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Judicial conceptions of prisoners' rights in Ireland: an emerging field

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I am very grateful for the invitation to speak about the role of the Irish courts in dealing with issues relating to detention and conditions of detention. I am particularly glad that Irish experiences are being shared at this conference, as prison law and prisoners' rights jurisprudence are only beginning to develop into a field of their own in Ireland.

In this paper I will discuss four themes. The first concerns judicial discussions of conditions of detention, secondly I will examine the development of the principles of procedural fairness in decisions on the use of separation or isolation of prisoners. I will then move to look at issues concerning foreign prisoners, and say a few words about conditions of detention in the immigration context. Finally, I will explore some of the barriers to a greater role for the Irish courts in the area of conditions of detention. I will speak from the experiences drawn from my research, but also from legal practice.

The legal framework governing Irish prisons

There are 14 prisons in Ireland and just under 4,000 prisoners, translating to a rate of about 96 per 100,000 population.¹ This rate is now falling, after four decades of an increasing prison population, and a particularly rapid increase during the last decade. Overcrowding is a feature of many of our prisons.²

¹ See further Rogan, *Prison Policy in Ireland: Politics, Penal-Welfarism and Political Imprisonment* (New York, Routledge, 2011); Rogan, *Prison Law* (Dublin, Bloomsbury Professional, 2014); www.iprt.ie.

² The Irish Prison Service publishes a daily census of the prison population, including details of occupancy levels: for example http://www.irishprisons.ie/images/dailynumbers/13_november_2014.pdf

The main legislative framework for conditions of imprisonment in Ireland is found in the Prisons Act 2007, and the Prison Rules,³ a secondary piece of legislation, from the same year. The Rules govern all aspects of prison life, including conditions, visits, and correspondence. The rules do not confer directly justiciable rights, but are an important source of guidance for courts assessing a claim by a prisoner that a particular right has been infringed and contain important procedures which must be followed in the disciplinary context and when isolating a prisoner from the rest of the prison population, a point to which I will return. A small but recently rapidly growing set of judicial decisions is also providing principles which should govern conditions of detention under our written Constitution which dates from 1937. Under the European Convention on Human Rights Act 2003, state bodies must perform their functions in a manner compatible with the state's obligations under the Convention and courts must interpret domestic law in light of the Convention, insofar as is possible. In practice, it must be said that the Convention has had a fairly muted impact on judicial decision-making in the prison context, and indeed elsewhere. In the High Court Hogan J in DF v Garda Commissioner (No 3)⁴ made his view clear that many of the protections in the Convention are already in place under the Irish Constitution, for example Article 3 of the Convention goes no further than the protection of the person under Article 40.3.2 of the Irish Constitution. Challenges to prison conditions or aspects of detention take the form of applications to the High Court for release, for judicial review, or in plenary proceedings alleging damages personal injuries and/or seeking other relief, again, usually to the High Court. There is no special division of our courts dealing with prison matters exclusively. There are, as yet, no cases resulting in a judgment by the ECtHR on prison conditions in Ireland which may surprise you, there is one on release procedures.⁵

³ S.I. No. 252 of 2007, as amended.

⁴ [2014] IEHC 213.

⁵ Lynch and Whelan v Ireland, application nos 70495/10 and 74565/10, June 18 2013 and July 8 2014.

Prison conditions

It is undoubtedly surprising that prison litigation has only emerged relatively recently in Ireland in light of our problems with overcrowding and lack of in cell sanitation for some prisoners.

Two cases decided in the past few years have, however, have given a great deal of guidance on what the Constitution requires regarding conditions of detention. First, it is of note that prison conditions may be challenged using what is known as the Article 40 procedure. This means that a prisoner can apply for an inquiry into the lawfulness of his or her detention, i.e a *habeas corpus* inquiry, and potentially obtain release on the basis that the conditions in which he or she is being detained are so bad as to amount to unlawful detention. This is an extremely interesting remedy, however, it will not surprise you to hear that it is extremely difficult to obtain! Article 40 contains the right to liberty, and Article 40.4.4 of the Constitution lays out the procedure whereby a person seeks to obtain an inquiry into the lawfulness of his or her detention, which requires the detainer to justify the detention.

The availability of the remedy of release in this context was established in the case of *The State (Richardson) v Governor of Mountjoy Prison*.⁶ This case held that an order for an inquiry into the legality of a prisoner's detention on the basis of cell conditions should only be granted in exceptional circumstances but. If a court considered that the authorities were taking advantage of the fact that a person was detained consciously and deliberately to violate his or her constitutional rights or to subject him or her to inhuman or degrading treatment, the court might order release. Likewise, if the court was convinced that the conditions of a person's detention were such as to seriously endanger his life or health, and that the authorities intended to do nothing to rectify these conditions, the court might release him. The position would also be similar if the conditions of a prisoner's detention were such as to seriously threaten his life or health, but the authorities were, for some reason, unable to rectify the conditions.

⁶ [1980] ILRM 82.

In *Kinsella v Governor of Mountjoy Prison*⁷ the applicant sought release under Article 40 in circumstances where he had been isolated from the rest of the prison population because of fears for his safety. He was placed in an observation cell in the basement of the prison. The cell was approximately three metres by three metres, was entirely padded, and contained nothing other than a mattress. There was a small window providing some natural light, and there was a dispute as to whether the shutter over the window was working. The applicant also argued that he was provided with no reading material and had access neither to a radio nor a television. Hogan J held that the conditions had breached the prisoner's right to bodily integrity, finding that the detention amounted to a form of sensory deprivation. Hogan J held that the protection in the Irish Constitution or the right to the person extended to the integrity of the human mind and personality, and that prolonged detention in such circumstances gave rise to the risk of obvious psychiatric disturbance. However, Hogan J refused to hold that the prisoner was in unlawful detention. This was on the basis that the court considered that the prison authorities had the best of intentions in housing the applicant and had placed him in the cell at issue simply because of a lack of space within the prison and to prevent threats on his life. In the view of the court, 'absent something akin to an intentional violation or manifest negligence on the part of the authorities it would be only proper to give them a fair opportunity to remedy the situation in light of the decision. The prisoner was transferred to another prison the following day. Hogan J considered that '... the present case may yet prove to be an example of constructive engagement of this kind between the executive and judicial branches which achieves a just solution in line with appropriate separation of powers concerns without the immediate necessity for a coercive or even a declaratory court order'.

In August of this year the Supreme Court was required to sit on an emergency basis to discuss the appropriateness of invoking the Article 40 *habeas corpus* procedure in circumstances concerning a challenge to rules on remission. The Supreme Court held in *Ryan v Governor of Midlands Prison*⁸ that the remedy of release can be used only in exceptional cases in the post-conviction setting, but implicitly recognised that cases

⁷ [2012] I IR 467. Hereinafter *Kinsella*.

⁸ [2014] IESC 54.

where prison conditions were being challenged did fall within that exceptional category. This was followed by the High Court in *Burke v Governor of Cloverhill Prison*.⁹

Another application for an inquiry into the lawfulness of a prisoner's detention arose in the case of *Connolly v Governor of Wheatfield Prison*.¹⁰ In this case, the applicant was detained for twenty three hours per day in his cell. He had requested to move to a cell of single occupancy, being fearful of homophobic victimisation and requiring protection from the general prison population. It was the view of the prison authorities that his life was not in danger, but the prisoner refused to come off 23 hour lock up. His cell had a bed, a counter, a toilet and sink, and a television. He had ready access to reading material. He was not able to participate in any training or recreational activities. However, he was detained in circumstances, which the court held were approaching solitary confinement, for several months. Hogan J considered that every detained person must be permitted some meaningful interaction with the human faculties of sight, sound and speech, as such interaction is vital if the integrity of the human personality is to be maintained. However, Hogan J also noted that the regime had been imposed upon him at his own request and his circumstances were monitored on a regular basis. The indefinite detention of a prisoner in these conditions for a period of years would clearly violate the right to the person. However, for periods less than that, and taking into account the very grave difficulties faced by those running prisons, the detention was held not to be unlawful at that point. Hogan J returned to the same theme developed in *Kinsella*, holding that 'the judicial branch can but rarely be prescriptive in terms of specific conditions, not least given that this is ultimately the responsibility of the executive branch, and the Courts should confine themselves to prompting, guiding and warning the executive branch, lest the precious values of human dignity and the protection of the person might be violated'.

It may also be of interest that the Irish High Court has held that a lack of in cell sanitation requiring a prisoner to use a chamber pot for human waste and to empty that pot with other prisoners into a sluice or drain was not inhuman or degrading

⁹ [2014] IEHC 449.

¹⁰ [2013] IEHC 334. Hereinafter *Connolly*.

either under the Irish Constitution or under the Convention, in circumstances where the prisoner was not sharing a cell and the conditions of detention were otherwise good.¹¹

Procedural fairness and decisions to isolate

The numbers of people on 23 hour lock up, or over 19 hours lock up, have been decreasing over the past year or two in Ireland.¹² However, the use of isolation has given rise to a series of cases on the procedural protections necessary before a decision to remove a prisoner from the rest of the prison population is made or to confine them to his or her cell for very long periods without access to recreational or educational services that other prisoners can use. We are aware of the concerns about holding prisoners in isolation for anything over 15 days. Procedural fairness is essential in the prison context in order to ensure that detention is legitimate and is experienced as being legitimate.

The use of isolation is governed by the Prison Rules 2007. There are three main bases upon which a prisoner can be put on isolation. These relate to grounds of order, protection of the prisoner or other prisoners, and the need to use a special observation cell.

Rule 62 governs the use of protection on the grounds of order, which I will focus on here. There is a procedure under the Rules which requires, *inter alia*, that the Governor of the prison must review the direction to isolate the prisoner not less than once in every seven days, and inform the prisoner in writing of the reasons therefor, either before the direction is given or immediately afterwards. Cases have arisen emphasising the importance of adhering to these provisions. In *Devoy v Governor of Portlaoise Prison*¹³ the applicant was placed in isolation, but rule 62 had not been invoked. The court considered that the circumstances of the detention were such that rule 62 could have been invoked and measures outside the Prison Rules should not be

¹¹ *Mulligan v. Governor of Portlaoise Prison* [2010] IEHC 269. Hereinafter *Mulligan*.

¹² See the census of restricted regime prisoners at http://www.irishprisons.ie/images/monthlyinfonote/oct_restrict_2014.pdf.

¹³ [2009] IEHC 288.

employed in the first instance, if the same result can be achieved by following the Prison Rules. Rule 62 should have been used. However, the court also held that the authorities were acting on their duty to protect life and it would be inappropriate to quash the decision, though the illegality required immediate remedy.

In *Dundon v Governor of Cloverhill Prison*¹⁴ the applicant was subject to a regime, the legal basis of which was in dispute. The prisoner argued that he was detained in conditions which were, in effect, those envisaged by rule 62, but without invoking rule 62. After the initiation of proceedings the authorities invoked rule 62. The High Court held that a Governor may not restrict the normal life of a prisoner, as envisaged by the Rules, without recourse to the provisions of the Rules. Whenever a restriction on the prisoner's ability to associate reaches the point at which rule 62 becomes applicable, it should be invoked so that its notification and oversight provisions take effect.

Foreign prisoners

Approximately 20% of the prison population in Ireland is from outside Ireland. Ireland does not keep good data on the precise profile of where these prisoners are from.

The Prison Rules require that an explanatory booklet outlining the entitlements, obligations and privileges under the prison Rules should, insofar as is practicable, be provided to a foreign national in a language that is understood by him or her, and if a booklet is not available, all reasonable efforts must be made to ensure that the contents are explained to the prisoner. A foreign prisoner must be provided with the means to consult a consul and an applicant for asylum with the means to contact the UN High Commissioner for Refugees. In *Gan v Governor of Arbour Hill Prison*¹⁵ the court held that 'a prisoner is entitled to seek to have special dietary needs and requirements catered for in a reasonable and proper manner'. Under the Prison Rules

¹⁴ [2013] IEHC 608. See also *Killeen v. Governor of Portlaoise Prison* [2014] IEHC 77.

¹⁵ [2011] IEHC.

(Amendment) 2013,¹⁶ if a complaint is made concerning racial abuse or discrimination against a prisoner it must be subject to an investigation, oversight of which is given to the Inspector of Prisons.

It is surprising that so little caselaw exists on the position of foreign prisoners in the Irish system. The courts have held that a foreigner may be entitled to a reduced sentence compared with an Irish national in light of the fact that a foreign prisoner will have a much more difficult time within the Irish prison system *DPP v Whitehead*.¹⁷

People can be committed to prison in Ireland for immigration related issues. In 2013 there were 374 people committed to prison for immigration issues, with a daily average population in this category of 13¹⁸. Those who are awaiting deportation may be held for a few days; prison may also be used for violations of immigration law such as those involving visas.

However, Ireland houses a much larger group of people in a system known as 'direct provision', which has come in for very significant criticism in the last few years and is now the subject of a review ordered by Government. Direct provision is used for asylum seekers. Such individuals receive a weekly allowance of €19.10 per week per adult and €9.60 per child. They are not entitled to any other social security payment and cannot seek or enter employment, on pain of criminal sanction. As Liam Thornton has written, it was introduced in April 2000. Asylum seekers are held in bed and board accommodation provided by the Reception and Integration Agency in hostels, guesthouses and holiday camps around Ireland. A case is currently before the High Court challenging the use of direct provision, arguing that it has no statutory basis and is therefore unlawful and challenging the lack of a complaints process which is independent, the inability to choose the food one wishes, freedom of movement and the interference with family life. A decision is awaited.¹⁹ The

¹⁶ S.I. No. 11 of 2013.

¹⁷ Court of Criminal Appeal October 20 2008.

¹⁸ Irish Prison Service, Annual Report 2013.

¹⁹ *C.A. and T.A. (a minor) v Minister for Justice and Equality and others*, record number 2013 751 JR. A judgment is expected on November 14th 2014.

Government has created a working group to review the use of the direct provision system. The amount of time people spend in direct provision is the subject to particular criticism (perhaps in the order of years). This system is entirely separate to that run by the Irish Prison Service.

Those in asylum detention are becoming increasingly visible in Irish political and public discourse, but there is much less in the way of discussion of those detained in prison while awaiting deportation, perhaps because of the short periods of time involved.

Why is prison law only now emerging in Ireland?

I want now to explore some of the reasons why the judiciary is only recently developing a set of constitutional principles concerning the regulation of conditions of detention. The first set of explanations is pragmatic – prison law is not yet an established area of legal practice in Ireland, though this is changing as training opportunities increase.²⁰

There is no legal aid in Ireland for prison cases involving challenges to conditions or decision-making by the prison authorities. There is a comprehensive scheme for criminal cases and for challenges to the legality of detention based on irregularities. However, prisoners challenging conditions do so on by means of lawyers acting on a no foal no fee, or no costs no charge basis or, *pro bono*, and may face a substantial legal bill. The lack of specialisation is a problem for both practitioners and judges, with most prison cases coming from criminal defence firms, whose core expertise is quite different.

There is also older caselaw in Ireland²¹ which suggests that a prisoner will not succeed in establishing a breach of his or her rights unless he or she can prove ‘evil intent’ on the part of the prison authorities (in direct contravention of the position under Article 3 of the Convention) though the decision in *Kinsella* suggests that the

²⁰ Prison Law is now offered to students at Dublin Institute of Technology.

²¹ *The State (C) v Frawley* [1976] IR 365.

judiciary is moving away from this position and that the question of the attitude of the authorities is relevant to the remedy which will be ordered.

The courts have, rightly, emphasised the separation of powers in prison cases. Deference to the position of a prison governor perhaps reached its height in the case of *Foy v Governor of Cloverhill Prison*²² which concerned the use of screens during a visit between a father and his son. The court held there that it was undesirable for a court to interfere with the running of a prison and found the use of screens in all cases in the remand prison to be reasonable, again in contrast to decisions under Article 8. However, in *Mulligan* the High Court held that in an appropriate case a court in Ireland may actually directly improvements in prison conditions where warranted to vindicate a constitutional right, and where the vindication of such rights is not constrained by boundaries such as practicability.

Importantly, the Irish High Court has also noted the crucial role played by the courts in vindicating rights within the context of detention. In *Connolly v Governor of Wheatfield Prison* Hogan J held:

While due and realistic recognition must be accorded by the judicial branch to the difficulties inherent in the running of a complex prison system and the detention of individuals, many of whom are difficult and even dangerous, for its part the judicial branch must nevertheless exercise a supervisory function to ensure that the essence of these core constitutional values and rights - the dignity of the individual and the protection of the person - are not compromised ...

The obligation to treat all with dignity appropriate to the human condition is not dispensed with simply because those who claim that the essence of their human dignity has been compromised happen to be prisoners. ...²³

²² [2012] 1 IR 37.

²³ [2013] IEHC 334 Paragraphs 15-18. Internal citations omitted.

With that uplifting statement about the role of the courts, I will finish. Thank you.