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## Prison Conditions Under Irish Law and the European Convention on Human Rights.

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### Recommended Citation

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# PRISON CONDITIONS UNDER IRISH LAW AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS

*Dr. Mary Rogan BL*

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ISBN: 978-0-9573037-1-3

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## PRISON CONDITIONS UNDER IRISH LAW AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS

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### INTRODUCTION

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 accountability structures and the law regulating Irish prisons; the other explores practical matters surrounding the taking of prison law cases.

The topic of this paper is 'prison conditions under Irish law and the European Convention on Human Rights'.

This publication is funded by the Irish Research Council for the Humanities and Social Sciences, as part of its Research Development Initiative. It is produced as part of a collaborative project between the Irish Penal Reform Trust and Dr. Mary Rogan BL of Dublin Institute of Technology, called 'Talking about Punishment: increasing understanding of prisoners' rights and how those rights may be vindicated'.

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 to Dr. Mary Rogan at [mary.rogan@dit.ie](mailto:mary.rogan@dit.ie).

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## **STRUCTURE OF THE PAPER**

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This paper provides an examination of domestic and Convention law relating to certain aspects of prison conditions. The rights of prisoners as discussed by the Irish courts are examined first. The test for when these rights are breached is then discussed. Irish caselaw on prison conditions is analysed, followed by an examination of the application of Articles 2 and 3 of the European Convention on Human Rights. The focus of this document is on the decisions of the courts under Irish and European Convention on Human Rights law on overcrowding, slopping out, hygiene, and health.

The full text of relevant domestic and 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](http://www.iprt.ie/prison-law).

## **THE CONSTITUTIONAL RIGHTS OF PRISONERS AND THE EFFECT OF IMPRISONMENT**

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Several decisions of the Irish courts have held that, while imprisonment inevitably involves the deprivation of rights, those rights which are not necessarily diminished must continue to be upheld. For example, in *Mulligan v. Governor of Portlaoise Prison* (hereinafter *Mulligan*) the High Court held:

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[A]ny attenuation of rights must be proportionate; the diminution must not fall below the standards of reasonable human dignity and what is expected in a mature society. Insofar as practicable, a prison authority must vindicate the individual rights and dignity of each prisoner.<sup>1</sup>

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In *Murray v. Ireland*<sup>2</sup> it was held that the rights which may be exercised by a prisoner are those which do not depend on the continuation of liberty and which are compatible with the reasonable requirements of the Prison Service or which do not impose unreasonable demands on it.

In *Holland v. Governor of Portlaoise Prison*<sup>3</sup> it was held that a prisoner is obliged to suffer such restrictions on constitutional rights as necessary to accommodate the serving of a sentence. Subject to this proviso however, McKechnie J held that all other rights should be capable of being exercised. McKechnie J also considered prisoners to have the right to free communication, the right to practice one's religion, and the right to natural and constitutional justice, holding that this was not an exhaustive list.<sup>4</sup> The court reiterated that any restrictions on the constitutional rights of prisoners must be proportionate.

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1 [2010] IEHC 269, at paragraph 14.

2 [1991] ILRM 465.

3 [2004] 2 IR 573.

4 [2004] 2 IR 573, at p. 594.

In *Devoy v. The Governor of Portlaoise Prison*<sup>5</sup> Edwards J recognised the broad discretion vested in each Governor, but held that:

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the application of the Rules must be in a manner which is respectful of and intended to vindicate the constitutional rights of the prisoner to the extent that they are not abrogated or suspended by the very fact of his being sentenced to a term of imprisonment. Among the residual constitutional rights of a prisoner which are not abrogated or suspended is the right to be treated humanely and with human dignity”. Edwards J also held that “a prisoner such as the applicant may be entitled to a degree of freedom of association as an aspect of his constitutional right to humane treatment and human dignity.”<sup>6</sup>

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The rights of prisoners specifically recognised by the courts to date are summarised in the case of *Mulligan*. MacMenamin J held that prisoners have the right to bodily integrity, which necessitates that the Executive should protect the right to health of persons held in custody as well as is reasonably possible in the circumstances.<sup>7</sup> The court held: “as a citizen, a prisoner is entitled to protection of his right to bodily integrity ... He or she is entitled not to have their health placed at risk. As a matter of general principle he or she must be protected against inhuman or degrading treatment”.<sup>8</sup> The court held further that prisoners have a right not to be exposed to inhuman or degrading treatment, a right to protect life from serious endangerment, and a right to privacy. The court went on to affirm that the conditions of detention must not be such as to seriously endanger a prisoner’s life or health.<sup>9</sup>

In *Kinsella v. Governor of Mountjoy Prison* (hereinafter, *Kinsella*) the High Court had no difficulty in accepting that a prisoner has a right to bodily integrity and that this right encompasses a person’s psychological wellbeing.<sup>10</sup>

## **THE ISSUE OF THE SEPARATION OF POWERS AND LIMITATIONS ON PRISONERS’ RIGHTS**

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The limitations on rights occasioned by the fact of imprisonment are amplified by the reluctance of the Irish courts to intervene in the running of prisons. The caselaw makes it clear that the duty of the state to avoid exposing the health of a prisoner to risk or danger is not absolute. The judgment in *Mulligan* held that it is not for the courts to recommend to the Executive what is desirable or to fix priorities in health and welfare policy. This has been held to mean that the rights to bodily integrity and the protection of health must be subject to limitations arising out of what is practicable in the prison setting.<sup>11</sup>

Older caselaw has also emphasised the limitations on the rights of prisoners. In *The State (McDonagh) v. Frawley*<sup>12</sup> it was held that many “normal constitutional rights are abrogated or suspended during the period of imprisonment”<sup>13</sup> such that the prisoner must accept prison discipline and accommodate himself or herself to the reasonable organisation of prison life as laid down in the prison regulations.

5 [2009] IEHC 288.

6 [2009] IEHC 288, at paragraph 88.

7 [2010] IEHC 269, at paragraph 108(a).

8 [2010] IEHC 269, at paragraph 14.

9 [2010] IEHC 269, at paragraph 10(d).

10 [2011] IEHC 235.

11 *Mulligan*, at paragraph 90.

12 [1978] IR 131.

13 [1978] IR 131, at p. 135

The court went on to hold that a prisoner cannot demand the medical treatment he thinks he should get, but will be given such medical treatment as the medical officer of the prison thinks appropriate.

The High Court showed very wide latitude to a prison Governor in *Foy v. Governor of Cloverhill Prison* when it held: “such measures incidental to imprisonment as are necessary for the proper implementation of an order made by a court, whether for remand of an accused or sentence of a convict, are within the entitlement of the governor in the management of a prison”.<sup>14</sup>

The same judge, Charleton J, held in *Walsh and others v. Governor of Midlands Prison*<sup>15</sup> the continual review by the courts of the ordinary day-to-day decisions of prison authorities carries a significant danger. Charleton J cited one US case, *Turner v Safley*,<sup>16</sup> where O’Connor J held:

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Subjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration. The rule would also distort the decision making process, for every administrative judgment would be subject to the possibility that some court somewhere would conclude that it had a less restrictive way of solving the problem at hand. Courts inevitably would become the primary arbiters of what constitutes the best solution to every administrative problem, thereby “unnecessarily perpetuat[ing] the involvement of the federal courts in affairs of prison administration.”<sup>17</sup>

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In relation to Charleton J’s citation of US caselaw, it should be noted that a majority of the US Supreme Court in *Plata v. Brown*<sup>18</sup> did not cite the restrictive caselaw of the 1980s such as *Turner v. Safley*. The cases Kennedy J, for the majority, cited to ground his judgment regarding the rights of prisoners come from the 1970s,<sup>19</sup> and the language he drew upon is that of judicial responsibility to remedy the failures of the State, holding that the Courts must not shirk from their obligations to protect the rights of all, including prisoners.<sup>20</sup>

14 [2010] IEHC 529, at paragraph 18.

15 [2012] IEHC 229.

16 (1987) 482 US 78.

17 Internal citations omitted.

18 563 U. S. \_ (2011). See further Rogan, “Plata v. Brown” (2012) 75 *Modern Law Review* 261–275.

19 *Hutto v. Finney* 437 US 678, 678 (1979); *Bell v. Woolfish* 441 US 520 (1979).

20 Relying on *Curz v Beto* 450 US 319, 321 (1972).

The question of how far the courts will intervene in prison administration is also at issue when it comes to the remedies a court may direct. *Mandamus* is a difficult remedy to obtain in a prison context, but may be given in an appropriate case. MacMenamin J in *Mulligan* interpreted the decision of *The State (Richardson) v. Governor of Mountjoy Prison*<sup>21</sup> (hereinafter *Richardson*) as recognising that in an appropriate case a court:

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has jurisdiction to actually direct improvements in prison conditions where warranted to vindicate a constitutional right, and where the vindication of such right is not constrained by boundaries such as practicability. Thus, for example, were it to be established that there was an ongoing and serious threat to a prisoner applicant's health, the vindication of that constitutional right could warrant a court in intervening by way of *mandamus*. The protection and vindication of that right might then have to be balanced against other constitutional provisions.<sup>22</sup>

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This issue is discussed further below in the context of the decision to release a person under Article 40.4 of the Constitution on the basis that the nature of the conditions renders a person's detention unlawful.

#### **'EVIL INTENT' ON THE PART OF PRISON AUTHORITIES: THE TEST FOR A BREACH OF CONSTITUTIONAL RIGHTS**

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The reluctance of the courts to intervene in prison life is most apparent in the test laid down in the caselaw for when the rights of prisoners have been breached. The balance of the older jurisprudence, and arguably also the judgment in *Mulligan*, indicates that in order for a prisoner to be successful in arguing a breach of the right not to be exposed to inhuman or degrading treatment, it would be necessary to establish an 'evil purpose' on the part of the prison authorities in the maintenance of such conditions. In *State (C) v. Frawley*<sup>23</sup> (hereinafter, *C*) Finlay P considered the question of whether prison conditions constituted a failure to protect a prisoner from torture or inhuman or degrading treatment such that the detention was unlawful. Finlay P held there had been no such failure, stating that the purpose and intention of the restrictions and privations surrounding the detention were neither punitive nor malicious.<sup>24</sup> Finlay P went on to say:

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I must construe the entire concept of torture, inhuman and degrading treatment and punishment as being not only evil in its consequences but evil in its purpose as well. It is most commonly inspired by revenge, retaliation, the creation of fear or improper interrogation.<sup>25</sup>

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MacMenamin J, analysing the case in the course of the *Mulligan* decision, held that *C* does not derogate from the constitutional rights to which a prisoner is entitled but "rather demonstrated the limitation of such rights by considerations of practicality, the common good or protection of the prisoner himself. The rights in question are not absolute rights".<sup>26</sup>

21 [1980] ILRM 82.

22 [2010] IEHC 269, at paragraph 99.

23 [1976] IR 365.

24 [1976] IR 365, at p. 374.

25 [1976] IR 365, at p. 374.

26 [2010] IEHC 269, at paragraph 93.



There is some inconsistency in the caselaw here, however. *C* seems to suggest that it is only where a prisoner is asserting a breach of the right not to be exposed to inhuman or degrading treatment that it is necessary for the prisoner to show that there is 'evil' intent on the part of the prison authorities. MacMenamin J followed this in *Mulligan* but did not expressly apply this test to the other rights he was concerned with, such as privacy.

However, MacMenamin J held further that it was of relevance to examine whether or not there is evidence that the state authorities are taking advantage of detention to violate constitutional rights or to subject the applicant to inhuman or degrading treatment.<sup>27</sup> This seems to broaden the application of the 'evil purpose' test to situations other than where the right to be free from inhuman or degrading treatment is at issue. MacMenamin J cited *Richardson* as authority for this proposition.

However, in *The State (Richardson) v. Governor of Mountjoy Prison*, Barrington J held that a prisoner could be successful in an application for release under Article 40.4 if the authorities intended to do nothing, or, significantly, if they were unable to rectify the conditions of detention which were a serious danger to a prisoner's life or health. Such circumstances would constitute "exceptional circumstances" warranting release. This is of importance as Barrington J included in those circumstances, situations where the authorities are unable to rectify conditions as opposed to having an 'evil' intention to maintain them. Similarly, Budd J in *Brennan v. The Governor of Portlaoise Prison*<sup>28</sup> found, in an Article 40 inquiry, that as well as showing the conditions in which the applicant was held seriously endangered the right to life or health, the applicant must satisfy the court that the authorities were unwilling or unable to rectify the conditions. Again, Budd J allows for the possibility for an action to succeed even when malicious intent cannot be proven, but also where the authorities are unable to rectify the conditions in question.

The decision in *Kinsella v. Governor of Mountjoy Prison*, which postdates *Mulligan*, is more in keeping with the judgments of *Brennan* and *Richardson*. There, Hogan J recited the requirement in earlier caselaw that a breach of the rights of a prisoner requires a malicious motive on the part of the authorities, but went on to find a breach of the right to bodily integrity in the absence of any such motive. It would appear that this decision, if not in principle then at least in effect, has retreated from the requirement that an evil intent on the part of the authorities is essential before a breach of rights will be found. From Hogan J's judgment, the attitude of the prison authorities is more relevant to the nature of the remedy (in this case, release) rather than the presence or absence of a breach.

It should also be noted that the European Court of Human Rights has held that a willingness to improve conditions cannot exculpate prior events which were incompatible with the Convention.<sup>29</sup> Furthermore, the European Court of Human Rights has made it clear that in cases where inhuman and degrading treatment is alleged, the absence of malicious motives held by the authorities responsible for the treatment will not prevent a finding that Article 3 has been breached.<sup>30</sup>

## **THE TORT DIMENSIONS OF CONSTITUTIONAL RIGHTS CLAIMS BY PRISONERS**

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The *Mulligan* decision suggests that where a prisoner is seeking relief under the Constitution in a plenary action, tort principles will be relevant to the assessment of the court. In that case, the plaintiff argued that the treatment he had received constituted an actionable wrong or tort under the Constitution.

<sup>27</sup> Following *Richardson*.

<sup>28</sup> [1999] 1 ILRM 190.

<sup>29</sup> *Cenbauer v. Croatia* 44 EHRR 49.

<sup>30</sup> *Peers v. Greece*, 19 April 2001, no. 28524/95.

The High Court held that while the authorities owed a duty of care to the applicant under the law of tort, there was also a right of action and remedy within the Constitution if that duty was breached. MacMenamin J held that where the rights were manifested both constitutionally and in tort form, defences in the law of torts such as *volenti non fit injuria*, foreseeability, and contributory negligence may arise.<sup>31</sup>

In the particular circumstances of the case, involving claims of a breach of constitutional rights arising out of *inter alia* a requirement to slop out using a chamber pot, MacMenamin J found that the plaintiff's case was primarily relying on the assertion of constitutional rights in tort form and, as a corollary, the defendant was entitled to assert that no rights were violated, the rights involved were limited, or to rely on defences in tort law. MacMenamin J placed a great deal of emphasis on the fact that the prisoner had failed to inform the prison authorities of the medical problems he alleged were occasioned by his conditions, in this case, haemorrhoids, in finding against Mr. Mulligan.

### **SUMMARY OF THE APPLICABLE PRINCIPLES FROM MULLIGAN**

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MacMenamin J in *Mulligan* provided the following summary of the legal principles considered to be applicable to cases taking by prisoners alleging breaches of their constitutional rights:

- (a) The right to bodily integrity necessitates that the Executive should protect the right to health of persons held in custody as well as is reasonably possible in all the circumstances (*The State (C) v. Frawley*);
- (b) There is also a right, be it framed negatively or positively, not to be exposed to inhuman or degrading treatment. Here a material consideration in determining the constitutional status of the matter complained of is the purpose and intention of the restriction and privations; in particular whether they are punitive, malicious or whether they are evil in purpose (*The State (C) v. Frawley*);
- (c) A further relevant consideration is whether there is evidence that State authorities are taking advantage of detention to violate constitutional rights or to subject the applicant to inhuman or degrading treatment (*The State (Richardson) v. Governor of Mountjoy Prison*);
- (d) The conditions of detention must not be such as to seriously endanger a prisoner's life or health (*Richardson*);
- (e) If the conditions of detention are potentially life or health threatening, a court should ask whether there is evidence that the authorities are for some legitimate reason unable to rectify the conditions (*Richardson*);
- (f) There is a right of privacy subject to limitations imposed by detention;
- (g) A court must enquire the extent to which considerations of security, including the protection of prisoners themselves, requires a limitation of their rights (*Richardson*);
- (h) A court should enquire as to the extent of complaints made by a prisoner or other prisoners (*Richardson*);
- (i) A court must assess the extent to which the vindication of a claimed right would be practical (*Murray v. Ireland*);

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31 [2010] IEHC 269, at paragraph 18, following *Hanrahan v. Merck Sharpe and Dohme* [1988] ILRM 629.

(j) A court must establish the extent of the burden which might be placed on the authorities in the vindication of the right claimed; whether the burden is in all the circumstances proportionate to the right asserted in the overall context of the prisoner's conditions of detention (*Murray*);

(k) There is a right of freedom to communicate; the limitation of which is subject to the principle of proportionality as must all such limitations on a constitutional right [be]. Other constitutional rights may also arise in the future (*Holland*);

(l) A court must establish the extent to which, on the facts of this case the nature of the constitutional wrong asserted necessitates the application of other principles applicable to the law of torts (*McDonnell*).<sup>32</sup>

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## CASELAW ON ASPECTS OF PRISON CONDITIONS

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This section examines caselaw on particular aspects of prison conditions from the Irish courts and under the European Convention on Human Rights.

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### SLOPPING OUT AND CELL CONDITIONS

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Slopping out, or the discharge of human waste into a receptacle such as a bucket or chamber pot, has been litigated as a breach of rights under the Constitution and the Convention in some cases.

*The State (Richardson) v. Governor of Mountjoy Prison*<sup>33</sup> involved a prisoner applying for an inquiry under Article 40.4 of the Constitution into the conditions in the then women's section of Mountjoy prison. Each morning, an average of 16 prisoners engaged in slopping out using a cold water tap over a sink, and steel wool. The applicant claimed that because of the pressure of time to finish the process, some prisoners emptied chamber pots into the sink in which they washed themselves. There was also a complaint that the toilet doors were made of opaque glass and could not be locked from the inside. In Barrington J's view, slopping out made it inherently probable that human waste would appear in the sink, that this procedure failed to respect the applicant's health, and that the applicant would be entitled to relief by *mandamus*. Barrington J also laid emphasis on the fact that the practices at issue had continued for nine years. As the authorities agreed to alter the regime it was not necessary to make an order.

In the *Mulligan* decision, the plaintiff claimed that his right to bodily integrity and his right to privacy under the Constitution had been breached. He also argued that the conditions breached his right to freedom from inhuman or degrading treatment under Article 3 of the European Convention on Human Rights.

The plaintiff had been the sole occupant of his cell which measured ten feet by eight feet and contained a bed, a bedside locker, an armchair, a plastic chair, shelving units, a desktop computer, a television set and VCR machine, a reading light, electric fan, radiator and a window. The door contained a spy hole. The court found ventilation to be "primitive".<sup>34</sup> Two aluminium sliding sections in an aperture, and a missing window pane were the only means of ventilation.

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32 [2010] IEHC 269, at paragraph 108. Internal citations omitted.

33 [1980] ILRM 82.

34 [2010] IEHC 269, at paragraph 29.

During the day there was adequate access to toilets. At night prisoners used a chamber pot with a handle and a lid, made of heavy plastic. The applicant said he had to defecate into the pot on average three to four times per week and that this was extremely painful and aggravated an anal fissure and haemorrhoids. The plaintiff had spent five years in Portlaoise prison. He had been asked if he had a medical condition on admission but did not mention any pre-existing problems. He complained once to the prison doctor about haemorrhoids, two and half months after he was detained and placed in custody. He said he felt humiliated as a result and particularly degraded in light of his condition.

The hygiene facilities were also, in the words of the court, “below standard”,<sup>35</sup> with no running water in the cell. A dish of water was provided but once used there was no other water available during lock up. Each morning, the chamber pots were emptied at two sluice rooms at either end of the landing.

A consultant microbiologist gave evidence that using a sluice could potentially give rise to health risks through contamination. The plaintiff stated that he had been splashed by human waste when using the sluice. MacMenamin J held, however, that there was no real evidence of a rush to use the sluice and found soap, disinfectant and bleach were provided, meaning the sluice was clean and in good order. Overall, MacMenamin J concluded that “the ventilation, sanitation and hygiene regime fell significantly below the standard one would expect at the time”.<sup>36</sup> However, this was not the end of the matter.

The applicant had called evidence regarding the effect of straining to use a chamber pot and a feeling of pressure to use the toilet during the day. MacMenamin J accepted this evidence, but considered the fact that he had not presented for treatment in a timely fashion to be important. Experts further gave evidence that the anxiety of the applicant had been mild and he had a stoical and non-complaining personality.

MacMenamin J examined the other aspects of the regime in Portlaoise, noting the wide range of classes available, the fact that prisoners could exercise, take a shower or go to the gym, and have lunch either communally or in their cell. Prisoners could spend up to 12 hours a day out of the cell. Prisoner-staff relations were found to be relatively good and there was no ‘lights out’ regime. There was no evidence that a prison officer passed any remarks or comments with regard to slopping out. MacMenamin J held “in this aspect the situation was different from the “impoverished” or poor general regime described in some of the international jurisprudence”.<sup>37</sup>

MacMenamin J placed much emphasis on the tort aspects of the claim and, in particular, the fact that the applicant made only one complaint about his haemorrhoids. Because of this, the court considered the lack of complaint raised “serious questions as to the extent to which the respondents could be “fixed with”, or on “notice” of the applicant’s prior history”<sup>38</sup> and the onus was on the prisoner to apprise the medical authorities of the condition. In this respect, MacMenamin J took account of the fact that the applicant had been the spokesman on behalf of Real IRA prisoners in Portlaoise.

It was further accepted by the court that it was not an economic proposition to introduce in-cell sanitation and there was nowhere to accommodate high security prisoners during any such works.<sup>39</sup> However, the court was not convinced that the prison authorities ever thoroughly examined the possibility of providing an automatic visual unlock facility.

35 [2010] IEHC 269, at paragraph 36.

36 [2010] IEHC 269, at paragraph 43.

37 [2010] IEHC 269, at paragraph 64.

38 [2010] IEHC 269, at paragraph 69.

39 [2010] IEHC 269, at paragraph 76.

MacMenamin J noted that there was no evidence that the authorities were acting with motives which were punitive, malicious or evil in purpose. Still less was there evidence that the authorities were taking advantage of the applicant's detention to violate his constitutional rights. MacMenamin J held that the conditions, though demeaning, were not such as to seriously endanger the applicant's life or health.

In the absence of 'doubling-up' in the cell, MacMenamin J could not find a breach of the right to privacy. MacMenamin J was not convinced that the process of transferring the contents of the chamber pots to the sluices engaged a privacy right to the degree necessary to give rise to a cause of action.

On the right to bodily integrity, MacMenamin J accepted that the conditions affected Mr. Mulligan's health and wellbeing. Without putting the authorities on notice, however, remedial measures could not have been adopted. The court did emphasise also, however, that the right to bodily integrity sought to be relied on by Mr Mulligan was very specifically framed in the context of the particular circumstances of the applicant as a spokesman and member of a political group. He was not an ordinary prisoner who might well have acted very differently.

The Court also noted that on the evidence, the applicant's argument amounted to the position that the only way to vindicate his rights it could only be that E Block of Portlaoise would have to be shut down and replaced with an entirely new facility. Such broad ordering and allocation of public resources was a matter for the Executive and the courts should be reluctant to intervene.

The court therefore dismissed the claim for damages for breaches of his constitutional rights.

The court in *Mulligan* also examined the claims under Articles 3 and 8 of the European Convention on Human Rights. MacMenamin J noted that under Article 3, the totality of the conditions and their cumulative effect must be examined in any such claim. In the court's view, the out of cell time and the other positive aspects of the prisoner's detention outweighed the effect of slopping out, and the claim under Article 3 failed. The fact that the prisoner was not required to share a cell was a key element of the decisions under Article 3 and Article 8. In this respect, *Mulligan* appears to leave open the possibility that a prisoner slopping out in cramped cell conditions in the presence of others may have a greater chance of success.

The ultimate outcome regarding the claim of a breach of the right to privacy contrasts with the Scottish decision of *Re Greens, Stanger and Wilson*<sup>40</sup> (hereinafter *Greens*), discussed further below, where a situation involving prisoners queuing to empty chamber pots into a sluice was found to be a breach of the prisoners' rights under Article 8 of the Convention. Counsel for the petitioner in the Scottish decision in *Greens* criticised MacMenamin J's analysis on the basis, *inter alia*, that the High Court relied on out of date caselaw on slopping out from the European Court of Human Rights. It is true that *Mulligan* did not examine the more recent Strasbourg jurisprudence discussed further below.

The decision may, however, be confined to its particular circumstances. MacMenamin J laid emphasis on the fact that the prisoner involved was a spokesperson for others and was in a different position to those who might not be able to communicate their problems. This was especially important in the context of the tort dimension of the case which MacMenamin J clearly considered to be crucial.

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40 [2011] CSOH 79.

Sanitation facilities comprised one aspect of the claim regarding conditions in *Kinsella*. Mr. *Kinsella* had spent 11 days in conditions which included the use of a cardboard box in the corner of the cell. The combination of this and his conditions generally were held to give rise to a breach of the right to bodily integrity.

The applicant was on protection and was placed in an observation cell in the basement of the prison. The cell, 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. The window had a shutter but there was a dispute in evidence as to whether the shutter was working. The applicant further maintained that he was provided with no reading material and had no access to a radio or television.

Hogan J. held that these conditions had breached the applicant's right to bodily integrity, finding that the detention had amounted to a "form of sensory deprivation",<sup>41</sup> noting that the term 'sensory deprivation' was being used advisedly, as the conditions were still very far removed from those found in *Ireland v. United Kingdom*.<sup>42</sup> Hogan J. considered that the protection afforded by Article 40.3.2 extended to the integrity of the human mind and personality and that prolonged detention in such circumstances gave rise to the risk of psychiatric disturbance.

The court, however, refused to rule that Mr. *Kinsella* was in unlawful detention at that time given that the authorities were not acting out of malice, but had placed him in that cell as there was nowhere else where he could be accommodated.

## **THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND PRISON CONDITIONS**

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There has been far more extensive examination of the rights of prisoners and the effect of prison conditions from the European Court of Human Rights and, in particular, in Scottish caselaw drawing on the Convention's principles.

Article 2, the right to life, may become involved in extreme cases where conditions give rise to threats to life. Most cases concerning prison conditions, however, will come under Article 3. Article 8, the right to private and family life, may also be involved if the privacy of the prisoner is an issue.

Article 3 of the European Convention on Human Rights provides protection against torture or other forms of inhuman or degrading treatment or punishment. It is clear that it applies irrespective of the circumstances or the victim's behaviour.<sup>43</sup> There has been no specific definition of the terms 'inhuman and degrading', but the treatment must attain a minimum level of severity in order to fall into this category. All the circumstances of the case will be examined.<sup>44</sup> These include the duration of the treatment, its physical and mental effects, and, in some cases, the sex, age and state of health of the victim.<sup>45</sup> The amount of exercise and contact with the outside world the prisoner has are important, as is the duration of the detention.<sup>46</sup> The suffering and humiliation involved must go beyond the inevitable element of suffering or humiliation connected with legitimate punishment and the deprivation of liberty in order to be prohibited by Article 3.

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41 [2011] IEHC 235, at paragraph 8.

42 (1978) 2 EHRR 25.

43 *Labita v. Italy*, 6 April 2000, no. 26772/95.

44 *Dougoz v. Greece*, 6 March 2001, no. 40907/98.

45 *Valašinas v. Lithuania*, 24 July 2001, no. 44558/98, at paragraphs 100–101.

46 *Kehayov v. Bulgaria*, 18 April 2005, no 41035/98; *Alver v Estonia*, 8 November 2005, no. 64812/01.

The State may not avoid liability under Article 3 by blaming the attitude and behaviour of the prisoner. For example, it has been held to be irrelevant if a prisoner fails to participate in prison activities. All inmates should be afforded prison conditions in conformity with Article 3.<sup>47</sup>

Regarding the relevance under Article 3 as to whether the authorities intended for the prisoner to suffer, the Court has said “although the question whether the purpose of the treatment was to humiliate or debase the victim is a factor to be taken into account, the absence of any such purpose cannot exclude a finding of violation of Article 3”.<sup>48</sup> The Court has also said that “lack of resources cannot in principle justify prison conditions which are so poor as to reach the threshold of treatment contrary to Article 3”.<sup>49</sup>

The burden of proof is on the prisoner to establish the fact of ill-treatment ‘beyond a reasonable doubt’, however, in reality, the European Court of Human Rights takes account of the practical difficulties faced by prisoners in providing evidence for their claims, particularly when the Government is in possession of information which will prove the facts, such as the size of a cell.

There is a lack of specific guidance from the Court on what constitutes treatment in breach of Article 3 and the cases turn on their individual facts. However, in the course of coming to an overall conclusion on substantive conditions, the Court has commented on specific aspects of detention. It should also be noted that the European Court of Human Rights has drawn on the General Reports of the European Committee on the Prevention of Torture in examining what the Convention requires. The Court also examines the reports of the Committee for the Prevention of Torture from the countries against which a case is taken.

## **VENTILATION**

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The absence of natural light and fresh air has been viewed as a contributory factor in finding an infringement of Article 3. In circumstances where metal shutters blocked access to fresh air and natural light, and there was overcrowding, a breach of Article 3 was found.<sup>50</sup>

## **MINIMUM SPACE AND OVERCROWDING**

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The European Court of Human Rights was initially slow to lay down specific space requirements for all situations. In *Trepashkin v Russia*<sup>51</sup> it was stated that:

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the court cannot decide, once and for all, how much personal space should be allocated to a detainee in terms of the Convention. That depends on many relevant factors, such as the duration of detention in particular conditions, the possibilities for outdoor exercise, the physical and mental condition of the detainee, and so on. This is why, whereas the Court may take into account general standards in this area developed by other international institutions such as the CPT, these cannot constitute a decisive argument.<sup>52</sup>

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<sup>47</sup> *Testa v Croatia*, 12 July 2007, no. 20877/04.

<sup>48</sup> *Peers v Greece*, 19 April 2001, no. 28524/95.

<sup>49</sup> *Poltoratskiy v. Ukraine*, 29 April 2003, no. 38812/97.

<sup>50</sup> *Novoselov v. Russia*, 2 June 2005, no 66460/01; *Khudoyorov v. Russia*, 8 November 2005, 6847/02.

<sup>51</sup> 19 July 2007, no 36898/03.

<sup>52</sup> 19 July 2007, no 36898/03, at paragraph 91.

The Court has, however, relied on reports of the CPT criticising overcrowding in its decisions<sup>53</sup> and several decisions have found overcrowding to be key factor in a violation of Article 3. In others, relatively restricted space has been held to be acceptable if other factors compensate for it. In all cases, all of the circumstances of the detention are examined. Unless especially severe, overcrowding will usually need to be accompanied by other aspects of poor conditions to give rise to concerns under Article 3.

The reasons for overcrowding are irrelevant. In *Mamedova v Russia* it was held that: “whether overpopulation was due to maintenance works or to other causes is immaterial for the Court’s analysis, it being incumbent on the respondent Government to organise its penitentiary system in such a way that ensures respect for the dignity of detainees, regardless of financial and logistical difficulties”.<sup>54</sup>

In *Peers v Greece*,<sup>55</sup> the Court took into account the fact that the applicant had to spend a considerable part of each 24 hour period practically confined to his bed in a cell with no ventilation and no window, which would at times become unbearably hot. He also had to use the toilet in the presence of another inmate and be present while the toilet was being used by his cellmate. There was no evidence of a positive intention on the part of the State to humiliate or debase, but the Court considered that the lack of such a purpose will not rule a violation out. The Court also took account of the fact that the competent authorities took no steps to improve the objectively unacceptable conditions. In the view of the Court, these conditions diminished the human dignity of the applicant.

Where the amount of space for a prisoner is very limited, this fact of itself may give rise to a claim under Article 3. For example, the prisoners in the case of *Kalashnikov v Russia*,<sup>56</sup> had only 0.9 to 1.9 square metres of space each.

Decisions of the Court arising out of Polish prison conditions have also given rise to statements about the effect of overcrowding. In *Orchowski v. Poland*<sup>57</sup> the prisoner was detained for the majority of the time in cells where he had less than three square metres of personal space, and sometimes less than two metres squared. The applicant’s situation was further exacerbated by the fact that he was confined to his cell day and night, save for one hour of daily outdoor exercise and, possibly, an additional, though short, time spent in an entertainment room.

The Court noted that the CPT’s standard recommended living space per prisoner for Polish detention facilities (four square metres) was higher than the national statutory minimum standard. The Court also concluded that the applicant was allowed a one–hour long period of outdoor exercise each day, one hot shower per week, which was taken together with other prisoners; his bed linen was changed once every two weeks, his underwear changed usually once a week, and all meals were taken inside the cell.

The Court further noted that the applicant had been transferred, over a period of six years, twenty–seven times between eight different prisons and remand centres. He was also very frequently moved between cells within each of the detention facilities in question.

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<sup>53</sup> *Dougoz v. Greece*, 6 March 2001, no. 40907/98; *Peers v Greece*, 19 April 2001, no. 28524/95.

<sup>54</sup> 23 June 2006, no. 7064/05, at paragraph 63.

<sup>55</sup> 19 April 2001, no. 28524/95.

<sup>56</sup> 15 July 2002, no. 47095/99, at paragraph 97.

<sup>57</sup> 22 January 2010, no. 17885/04.



On the specific issue of frequent transfers, the Court noted:

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Too frequent transfers of a person under the existing system of rotating transfers of detainees may create a problem under the Convention. By using this system, the authorities provide an urgent but short-term and superficial relief to the individuals concerned and to the facilities in which the rate of overcrowding is particularly high. As shown by the example of the applicant in the instant case, in the light of massive overcrowding the system does not provide a real improvement of a detainee's situation. On the contrary, such frequent transfers may, in the Court's opinion, increase the feelings of distress experienced by a person deprived of liberty and who is held in conditions which fall short of the Convention.<sup>58</sup>

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Overall, the Court held that in these circumstances, aggravated by the frequent transfers, there had been a breach of Article 3.

In *Sikorski v. Pologne*<sup>59</sup> the Court found a breach of Article 3 in circumstances where a prisoner was subject to a long period of incarceration without the possibility of moving freely outside of the cell, combined with poor hygiene conditions which the authorities had not acted to improve. The overcrowding rate at issue was 149% of the prison's capacity. The applicant had been detained in various prisons, in some of which he was allowed out of the cell for two to three hours per week, in others for 45 minutes per day. Furthermore, the prisoner was detained with several others in a very restricted space for the entire day in a non-air conditioned cell, beside toilet facilities which were not always sufficiently separated from the cell. The Court also considered that as the room served as both a bedroom and place to eat, it could not be controversial that the hygiene conditions were likely to become a concern.<sup>60</sup>

Regarding the size of prison cells, the Court emphasised that the cumulative effect of the conditions must be examined. However, it referred to the recommendations of the Committee for the Prevention of Torture which suggest a minimum of four square metres per prisoner for multiple occupancy cells and nine square metres for single prison cells.<sup>61</sup>

### **ANANYEV V. RUSSIA**

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The most extensive discussion of the requirements of the Convention regarding cell size and accommodation is to be found in the decision of *Ananyev v. Russia*.<sup>62</sup> In this case the Court issued a 'pilot judgment', whereby it joined a number of applications together and gave quite specific advice to the Russian authorities on how to deal with the large numbers of prisoners on remand there in ways compatible with the Convention. In the course of the judgment the Court engaged in its most specific examination yet of cell sizes, drawing on General and Country Reports of the Committee for the Prevention of Torture, and the UN Standard Minimum Rules for the Treatment of Prisoners.

58 15 July 2002, no. 47095/99, at paragraph 133.

59 22 July 2009, no. 17599/05.

60 Translated from the original French by the author.

61 *Davydov v. Ukraine*, July 1 2010, no. 17674/02 39081/02.

62 10 January 2012, no. 42525/07 60800/08.

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The Court began its assessment of Article 3 by examining the standard of proof required in such cases. The Court noted that while ‘beyond reasonable doubt’ was the standard adopted, this was not to be taken as a straightforward application of those terms within national legal systems. The “level of persuasion”<sup>63</sup> depends on the nature of the facts and the rights at stake. The Court also noted that it was mindful of the difficulties faced by applicants seeking to collect evidence to support their claims. The Court held that prisoners could not realistically be expected to, for example, have photographs of their cells or precise measurements of the cells. The Court also stated that the principle of ‘he who asserts must prove’ is not always rigorously applied in such cases as it will usually be the Government rather than the prisoner who will have access to information capable of corroborating or refuting the allegations. However, the Court also held “an applicant must provide an elaborate and consistent account of the conditions of his or her detention”.<sup>64</sup>

The Court reiterated that ill-treatment must attain a minimum level of severity in order to fall within the scope of Article 3. This usually involves actual bodily injury or intense physical or mental suffering, but, where:

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treatment humiliates or debases an individual, showing a lack of respect for or diminishing his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking trading and also fall within the prohibition of Article 3.<sup>65</sup>

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Any such suffering must go beyond that inherent in detention and account must be taken of the cumulative effects of the conditions as well as specific allegations made by the applicant. The length of the period during which a person is detained in such conditions must also be considered.<sup>66</sup>

Dealing specifically with overcrowding, the Court held that the extreme lack of space in a prison cell weighs heavily as an aspect to be taken into account when establishing if there has been degrading treatment. Considering the country reports given by the CPT, the Court noted that, while the provision of four square metres of space remains the desirable standard, the Court had previously found that where applicants have less than three metres of personal space, the overcrowding must be considered so severe as to justify *of itself* a finding of a violation of Article 3.<sup>67</sup> The Court also reviewed its caselaw on the lack of a space for prisoners to sleep.

Overall, the Court held that, in deciding whether or not there has been a violation of Article 3 on account of a lack of personal space, the Court has to have regard to three elements:

1. Each detainee must have an individual sleeping place in the cell;
2. Each detainee must have at least three square metres of floor space; and
3. The overall surface of the cell must be such as to allow the detainees to move freely between the furniture items.

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63 10 January 2012, no. 42525/07 60800/08, at paragraph 121.

64 10 January 2012, 42525/07 60800/08, at paragraph 122.

65 10 January 2012, 42525/07 60800/08, at paragraph 140.

66 10 January 2012, 42525/07 60800/08, at paragraph 142.

67 *Lind v. Russia*, 6 December 2007, no. 25664/05; *Kantyrev v. Russia*, 21 June 2007, no. 37213/02; *Andrey Frolov v. Russia*, 29 March 2007, no. 205/02; *Labzov v. Russia*, 16 June 2005, no. 62208/00.

The Court held that the absence of any of these elements “creates in itself a strong presumption that the conditions of detention amounted to degrading treatment and were in breach of Article 3”.<sup>68</sup>

The Court went on to examine the situation when prisoners have sufficient personal space but there are problems concerning other aspects of the detention. The Court held that even if there is sufficient space, other aspects of detention are relevant for the assessment of compliance with Article 3. These elements include access to outdoor exercise, natural light or air, availability of ventilation, adequacy of heating arrangements, the possibility of using the toilet in private, and compliance with basic sanitary and hygienic requirements, noting that even in larger prison cells, the combination of lack of space and a lack of ventilation or lighting gave rise to a violation of Article 3.

The Court also referred to the CPT’s recommendations that prisoners be allowed at least one hour of exercise in the open air every day, preferably as part of a broader programme of out-of-cell activities. The Court noted that a short duration of outdoor exercise exacerbated poor conditions and the physical characteristics of outdoor exercise facilities in terms of their size and nature were also relevant.

The Court emphasised the importance of unobstructed and sufficient access to natural light and fresh air in cells. In the view of the Court restrictions on access to natural light and air occasioned by metal shutters seriously aggravated the situation of prisoners, though without overcrowding or a malfunctioning ventilation system and artificial lighting, the threshold of severity under Article 3 would not be met by the use of shutters alone.

#### **SPECIAL ACCOMMODATION NEEDS**

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In *Price v. United Kingdom*<sup>69</sup> a severely disabled woman, who had lost four limbs and suffered from kidney problems was detained for seven days for contempt of court. She was required to sleep in her wheelchair while detained in police custody because the facilities were unsuitable, the toilets were inaccessible, and she could not reach the panic buttons. In prison she was detained in a health care centre. There, male officers had to accompany her to the toilet. Her health suffered as a result of the conditions. The Court found a breach of Article 3, her treatment being degrading.

#### **HYGIENE**

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In *Melnik v Ukraine* the Court considered overcrowding, poor conditions of hygiene and sanitation, and inadequate medical care to amount to a breach of Article 3. On the issue of hygiene, the Court held that:

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the fact the applicant had only once-weekly access to a shower and his linen and clothes could be washed only once a week raises concerns ... given the acutely overcrowded accommodation. Such conditions would have had an aggravating effect on his poor health... taking the aforementioned factors into account, the Court concludes that the applicant’s conditions of hygiene and sanitation are unsatisfactory and would have contributed to the deterioration of his poor health.<sup>70</sup>

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68 10 January 2012, no. 42525/07 60800/08, at paragraph 148.

69 (2002) 34 EHRR 53.

70 28 March 2006, no. 72286/01, at paragraphs 107–109.

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## **SLOPPING OUT AND SANITARY CONDITIONS**

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The European Court of Human Rights has found the presence of slopping out, in conjunction with other poor aspects of conditions, to breach Article 3 of the Convention in some cases. MacMenamin J in *Mulligan* noted that, with regard to Article 3 claims, no case had found the practice of slopping out or the absence of in-cell sanitation *per se* to be a violation of the Convention. However, the Council of Europe's Committee for the Prevention of Torture has strongly condemned the practice both generally and in the Irish context, and the Court's position does appear to be evolving on the issue.

In an early case, cited in *Mulligan*, *DeLazarus v. United Kingdom*,<sup>71</sup> the applicant challenged the conditions of his detention under Article 3, alleging that he had been segregated from other prisoners, and subject to overcrowding, a lack of purposeful activity, and a lack of in-cell sanitation. The European Commission on Human Rights held the complaint to be manifestly unfounded. The Court considered that the applicant could not complain of overcrowding when he had been held in a single cell and this must have reduced the difficulties caused by the lack of in-cell sanitation.

In another early case, *NH v. United Kingdom*,<sup>72</sup> the applicant was kept in a punishment cell in which there was no toilet or running water. He had to slop out three times a day and at those times was required to clean utensils and collect drinking and washing water. In the view of the Commission, the application was manifestly unfounded as the facts did not reach the minimum level of severity to amount to a violation of Article 3.

Later caselaw, however, indicates a different approach to Article 3. As Lady Dorrian recognised in the Scottish case of *Greens*, concepts of inhuman and degrading treatment have evolved since the Convention came into force and, in particular, since 2001 the European Court of Human Rights has found violations of Article 3 where a person has been required to relieve themselves into a bucket in the presence of others and where they have been present while the facilities were used by others, except when allowing prisoners to visit sanitation facilities posed particular and serious security risks.

*Peers v. Greece*<sup>73</sup> concerned a prisoner in a shared cell in which he was required to use a 'squat' toilet with no screen or curtain separating the toilet from the cell. There was no sink, and the supplies of toilet paper and toiletries were found to be inadequate. The cell was small and there was only one window in the roof which did not open and through which no light could pass. The prisoner had also been denied sheets and pillows and there were difficulties in communicating with prison staff. The Court found that the combination of all these factors amounted to a violation of Article 3.

In *Ramishvili and Kokhraidze v. Georgia*<sup>74</sup> the prisoner was detained in a cell in which the toilet consisted of a narrow pipe in the corner, which the applicant refused to use because of the conditions involving infestation with cockroaches and rats. The cell was also small and he had to share a bed with another prisoner. This amounted to a breach of Article 3.

More recent caselaw, not cited in *Mulligan*, has taken a more stringent line regarding slopping out. In *Malechkov v. Bulgaria*<sup>75</sup> the Court held that where a prisoner is required to relieve himself in a bucket, while being detained alone for practically 24 hours a day for more than four months with no exposure to natural light or the possibility of physical and other out of cell activity, this amounted to a breach of Article 3.

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71 16 February 1993, no. 17525/90.

72 30 June 1993, no. 21447/93.

73 19 April 2001, no. 28524/95.

74 27 January 2009, no. 1704/06.

75 28 June 2007, no. 57830/00.

The Court also held that, despite being accommodated alone in a cell, subjecting a detainee to the inconvenience of having to relieve himself in a bucket cannot be considered warranted, except in specific situations where allowing visits to the sanitary facilities would pose concrete and serious security risks.<sup>76</sup>

In *Radkov v. Bulgaria (No. 2)*<sup>77</sup> the applicant was held for part of his detention in a cell with others without toilet facilities, sink or running water. He was allowed to go to the toilet just three times a day, for ten minutes at a time. Otherwise the occupants of the cell were required to relieve themselves in a plastic bucket which they could empty and clean when using the toilets outside the cell. For part of his detention he occupied a cell by himself. The domestic court held that having to use a bucket in a cell measuring around 10 metres squared without sufficient ventilation in the presence of others, was a breach of Article 3.

Regarding the period spent alone in a cell, the Court said it saw “no reason not to extend that conclusion [that there had been a breach of Article 3] to the time when he was kept in an individual cell”.<sup>78</sup> This would seem to indicate that the Court is prepared to contemplate situations when slopping out in a single cell could amount to a breach of Article 3. However, the court in the Scottish case of *Greens* resists this conclusion.

It seems to be the case that, while the development of prisoners’ rights jurisprudence under the Convention means the Court is becoming stricter on the situations in which slopping out *per se* will be considered not to amount to inhuman and degrading treatment, for the moment other aspects of poor conditions will be required in order to find a breach.

Most recently, in *Ananyev v. Russia*, the Court examined the Convention’s requirements regarding sanitation facilities. The Court noted recommendations of the CPT and the UN Minimum Rules, holding that:

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Access to properly equipped and hygienic sanitary facilities is of paramount importance for maintaining the inmates’ sense of personal dignity ... not only are hygiene and cleanliness integral parts of the respect that individuals owe to their bodies and to their neighbour with whom they share premises for long periods of time ... A truly humane environment is not possible without ready access to toilet facilities or the possibility of keeping one’s body clean.<sup>79</sup>

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The Court noted that in many Russian prisons the lavatory pan was placed in the corner of the cell and either lacked any separation from the living area or was separated by a single partition of around one and a half metres high. The Court considered this was objectionable not only from a hygiene point of view but also deprived a prisoner of any privacy.<sup>80</sup> The Court also emphasised the importance of showers and the need to take measures against infestation of rodents, fleas, lice, bedbugs and other vermin.<sup>81</sup>

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<sup>76</sup> 28 June 2007, no. 57830/00, at paragraph 140.

<sup>77</sup> 10 February 2011, no. 18382/05.

<sup>78</sup> 10 February 2011, no. 18382/05, at paragraph 49.

<sup>79</sup> 10 January 2012, no. 42525/07 60800/08, at paragraph 156.

<sup>80</sup> 10 January 2012, no. 42525/07 60800/08, at paragraph 157.

<sup>81</sup> 10 January 2012, no. 42525/07 60800/08, at paragraph 159.

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## **USE OF THE EUROPEAN CONVENTION IN SLOPPING OUT CASES IN OTHER JURISDICTIONS**

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Courts in other jurisdictions, notably Scotland, have examined the compatibility of prison conditions with the European Convention on Human Rights.

The case of *Napier v. Scottish Ministers*<sup>82</sup> (hereinafter *Napier*) involved prison conditions in which prisoners were confined two to a cell for at least 20 hours on average per day. The cells were found by the Scottish court to be “cramped, stuffy and gloomy”.<sup>83</sup> Prisoners had no access to a toilet during the night and for extended periods at the weekend and were required to slop out. There was no structured activity other than walking in the yard for one hour, and recreation for ninety minutes per week.

Examining the effect of the conditions on the prisoner, the court held that they induced feelings of worthlessness and disgust, as well as avoidance of using the chamber pot.

The petitioner had eczema, which was considered to be of “crucial importance” to the lower court’s determination.<sup>84</sup> The court held that the petitioner’s serious outbreak of eczema resurged and persisted because of the conditions of detention. The eczema was of itself a source of acute embarrassment and humiliation. The petitioner believed that the infection of the eczema was caused by the conditions of detention, particularly slopping out, which belief the court described as reasonable and held to be felt acutely.

The petitioner was held, therefore, to have been exposed to conditions which, taken together, meant that he had been subjected to degrading treatment in infringement of Article 3.<sup>85</sup>

In distinguishing this case in *Mulligan*, MacMenamin J commented on the fact that the cumulative effect of the conditions, rather than the requirement to slop out only, resulted in the finding that Article 3 had been breached. The Court considered that *Napier* must be seen as a case where slopping out had a particular obvious and evident impact on the prisoner. It was also relevant that the prison authorities in Scotland could have easily installed integrated sanitation facilities and they had deliberately decided not to address the cell conditions.

## **GREENS V SCOTTISH MINISTERS**

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In 2011, three former prisoners at HMP Peterhead in Scotland took judicial review proceedings complaining, *inter alia*, that the conditions of their incarceration subjected them to inhuman or degrading treatment and were also an unjustified interference with the right to respect for private life.<sup>86</sup>

82 [2004] UKHRR 881.

83 [2004] UKHRR 881, at paragraph 75.

84 [2004] UKHRR 881, at paragraph 2.

85 The decision in *Napier* led to the Scottish Prison Service issuing a statement acknowledging that, where two prisoners had been detained in a relatively small cell for a significant part of the day, and had to use a chamber pot or similar arrangement to perform bodily functions in one another’s presence in that shared cell, their rights under Article 3 of the European Convention on Human Rights had been breached and they would, in general, be entitled to payment in satisfaction of the breach.

86 *Greens & Ors* [2011] CSOH 79.

At HMP Peterhead each cell was equipped with a chemical toilet known as a 'porta potti'. The petitioners claimed that the use of these toilets, the lack of hand washing facilities within the cells, the lack of ventilation, and the practice of 'bombing', whereby prisoners defecated into newspapers or other items or urinated into jars and threw them out of the window, breached Article 3.

The court accepted that it is not necessary to establish damage to physical or mental health for a breach of Article 3 to be established, but treatment of "some severity" must nonetheless be made out.<sup>87</sup> Examining the jurisprudence of the European Court of Human Rights, the court held that single cell slopping out *per se* had not been found to amount to a breach of Article 3 in any case, but that the European Court had repeatedly found a violation of Article 3 in situations where a prisoner has been required to relieve himself into a bucket in the presence of others, and having to be present when others did the same.

The court in *Greens* specifically rejected the contention that Article 3 requires the use of a screened and flushing toilet. The court considered that the finding in *Napier* was based on the triple vices of overcrowding, slopping out, and an impoverished regime. By contrast, the court held the petitioners in *Greens* based their cases very strongly on the slopping out process itself.

The court rejected evidence from the petitioners regarding the nature of the slopping out process and the extent of the smell, and placed a great deal of emphasis on the facts that the prisoners involved did not have to share a cell, that work was available and there were many opportunities for out-of-cell time. The lack of overcrowding in the prison was also important. The court considered the privacy of the single cell and the accepted practice of blocking the spy hole when using the chemical toilet (despite being a breach of the regulations) to be very important factors and also rejected the prisoners' evidence that they felt stressed and humiliated. The court noted that there were differences between the use of buckets and chamber pots and the use of chemical toilets. Taken together, the court did not consider that the petitioners' human dignity was diminished by the conditions.

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<sup>87</sup> [2011] CSOH 79, at paragraph 257.

Lady Dorrian examined the approach of the European Court of Human Rights, holding:

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With the exception of cells of a size allowing less than about 3m<sup>2</sup> per person, the ECtHR has not isolated one aspect of imprisonment as being sufficiently severe to meet the threshold [under Article 3]. ... It is clear that the ECtHR has repeatedly found a violation of Article 3 in situations where a prisoner has been required to relieve himself into a bucket in the presence of others, and having to be present when others did the same. ... in my view it is clear from the consideration of what was said in *Malechkov* that the court seems to be expressing the view that to require the use of a bucket even in a single cell constitutes a breach of Article 3. *Radkov* is the only case of the many which were cited which reaches such a conclusion on the basis of the use of a bucket alone and care must therefore be taken in considering and applying that decision. The reliance on the passage from *Malenchkov* is made without regard to the wider considerations which applied in that case or to the fact that there the breach was not found to consist in the requirement to use a bucket but in the “cumulative effects of the unjustifiably stringent regime to which the applicant had been subjected and the material conditions in which he had been kept”. I would therefore be reluctant to conclude that this case forms part of the clear and consistent jurisprudence of the court. In any event, even taking the decision at its highest, it does not follow that any regime which requires slopping out to any degree is in itself a breach of Article 3. If the difference between requiring to use a chamber pot and a chemical toilet is “day and night” the difference between having to use a bucket and a chemical toilet is at least as great. I do not accept the petitioners’ submission that to require a prisoner to use any receptacle other than a screened and flushing toilet constitutes a breach of Article 3.<sup>88</sup>

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Significantly, Lady Dorrian seems to be leaving open the possibility that a different conclusion might have been reached in circumstances where a person was required to use a chamber pot or other such item rather than a chemical toilet. The judgment also notes the tension within some of the Convention cases regarding whether slopping out in a single cell can amount to a breach of Article 3.

No breach of Article 3 was found, but the court in *Greens* did find a breach of Article 8. In its view, the scope of ‘private life’ can include the activities of discharging bodily waste and maintaining a standard of cleanliness. The court was keen to point out that it was not laying down a general principle that requiring a person to defecate into a bucket which must be slopped out was a breach of Article 8. Assessing the facts before the court, it held that there was no human right to a screened and flushing lavatory and the use of a chemical toilet in a single cell where a sanitation work party empties such toilets was not a breach of Article 8. However, when prisoners were required to slop out the chemical toilets themselves and queue to do so, there had an interference with their private lives. To be forced to queue in a line of others with a receptacle of one’s own waste and to have to empty it in the presence of others constituted an infringement of Article 8. The Court therefore awarded damages in the sum of £500.

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88 [2011] CSOH 79, at paragraph 258. Internal citations omitted.



## ENGLISH CASELAW

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Regarding sanitation, in *Broom v. Secretary of State for the Home Department*<sup>89</sup> a prisoner was transferred between cells every three months and was not provided with an in-cell privacy screen, which was exacerbated by the dirty nature of some of the toilets and the presence of female prison officers. The court rejected the claim that there had been a breach of Article 8, holding that imprisonment was of itself humiliating and his conditions were no worse than ordinary prison regimes.<sup>90</sup>

*R (Wellington) v. Secretary of State for the Home Department*<sup>91</sup> examined slopping out in the context of a challenge to prison conditions under Article 3. Lord Hoffman reserved his position as to whether the absence of in-cell sanitation *per se* constituted a breach of Article 3. Lord Hoffman held:

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It must, in my respectful opinion, be borne in mind that Article 3 was ... prescribing a minimum standard, not a norm ... It would, of course, be unexceptionable for the courts of Scotland, or the courts of any other jurisdiction, or their prison authorities to rule that the practice of slopping-out was unacceptable and should cease. But to give that ruling as an interpretation of an Article 3 obligation would, in my opinion, undermine the absolute nature of the obligation in question. It would be unthinkable to rule that in no circumstances could slopping-out in a prison, or comparable institution, be tolerated. Whatever view one might have about the objectionable quality of slopping-out, that view could not, in my opinion, be carried forward into an acceptable interpretation of an absolute obligation in Article 3.<sup>92</sup>

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## NORTHERN IRELAND

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In *Martin v. Northern Ireland Prison Service*<sup>93</sup> the plaintiff claimed damages for breaches of Article 3 and Article 8. Again, the plaintiff occupied a cell on his own. For much of the day he was allowed out of the cell and could use ordinary toileting and hand washing facilities. There was also a system of night unlock. Though the system was not performed as it should have been on occasion, for the most part most prisoners could leave their cells at night time to use the toilets.

In these circumstances no violation of Article 3 was found. However, Girvan J did find a breach of Article 8. Girvan J found that the prison staff had been uncaring and hostile towards prisoners in the slopping out process. In the view of the Court "if not properly managed and handled with care the practice has the potential to be significantly demeaning to a prisoner in an intimate aspect of private life".<sup>94</sup>

89 [2002] EWHC 2041.

90 [2002] EWHC 2041.

91 [2009] 1 AC 335.

92 [2009] 1 AC 335, at paragraph 43.

93 [2006] NIQB 1.

94 [2006] NIQB 1, at paragraph 35.

## HEALTH

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It has been established that inadequate healthcare may result in inhuman or degrading treatment.<sup>95</sup> The European Court of Human Rights does take into account the fact that prison facilities may not be equivalent to those in the community, but requires treatment to be compatible with the dignity of the individual.<sup>96</sup>

Failure to examine a prisoner when there are indications it might be necessary to do so, amounts to inadequate medical assistance and was found to constitute degrading treatment in *Nevmerzhitsky v. Ukraine*.<sup>97</sup>

*Pilcic v Croatia* held that a prisoner has the right of access to medical care without undue delay, regardless of the regime in the prison.<sup>98</sup> In *Rohde v Denmark* the Court held that the failure to provide the “requisite medical assistance”<sup>99</sup> can unnecessarily exacerbate suffering and may violate Article 3. In *Dobri v. Romania*<sup>100</sup> the Court noted the importance of screening for highly infectious diseases such as tuberculosis. There, a prisoner developed tuberculosis while in prison. This in combination with the conditions of the cell in which he was detained gave rise to a violation of Article 3.

In *Melnik v Ukraine* the Court held that the State’s failure to prevent, diagnose and cure tuberculosis along with the existence of overcrowding and unsanitary conditions amounted to degrading treatment.<sup>101</sup>

In *Mouisel v. France*<sup>102</sup> a prisoner was suffering from cancer and required transfer to outside medical treatment. During this transfer and treatment he was handcuffed. This caused suffering beyond that inherent in either imprisonment or chemotherapy and a breach of Article 3 was found.

In *Florea v. Romania* the Court held that the authorities are obliged to take measures to protect a prisoner from passive smoking if s/he has a condition which requires such protection.<sup>103</sup> In *Elefteriadis v. Romania*<sup>104</sup> a prisoner had a chronic pulmonary condition and was required to share a cell with two smokers and was kept in court waiting rooms in which prisoners smoked. A breach of Article 3 was made out. In *Aparicio Benito v. Espagne*<sup>105</sup> a prisoner failed in his claim under Article 3 where he had a single cell and the passive smoking only occurred in a single communal area.

Prisoners suffering from symptoms arising out of withdrawal from drugs should receive adequate medical assistance or the State may be in violation of Article 3. In *McGlinchey v. United Kingdom*<sup>106</sup> the prisoner involved was addicted to heroin and suffering from asthma. While detained, she suffered withdrawal and lost a lot of weight. Her condition was monitored by the prison doctor, but not on a daily basis.

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95 *Kudla v Poland*, 26 October 2010, no. 30210/96.

96 *Aleksanyan v. Russia*, 22 December 2008, no. 46468/06.

97 5 April 2005, no. 54825/00.

98 17 January 2008, no. 33138/06.

99 28 March 2006, no. 72286/01.

100 14 December 2010, no. 25153/04.

101 28 March, 2006, no. 72286/01.

102 14 November 2011, no. 67263/01.

103 14 September 2010, no. 37186/03.

104 January 25 2011, no. 38427/05. Translated from the French by the author.

105 November 3 2006, no. 36150/03

106 (2003) 37 EHRR 41. See further Steve Foster, “Prison authorities, the duty of care and the protection of prisoners’ rights” (2005) *Coventry Law Journal* 10(1) 1 – 17.

She was removed to hospital and put on a life-support machine, where she died. The Court found that Article 3 had been violated in relation to her treatment of heroin withdrawal. She had not been seen for two days by a doctor despite suffering fits of vomiting and losing weight. This posed a serious risk to her health and was the cause of great distress.

Where there is seriously inadequate medical treatment resulting in death, Article 2 may be engaged. For example in *Kats v. Ukraine*, a prisoner was HIV positive and suffering from a variety of chronic illnesses exacerbated by her condition. The Court found the treatment she had received was very basic and often delayed. She was not moved to the medical wing of the hospital or to a specialist hospital on the outside. Nor was she released despite the deteriorating nature of her health. The Court held that the prisoner's death was caused indirectly by the inadequate medical assistance given to her, violating Article 2.<sup>107</sup>

The European Court of Human Rights has stated that there is no general obligation arising out of Article 3 to release prisoners on health grounds<sup>108</sup> but if it is decided to keep a seriously ill person in prison, the authorities should demonstrate special care in guaranteeing such conditions of detention that correspond to the special needs arising out of the person's disability.

## **PRISONERS WITH MENTAL ILLNESSES**

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Particular attention must be paid to the position of mentally ill prisoners. In some such cases, the right to liberty under Article 5 has been invoked. Failure to provide a mentally ill prisoner with adequate psychiatric health care was found to breach Article 5(4) because of the absence of a link between the aim and implementation of the deprivation of liberty.<sup>109</sup>

The failure to recognise the particular vulnerability of prisoners with mental illnesses may lead to a finding they have been subjected to inhuman or degrading treatment. *Kucheruk v. Ukraine* held that prison authorities must take into consideration their vulnerability and inability to complain coherently or at all about how they are being affected by any particular treatment.<sup>110</sup>

*Renolde v. France*<sup>111</sup> concerned a man who took his life in his cell while awaiting his trial. There were several reports available to the prison authorities indicating cognitive deficiencies and paranoia. He made an attempt to commit suicide and was placed in a cell on his own under supervision. During this period he assaulted a warder. He received a penalty of 45 days in a punishment cell. His lawyer sought a psychiatric examination of her client to ascertain the compatibility of his punishment with his mental state. Mr Renolde was given medication, but received several doses without supervision of whether he took them as required. He committed suicide the next day. No medication was found in his body.

The Court found breaches of Article 2 and 3. The Court felt that the authorities, faced with a prisoner known to have serious mental problems and posing a suicide risk, should have taken special measures to ensure his continued detention was compatible with his mental state.

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<sup>107</sup> 18 December 2008, no. 29971/04.

<sup>108</sup> *Khudobin v Russia*, 26 January 2007, no. 59696/00.

<sup>109</sup> *Aerts v Belgium*, 30 July 1998, no. 25357/94.

<sup>110</sup> 6 September 2007, no. 2570/04.

<sup>111</sup> (2009) 48s EHRR 42.

The Court reiterated that the vulnerability of the mentally ill called for special protection. This applied all the more when a prisoner with severe disturbance was placed in solitary confinement or a punishment cell for a prolonged period with an inevitable impact on his mental state, particularly where there had already been an attempted suicide. The authorities did not do all that could have been required of it to prevent the prisoner's life from being avoidably put at risk. The authorities knew of the risk to his life. As such, there was a breach of Article 2.

There was also a breach of Article 3. The prisoner had been given the maximum punishment available for assaulting the warden without any consideration being given to his mental state or the fact that it was a first offence. This was not compatible with the standard of treatment required for a mentally ill person and breached Article 3. The Court reaffirmed that all prisoners had the right to conditions of detention compatible with human dignity. In the case of mentally ill persons, any assessment of the conditions of their detention under Article 3 had to take account their vulnerability and the difficulties they faced in complaining about their treatment. The Court also noted that the treatment of mentally ill persons may be incompatible with the standards imposed by Article 3 in the protection of human dignity, even if the person involved may not be able to or cannot point to any specific ill-effects.

*Riviere v. France* has also held that prisoners known to be suffering from serious mental disturbance and posing a suicide risk require special measures geared to their condition.<sup>112</sup> In that case, a prisoner with psychosis and suicidal tendencies was kept in prison. The Court held this imposed suffering beyond that normally associated with imprisonment and he required accommodation in a permanent specialised hospital.

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<sup>112</sup> 11 July 2006, no. 3834/03. Translation from the French by the author. The applicant had served the minimum tariff for his sentence but continued to be detained. His appeals for release were rejected. He had a severe psychotic illness and was at risk of suicide. Though efforts were made to care for him, they were not adequate. He was not in receipt of daily medical assistance. The Court held that those at risk of suicide, even if it has not been attempted, require particular measures to be adapted to their condition. There was, however, no general obligation to release a prisoner on health grounds.

