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A European Response to Ill-treatment in Prison

Matt Evans looks at what protection is accorded to prisoners by the Council of Europe

One of the main objectives of international human rights law has been to prohibit the state's use of torture and other ill treatment on human beings. This is reflected in both the preamble to all principal human rights treaties (such as the Covenant on Civil and Political Rights (ICCPR)) – which stress the need to uphold the inherent dignity of every individual - and expressed in absolute terms by art.5 of the Universal Declaration of Human Rights 1948:

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

Those in detention, lawfully or not, are often by very reason of their incarceration particularly vulnerable to mistreatment by the state and its agents (see, the Children Commissioners reports in respect of the ill treatment of children subject to immigration control in Yarl's Wood in 2009 and 2010).

> ***"That all persons within every state should be able to enjoy 'human rights and fundamental freedoms"***

The Council of Europe currently has 46 member states (the "member states"). The statute establishing the Council of Europe in 1959 required the acceptance by all member states not only of the principle of law, but also that all persons within every state should be able to enjoy, "human rights and fundamental freedoms" (Article 3 of the Statute: see European Commission of Human Rights; Documents and Decisions (The Hague, Martinus Nijhoff, 1959), p.2). The first of these phrases is suggestive of human dignity, the second of civil liberties.

Many of the central provisions of the Convention (particularly the non-derogable rights under art.2 and 3) can best be understood not as assertions of the importance of civil liberties but as manifestations of an underlying commitment to human dignity.

The European Court is only one of a number of bodies active in the pursuit of better human rights protection within the framework of the Council of Europe. The Human Rights Commissioner, Committee of Ministers, Councils Social Charter etc, all greatly contribute to this task.

The Council of Europe

have, in their efforts to guarantee the rights set out in the convention and other international statutory instruments, laid increasing emphasis on preventing violations by states, through the imposition of certain standards of treatment on people whom the state has seen fit to detain. In 2006 the Council of Europe passed a set of Prison Rules ("The Rules") establishing minimum standards in respect of prisoners and their detention (the European Prison Rules 2006). The basic principles set out these rules (prison rules had been produced previously in 1973 and 1987) included that prisoners retained all rights not taken away by the decision sentencing or remanding them, any restrictions should be proportionate and legitimate to the objective imposed, and conditions which infringed a prisoner's human rights could not be justified by a lack of resources. Specifically they prohibited certain practices including young and adult prisoners being detained together and that prisoners should have adequate clothing and accommodation, and their health and sanitary needs met.

The Council of Europe in 1989 also brought in to force the Committee for the Prevention of Torture (CPT) under the "European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment." The CPT is not an investigative body, but provides a non-judicial preventive mechanism (through visits and reports arising from these visits) to protect persons deprived of their liberty against torture and other forms of ill-treatment. It thus complements the judicial work of the European Court of Human Rights in the area of art.3 of the European Convention on Human Rights ('the convention').

However, the influence of the Rules and the CPT on the case law of the European Court of Human Rights (ECtHRs') has been mixed. Neither the Rules or the CPT reports and recommendations are directly or judicially enforceable on member states. In the case of the European Prison Rules this has proved somewhat fatal to its influence (see, Livingstone, S Owen, T and Macdonald, A (2008) *Prison Law*, 4th ed. (Oxford, Oxford University

Press). But in respect of the CPT, as we shall see, initial judicial inhibition has been thrown off and CPT reports are now of increasing importance both evidentially and within the factors considered by the courts in their decision making both domestically (*Napier v. Scottish Ministers* ((2004) *The Times*, May 14,) and the ECtHR (see, Murdoch, J (2006) "The impact of the Council of Europe's "Torture Committee" and the evolution of standard-setting in relation to places of detention" European Human Rights Law Review 159).

Article 3 - Definitions, Challenges and Limitations

Article 3 of the convention provides that no one shall be subject to torture or inhuman and degrading treatment and punishment.

The European Court has consistently stressed in a number of cases such as *Soering v. UK* (Application No 14038/88, decision of the European Court July 7, 1988), *Chahal v. United Kingdom* (1997) 23 EHRR 413) and *Selmouni v. France* ((1999) 20 EHRR 403) the absolute character of art.3, admitting of no exceptions or qualifications irrespective of the actions of the victim (see, *Labita v Italy*, Application No 26772/95, decision of the European Court April 6, 2000) or the risks posed to national interests. In Selmouni (para.95), the court (at para.95) strongly reiterated this position saying:

> "Article 3 enshrines one of the most fundamental values of democratic societies. Even in the most difficult circumstances, such as the fight against terrorism and organized crime, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, art.3 makes no provision for exceptions and no derogation from it is permissible ... even in the event of a public emergency threatening the life of the nation."

To fall within the scope of art.3 cases of ill-treatment must attain a minimum level of severity (East African Asians Case, Eur. Commn. HR., Report of December 14, 1973, (1994) 78-A D.R. 5). The individual terms employed in art.3 were defined by the European Court in both *The Greek Case Yearbook* 12 (1969) 1 and in *Ireland v. United* Kingdom (1978) 2 EHRR 25. Degrading treatment in the Greek Case (para.186) was described as: "Treatment or punishment of an individual may be said to be degrading if it grossly humiliates him before others or drives him to act against his will or conscience". In *Ireland*, the court defined inhuman treatment as that which is capable of causing if not bodily injury, then at least intense physical and mental suffering and acute psychiatric disturbances. Torture was separately defined as treatment constituting deliberate inhuman treatment such as to cause very serious and cruel suffering (paras.167-8).

The assessment of this minimum level of severity is relative, a question of degree and often individual circumstance (*Price v. UK European Court of Human Rights*, July 10, 2001) including the health and age of the victim (Tyrer v. United Kingdom (1978) 2 EHRR 1).

In addition to case sensitive factors the court will also consider others which require a more general and objective enquiry. So certain treatment or punishment, such as imprisonment, will be considered at least prima facie acceptable because it is a form of punishment adopted commonly among all member states.

Although art.3 is supposedly an absolute right, admitting of no exceptions or justifications, it is therefore already clear that not every form of ill treatment against individuals by the state will violate its provisions and, as will be explored below, concepts of dangerousness, the actions of the victim and how the state has responded to meet these threats perceived or otherwise have also temper.

Article 3, especially where treatment or conditions have affected a prisoner's health and integrity. It has been advanced to successfully challenge the use of physical restraints and solitary confinement in the absence of security risk (*Raninen v. Finland* (1998) 26 EHRR 563), disciplinary punishments (*Keenan v. United Kingdom* (2001) 33 EHRR 38), the manner and necessity of forced medical treatment (Nermerzhitsky u Ukraine Application no.54825/00, decision of the European Court April 5, 2005), and multiple prison transfers (*Khider v. France* Application no. 39364/05, decision of the European Court July 9, 2009) amongst other things. Yet prisoners attempting to challenge their conditions of detention in line with international standards, have faced a number of difficulties, both inimical to their actual detention but also judicially imposed. A review of the case law in this area highlights that historically:

> ***"Already clear that not every form of ill treatment against individuals by the state will violate its provisions."***

i. The European Court has consistently, in assessing whether the threshold necessary for finding a violation of art.3 has been crossed, considered a very particular view and aim of penal punishment. This is whether the 'inevitable and normal' harshness of the prison environment militates against any ill-treatment suffered so as to fall below the threshold that ordinary citizens might expect (see *Valisanas v. Lithuania* Application No. 44558/98 decision of the European Court October 21, 2001).
ii. Related to this issue is the way the European Court has accepted the permissibility (and often offered a generous discretion to state authorities) of taking into consideration dangerousness (as assessed by the state) or behaviour (see, *X v. UK* Application No 8328/78 unpublished) of the particular prisoner when assessing whether art.3 has been violated. This factor, often in conjunction with state arguments around public safety, good order and discipline, has led to a further

watering down of the supposed absolute character of art.3, and to the approval of conditions and practices which on their face appear totally inconsistent with the state's duty to treat individuals with due respect and dignity. So in *Krocher and Moller v. Switzerland* (34 D & R 24, decision of the European Court July 9, 1981) the general situation regarding terrorist climate at the time was found to justify severe security measures. These included solitary confinement, isolation from each other and other prisoners, light only through a 60 watt bulb with the windows of their cells blocked so they could not see outside, prohibition on contact with the outside world, and restricted access to legal representation.

iii. Finally is the extent to which states have been able to raise economic and resource arguments against accepted and/or otherwise unarguable failures by the state in question to properly monitor and maintain decent prison conditions and facilities.

iv. The distinction between judicial deference and judicial restraint has not always been clear, especially where the economic, social and policy areas of member states are questioned or might in some way be affected.

These factors individually and in combination have led states being accorded a significant degree of leeway in how they run their prisons. Member states including the UK have for instance often sought to argue (as an almost blanket defence) that the "good administration" of prisons would somehow be jeopardized by judicial inquiry and intervention. Although the courts have become less and less sympathetic to such arguments (see in particular Lord Bridges scathing comments in *R. v. Deputy Governor* of *HMP Parkhurst ex party Leech* 1 AC 533 at p.566), concerns (real or exaggerated) over things like prison security and custody have led to treatment, which though undoubtedly harsh, has not been felt sufficient to breach art.3. This is because the treatment complained is deemed to be part and parcel of "necessary and civilised social order" and punishment (Arai-Yokoi, (2003) "Grading Scale of Degradation: Identifying the Threshold of Degrading Treatment or Punishment under art.3 ECHR" *Netherlands Human Rights Quarterly* 383). So in *Tyrer* (see above reference) the European Court felt it would be absurd to hold that judicial punishment generally, by reason of its usual and "perhaps almost inevitable element of humiliation", is "degrading" within the meaning of art.3.

The deference to custodial demands (and the need to not set too high a standard) has also effectively resulted in the importation of proportionality into assessments of where to set the threshold (Palmer, S (2006) "A Wrong Turning: Article 3 ECHR and Proportionality" *Cambridge Law Journal* 438) imposing a margin of discretion similar to that applied to the determination of conditional rights (*V and T v. United Kingdom* (2000) 30 EHRR 121). Though these considerations will be irrelevant in cases where there has been a clear breach, such discretion has been significant in shaping the boundaries of acceptable treatment and what constitutes lawful and unlawful prison conditions.

To be continued next week.

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The First Steps of Change?

Matt Evans looks at what protection is accorded to prisoners by the Council of Europe

Judicial desire to preserve member state's autonomy in respect of their own penal policy and issues of macro policy are always going to be given considerable weight (see, *R (Wilcox) v. Secretary of Sate for Justice* (2009) EWHC 1483 (Admin). However, the early case law of the European Court and Commission displayed an overly cautious approach to unsatisfactory prison conditions in this regard. In addition, despite the abundance of international regulation and guidance in this area, the court and Commission were very reluctant to establish strict judicial guidelines and standards as regards prison conditions and practices preferring instead to leave "standard setting" to domestic authorities. This was evident in the European Courts reluctance to take into consideration the findings of the CPT when looking at whether a breach of art.3 might have occurred (see *Delzarus v. United Kingdom* (App. No.17525/90 in relation to a rejection of a CPT and a Chief Inspectorate report around the appalling conditions pertaining to HMP Wandsworth at the time). It remains the case that the closer a case can be made to resemble a one off assertion of legal rights, the more likely it is that the court will be brave in it's assertion of principle and certainly domestically the UK courts have shied away from elaborating or providing judicial guidance around policies even where they feel they potentially breach art.3 (see *R (Russell) v Governor of Frankland Prison* (2000) 1 WLR 2027). However the European Courts more pro-active stance has now placed on states a more positive duty to prevent art.3 breaches. So in *Premininy v. Russia* (application no 44973/04, decision of the European Court, February 20, 2011) a prisoner's systematic and prolonged ill treatment at the hands of his cellmates amounted to a breach of art.3. It was held that it was the states responsibility to prevent and address violence amongst inmates in prison in accordance with their art.3 obligations, and where such violence was known to be occurring, the authorities could and should have reasonably foreseen that it rendered him more vulnerable than an average detainee and required them to act accordingly.

Why the Change?

The case of *Selmouni v. France* ((1999) 20 EHRR 403) provided first real step change to how the European Court had traditionally approached art.3 challenges. In *Selmouni*, the court made clear (at para.101) that the Convention was a "living instrument which must be interpreted in the light of present-day conditions" and explicitly accepted that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably required greater firmness in assessing breaches of the fundamental values of democratic societies. The court felt that certain acts which were classified in the past as "inhuman and degrading treatment" as opposed to "torture" could be classified differently in future. It also implicitly stated that acts (and conditions of detention) which they had formerly regarded as unacceptable but not inhuman or degrading might now be in violation of art.3.

The development of a body of case law happier to engage with art.3 rights around prison conditions and policies can be explained on a number of grounds;

- First, following its judgment in *Selmouni*, the court appears to have accepted that the threshold as regards concepts of inhuman and degrading treatment needed to be reviewed and updated in light of changing concepts around human and other social rights. This led to a more proactive enquiry and criticism of previously accepted prison conditions and practices. In this area the European Court distanced itself from being tied to notions of what constituted torture and ill treatment which had been formulated through a series of extreme cases coming from Turkey (see, *Aksoy v. Turkey* Application No 100/1995/606/694 decision of the European Court dated December 28, 1996). An earlier precursor to *Selmouni* can be found in a powerful dissenting opinion in the case of *Krocher and Moller v. Switzerland* referred to above and which looked at state arguments around dangerousness and whether in light of these arguments, more severe conditions and treatment were justifiable. In that case the four dissenting Judges indicated that whilst there were new threats to public order which demanded a new approach the manner in which this is done had to be compatible with the convention and democratic principles it espoused. In their view there had to be 'proportionality between the satisfaction of these demands (security) and the respect of every human being, however dangerous'
- Secondly, since the creation of the full-time court in the 1990's, all (prison condition) cases were now being considered by a judicial body. This avoided the allegation that previously admissibility decisions were often made by the Commission in a cursory fashion and, possibly, on policy grounds
- Thirdly, in recent years the European Court has begun, with the disintegration of the Soviet Union, to consider a great number of claims concerning extreme prison conditions in Eastern Europe. This has provided it with the opportunity to condemn a variety of practices and establish

some minimum standards with respect to the treatment of prisoners throughout all the jurisdictions within the Council of Europe (see, M*athew v. The Netherlands* Application No 24919/03, decision if the European Court, September 29, 2005).

- Finally the European Court, as mentioned at the beginning of this article, has begun to show a much greater willingness than hitherto to take account of the findings of bodies like the CPT (see, *Kaja v Greece* (App.No. 32927/03, decision of European Court, July 27, 2006) and *AB v, The Netherlands* (2003) 37 EHRR 48) when making substantive determinations under art.3.

The courts new robust approach can be seen in how they now challenge unsatisfactory conditions in prison. Decisions such as *Hilton* (*Hilton v. UK* (1981), 3 EHRR 104) showed the court was, in the past, more than happy to tackle specific state practices and whether they were prohibited under art.3. However it was less keen on developing a "totality of conditions" approach, seen in the case law of the United Sates at the time. Whilst the courts remain loathe to identify any particular criteria for establishing liability under art.3 they do now consider the cumulative effect of the conditions and the impact on the particular prisoner in considering whether a violation of art.3 has occurred (see *Dougoz v. Greece,* App. No.40907/98, decision of European Court, March 6, 2001). It is this change that has undoubtedly made the court much more willing to find member states in violation. So in *Peers v. Greece* (2001) 33 EHRR 51, the applicant complained of being detained (along with another inmate) for two months in a cramped cell with little natural light and no ventilation, which had an open toilet that often failed to work and which had to be used in the presence of the other inmate, and with no access to vocational courses, activities or a library. The European Court held that though there was no evidence of a positive intention to humiliate or debase the fact that the state authorities had taken no steps to improve the objectively unacceptable conditions of the applicant's detention gave rise in him feelings of anguish and inferiority, capable of humiliating and debasing him, and engaging art.3. Similarly in *Karalevicius v. Lithuania* (decision of the European Court, April 5, 2005) although the court felt the limited bath and shower facilities (limited to once every 15 days) did not themselves amount to degrading treatment, when added to the serious overcrowding problems (15 in a cell) meant the conditions of detention breached art.3. The court has also begun to routinely reject the idea that the standards imposed by art.3 can be compromised by a states lack of economic and social resources. In *Poltorastskiy and others v. Ukraine* (decision of the European Court, April 29, 2003), a number of death row prisoners were locked up for 24 hours in a room with no natural light and with little or no provision for activities or human contact. The court whilst acknowledging the Ukraine's socio-economic problems held that a lack of resources could not in principle justify prison conditions that were so poor as to constitute inhuman or degrading treatment. In *Gusev v. Russia* (decision of the European Court May 15, 2008) the court after finding a violation of art.3 with respect to the general conditions of detention, stated that the member state must organise its prisons in such a way so as to secure respect for the dignity of the detainee regardless of "financial or logistical difficulties."

Amidst this more positive stance the court has continued in relation to the threshold implicit in the wording of art.3 to have in mind what they feel is the inevitable level of "harshness" necessarily imposed by the very imposition of a legitimate punishment (see, *Valasinas v. Lithuania* 12 BHRC 266 and domestically *Broom v. Secretary of State for the Home Department* [2002] EWHC 2041). One area where concerns around prison security and the prevention of disorder or crime have been highlighted and defeated potential article 3 violations is the use of intimate body searches. Such searches, as long as they had been conducted in a proper and non arbitrary manner with 'clear' respect for the prisoner, would held not breach article 3 (*Frerot v. France* Application no 70204/01, decision of the European Court June 12, 2007). However more recent case law give hope that even where such policy arguments are put forward that the state will be required to justify them as necessary. So in *El Shennawy v. France* (App.No 51246/08, decision of the European Court dated January 20, 2011), a strip search not based on any obvious pressing security need was held to amount to an art.3 violation. Again the particular group of prisoners affected may be an important consideration. So strip searching is something which can be seen as having a far harsher effect on women simply because of the high levels of sexual abuse reported and suffered by women prisoners. Given the greater likelihood that women will suffer more trauma as a result of being strip searched, it is therefore arguable that strip searching in the women's prison estate should only ever be for cause. Assistance can be derived from the comments of Lord Bingham and Scott in *R (Munjaz) v. Mersey Care NHS Trust* (2005) 3 WLR 793, at paras.29 and 101, that the state is under a duty to not only refrain from inflicting treatment that will violate art.3 obut also refrain from action which exposes someone to a risk of such a violation. Finally the European Court, whilst acknowledging that art.3 prohibits torture or inhuman and degrading treatment or punishment irrespective of the circumstances and the disruptive behaviour of the victim, have also retained the idea that the dangerousness of the prisoner remains relevant. Thus, in *Sanchez v. France* (2006) 43 EHRR 54, it was held that there had been no violation of art.3 when a prisoner (Carlos "The Jackal") had been segregated in prison for over eight years. The majority in concluding that the hardship of segregation had not crossed the threshold necessary for a finding of a violation under art.3 noted that the prisoner was very dangerous and had shown no remorse for his crimes.

The Problems of Vulnerable Prisoners

The European Court has certainly always shown a greater willing to intervene, perhaps understandably, in cases where harsh conditions have had a significant impact on prisoners because of either specific physical or other needs. So in *Modarca v. Moldova* (App.No.144371/05, decision of the European Court, May 10, 2007) the cumulative (that word again) effect of cell conditions on a prisoner suffering from osteoporosis was held to violate art.3. In respect of the domestic UK courts they too have shown a more interventionist approach to such cases. In *Napier v. Scottish Ministers* ((2004) *The Times*, May 14,) a remand prisoner complained that his living space was shared, he was confined to his cell for long periods (20 hours), his cell was inadequate in terms of light, ventilation and space and involved inadequate sanitary conditions such as "slopping

out" and no overnight access to a toilet. Importantly a medical report stated that he was suffering from a condition that was unlikely to improve whilst held in such condition. In finding a breach of art.3, Lord Bonomy stated that: " .. to detain a person (in such conditions) … was, in Scotland in 2001, capable of attaining the minimum level of severity necessary to constitute degrading treatment and thus to infringe art.3." (at para.75). And, *Elefteriadis v. Romania* (appl.No.38427/05 2011), which concerned a prisoner with bronchial pneumonia who was found to have had his art.3 rights breached when he was exposed to fellow prisoners' tobacco smoke. The court again rejected a resources and practicality argument on behalf of the state about the impossibility of separating smokers and non smokers.

Prisoners With Mental Disabilities

The European Court has adjudicated on a number of complaints brought by prisoners with mental and physical disabilities and who require special treatment whilst in prison. The leading authority is the case of *Keenan v. UK* (2001) 33 EHRR 38, where the court found that the suicide of a mentally ill prisoner gave rise to a violation of art.3. In that case the European Court established that the prison authorities were under an obligation to protect the health of persons deprived of their liberty and that in assessing whether the treatment or punishment was incompatible with art.3, consideration should be given to the vulnerability of those suffering from mental illness and the difficulty this caused in terms of their complaining about the treatment (at para.111). The principles in *Keenan* were subsequently applied in the case of *Renolde v. France* (App. No.5608/05 decision of the European Court October 16, 2008) which confirmed that State authorities have substantive duties of care and, unlike its reluctance to do so on general prison conditions, evinced a greater willingness to prescribe standards of care in respect to the treatment and monitoring of mentally ill prisoners. In this case, a prisoner with mental health issues, committed suicide after being placed in a punishment cell following his assault of a prison guard. He had been left unsupervised (and had failed) to take his own medication. The court acknowledged the difficulties facing prison authorities and the need to impose good order and discipline in cases of assaults on prison officers, but felt the severity of the penalty (entailing as it did the prohibition of all visits and all contact with other prisoners) was not compatible with the standard of treatment required in respect of mentally ill persons and the associated duty of the authorities to make special provision for them. The punishment so threatened the prisoners already weakened physical and moral resistance that it amounted to a violation of article 3. In *Rodic and others v. Bosnia and Herzegovina* (App. No.22893/05 December 1,2008) although there was no actual violence, a failure to separate Serb and Croat prisoners from the general Bosnian prison population despite their having been convicted of war crimes against Bosnians and receiving death threats and beatings in prison, violated art.3. The court had particular regard to the constant mental anxiety suffered by the applicants as a result of the threat and anticipation of physical violence. Such arguments cut both ways of course and can be used in the reverse. And so in a recent domestic case, *R (Bary and others) v. Secretary of State for Justice and Governor of HMP Long Lartin* (2010 EWHC 587 (Admin) an argument that a regime change which required a number of prisoners' to remain in a special unit at all times save for health care and family visits was in breach of art.3 was rejected. This was on the basis primarily that the regime change, had to date, caused nothing more than "a light or mild deterioration" in their mental conditions.

Prisoners With Physical Problems

Similarly prison and police authorities owe an enhanced duty in respect of and to detainees with physical disabilities them (*R (on the application of C) v. Secretary of State for Justice* [2009] 2 WLR 1039, para.58). So under art.3, the state has an obligation to protect the physical well-being of inmates, for example, by providing them with the requisite medical assistance (*Sarban v. Moldova* application no. 3456/05, decision of the European Court, January 4,2006). In *Price v. UK* (2002) 34 EHRR 53, the European Court held that there had been a violation of art.3 when a very disabled female prisoner complained that she had to endure a number of physical and medical difficulties whilst in police and prison custody and that little or no thought had been given as to how she might cope in custody. Again there was no evidence of any positive intention to humiliate or debase the applicant, but as the court made clear the absence of any such purpose cannot conclusively rule out a finding of violation of art.3. The court found that the detention of a severely disabled person in conditions where she was dangerously cold, risked developing sores because her bed was too hard or unreachable, and was unable to get to the toilet or keep clean without the greatest of difficulty, constituted degrading treatment within art.3. Although the majority of the court was not prepared to declare that her imprisonment was in violation of art.3 *per se*, the lack of any consideration as ascertain where she would be detained or whether it would be possible to provide facilities adequate to cope with her severe level of disability (para.30) meant art.3 had been breached. Similarly, in *Vincent v. France* (Decision of the European Court, October 24, 2006) the court concluded that an applicant (wheelchair bound and detained for four months in inadequate facilities) who had been totally reliant on the authorities and had lost the ability to leave his cell or move about the prison independently has suffered a violation of art.3. The principles in *Keenan and Price* were applied subsequently with respect to a case of a prisoner with drug problems (*McGlinchey v. UK* (2003) 37 EHRR 41), imposing on the state duty to make proper provision for the prisoner's health and well being in the form of requisite medical assistance and that in this particular case the treatment for heroin withdrawal had not only caused her great distress and suffering, but had posed a very serious risk to her health.

Negligence and Mistreatment

The approach to enhanced duties on the state towards vulnerable prisoners is also reflected in domestic case law concerning actions in negligence. In *Reeves v. Commissioner for the Police of the Metropolis* [2002] AC 283 the House of Lords decided that, even in the case of a prisoner of apparently sound mind, the authorities may be liable for a negligent failure to prevent his suicide, although in such a case the liability is shared with the deceased because of his voluntary act. Respect for personal autonomy did not preclude that steps be taken to "control a prisoner's environment in non-invasive ways calculated to make suicide more difficult". There are natural limits to the extent of

the duties that can be imposed on the executive. So in *Orange v. Chief Constable of West Yorkshire Police* [2001] 3 WLR 736), the Court of Appeal ruled that prison and police authorities did not owe a duty of case to all prisoners to treat them as a suicide risk or prevent them committing suicide.

Age and Infirmity

Again in line with the court looking at the cumulative effect of the conditions complained of and their particular effect on the prisoner the European Court [has been robust in looking behind state arguments an seeking the justification for what appears to be potentially degrading treatment. The use of handcuffs for security purposes on prisoners receiving medical treatment will not be considered to be in violation of art.3 *per se* (see ,*R (Green and Allen) v. Secretary of State for Justice* [2007] EWHC 2490 (Admin). The court has made clear that it would need to be satisfied that there were substantial and necessary reasons for the restraint. In *Henaf v. France* (2005) 40 EHRR 44, the handcuffing of a 75-year old prisoner whilst coming to and from chemotherapy sessions (something the CPT has been very critical of) was not justified either by age, conduct, or security requirements. In *R (C) v. Secretary of State for Justice* [2008] EWCA Civ 882, it was held that rules allowing restraints to be used on children in detention to secure good order and discipline were in conflict with art.3 because the authorities had failed to show their necessity in general.

A Note of Caution

Whilst the court has been more sympathetic in its approach to vulnerable prisoners, certain factors and a degree of deference to state authorities and their actions are still present. Article 3 has therefore not been interpreted as laying down a general obligation to release a detainee on health grounds or to transfer him to a civil hospital, even if he is suffering from a terminal or difficult to treat illness (see, *Mouisel v. France* (2004) 38 EHRR 34). The court has also made clear that, on the question of whether a person should remain in detention, it is precluded from substituting the domestic courts assessment with its own especially where the domestic authorities have "generally" discharged their obligation to protect the detainees physical integrity through appropriate medical care (see *Sakkopulis v. Greece*, App.No.61828/00, decision of the European Court January 15, 2004). A prisoners behaviour and assessed risk are also factors the court has taken into account in assessing whether someone's condition was compatible with detention in prison or necessitated admission to hospital (*Gelfman v. France* (2006) 42 EHRR 4)

Conclusions

The European Court now regards cases around prison conditions and treatment as generally justiciable and is prepared to find violations of those standards in the absence of bad faith, deliberate ill treatment or any positive intention to humiliate. In doing so the Court has, more inadvertently than expressly, established some minimum standards of acceptable treatment, which can as a consequence be legally enforced, both in Strasbourg and UK courts. However, the case law has been inconsistent, and as we have seen, even what appear to be certain inalienable and fundamental entitlements that inhere in us all as human beings such as those contained in art.3, are uncertain around the edges. The declaration in art.3 that "no one shall be subjected to torture or to inhuman or degrading treatment and punishment" is shown by the jurisprudence of the ECtHR to have plenty of grey areas around its fringes in which disputes have been able to thrive (See *Campbell and Cosans v. UK* (1982) 4 EHRR 293). Article 3 continues to offer the prison authorities a wide level of discretion and has led, inevitably to an unpredictable body of case law, highlighted by some judicial deference and a reluctance to make authoritative and precedent-setting rulings on specific aspects of prison conditions, such as the acceptability of solitary confinement, or the incarceration and treatment of physically and mentally incapable prisoners. Instead the court has preferred to decide cases on their individual facts and more recently examine the cumulative effect of prison conditions on the individual especially within the positive duty to protect vulnerable prisoners. These cases, often mirroring the jurisprudence of common law, have in turn informed domestic law on the tortuous liability of state authorities as seen in cases like *Reeves*. More specifically, the European and domestic courts have been prepared to consider general interests of penal policy, "good administration" and the need for prison discipline and order in determining whether the threshold required for a violation of art.3 has been breached. More controversially they have also allowed more personal factors (and arguably irrelevant ones) such as the dangerousness of the particular prisoner into the decision making mix. The court's reluctance to override these matters and to find a violation of art.3 despite the utilitarian benefit derived from prisoners receiving decent and fair treatment has led to a watering down of art.3 and its absolute status with the determination of prisoners' cases within this jurisprudence especially difficult to predict. A key factor in bringing down art.3 levels has been the assimilation of the former eastern bloc countries where truly awful prison conditions are routinely evident. The danger may be that by setting too high a standard for the UK, France etc that countries like Russia will never be able to attain it and will remain in perpetual violation. This pragmatism goes to a wider question of whether the European Court should be adopting an absolute or relativist approach in the future. The institutional limitations inherent in the judicial role have been well researched and need no further comment here. More critically from the perspective of the European Court is the fact that courts are by their nature reactive and *ex post facto* in their adjudications. They depend on others to initiate disputes and they rely on a whole series of extraneous decisions by independent actors before they can find themselves seized of an issue of principle. Given these limitations it is certainly likely the establishment and enforcement of strict guidelines will continue to be the sole domain of state authorities albeit that state authorities are no longer provided with unlimited discretion in this area. The energy required to secure the protection of human dignity across Europe should not be needlessly channelled into any single activity, least of all on rooted in litigation. If the rule of law is to mean anything, it has to mean that the prison system of all the European member states are no less answerable to the courts that any other limb of the state, especially in respect of how it treats those in custody.

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