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Prison Conditions and Human Rights: the development of judicial protection of prisoners' rights

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Summary

This article examines the prohibition of torture and inhuman and degrading treatment, contained, *inter alia*, in Article 5 of the Universal Declaration of Human Rights 1948 and Article 3 of the European Convention on Human Rights, as it applies to conditions of imprisonment and the treatment of prisoners. Essentially, the article examines the application of that prohibition with respect to prisoners who are *lawfully* incarcerated, as opposed to those generally in detention, although some of the principles and case law discussed in it apply equally to the latter category. The article thus seeks to assess the efficacy of international human rights law, and in particular the European Court of Human Rights, in protecting prisoners from such conditions and treatment; examining the developing jurisprudence of the Court and critically analysing the principles applied by it when seeking to adjudicate on complaints brought by prisoners relating to their conditions or individual treatment. The article will examine the case law of the Court, and of relevant and comparable English domestic cases, with respect to both conditions in general and, more specifically, the treatment of vulnerable prisoners, such as those with mental and physical disabilities.

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Introduction

One of, if not the main, objective of international human rights law was to prohibit the state's use of torture and other ill treatment on human beings. This is reflected in both the preamble to all principal human rights treaties – which stress the need to uphold the inherent dignity of every individual - and is expressed in absolute terms in Article 5 of the Universal Declaration of Human Rights 1948:

> 'No one shall be subject to torture or to cruel, inhuman or degrading treatment or punishment.'

Although Article 5 is not expressly related to the treatment of detainees, those in detention, lawfully or not, are particularly vulnerable to mistreatment and as a consequence a variety of international instruments are dedicated to imposing acceptable standards of treatment on those responsible for the detention of individuals. For example, in addition to Article 7 of the International Covenant on Civil and Political Rights 1966, which repeats the general prohibition against torture and inhuman and degrading treatment and punishment, Article 10 of that treaty makes specific reference to prisoners and declares that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. This provision has engendered a good deal of case law on general conditions of imprisonment (Joseph, Shultz and Castan: 377 *et seq*) although lacking the formal judicial characteristics of the European Court of Human Rights, the jurisprudence of the Human Rights Committee has been uncertain and unpredictable with respect to establishing binding principles.

There are, of course, a number of treaties and other international and instruments and bodies established to set and enforce standards with respect to the treatment of prisoners (Rodley 1999). Both the UN and the Council of Europe have passed Prison Rules establishing the minimum standards of the detention of prisoners (UN Standard Minimum Rules for the Treatment of Prisoners (1955), including the Basic Principles for the Treatment of Prisoners (1990), and the European Prison Rules 2006). Both sets of Rules seek to prohibit certain practices, such as the detention of young offenders with adult prisoners, and lay down basic principles based on respect for human dignity and the prisoner's rehabilitation. However, the Rules are not intended to be directly and judicially enforceable, and have limited authority with respect to the case law of the European Court of Human Rights, below (Livingstone, Owen and Macdonald 2008: 168).

On the other hand, the establishment of international bodies responsible for preventing ill treatment in detention has had a greater impact on the judicial challenge to unlawful prison conditions. Instruments such as the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (CAT) and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment 1987 (ECPT) establish Committees to monitor the prohibition of Torture in Member States. More importantly the ECPT establishes an independent Committee for the Prevention of Torture (CPT) which has the power to make visits to places of detention in each Member State and to submit reports of those visits, reporting ion any violation of Article 3 and the principles contained in the Torture Convention (Morgan and Evans 1998). Although such reports are not strictly enforceable on the Member State, they can inform domestic practice and have been used by judicial bodies such as the European Court of Human Rights to inform its jurisprudence in cases where prison conditions and practices are being challenged under Article 3 of the European Convention on Human Rights (Murdoch 2006).

Despite the plethora of international regulation in this area the *judicial* enforcement of acceptable prison conditions in line with internationally accepted standards faces a number of difficulties. First, the fact of lawful imprisonment itself might lead to a re-evaluation of the standards expected in prisons and the acceptability of certain practices such as social isolation, which outside the context of imprisonment might be regarded as inhuman and degrading. Secondly, and related to the first issue, adjudicative bodies might take into consideration the dangerousness of the offender and the need to guarantee prison order and public safety in assessing whether international standards have been violated. These factors may well compromise the absolute character of provisions such as Article 3 of the European Convention and lead to the approval of conditions and practices which are inconsistent with the state's duty to treat individuals with due respect and dignity (Palmer 2006). Thirdly, as decent prison conditions depend essentially on economic resources as well as the willingness of the state institutions to abide by international human rights standards, judges may be reluctant to challenge conditions that are claimed to be in breach of those standards.

These difficulties might lead to a conservative approach being adopted by the courts, whereby they will only intervene if the mistreatment of the prisoner is deliberate. It is with respect to the above difficulties that this article will now seek to analyse the jurisprudence of the European Court of Human Rights with respect to challenges of prison conditions and practices by, largely, lawfully incarcerated detainees.

Prison conditions and treatment and the European Convention

Article 3 of the European Convention provides that no one shall be subject to torture or inhuman and degrading treatment and punishment. As with other international law provisions, article 3 admits of no exceptions or qualifications and the European Court has stressed its absolute character, irrespective of the actions of the victim and the risks posed to national interests (*Chahal v United Kingdom* (1997) 23 EHRR 413). Thus, theoretically at least, once the Court determines that there has been a violation of article 3, the fact that the victim has broken the law and may pose a risk to society and prison security should be irrelevant. As we shall see, however, those factors will be relevant in determining whether the necessary threshold has been passed and thus whether Article 3 has in fact been violated. (Palmer 2006)

The individual terms employed in article 3 were defined by the European Court in both *The Greek Case* Yearbook 12 (1969) 1 and in *Ireland v United Kingdom* (1978) 2 EHRR 25. In the latter case the Court defined inhuman treatment as that which is capable of causing if not bodily injury, at least intense physical and mental suffering and acute psychiatric disturbances, whilst degrading treatment was such as to arouse in their victims feelings of fear, anguish and inferiority capable of humiliating them and possibly taking away their physical or moral resistance. Although rarely applicable to the prison context, torture was defined as treatment constituting deliberate inhuman treatment causing very serious and cruel suffering (at paras 167-8)**.** These distinctions are, in practice, a question of degree and the Court will need to look at a variety of factors, some of which are specific to the particular case, and applicant, at hand, and others which require a more general and objective enquiry. Thus, the Court may regard certain treatment or punishment, such as imprisonment, as at least *prima facie* acceptable because it is adopted commonly among all member states. That standard will be tempered by the need to apply the terms of the article to the particular facts, and in any case the Court may grant the Member State some margin in deciding to what extent acceptable measures of treatment and punishment are applied to any particular person.

In particular, when deciding whether treatment is at least degrading within article 3 the Court has stressed that the humiliation or debasement involved must reach a particular level, such an assessment being relative, depending on all the circumstances of the case, including the age of the victim (*Tyrer v United Kingdom* (1978) 2 EHRR 1). Thus, although, article 3 is recognised as an absolute right, admitting of no exceptions or justifications, it is clear that not all forms of ill treatment will be in violation of its provisions. Further, although any possible social or other benefits deriving from such treatment will not excuse treatment that falls within such terms, it is clear that in deciding whether the threshold under article 3 has been met, the Court can take into account whether the treatment complained of is part and parcel of a necessary and civilised social order. (Arai-Yokoi 2003). Further, the Court is often prepared to give a Member State a certain margin of discretion in deciding such matters as the acceptability of imprisonment of young, or elderly persons (*V and T v United Kingdom* (2000) 30 EHRR 121) and this latitude allows the Court to impose a margin of discretion similar to that applied in the determination of conditional rights, and although such a mechanism is inappropriate once the necessary threshold has been met under article 3, such discretion is relevant in shaping the boundaries of acceptable treatment and, in this context, lawful and unlawful prison conditions.

More positively, in *Selmouni v France* (1999) 20 EHRR 403 the European Court took the view that the increasingly high standard being required in the area of human rights correspondingly required a greater firmness in assessing breaches of the fundamental values of democratic societies. Thus, it was of the view that certain acts which in the past were classified as inhuman and degrading treatment as opposed to torture could be classified differently in the future (at para 101).This dicta is important in the context of prison conditions, for the Court might now consider acts (and conditions of detention) formerly regarded as unacceptable, without being considered inhuman or degrading, as now being in violation of article 3. This may be especially true of situations where the conditions in question are in breach of, formerly unenforceable, international guidelines.

Although article 3 of the European Convention, prohibiting torture and inhuman or degrading treatment or punishment, makes no specific reference to prisoners or prison conditions, the article has enormous potential in that respect and it has been used extensively in actions brought by prisoners. (Cooper 2003: chapter 3) In addition to its relevance to challenging general conditions of imprisonment, article 3 can also been employed in respect of various practices and procedures which might impact on the prisoner's health and integrity. Thus it has been used to challenge the use of physical restraints and solitary confinement (*Raninen v Finland* (1998) 26 EHRR 563; *X v United Kingdom* 21 DR 95), disciplinary punishments (*Keenan v United Kingdom* (2001) 33 EHRR 38), and forced medical treatment (*X v FRG* (1985) 7 EHRR). Further, as seen below, the article has engendered a good deal of jurisprudence with respect to medical and mental health care. (Foster 2005 (b))

However, despite its potential for reviewing and providing a remedy for unlawful conditions and practices, the development of a prisoners' rights jurisprudence has been restrained by a number of factors. First, the early case law of the European Court and Commission displayed an overly cautious approach with those bodies reluctant to find states in violation of article 3 by reason simply of unsatisfactory conditions (Dickson 1997). This ''hands off'' approach represented both bodies' reluctance to interfere with managerial decisions, particularly where that might affect the allocation of resources, and this reluctance was heightened by the desire of the European Court and Commission to respect the Member State's autonomy in respect to its own penal policy(Livingstone (2OO2). Thus in *Reed v United Kingdom* (1983) 5 EHRR 114 the Commission declared inadmissible the prisoner's complaint that three months in solitary confinement amounted to a breach of article 3, even though it accepted that his cell was infested with cockroaches and that the prison was seriously dilapidated and without adequate supervision, and in *B v United Kingdom* (1983) 5 EHRR 114 it held that although the conditions at the institution were unsatisfactory, they did not constitute a violation of article 3. Although critical of some of the aspects of the prisoner's detention, the Commission accepted the evidence of the prison psychiatric staff and held that the applicant's treatment did not amount to inhuman or degrading treatment. (See also *Hilton v United Kingdom* (1981) 3 EHRR 104, *T v United Kingdom* 28 DR 5, and *McFeeley v United Kingdom* (1981) 3 EHRR 161).

A second factor in stifling judicial intervention in this area was the reluctance of the Court and Commission to establish strict *judicial* guidelines and standards with respect to prison conditions and practices. Thus, despite the abundance of international regulation and guidance in this area, the Commission and Court refused to set enforceable standards, preferring to leave standard setting either to the domestic authorities or other international or regional regulations, and refusing to consider the justiciability of regulations such as the European Prison Rules 1987. Further, the Convention organs were traditionally reluctant to take into consideration the findings of the European Committee for the Prevention of Torture (ECPT) to establish a breach of Article 3. For example, in *Delzarus v United Kingdom* (Application No 17525/90) the applicant claimed that his conditions in solitary confinement in Wandsworth Prison amounted to a breach of article 3 relying on the findings of the European Committee on the Prevention of Torture and the Inspector of Prisons in England that there was overcrowding, the use of chamber pots, and that prisoners were kept in their cells for 23 hours per day. Eschewing the findings of those bodies

the Commission declared the case inadmissible on the basis that being in solitary confinement he could not complain of overcrowding and was less affected by the use of chamber pots. On the other hand, in *S, M and T v Austria* (1993) 74 DR 179 the European Commission referred to a finding of the Committee that the conditions of the temporary detention of aliens at an airport were acceptable in finding that there was no breach of Article 3 on the facts.

Although, as we shall see below, this deference has to an extent been overcome and the new European Court is prepared to take a more active stance in this area, judicial regulation is still beset by other difficulties. These difficulties will be examined through the case law, below, but a number of factors will be relevant in determining the success of prisoners' actions with respect to prison conditions and policies and practices that impact on their physical and mental well-being. First, to what extent can the European Court consider the aim of penal punishment, and the inevitable harshness of the prison environment in assessing whether the threshold necessary for finding a violation of article 3 has been crossed? The Court will need to be satisfied that a prisoner's treatment is serious enough to constitute a breach of the terms employed in article 3 of the Convention and, specifically, will have to distinguish treatment or conditions that are part and parcel of the harshness of incarceration from treatment or conditions which impose an unacceptable detriment on the detainee so as to constitute a violation (*Valisanas v Lithuania* Application No. 44558/98). Related to that factor is the question to what extent it is permissible to consider the dangerousness of the prisoner and issues of public and prison safety in determining whether relevant conditions and practices are contrary to article 3. The European Court has accepted that it is indeed permissible to consider those factors in determining whether the conditions were contrary to article 3, and has offered a generous element of discretion to the authorities. In *Krocher and Moller v Switzerland* 34 D &R 24 two German nationals were detained in a Swiss prison on remand on charges of terrorist murders. They were kept under constant surveillance in separate, isolated cells with the windows frosted over and allowed twenty minutes exercise per day. This carried on for five weeks although after four weeks some of the conditions were relaxed. In rejecting their claim under Article 3 the European Commission found that taking into account that the terrorist environment justified severe security measures, and that the conditions were relaxed after four weeks, there was insufficient evidence that they had been subjected to a form of suffering designed to punish them, destroy their personality or break their resistance. This approach is still often applied by the new European Court, particularly with respect to claims that continued detention in prison has become inhumane because of the prisoner's age or disability (*Mousiel v France* (2004) 38 EHRR 34). Secondly, to what extent are economic and resource factors relevant in determining the standards to be imposed on prison authorities with respect to prison conditions and facilities? These questions are relevant in applying the absolute character of Article 3 to the prison context and will be essential in assessing the powers and efficacy of the Court in challenging prison conditions.

The developing case law of the European Court on prison conditions

Coinciding with the creation of the full-time Court in the 1990's, there developed what can now be regarded as a reasonably coherent body of case law on the challenge to prison conditions and policies engaging article 3 of the Convention. The Court's

more positive stance with respect to article 3 and prison conditions can be explained on a number of grounds. Firstly, following its judgment in *Selmouni v France* (2000) 29 EHRR 403, the Court appears to have lowered its threshold with regard to the concepts of inhuman and degrading treatment, leading to a more proactive approach to matters such as poor prison conditions (Arai-Yokoi: 404-410. Secondly, since the creation of the full-time Court, all (prison conditions) cases are considered by a judicial body, avoiding the allegation that was made in the past that admissibility decisions were often made by the Commission in a cursory fashion and, possibly, on policy grounds (Gardner and Wickremasinghe 1997: 47-48; and Livingstone, Owen and Macdonald 2008). Thirdly, in recent years the European Court has considered a great number of claims concerning quite extreme prison conditions in Eastern Europe, thus providing it with the opportunity to condemn a variety of practices and to establish some minimum standards with respect to the treatment of prisoners in all jurisdictions within the Council of Europe. Fourthly, the European Court has been willing to take into account the findings of the European Committee for the Prevention of Torture in making a substantive determination under article 3. Thus, whereas in the past the Court and Commission was reluctant to make a link between the findings of an investigative committee and a judicial finding of a violation of article 3, there is now substantial evidence that the Court is prepared to be led by the Committee's findings and to feed those into their final judicial determinations. (Murdoch 2006).

With respect to challenging prison conditions in general, in comparison with the early case law, the Court is now prepared to take a more robust approach, and to find a violation on the basis of the cumulative effect of those conditions. In *Peers v Greece* (2001) 33 EHRR 51 the applicant complained about the conditions of his incarceration as a remand prisoner in a Greek prison: that he had been detained, alongside one other detainee, in a cramped cell which had little natural light and no ventilation and which had an open toilet, which often failed to work, and that he had been provided with no access to vocational courses or activities or a library. The European Court held that although there had been no evidence of a positive intention to humiliate or debase the applicant, the fact that the state authorities had taken no steps to improve the objectively unacceptable conditions of the applicant’s detention denoted a lack of respect for the applicant. Taking into account the fact that, for at least two months, he had to spend a considerable part of each day practically confined to his bed in a cell with no ventilation and no window, and had to use the toilet in the presence of another inmate (and be present while the toilet was being used by his cellmate), the Court was of the opinion that the conditions gave rise in him feelings of anguish and inferiority capable of humiliating and debasing him. Further, in *Kalashnikov v Russia* (2003) 36 EHRR 34, where a prisoner complained that the conditions and duration of his detention (four years and 10 months) were in breach of Article 3, the Court held that the duration of the applicant’s detention, taken with the cramped and unsanitary conditions in which he had been held, amounted to degrading treatment. In particular, it noted that he had been forced to endure overcrowding and poor sleeping conditions, and as a result he had contracted skin diseases and fungal infections over the period of his detention.

The cases above fail to identify or establish any particular criteria for establishing liability under article 3 but rather rely on the assessment of the cumulative effect of the conditions and the impact on the particular prisoner. However, other cases have

relied on more objective and standardized factors. In *Dougoz v Greece* (2002) 34 EHRR 61, the Court found that the detention of the applicant in an overcrowded cell with inadequate sanitation and insufficient beds where he was deprived of fresh air, daylight, hot water and exercise, constituted degrading treatment and thus a violation of article 3. Importantly, in coming to that conclusion, the Court noted that the European Committee for the Prevention of Torture had corroborated the applicant's allegations. Further, in *AB v The Netherlands* (2003) 37 EHRR 48, it was held that the inadequate implementation by state authorities of judicial orders to improve prison facilities and the failure to implement urgent recommendations from the European Convention for the Prevention of Torture, meant that the applicant who had complained about such conditions during his detention had no effective remedy in domestic law as required by article 13 of the Convention. The Court has also rejected the idea that the standards imposed by article 3 can be compromised by reason of the state's lack of economic and social resources. In *Poltorastskiy and others v Ukraine* (Decision of the European Court 29 April 2003), it was held that there had been a violation of article 3 with regard to the conditions of detention suffered by a number of death row prisoner when they had been locked up for 24 hours in a room with no natural light and that there had been little or no provision for activities or human contact. The Court took into account the Ukraine's socio-economic problems, but held that a lack of resources could not in principle justify prison conditions that were so poor as to constitute inhuman or degrading treatment. Again, in *Gusev v Russia* (15 May 2008) the European Court, after finding a violation of article 3 with respect to the general conditions of detention stated that the member state must organise its prisons in such a way so as to secure respect for the dignity of the detainee regardless of financial or logistical difficulties.

However, despite evidence of this bold new approach, the Court has made it clear that it is essential for the applicant to prove that the conditions are so intolerable that they cross the threshold implicit in the wording of article 3. For example, in *Valasinas v Lithuania* (12 BHRC 266) the applicant complained that in both the normal regime wing and in the separate segregation unit there was, *inter alia*, overcrowding, poor sanitation and washing facilities, poor catering, a lack of access to medical treatment and limited meaningful activities for prisoners, although there were access to books and newspapers and organised cultural and recreational events. He also complained that he was subjected to an intimate body search in the presence of a female prison officer, which was performed with the intention of humiliating him and that he had been victimised by the prison authorities. The Court found that there was no breach of Article 3 in respect of the conditions of detention because they did not attain the minimum level of severity required to amount to degrading treatment within the meaning of Article 3. In the Court's view, the treatment had to go beyond the level that was inevitable upon the imposition of a legitimate punishment.

The European Court will also consider the dangerousness of the prisoner in assessing the compatibility of prison conditions with article 3, as well as the public interest that sentences are served in full. Thus, in *Sanchez v France* (2006) 43 EHRR 54 it was held that there had been no violation of article 3 when a prisoner (Carlos 'The Jackal') had been segregated in prison for over eight years. The majority noted that he had not been subject to social isolation as he had had visits from lawyers, access to television and newspapers and time outside his cell, and concluded that the hardship of segregation had not crossed the threshold necessary for a finding of a violation under

article 3. In particular the Grand Chamber noted that the prisoner was very dangerous and had shown no remorse for his crimes. On the other hand, the minority of the Court found that the treatment was contrary to basic minimum standards of human dignity and posed threats to his future mental health. So too, the Courts has considered issues of good order and discipline in deciding whether a specific practice intended to achieve good order and discipline, for example, intimate searches, amount to a breach of Article 3. The Court has held that such searches are not in violation of Article 3 where they are necessary to ensure prison security or prevent disorder or crime and are conducted in a proper manner showing clear respect for the prisoner (*Valasinas* v *Lithuania*, decision of European Court of Human Rights, 24 July 2001) are not conducted in an arbitrary fashion (*Frerot v France* Application No 70204/01, decision of the European Court 12 June 2007). This approach has also been adopted by the English courts (*R* v *Secretary of State for the Home Department, ex parte Carroll and Al-Hasan* ([2002] 1 WLR 545).

This cautious approach has been followed in the English courts, with judges demanding exceptional evidence before challenging inevitably harsh conditions. In *R (on the application of BP) v Secretary of State for the Home Department* [2003] EWHC 1963, a 17 year old detainee in a young offender institution sought a declaration that his confinement on two occasions in a segregation unit was contrary to the articles 3 and 8 of the Convention. The claimant had a history of self harm and attempted suicide and contended that on the first occasion no heating was provided and that he was not given anything to do as a consequence of which he felt odd and paranoid when he returned to his normal unit. It was held that in failing to provide education, training and physical education to B whilst in the unit, the institution had breached Rules 37-41 of the Young Offender Institution Rules 2000. However, it found that the facilities afforded to B within his cell including the number of visits, the length of time which he was kept there and the penal purpose of the segregation precluded a finding that his treatment was in breach of article 3 of the 1998 Act. Similarly, in *Broom v Secretary of State for the Home Department* [2002] EWHC 2041, the court rejected a claim under the Act when a prisoner challenged decisions on the part of the Governor, firstly to transfer him between cells every three months, and secondly not to provide in-cell privacy screens, claiming that each of the decisions subjected him to inhuman or degrading treatment. In particular, the prisoner complained that he was subjected to disgusting and unhygienic condition, one cell had excrement around the toilet and in another the cupboards were soaked in grease from cooking utensils He also complained that his most recent cell was previously occupied by a heavy smoker and was stained yellow. Further, he claimed that as in-cell modesty screens were provided in all other dispersal prisons, not to have them was humiliating because there was no privacy when using the toilet, exacerbated as female staff were on the wing. In rejecting the claim it was noted that imprisonment itself is humiliating and the circumstances of the present case were no more than the ordinary incidence of a prison regime. The treatment was not discriminatory: all category A single cell prisoners in Wakefield were treated the same. Although other prisons may have different regimes, some variation between prisons is only to be expected. Secondly, the treatment was not shown to be gratuitous; there was nothing to suggest that that action was taken with the objective of humiliating prisoners, rather than for the purposes of equality among prisoners and prison security. Thirdly, the degree of suffering was clearly relatively low when set in the overall context of a prison regime.

Consequently, the threshold of degradation that would be required for the claimant to succeed had not been exceeded.

Nonetheless, the domestic courts have been willing to intervene when there is evidence that harsh conditions have had a greater impact on prisoners because of their specific physical or other needs. In *Napier v Scottish Ministers* (*The Times*, 14 May 2004) a remand prisoner complained that his living space was shared and was inadequate in terms of light, ventilation and space. He also complained of inadequate sanitary conditions, which involved "slopping out,'' and that he was confined to his cell for excessive periods. A medical report stated that he was suffering from a condition that was unlikely to improve whilst held in such conditions. The Court of Outer Session found that the subjection of the applicant to 'slopping out' in prison constituted inhuman and degrading treatment within article 3 and awarded the prisoner £2,400 in compensation. Having taken into consideration a number of decisions of the European Court and Commission in this area, Lord Bonomy stated that:

> '' .. to detain a person along with another prisoner in a cramped, gloomy and stuffy cell which is inadequate for the occupation of two people, to confine them there for at least 20 hours on average per day, to deny him overnight access to a toilet throughout the week and for extended periods at the weekend and thus to expose him to both elements of the slopping out process, to provide no structured activity other than daily walking exercise for one hour and one period of recreation lasting an hour and a half in a week, and to confine him to a ''dog box'' for two hours or so each time he entered or left the prison was, in Scotland in 2001, capable of attaining the minimum level of severity necessary to constitute degrading treatment and thus to infringe article 3.'' (at para 75)

In considering whether the prisoner was subjected to conditions which reached that level of severity required by Article 3 his Lordship noted that the threat that either (he or his cell mate) would require to defecate in the cell was ever present because of the uncertainty about whether a request to go to the toilet would be granted. Taking part in the practice made the petitioner feel small and overwhelmed his efforts to maintain his hygiene routine (at para 76). A taking particular account of the prisoner's eczema condition, and the fact that the infected eczema was caused by the conditions of his detention, his Lordship was satisfied that the prisoner had been exposed to conditions of detention which, taken together, were such as to diminish his human dignity and to arouse in him feelings of anxiety, anguish, inferiority and humiliation so as to cause a violation of article 3 of the Convention (at para 78).

As with the general case law of the European Court of Human Rights, the court in *Napier* was not prepared to lay down any specific guidance with regard to challenging prison conditions or individual practices. Thus, instead of outlawing any particular practice, the court concentrates on the collective and cumulative effect of the conditions on the particular prisoner; shying away from outlawing, or setting standards on, any particular aspect of imprisonment. (Foster (a)) Nevertheless, the decision appears to reflect the more robust approach taken by the European Court in recent years, particularly where the general conditions of detention have a specifically

disadvantageous effect on particular prisoners; an aspect of the Court's jurisprudence which will now be examined.

Article 3 of the ECHR and vulnerable prisoners

As seen in the case of *Napier*, a claim under Article 3 may be more successful if the court is satisfied that the conditions or practice in question have adversely affected particular prisoners, perhaps because of their physical or mental state. In such a case the court may be prepared to find a violation of Article 3 despite its reluctance to outlaw a particular act or to establish judicially enforceable standards to supplement guidance provided by international and regional regulations such as UN or European Prison Rules. The treatment of vulnerable prisoners – those with physical, mental or other disabilities – poses specific problems for both monitoring and judicial bodies in setting, and adjudicating on, appropriate standards in respect of the conditions of their detention. Yet despite the difficulties for the European Court in setting appropriate standards vis a vis the application of Article 3, the Court has established a reasonably coherent and robust jurisprudence in this area, including a number of decisions regarding the treatment of such detainees in British prisons and police cells. (Foster 2005 (a) Lawson and Mukherjee 2004.)

Prisoners with mental and physical disabilities

The European Court has adjudicated on a number of complaints brought by prisoners with mental and physical disabilities and who require special treatment whilst in prison. The leading authority in this respect is the case of *Keenan v United Kingdom* (2001) 33 EHRR 38, where the Court found that the suicide of a mentally ill prisoner gave rise to a violation of Article 3. In that case the European Court established that the prison authorities were under an obligation to protect the health of persons deprived of their liberty and that in assessing whether the treatment or punishment was incompatible with Article 3 the Court, in the case of mentally ill persons, had to take into consideration the prisoner's vulnerability and their inability, in some cases, to complain coherently or at all about how they are being affected by any particular treatment (at para 111). On the facts the Court found that the lack of effective monitoring of the prisoner's condition and the lack of informed psychiatric input into his assessment and treatment disclosed significant defects in the medical care provided to a mentally ill person known to be a suicide risk; and that the imposition on him in those circumstances of a serious disciplinary punishment, which might well have threatened his physical and moral resistance, was incompatible with the standard of treatment required in respect of a mentally ill person (at para116).

The principles in Keenan have been applied in the recent case of *Renolde v France* (Application No 00005608/05) concerning the suicide of a prisoner in pre-trial detention. The prisoner had been diagnosed as an 'acute delirious episode' and was prescribed medication. The medical team were informed of previous psychiatric problems and the next day he was placed in a single cell under special supervision and continued to be given antipsychotic medication which he was required to take. Two days later he assaulted a guard and was ordered to serve 45 days in a punishment cell, despite appearing ''very disturbed'' during the hearing, and ten days later he was found hanged in his cell and it was subsequently discovered that he had not taken his medication for three days. Distinguishing the case of Keenan with respect to the claim under Article 2 (the right to life), the Court noted that the authorities had been aware of his condition and mental illness history and the specific risk of self harm, but

nevertheless was left to take his own medication without supervision. That fact, and the fact that three days after his first suicide attempt he had been given the maximum penalty of 45 days' detention in a punishment cell, with no consideration being given to the fact that he was incoherent and very disturbed, led to the conclusion that the authorities had failed to protect the prisoner's right to life and were in violation of article 2.
With respect to his claim under Article 3, although the Court acknowledged the difficulties facing prison authorities and the need to punish attacks on their officers, it found that given the severity of the penalty, and the fact that he was clearly in a disturbed state, the punishment, entailing as it did the prohibition of all visits and all contact with other prisoners, might well have threatened his moral and physical resistance. In the Court's view the penalty was not compatible with the standard of treatment required in respect of mentally ill persons and the duty of the authorities to make special provision for them.

The decision in *Renolde* highlights the robust approach taken by the European Court with respect to vulnerable detainees and the problem of self harm, including suicides. The judgment re-iterates the need to subject such authorities to substantive duties of care, and unlike its case law on general prison conditions evinces a willingness to use Article 3 to prescribe, albeit in general terms, standards of care with respect to the treatment and monitoring of mentally ill prisoners.

The Court has also established that prison and police authorities owe an enhanced duty towards detainees with physical disabilities. In *Price v United Kingdom* (2002) 34 EHRR 53, the European Court held that there had been a violation of article 3 when a disabled female prisoner complained that she had to endure a number of physical and medical difficulties whilst in police and prison custody. The European Court noted that that the evidence submitted by the government indicated that the prison and police authorities were unable to cope adequately with the applicant's special needs and concluded that although there was no evidence of any positive intention to humiliate or debase the applicant, the detention of a severely disabled person in conditions where she was dangerously cold, risked developing sores because her bed was too hard or unreachable, and was unable to get to the toilet or keep clean without the greatest of difficulty, constituted degrading treatment within Article 3.

Although the majority of the Court was not prepared to declare that the her imprisonment was in violation of article 3 per se, it noted that the sentencing judge took no steps before committing the applicant to immediate imprisonment to ascertain where she would be detained or to ensure that it would be possible to provide adequate facilities to cope with her severe level of disability. Consequently, the decision in *Price* imposes a strict obligation on police and prison authorities to provide the necessary resources to ensure that the prisoner is not subjected to intolerable treatment. Similarly, in *Vincent v France* (Decision of the European Court, 24 October 2006) the Court found a violation of article 3 in respect of the treatment of a wheel chair bound prisoner who had been detained for four months in a prison which had inadequate facilities to deal with his disability. The Court concluded that the applicant had been totally reliant and vulnerable on the authorities and had lost the ability to leave his cell or move about the prison independently

The principles in *Keenan* and *Price* were applied subsequently in *McGlinchey v United Kingdom* (2003) 37 EHRR 41 with respect to prisoners with drug problems. The prisoner, who had a long history of heroin addiction and was asthmatic, was sentenced to four months imprisonment. She began to suffer heroin-withdrawal symptoms, and despite medical attention she died after being put into intensive care. In finding a violation under Article 3 the Court stressed that the confirmed that the state had a duty to make proper provision for the prisoner's health and well being in the form of requisite medical assistance. The Court concluded that her treatment for heroin withdrawal had not only caused her great distress and suffering, but had posed a very serious risk her to her health. Accordingly the prison authorities had failed to comply with their duty to provide her with the requisite medical care and their treatment of her had violated Article 3.

As opposed to the cases concerning general prison conditions, cases such as *Keenan* and *McGlinchey* display a greater readiness on behalf of the Court to establish specific medical and other duties on the prison authorities which then allow them to find a violation of Article 3 when such duties are breached. This approach is also reflected in domestic case law concerning actions in negligence (*Reeves v Commissioner for the Police of the Metropolis* [2002] AC 283 and *Orange v Chief Constable of West Yorkshire Police* [2001] 3 WLR 736).This has led the Court to establish the principle that a prisoner with specific disorders should not be detained in normal prison conditions without proper facilities, but should be moved to special conditions irrespective of the perceived dangerousness of the prisoner (*Riveiere v France*, decision of the European Court, 11 July 2006).

However, the Court has been less willing to intervene in any cases where it is alleged that it is inhuman and degrading to detain a person in prison despite the fact that their age and infirmity are exacerbating the normal harshness of prison life. The Court has conducted a pragmatic approach in this respect, attempting to balance the human rights of the prisoner with the functions of the criminal justice and penal system. Thus in *Papon v France* (2004) 39 EHRR10 it was held that although the Court did not exclude the possibility that in certain conditions the detention of an elderly person over a lengthy period might raise an issue under Article 3, in the instant case the applicant's general state of health and his conditions of detention and treatment had not reached the level of severity required to bring it within Article 3. Specifically the Court noted that it could not dictate to Member States on this issue as no Member State's domestic law had an upper age limit for detention.

In general, therefore, the Court will only intervene if such a prisoner is not receiving adequate medical assistance (*Matencio v France*, Application No 58749/00). For example, in *Mouisel v France* (2004) 38 EHRR 34 it held that the failure to release a seriously ill prisoner from prison amounted to a violation of Article 3 because the prison was scarcely equipped to deal with illness, but had still failed to transfer him to another institution. In that case the prisoner had contracted leukaemia and was suffering from permanent asthenia and fatigue, which caused him to wake up in pain in the night. Finding that there was a psychological impact of stress on his life expectancy, the Court found that the authorities had failed to take sufficient care of the prisoner's health to ensure that he did not suffer treatment contrary to Article 3.

So too, the Court will interfere where the prisoner has been deliberately mistreated and the prisoner's age and state of health have exacerbated that situation. Thus, in *Henaf v France* (2005) 40 EHRR 44 it was held that there had been a violation of article 3 when a 75-year old prisoner had been handcuffed on his way to hospital to undergo an operation and had been chained to the bedpost the night before the operation. Having regard to his health, age and the absence of any previous conduct suggesting that he was a security risk, the restrictions on his movement were disproportionate to any security requirements. The Court also took into account the fact that the prisoner had been handcuffed to and from chemotherapy sessions, of which the European Committee for the Prevention of Torture had been very critical. A more interventionist approach has also been taken with respect to the use of restraints on young offenders and in *R (C) v Secretary of State for Justice*, [2008] EWCA Civ 882 it was held that Rules 2008 allowing restraints to be used on children in detention to secure good order and discipline were in conflict with article 3 because the authorities had failed to show their necessity.

Despite that ruling the use of handcuffs for security purposes on prisoners receiving medical treatment is not considered to be in violation of Article 3 *per se*, and the court would need to be satisfied that there were no substantial reasons for restraint. In *R (Green and Allen) v Secretary of State for Justice* [2007] EWHC 2490 (Admin) it was held that the use of handcuffs on a 73 year-old prisoner serving a life sentence for the murder of his wife and children was not in breach of Article 3, and that in general such assessment was initially for the prison authorities. In this case the authorities had assessed him as posing a sufficient risk of escape and of harm to the public during his hospital treatment. Further there were no health reasons why he should not be restrained. However, in a joint application it was held that there had been a violation of Article 3 when a prisoner receiving treatment for Hodgkin's Lymphoma whilst serving a sentence of three years for drug offences had been handcuffed to officers during his medical treatment and placed in handcuffs during subsequent visits to receive chemotherapy treatment. Although the initial decision to handcuff the prisoner did not violate article 3 (although the court found that it came perilously close to do doing so), when the prison authorities became aware of the full facts of his illness and of the unlikelihood of him escaping, and recommended the removal of the restraints, the subsequent use of handcuffs during further hospital treatment and out-patient visits constituted both degrading and inhuman treatment..

In the absence such mitigating factors above, and where adequate treatment is available the Court has refused to take a humanitarian approach towards its application of Article 3. For example, in *Gelfmann v France* (2006) 42 EHRR 4 the Court held that there had been no violation of Article 3 when a prisoner, who had suffered from AIDS for nearly 20 years, 10 years before his incarceration, had had his request for release on medical grounds refused. In the Court's view there was no general obligation to release a prisoner on health grounds or to transfer him to a civilian hospital, even if suffering from an illness that was difficult to treat, provided the prisoner was receiving adequate treatment in prison and his condition was being monitored by an outside hospital. In taking this approach, the Court will consider the dangerousness of the prisoner and the general public interest that the prisoner serves the prescribed sentence. This approach was followed by the domestic courts in *R (Spink) v Home Secretary* [2005] EWCA Civ275, where it was held that the refusal of the Secretary of State to grant compassionate release to a prisoner serving a life

sentence and had been diagnosed with terminal cancer, and who's life expectancy was estimated at between 3 and 6 months, was not in breach of Article 3. His request for release had been refused because he represented a real risk of re-offending, and had not satisfied the authorities that there were exceptional circumstances to justify his release. The Court of Appeal stressed that it was, in general, in the public interest that the allotted sentence is served, and that the risk of re-offending was a material factor in the present case; not only in justifying his continued detention, but also his handcuffing handcuffed when in hospital, after a suitable risk assessment had been carried out with respect to the risk of him committing acts of violence. Thus, only in exceptional cases will the European and domestic courts apply Article 3 and insist on release on compassionate and humane grounds. For example, in *Farbthus v Latvia* (2 December 2004) the European Court found a violation of article 3 when an 84 year-old prisoner, suffering from very poor heath who had been detained in prison and prison hospitals for nearly two years was refused release. The Court held that given his very poor and worsening health, together with the fact that he could not stand up and wash etc without assistance, his delayed release on medical grounds constituted a violation of Article 3.

Conclusions

Compared with the early case law of the European Court and Commission of Human Rights, there has been an increased willingness of the European Court, and the domestic courts, to judge prison conditions in accordance with international human rights norms. The European Court has in general regarded such cases as justiciable and is prepared to find violations of those standards in the absence of bad faith, deliberate ill treatment or any positive intention to humiliate. In doing so the Court has, more inadvertently than expressly, established some standards of acceptable treatment, which can as a consequence be enforced in formal legal adjudication, both in Strasbourg and in the domestic court. Such standards, therefore, are not exclusively in the domain of each state government and guided by international guidelines from treaties lacking judicial enforcement,

However, the case law of both the European Court and the domestic courts has been inconsistent, and despite the absolute character of Article 3, has offered the prison authorities a wide level of discretion on matters such as the sentencing of vulnerable individuals, and prison security and discipline. This has led, inevitably to an unpredictable body of case law, highlighted by some judicial deference and a reluctance to make authoritative and precedent-setting rulings on specific aspects of prison conditions, such as the acceptability of solitary confinement, sanitary and recreational facilities or the incarceration and treatment of physically and mentally incapable prisoners. Instead the Court has preferred to decide cases on their individual facts and examine the cumulative effect of prison conditions on the individual.

More specifically, the European and domestic courts have been prepared to consider the general interests of penal policy and of securing prison discipline and order, as well as more personal factors such as the dangerousness of the particular offender, in determining whether the threshold required for a violation of Article 3 has been breached. The Court's reluctance to override these matters and to find a violation of article 3 despite the utilitarian benefit derived from such practices has led to the questioning of Article 3's absolute status.

On the other hand, the European Court has taken a very positive and more constructive approach towards the protection of vulnerable prisoners, such as those with physical or mental problems or, to a lesser extent, young, older or infirm prisoners. The Court has come relatively close to establishing general guidelines in these areas, and cases such as *Keenan, Price* and *McGlinchey* have imposed strict duties on domestic authorities with respect to their care and treatment, thus protecting them from dangers such as self-harm and the harshness of general prison life that is likely to be felt more intensely because of their situation. These cases have often mirrored the jurisprudence of common law action and in turn case law of the European Court has informed domestic law on the liability of authorities in tort.

The determination of prisoners' cases under Article 3 are especially difficult to predict and it is expected that the courts will continue to take a reactive rather than pro active stance, leaving the establishment and enforcement of strict guidelines to state authorities and the drafters and monitors of international rules governing conditions of detention. Notwithstanding this, recent case law does provide some evidence that prison conditions are most clearly a justiciable matter, and that state authorities are not to be provided with unlimited discretion in this area. In that sense, the general spirit of Article 5 of the Universal Declaration is being respected in the context of securing acceptable conditions for the incarcerated.

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