolled earlier in the night and up to seventeen minutes could have passed after the call button had been pressed.

An inquiry was started into the death of Mr. Edwards in prison by the Prison Service in the UK, the local County Council and the local health authority. Although the internal report was extensive, the European Court of Human Rights held that it did not meet the requirements of Article 2. The authors could not require witnesses to attend hearings and the parents of Mr. Edwards were only allowed to attend the inquiry when giving their own evidence and could not receive the evidence of others until the final report was published. They could not put questions to any witnesses and were not legally represented.

In *Kats v. Ukraine*⁴⁵ the effective exclusion of the family of a prisoner who had died from medical complications in custody from the subsequent inquiry and the lack of even basic information about its progress were considered to breach the requirement that the interests of the next-of-kin be safeguarded.

⁴⁴ *Edwards v. United Kingdom* 14 June 2002, no. 46477/99; (2002) 35 EHRR 487.

⁴⁵ *Kats and others v. Ukraine*, 18 March 2009, no. 29971/04.

LEGAL AID

The next-of-kin of a person who has died in prison are not automatically entitled to legal aid at an inquest in Ireland. Discretionary payments may be made by the Department of Justice and Equality to cover the cost where a person died in the care of the State or in custody, or where the State was directly involved in the death.

The Irish Supreme Court in *Magee v Farrell*⁴⁶ has found that legal aid is not required under the Constitution or the Convention for families at inquests into the deaths of a person in Garda custody. This is in contrast to the finding of the House of Lords in *R (Amin) v. Secretary of State for the Home Department*⁴⁷ (hereinafter *Amin*) where it was held that legal aid is required under Article 2 in circumstances where the State may have been involved in some way in the death. The position in the UK is that legal aid is provided in these circumstances, subject to the family's financial position.

PUBLIC INQUIRIES

While all investigations must be open to public scrutiny in order to comply with Article 2 of the European Convention on Human Rights, what this means depends on the circumstances. It is not possible to state with certainty when a full public inquiry, where all the evidence is heard in public, is required.

Some guidance is given by reference to previous cases decided by the European Court of Human Rights. In *Edwards* the Court stated that, in some circumstances, publication of the report into the death alone will be enough to fulfil the requirements of Article 2. However, in circumstances where “the deceased was a vulnerable individual who had lost his life in a horrendous manner due to a series of failures by public bodies and servants who bore a responsibility to guard his welfare... the public interest attaching to the issues thrown up by the case was such as to call for the widest exposure possible”.⁴⁸

The House of Lords also examined this issue in *Amin*. There, a young man was murdered in a racially motivated attack by another prisoner with whom he was sharing a cell. That prisoner had a record of violence and prison staff were concerned about his potential dangerousness to staff and other inmates.

The prisoner who attacked the deceased was found guilty of murder. His trial did not, however, explore any of the wider issues within the prison such as the procedures by which cells were allocated. An inquest into the death was adjourned to wait for the criminal proceedings to finish. The Prison Service also conducted its own investigation. The Commission for Racial Equality also carried out an inquiry.

None of these inquiries, however, involved a formal role for the family of the deceased. His family refused to participate in an indirect way and sought an independent public inquiry; this was refused. The House of Lords accepted that there is no single model of investigation laid down by Article 2. However, in the circumstances of the death, involving general and system-wide failures in decision-making about who should share cells, the failure to follow established procedures and the likelihood of human error within the prison, only a public and independent investigation with legal representation for the family would be enough to uphold their rights accruing under Article 2.

⁴⁶ [2009] 4 IR 703.

⁴⁷ [2004] 1 AC 653; [2003] 3 WLR 1169; [2004] 2 All ER 465.

⁴⁸ *Edwards v. United Kingdom* 14 June 2002, no. 46477/99; (2002) 35 EHRR 487, at paragraph 83.

By contrast, however, in *Scholes v. Secretary of State for the Home Department*⁴⁹ no breach of Article 2 was found where a public inquiry was not established to examine the suicide of a vulnerable 16 year old boy who was considered at risk of self-harming. The inquest into his death had lasted for ten days and covered a wide range of issues, including the policies and practices and there were other suitable investigations also carried out. This was considered to be sufficient for the purposes of Article 2.

DELAY

Promptness or reasonable speed in conducting the investigation is also a requirement under Article 2. This was considered by the European Court of Human Rights to be “essential in maintaining public confidence in their [the authorities’] adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts”.⁵⁰ The Court also considered speed to be important because the passage of time can affect the amount and quality of evidence, cast doubt on the good faith of the investigators and prolong the ordeal for the family involved.⁵¹

The Court has not, however, indicated what might be considered an undue delay in the context of deaths in prison. In *Edwards* a delay of three and a half years did not breach the requirements of Article 2, especially as the preparation for the inquiry took a long time. In *Kats v. Ukraine*, the court held that the authorities must act with “exemplary diligence and promptness”,⁵² but did not specify how long is considered ‘too long’.

VERDICTS AT INQUESTS: SUFFICIENT TO SATISFY ARTICLE 2?

The question of what kind of inquiry is required by Article 2 was considered in some depth by the House of Lords in *R (Middleton) v. West Somerset Coroner and another*⁵³ (hereinafter *Middleton*). Here a prisoner had committed suicide and an inquest was held into his death. As Lord Bingham of Cornhill recognised “the European Court has never expressly ruled what the final product on an official investigation... should be”.⁵⁴ What is required is a mechanism to ensure the safeguards contained in Article 2 are rendered practical and effective.

In *Middleton* the House of Lords examined a number of possibilities. Lord Bingham of Cornhill felt that in some cases criminal proceedings may discharge the state’s obligations, but this would usually be in cases where a defendant pleads not guilty and the trial involves full exploration of the facts of the death.

49 [2006] EWCA Civ 1343.

50 *Edwards v. United Kingdom*, 14 June 2002, no. 46477/99; (2002) 35 EHRR 487, at paragraph 72.

51 *Edwards v. United Kingdom* 14 June 2002, no. 46477/99; (2002) 35 EHRR 48, at paragraph 86.

52 *Edwards v. United Kingdom* 14 June 2002, no. 46477/99; (2002) 35 EHRR 487, at paragraph 116.
See also *Trubnikov v. Russia*, 5 July 2005, no. 49790/99.

53 [2004] 2 AC 182; [2004] 2 WLR 800; [2004] 2 All ER 487; [2004] UKHL 11.

54 [2004] UKHL 11, at paragraph 7.

The House of Lords came to the conclusion that in order to satisfy Article 2, an inquest into a death in custody must allow for the possibility that the responsibility of the prison authorities could be established and be capable of leading to the identification and punishment of those responsible for the death. Lord Bingham of Cornhill held that an inquest “ought ordinarily to culminate in an expression, however, brief of the jury’s conclusion on the disputed factual issues at the heart of the case”.⁵⁵

Lord Bingham of Cornhill considered that inquests which give rise to the traditional short verdict of suicide, unlawful killing, misadventure, etc may enable a conclusion to be made on the central issue involved if that issue was whether the prisoner had committed suicide or was killed by another. However, this would not be enough in cases where there may have been other, much broader, factors at play. For example, in *Edwards* or *Amin* a verdict of unlawful killing would not have said anything about the procedures which culminated in the deceased and his killer sharing a cell.⁵⁶ As such, inquests with these restrictions were considered to be insufficient to comply with Article 2 in these more complex cases. Lord Bingham was fortified in his conclusion by the fact that an “uninformative” verdict would not provide any satisfaction to the family that lessons learned may save the lives of others.⁵⁷ As such, the House of Lords recommended that the duty of investigating deaths must be extended to examine not only the means of death but also the circumstances thereof. In these cases, Lord Bingham recommended that inquests give rise to a narrative verdict or answer a series of questions. These questions include what was the cause or what were the causes of death, were there any defects in the system which contributed to the death and were there any other factors relevant to the circumstances of the death.⁵⁸

Narrative verdicts are now a feature of inquests in the United Kingdom. In Ireland, at present,⁵⁹ the inquest continues only to be able to give the traditional verdicts, though recommendations about broader matters which may have contributed to the death can be made. In circumstances such as those at issue in *Amin* or *Edwards* it may well be the case that these verdicts would be insufficient to satisfy the requirements of Article 2.

SHORTCOMINGS OF OUR SYSTEMS FOR INVESTIGATING DEATHS IN CUSTODY

There are a number of matters which indicate that our system of investigating deaths may not comply with Article 2. The lack of narrative verdicts at inquests and the absence of automatic legal aid for families, along with the possibility that an inquest might be delayed or suspended pending the outcome of a criminal trial raise concerns. Trials of criminal offences have a very limited role for the family and there is little opportunity to examine failures in the policies within a prison which may have contributed to the death.

55 [2004] UKHL 11, at paragraph 20.

56 [2004] UKHL 11, at paragraph 31.

57 [2004] UKHL 11, at paragraph 18.

58 The example in *Middleton* was that “the deceased took his own life, in part because the risk of his doing so was not recognised and appropriate precautions were not taken to prevent him doing so”, at paragraph 45. In *R (Sacker) v. West Yorkshire Coroner* the House of Lords held that the Coroners Act 1988 could be interpreted to allow the jury at an inquest to inquire into how a person had died, including systemic failures. [2004] 1 WLR 796.

59 The Coroners Bill 2007 proposes a change to the law in this regard. At the time of writing, it is not clear when this Bill will become law.

The ability to compel the attendance of witnesses to an inquiry which can examine questions of systemic failure is also at issue. It is not clear yet if the Inspector of Prisons will be conferred with such powers. In some cases, particularly those involving vulnerable individuals, the Convention has been interpreted to require a fully public inquiry, which has yet to happen in the Irish context.

ALLEGATIONS OF ILL TREATMENT AND ACCOUNTABILITY FOR INCIDENTS OF NEAR DEATH OR SERIOUS SELF HARM

If a prisoner makes an allegation that s/he has been the subject of ill-treatment amounting to a breach of Article 3, the European Court of Human Rights has laid down particular requirements for the nature of the investigation which must take place.

In *Assenov v. Bulgaria* the Court stated:

Where an individual raises an arguable claim that he has been seriously ill-treated by the police or other such agents of the State unlawfully and in breach of Article 3, that provision, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in... [the] Convention", requires by implication that there should be an effective official investigation. This investigation, as with that under Article 2, should be capable of leading to the identification and punishment of those responsible. If this were not the case, the general legal prohibition of torture and inhuman and degrading treatment and punishment, despite its fundamental importance, would be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity.⁶⁰

Article 3 therefore has a procedural dimension whereby it requires mechanisms to prevent breaches of Article 3 and proper investigations where such breaches have taken place.

The case of *Labita v. Italy*⁶¹ concerned a prisoner alleging ill-treatment at the hands of prison officers. The Court found that there had not been a thorough and effective investigation into the allegations and thus a violation of Article 3, even in circumstances where the Court did not have sufficient evidence that the treatment itself amounted to a breach of Article 3. As van zyl Smit and Snacken aver: "the outcome in *Labita* is an illustration of just how much weight the Court attaches to the effective investigation of serious complaints".⁶²

While Article 3 does have a procedural component, it is not as extensive as that under Article 2. Independent disciplinary proceedings and criminal investigations may fulfil the requirements for an effective investigation under Article 3.

⁶⁰ 28 October 1994, no. 90/1997/874/1086, at paragraph 12.

⁶¹ 6 April 2000, no. 26772/95.

⁶² van zyl Smit and Snacken, *Principles of European Prison Law and Policy* (Oxford, Oxford University Press, 2009), at p. 308.

The European Court of Human Rights examined the requirement to hold investigations under Article 3 in *Banks v. United Kingdom* (hereinafter *Banks*).⁶³ The applicants were nine former prisoners of Wormwood Scrubs while the tenth was the brother of a prisoner who had died there through hanging in worrying circumstances. The first nine applicants had been subjected to serious assaults at the hands of prison officers during the 1990s. In some cases, prosecutions of these officers had been instituted and a number of these had led to convictions. Most of the applicants had already received compensation in settlement of their civil claims arising out of this abuse. The tenth applicant alleged that his brother's hanging had in fact arisen out of the actions of prison officers. Civil cases involving the prison had given rise to evidence of death threats being made against prisoners and mock hangings being carried out by prison officers. All the applicants sought an investigation into what they considered to be a culture of abuse at Wormwood Scrubs.

The Prison Service had carried out a number of investigations, staff were suspended, prosecutions had followed, civil claims had been brought by inmates and new measures had been taken to address the failings in the prison. There was no public inquiry. The applicants complained to the European Court of Human Rights that there had been a failure to provide an adequate investigation into allegations of torture and ill-treatment. They considered that an independent public inquiry, establishing the factual background, full nature and extent of the "culture of violence" at Wormwood Scrubs, how it took root and continued, as well as establishing responsibility, was necessary to fulfil the obligations under Article 3. The tenth applicant also alleged a breach of the procedural aspect of Article 2. All also alleged a breach of their rights under Article 13.

The Court declared their applications inadmissible. It noted that the obligations arising out of Articles 2 and 3 were different in both content and applicability. Article 2 imposed obligations of particular stringency when the victim was deceased and the only persons with full knowledge of what had occurred were the officers of the State.

In the case of Article 3, victims were generally able to act on their own behalf and give evidence of what had occurred. As such, according to the Court there is a "different emphasis".⁶⁴ The Court felt that in the normal course of events, a criminal trial with an adversarial procedure before an independent and impartial judge "must be regarded as furnishing the strongest safeguards of an effective procedure for the finding of facts and the attribution of criminal responsibility for unlawful acts of violence" under Article 3.⁶⁵

Secondly, where the allegations made are not of intentional violence but raise issues of negligence, civil or disciplinary remedies may be sufficient to provide protection under Article 2. In this regard, the Court referred to the use of civil proceedings in cases of medical negligence and felt similar considerations arose under Article 3. The applicants had taken civil proceedings which alleged systemic negligence and they could have raised any alleged failings in management, training and supervision linked to their ill-treatment, but they settled these proceedings.

63 (2007) 45 EHRR, no. 21387/05.

64 (2007) 45 EHRR, no. 21387/05, at paragraph 3.

65 (2007) 45 EHRR, no. 21387/05, at page 7.

Finally, if there were “wider issues” which had not been ventilated in either forum, Article 3 was not an appropriate mechanism by which to bring them to light. Article 3 requires that where a State or its agents potentially bear responsibility for serious ill-treatment the events in question should be subject to an effective investigation which enables the facts to become known. Here there was no indication that there had not been a sufficient investigation of the facts or a failure to hold those responsible to account, either civilly or criminally. The wider issues such as the background to the assaults and the remedial matters to prevent a recurrence in prison were “matters for public and political debate which fall outside of the scope of Article 3”.⁶⁶ The Court noted that Article 2 requires an examination of systemic issues, but Article 3 investigations are aimed at establishing the facts and attributing responsibility rather than identifying the root cause of the problems and how to eradicate them. As such the Court declined to find a breach of Article 3 and rejected the application. The application under Article 13 was also rejected.

The distinction between the requirements of Articles 2 and 3 has been followed in English caselaw as noted below. However, Lord Sedley LJ dissenting in *AM and others v. Secretary of State for the Home Department* held that, in his view, there should be no difference between the investigative obligations under both articles.⁶⁷

‘NEAR SUICIDES’ AND SERIOUS SELF HARM IN ENGLAND AND WALES

Recently, some interesting decisions have been given in England and Wales regarding the duty to investigate ‘near’ suicides or incidents of serious self-harm in prison. In *R (D) v. The Secretary of State for the Home Department*⁶⁸ the Court of Appeal for England and Wales was asked to determine the procedural requirements for an inquiry into a near-suicide. D had a history of self-harm and was considered at risk of suicide. D hanged himself using bed linen which had not been removed from his cell. Though he was cut down by prison staff, which saved his life, he nonetheless suffered permanent and irreversible brain damage.

The Court of Appeal agreed with comments made in *Amin* that the duty to investigate deaths in prison under Article 2 also arises in cases where the victim does not die but has sustained “life threatening injuries”, even in the case of self-harm.⁶⁹

There had been an internal prison service investigation and the Home Secretary then asked the Prisons and Probation Ombudsman to hold a further inquiry. This inquiry was to be held in private, with all evidence to be provided to representatives of the prisoner who were given an opportunity to comment on it. The Court was asked to decide whether a public inquiry was necessary. The Court agreed that in most cases an inquest, with a narrative verdict, in combination with a private Ombudsman investigation would cumulatively fulfil the requirements of Article 2.

However, in deciding that a public inquiry was necessary, the court interpreted *Amin* expansively. The Court considered that while the facts of the incident before it were not identical to those in *Amin*, the circumstances in which a suicide very nearly succeeded required similar public examination. The vulnerability of the deceased and the problems with the procedures in the prison were influential factors. The court also stressed that a public inquiry does not mean that every aspect must be carried out in public. The preliminary processes of obtaining evidence and witness statements can be in private, but the evidence and written submissions must be made public and oral evidence must be taken in a public forum.

⁶⁶ (2007) 45 EHRR, no. 21387/05, at page 8.

⁶⁷ (2009) UKHRR 973.

⁶⁸ [2006] EWCA Civ 143.

⁶⁹ [2006] EWCA Civ 143, at paragraph 11, referring to paragraph 31 of *Amin*.

The Court further examined whether Article 2 required the facility for the family of a deceased person or representatives of *D* in this case to cross examine witnesses. The court did not feel that the jurisprudence of the European Court of Human Rights required this, but that an ability to put questions through the chairperson of the inquiry, if considered appropriate, was necessary. The court did hold that the representatives are entitled to see written evidence, to be present during oral evidence and to make submissions about the lines of enquiry which should be adopted, the questions to be asked and who should be permitted to ask questions. This, it was felt, met the requirement to safeguard the legitimate interests of the representatives of *D*. Funding for the representatives of *D* was also considered “manifestly reasonable”.⁷⁰

Though laying down the principle that an Article 2-compliant investigation may be required in cases of ‘near’ suicide, *D* did not resolve the issue of when exactly such an investigation would be needed.

The matter was returned to by the House of Lords in *JL v. Secretary of State for Justice*.⁷¹ *JL* had attempted to commit suicide by hanging himself with a sheet. He was discovered and resuscitated but was left with serious brain damage and incompetent to conduct his own affairs. An internal prison investigation was carried out and *JL* sought an order requiring the Secretary of State to conduct an investigation satisfying Article 2.

The Court of Appeal ruled that a *D* type investigation was required. After the conclusion of the appeal, the Secretary of State decided to hold such an investigation but appealed the Court of Appeal verdict due to fears about the costs involved if such investigations were required generally.

It was accepted by the Secretary of State that where there is a suicide or near suicide⁷² that there must be an initial investigation of the facts, which may give rise to the need for a further investigation. The issues for consideration before the House of Lords were, therefore:

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1. Must the initial investigation be carried out by a person independent of the prison authorities?
 2. Must a further investigation be held whenever it is not plain from the initial investigation that the State or its agents bear no responsibility for the near-suicide or only where the initial investigation demonstrates that there is an arguable case that the State was at fault.
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Where a further investigation is required, must this necessarily be a *D* type investigation?⁷³

The Law Lords issued five separate judgments, and, despite the extensive discussion of the issues, regrettably the answers to these questions remain somewhat unclear.

⁷⁰ [2006] EWCA Civ 143, at paragraph 47.

⁷¹ [2008] UKHL 68.

⁷² Defined in the Secretary of State’s submissions as one that nearly succeeds and leaves the prisoner with serious injuries.

⁷³ [2008] UKHL 68, at paragraph 14.

Lord Phillips of Worth Matravers, who gave the leading judgment, expressed his reservations about the possibility of giving definitive guidance that will apply in every case of near-suicide in prison. However, his Lordship did feel it possible to identify certain principles that “will normally apply to such cases”.⁷⁴ His remarks however, were expressly confined to the situation where a prisoner’s attempt at suicide comes close to success and leaves the prisoner with the possibility of serious long term injury.

His Lordship considered it unhelpful to conflate the principles applicable in the case of death to those of near-suicide and felt that the procedure which occurs upon a death in custody is justifiably different. As such, an inquiry akin to an inquest may not be necessary. That said, his Lordship expressly refuted the Secretary of State’s argument that the purpose of an Article 2 investigation into a near suicide in prison is to secure the accountability of agents of the State regarding possible breaches of Article 2. Lord Phillips, reviewing the ECHR jurisprudence as well as *Amin and R (Gentle) v. Prime Minister*,⁷⁵ held that the purpose of such an investigation is broader and includes the need to see whether lessons can be learned for the future, regardless of whether there was fault on behalf of the State.

Overall, Lord Phillips concluded that a near-suicide in custody which leaves a prisoner with the possibility of a serious long-term injury automatically triggers an obligation on the State to institute an ‘enhanced’ (i.e. independent) investigation, which obligation is not discharged by an internal assessment of the facts. Finally, his Lordship ruled, somewhat opaquely, that in some circumstances an initial investigation may satisfy Article 2, in others a *D* type inquiry might be necessary.

In answering the second question before the House of Lords, Lord Phillips ruled that whether or not a further investigation is required depends on the nature of the initial investigation. The initial investigation should be prompt in any event. If all the material witnesses are available, give their evidence freely, the course of events appears clear and there is no indication of a possible defect in the system for preventing suicides nor a shortcoming on the part of anyone operating that system, the initial investigation may be enough. If the prisoner or his representatives are involved and the report of the investigation is published the other requirements of an enhanced investigation “may be satisfied”.⁷⁶ His Lordship clearly favoured a rigorous initial investigation given the costs of a *D* type inquiry.

There may be circumstances, however, when a public inquiry remains necessary. Such circumstances included, but were not limited to, *Edwards*-type scenarios where the events were themselves so horrendous that the public interest required the widest exposure possible, and situations where witnesses refused to give evidence and powers of compellability became necessary. Other situations noted by Lord Phillips were those where serious conflicts of evidence arose. There may be still others where the independent investigator may recommend a *D* type inquiry or indeed assess a particular area further without invoking *D*. Though not laying down any legal principle, his Lordship considered it “good sense” to hold independent investigations involving the person harmed and/or his or her family in all cases of attempted suicide, serious self harm and other near deaths.

⁷⁴ [2008] UKHL 68, at paragraph 15.

⁷⁵ [2008] UKHL 20.

⁷⁶ [2008] UKHL 68, at paragraph 43.

Lord Rodger of Earlsferry also rejected the contention that an independent investigation in the case of suicide is not required unless there was some positive reason to believe that the authorities had been in breach of their obligation to protect the prisoner. His Lordship felt that when a prisoner kills himself, it is at least *possible* that the prison authorities failed in their obligations. Without an independent investigation “you might never know”.⁷⁷ Such an investigation is required, his Lordship held, to see whether there was in fact a violation.

Holding that an independent investigation is required into all cases of suicide, Lord Rodger then went on to consider whether the same principles applied in cases of near suicide. The principles laid down in his judgment must, however, be considered tentative as he felt it unwise to “venture far without the benefit of full argument”.⁷⁸

Lord Rodger placed a great deal of emphasis on the type of injuries arising out of an attempted suicide. While the prisoner who is unable to walk again following an attempted suicide has been a victim of a breach of Article 2 in the same way as somebody left with major mental injuries, his Lordship noted an important difference in their positions. The prisoner who has his mental faculties intact is able to take the appropriate civil proceedings regarding a breach of Article 2. However, those in the position of JL are incapable of looking after their own interests. In Lord Rodger’s view, this situation is more like the position when a person has succeeded in committing suicide.⁷⁹ Reasoning this way, Lord Rodger felt that Article 2 required an independent inquiry where a prisoner’s life is put at risk and, due to the resulting injuries, she or he cannot take steps to hold the authorities responsible for any failures on the part of the authorities.

Despite apparently laying down a clear principle that an independent investigation is only required in cases of near suicide when a prisoner is, rendered mentally incompetent to take proceedings, his Lordship stated that he had formed no concluded view on such matters.⁸⁰ He did say, however, that in the present circumstances of JL’s case, the Secretary of State was right to hold a D-type investigation.

Lord Walker felt that he could not give detailed guidance on the circumstances in which a D-type inquiry is necessary and doubted whether any other court could do likewise. However, even though any statements on the topic would be “no more than expressions of opinion”, he nonetheless offered some “tentative views”.⁸¹ His Lordship held “even in cases where there is no serious permanent injury, investigation may be needed if the self-harmer was a known suicide risk or if the means of self-harm (whether a ligature, a sharp instrument or some harmful substance) suggested a failure in the system of searches”⁸² and noted there may be other special cases calling for investigation.

Lord Walker agreed that an independent investigation should be carried out as soon as possible and that relatively few cases would require public investigation, but did not intimate the nature of those that would. He agreed, however, with Lord Brown’s view that near-suicide cases which result in lasting serious injury require an independent investigation with the involvement of the person or their family and that the Ombudsman was the appropriate person to carry out the investigation. In addition, the investigation must be initiated by the state, be reasonably expeditiously carried out, and provide for a sufficient element of public scrutiny. As Lord Brown stated, however, “beyond this, however, it is impossible to be prescriptive”.⁸³

77 [2008] UKHL 68, at paragraph 59. *Emphasis in original.*

78 [2008] UKHL 68, at paragraph 62.

79 [2008] UKHL 68, at paragraph 65.

80 [2008] UKHL 68, at paragraph 73.

81 [2008] UKHL 68, at paragraph 90.

82 [2008] UKHL 68, at paragraph 90.

83 [2008] UKHL 68, at paragraph 107.

Lords Brown and Walker felt that public inquiries w Lords, Lord Brown agreed with Lord Phillips of Worth Matravers' reasons for rejecting the Secretary of State's contention that an Article 2 investigation is only needed where the State is in arguable breach of its duties under Article 2 and this is only so where the prison authorities knew or ought to have known of a real and immediate risk of the prisoner committing suicide and failed then to take reasonable preventive measures.

His Lordship felt that a public inquiry along the lines of a D-type investigation "goes far beyond what is necessary to satisfy the Article 2 procedural duty arising in any save the most exceptional near-suicide case".⁸⁴ In fact, Lord Brown declared his view that *D* was itself wrongly decided.

Lord Mance also agreed that the appeal should be dismissed and held that in all cases where the state's system for preventing suicide fails and as a result the prisoner suffers injuries in circumstances of near-suicide significantly affecting his or her ability to know, investigate, assess and/or take action by him or herself in relation to what has happened, an Article 2 investigation was needed.⁸⁵ Lord Mance also felt that an Article 2 investigation was required in *JL*'s case. He further agreed with Lord Phillips' view that there is a difference between cases in which a prisoner is able to take action on his or her own behalf and those in which a prisoner is rendered incompetent to do so. His Lordship agreed with Lord Walker that public inquiries would be relatively rare, but that an independent investigation would be needed in cases of serious long-term injury and with Lord Brown that *D* was wrongly decided.

Overall, the House of Lords decided that an Article 2 compliant inquiry is required each time the state's system for preventing a suicide in custody fails and that it is for the State to account for the failure and the investigation must be prompt, involve the family and allow for a sufficient degree of public scrutiny. A public hearing will be necessary in exceptional cases.

'*SP*' v. *Secretary of State for Justice*⁸⁶ examined the impact of *JL*. In that case *SP* was a young woman remanded in a young offender institution. Before and during her incarceration *SP* self-harmed regularly and became a danger to herself and others. Although this was not a case of near suicide but rather serious self harm threatening the life of *SP*, the Secretary of State at the Home Department agreed to hold an Article 2 compliant investigation into her circumstances. This was to be held by the Prisons and Probation Ombudsman (PPO). However, after protracted correspondence and concerns from the Howard League of Penal Reform about the inquiry's terms of reference, the PPO withdrew from the investigation, citing his dissatisfaction with *inter alia* what he considered to be an undue 'legalisation' of the process and the proposal that the Prison Service should decide which documents were relevant to his investigation. Eventually another investigator was appointed, though he was eventually held to lack the required independence.

There were many issues canvassed in *SP*, but for present purposes Pitchford J's analysis of *JL* is the most interesting aspect of the judgment. The judge ruled, based on *JL*, that the first or evidence-gathering stage of such an investigation may be held in private subject, in an appropriate case, to publication of the report. Thereafter it is for the investigator to assess whether public hearings were necessary.

⁸⁴ [2008] UKHL 68, at paragraph 104.

⁸⁵ [2008] UKHL 68, at paragraph 113.

⁸⁶ [2009] EWHC 13 (Admin).

More recently, another important judgment has been laid down by the Court of Appeal in England and Wales. In *R (on the application of P) v. Secretary of State for Justice*,⁸⁷ P was a prisoner in Feltham Young Offenders' Institution. He had a long history of very serious self harm and while in Feltham engaged in numerous and frequent incidents of this nature. The Howard League for Penal Reform wrote to the Secretary of State expressing concern about P's situation while medical professionals indicated that the extent of self-harm was such as to place him at a real risk of death. The health services at Feltham were not able to provide adequate care for him. The Howard League for Penal Reform sought an inquiry into the treatment and conditions experienced by P in Feltham. At first instance this was refused.

The Court of Appeal held that the circumstances did not call for an Article 2 inquiry, ruling that *Amin* could not be read in this way, having been decided in the context of its "notorious and tragic facts".⁸⁸ The Court also relied on *Keenan v. UK* to demonstrate that Article 2 is invoked when the authorities knew or ought to have known of an immediate risk to the life of an identified individual, regardless of whether this arises from a third party or self harm.

The Court also considered *JL* and rejected the submission that it was authority for the proposition that Article 2 requires an investigation into incidents of serious self harm. The Law Lords had clearly confined their remarks to near-suicides.

Stanley Burton LJ also clarified that the Court of Appeal in *JL*, when it stated that "the simple fact of death or serious injury of a person in custody gives rise to an obligation of the State to conduct the enhanced type of investigation",⁸⁹ did not mean that 'serious injury' required such investigation. This was on the grounds that the statements were made *obiter* and did not reflect the European authorities. Serious injury could only give rise to duties under Article 2 when they involved a risk to life.

As such, the Court of Appeal felt that because P's case was not one of attempted suicide, no investigation was required by Article 2. His self-harming could lead to life threatening injury or disease but this could not be assimilated to cases of suicide or near suicide. The risk to his life was real, but it was not immediate.⁹⁰ No investigation was required by Article 2.

Stanley Button LJ then turned his attention to the possibility of a duty to investigate being imposed by Article 3. He held that there was no such obligation due to the fact that there was no evidence of an arguable breach of Article 3, the legal provisions regarding the transfer of prisoners with particular disorders to hospital were not the proper subject of such an inquiry and, even if there were an arguable breach, it would not necessarily follow that there was such a duty to investigate. All the relevant facts were known in P's case and no inquiry was required.

The court also went on to make some general points about investigations into breaches of Article 3. It noted that the State is not required to make such an investigation in every case where there has been an arguable breach of Article 3. Relying on *Banks v. United Kingdom*⁹¹ the judge ruled that the obligations under Articles 2 and 3 are different. In the case of breaches of Article 3, the victim is generally alive and able to act on his own behalf. As such there is a "different emphasis" and it is not always necessary to examine such complaints.

⁸⁷ [2009] EWCA Civ 701.

⁸⁸ [2009] EWCA Civ 701, at paragraph 31.

⁸⁹ [2009] EWCA Civ 701, at paragraph 41.

⁹⁰ [2009] EWCA Civ 701, at paragraph 40.

⁹¹ (2007) 45 EHRR, no. 21387/05.

In *Banks* the Court felt that the 'procedural limb' or the duty to investigate under Article 3 is principally engaged when the Court cannot reach a conclusion as to whether there has been a breach of Article 3 and this is due to the failure of the authorities to react effectively to the complaints at the time. The Court also noted generally that a criminal trial is one of the strongest safeguards of an effective procedure for the finding of facts and the attribution of criminal responsibility for unlawful acts of violence. Where allegations are not of intentional violence at the hands of the State but raise issues of negligence, a civil or disciplinary remedy may be sufficient to provide protection under Article 2 and also under Article 3. Finally, the Court also noted that the facts were investigated and disclosed in the course of the criminal trial. The wider background of assaults and prevention of future occurrences in a prison were, in the Court's view, matters for public and political debate which fall outside the scope of Article 3.

The Court of Appeal also noted Lord Rodger's point in *JL* that, where a victim can give evidence about what happened and is able to act on his or her own behalf, a spontaneous independent investigation may not be necessary and the lack thereof may only be of issue if the court is unable to determine if there has been treatment prohibited by Article 3.

None of these issues have yet to be considered in the Irish context, but there have been no public investigations of incidents of serious self-harm or 'near suicides' in our prisons. Nor is it clear that there has been an independent preliminary examination of these incidents. An Irish court has yet to grapple with the issues canvassed in these English cases.

