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Focus on Disability

Disabled prisoners and human rights law:

the jurisprudence of the European Court of Human Rights and the domestic courts

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Introduction

Imprisonment, by its very nature, causes distress and discomfort to the detainee, but the detention of prisoners with disabilities raises more specific concerns with respect to their mental and physical health. These concerns engage human rights law, as the incarceration of disabled prisoners is capable of impacting on the private life of the prisoner (as guaranteed by article 8 of the European Convention on Human Rights). In addition, imprisonment, and the continued detention, of disabled prisoners might in certain circumstances engage article 3 of the Convention, which prohibits inhuman and degrading treatment and punishment, or in exceptional cases even article 2, which protects the right to life.

This article will examine the potential application of those Convention rights, in particular article 3, to disabled prisoners; and will analyze the relevant case law of both the European Court of Human Rights and the domestic courts with respect to claims made by such prisoners. In this context, 'disabled' prisoners refer to those with mental and physical illnesses, and will include elderly prisoners. The cases will consider the standard of care expected of the prison and government authorities with respect to disabled prisoners who are in their custody, and whether continued detention is compatible with such prisoners' Convention rights, but the article will also consider a recent domestic decision which considers whether the imposition of a custodial sentence on a disabled prisoner is compatible with human rights law.[1] The article will not attempt to cover specific disability discrimination law as it applies to prisoners, but will focus on Convention rights and the case law of the European Court and domestic decisions made under the Human Rights Act 1998.

Challenging general conditions of imprisonment

Article 3 of the European Convention can be employed to challenge the compatibility of general prison conditions with human rights standards.[2] However the European Court has always attempted to maintain a balance between the rights of the prisoner and issues of public and prison safety in determining whether the conditions were contrary to article 3. Accordingly, the Court has held that it is permissible to consider the dangerousness of the prisoner in determining whether the conditions violate the article,[3] and as we shall see this factor, together with the public interest that sentences are served in full, will often be relevant in deciding whether the continued detention of a disabled prisoner breaches the Convention. For example, in *Sanchez v France*,[4] it was held that there had been no violation of article 3 when a prisoner (Carlos 'The Jackal') had been segregated in prison for over eight years, the majority of the Grand Chamber noting that the prisoner was very dangerous and had shown no remorse for his crimes and thus the hardship of segregation had not crossed the threshold under article 3. Importantly, therefore, only the minority of the Court found that the treatment was contrary to basic minimum standards of human dignity and posed threats to his future mental health despite his dangerousness.[5] Further, as we shall see in respect of cases brought even by disabled prisoners, the courts must be satisfied that the applicant's treatment goes beyond the inevitable harshness associated with incarceration.

Nevertheless the European Court has been willing to challenge general prison conditions within the standards of article 3, and in *Peers v Greece*,[6] it held that although there had been no evidence of a positive intention to humiliate or debase the applicant, the fact that the authorities had taken no

1. *R v Qazi* [2010] EWCA Civ 2579.
2. See Foster, Prison Conditions, 'Human Rights and Article 3 ECHR' [2005] PL 33. For a view from the Chief Inspector of Prisons, see Owers, 'Prison Inspection and the Protection of Human Rights' [2004] EHRLR 107.
3. *Krocher and Moller v Switzerland* (1982) 34 DR 24.
4. (2006) 43 EHRR 54.
5. Note, however, the recent admissibility decision of the European Court in *Ahmad and others v United Kingdom* (Application Nos. 24027/07, 11949/08 and 36742/08).
6. Decision of the European Court 19 April 2001.

steps to improve objectively unacceptable conditions denoted a lack of respect for the prisoner and constituted degrading treatment within article 3. Further, although the Court may be sympathetic to the social and economic resources of the member state and thus its prison conditions, it will still find a breach if the conditions do not meet the standards laid down in the Convention.[7]

There has been little leading domestic law in the area of general prison conditions, but the leading authority — a Scottish case — does provide some guidance and was, interestingly, a case brought by a prisoner with a disability. In *Napier v Scottish Ministers*[8] a remand prisoner complained of inadequate sanitary conditions, which involved 'slopping out,' and that he was confined to his cell for excessive periods, relying on a medical report that stated that his eczema condition was unlikely to improve whilst held in such conditions. The Outer Session held that the subjection of the applicant to the conditions existing in that prison at that time, and in particular to the practice of 'slopping out,' constituted inhuman and degrading treatment within article 3. Specifically, to detain a person along with another prisoner in a cramped, gloomy and stuffy cell and, to deny him overnight access to a toilet throughout the week and for extended periods at the weekend and thus to expose him to both elements of the slopping out process, was capable of attaining the minimum level of severity necessary to constitute degrading treatment and thus to infringe article 3. The court also felt that the prisoner's eczema condition was of crucial importance to the determination of the case. This was because the very presence of the condition was a source of acute embarrassment and a feeling of humiliation causing him a degree of mental stress; moreover, the infected eczema was caused by the conditions of his detention, in particular by the practice of slopping out.

In contrast, the domestic courts have been less willing to interfere where the prisoner is not suffering from a specific ailment or disability. Thus, in *Broom v Secretary of State for the Home Department*,[9] the court rejected a claim when a prisoner complained that he was subjected to disgusting and unhygienic conditions; one cell had excrement around the toilet and in another the cupboards were soaked in grease from cooking utensils. In rejecting the claim the court stressed that imprisonment itself is humiliating and the circumstances of the present case were no more than the ordinary incidence of a prison regime. The fact that the claimant prisoner has a disability might, therefore, lead to a more robust approach by the courts, European and domestic.

In particular it will examine how the courts balance the rights of disabled prisoners with the need for punishment, and the acceptance of the idea that imprisonment involves an inevitable element of harshness and degradation.

Prisoners with physical and mental disabilities

Having established that the prisoner's disability might lead the court to more likely find a violation of Convention rights, the article will now examine the extent to which the European and domestic courts have used Convention rights to regulate and challenge the conditions that disabled prisoners may normally be required to endure. In particular it will examine how the courts balance the rights of disabled prisoners with the need for punishment, and the acceptance of the idea that imprisonment involves an inevitable element of harshness and degradation.

The detention and treatment of prisoners with physical, mental or other disabilities has excited a good deal of debate with respect to the question of whether such persons should be incarcerated in prison, and the appropriate standards of their treatment in prison. In addition to concerns expressed by the European Committee for the Prevention of Torture,[10] there have been a number of decisions of the European Court in respect to the treatment of such detainees, raising issues of the compatibility of their detention and treatment with article 3. The Court's approach is to look

7. *Poltorastskiy and Others v Ukraine*, decision of the European Court 29 April 2003.
8. *The Times*, 14 May 2004. See Foster, Prison Conditions, Human Rights and Article 3 ECHR [2005] PL 33; Lawson and Mukherjee, Slopping out in Scotland [2004] EHRLR 645.
9. [2002] EWHC 2041.
10. See Murdoch, The Impact of the Council of Europe's 'Torture Committee' and the Evolution of Standard-setting in Relation to Places of Detention [2006] EHRLR 159.

at each case on its merits and in *Grori v Albania*,[11] it was held that although there was no general duty to release prisoners suffering from serious illnesses, there was an obligation to ensure that a prisoner received adequate treatment or medication and that this duty was not excused on grounds of expense.[12]

The European Court will certainly take a robust approach where vulnerable prisoners are subjected to harsh conditions of imprisonment and not treated in a manner that is consistent with their physical or mental state. For example, in *Keenan v United Kingdom*,[13] the European Court held that there had been a violation of article 3 in respect of the manner in which the authorities had treated a mentally ill prisoner known by them to be a suicide risk. In that case the Court found that the lack of effective monitoring of the prisoner's condition and the lack of informed psychiatric input into his assessment and treatment disclosed significant defects in the medical care provided to a mentally ill person with such a risk. That approach was followed in *McGlinchey v United Kingdom*,[14] which concerned the standard of care and treatment of prisoners with drug addiction. In this case the prisoner had a long history of heroin addiction and was asthmatic and began to suffer heroin withdrawal symptoms immediately following her imprisonment. The prisoner died despite the treatment she received at the prison and in hospital and claimed that her treatment violated article 3. The Court confirmed that the state had a duty to ensure that a person was detained in conditions that were compatible with respect for human dignity, including the duty to make proper provision for the prisoner's health and well-being in the form of requisite medical assistance. Although the prisoner's condition had been regularly monitored over one period, during that period she had been vomiting repeatedly and losing a lot of weight. Further, in another period despite the lack of evidence that her condition had improved she was not seen by a doctor for two days and continued to vomit and lose weight. Subsequently, despite some improvement in her condition, she continued to lose weight and had become dehydrated, which had not only caused her great distress and suffering, but had posed a very serious risk to her health. The Court thus concluded that the prison authorities had failed to comply with their duty to provide her with the requisite medical care and their treatment of her had violated the prohibition against inhuman and degrading treatment contained in article 3.[15]

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The approach in *Keenan* and *McClinchey* has also been adopted in cases concerning prisoners with long term or permanent physical disabilities. Thus, in *Price v United Kingdom*,[16] it was held that although there had been no evidence of any positive intention to humiliate the prisoner, 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 go to the toilet or to keep clean without the greatest of difficulty, constituted degrading treatment within article 3. Further, in *Vincent v France*,[17] the Court found a violation of article 3 in respect of the treatment of a wheelchair bound prisoner who had been detained for four months in a prison which had inadequate facilities to deal with his disability. The Court concluded that the applicant had been totally reliant on the authorities and had lost the ability to leave his cell or move about the prison independently as a wheel had to be removed from his chair every time he entered or left his cell.

The question is, therefore, whether the place of detention is adequately and appropriately sourced to accommodate the prisoner. If this is not the case, then there will be a violation of article 3, despite any

11. Decision of the European Court, 7 July 2009.
12. See also *Akhmetov v Russia* (Application No. 37463/04), where the refusal to transfer the prisoner to a civilian hospital was held in breach of Article 3.
13. (2001) 33 EHRR 38.
14. (2003) 37 EHRR 41.
15. See more recently, the decision of the European Court in *Taddei v France* (Application No. 36435/07), where it was held that the failure by the prison authorities and the French courts to move an anorexic prisoner to a civilian hospital where she could be treated properly for her condition was in breach of article 3.
16. (2002) 34 EHRR 53; see Foster, Inhuman and Degrading Prison Conditions (2001) NLJ 1222.
17. Decision of the European Court 24 October 2006.

practical security reasons for detaining the prisoner in a normal prison. Thus, in *Riveiere v France*,[18] it was held that there had been a violation when the applicant, a long-term prisoner with a psychiatric disorder, had been detained in normal prison conditions without proper facilities for his disorder. In the Court's view he should have been detained in special conditions irrespective of his offence or perceived dangerousness. In contrast, in *Gelfmann v France*,[19] there had been no violation when a prisoner, who had suffered from AIDS for nearly 20 years, had had his request for release on medical grounds refused. The Court stressed that was no general obligation to release a prisoner on health grounds or to transfer him to a civilian hospital, even if suffering from an illness that was difficult to treat, provided the prisoner is receiving *adequate* treatment in prison and his condition was being monitored by an outside hospital.

The decisions in cases such as *Keenan* and *Price* are particularly relevant to the treatment of mentally ill or disabled persons. Although the Court accepts that prison authorities are under an obligation to protect the health and safety of persons deprived of their liberty, thus making the decision relevant to prisoners generally, the disability of the prisoner often makes the Court more willing to rule on the compatibility of prison conditions with basic human rights. However, the Court is not prepared to lay down or prescribe general standards, preferring instead to consider the impact of the conditions on the particular prisoner. Thus, in *Aerts v Begium*[20] it found no violation when a mentally ill prisoner was detained in what the Court conceded were 'unsatisfactory conditions' that were not conducive to his effective treatment. As there was no evidence of a deterioration of the applicant's mental health, it held that the prisoner had not been subjected to inhuman or degrading treatment.

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Imposing standard prison practices on disabled prisoners

The Court will also find a violation of article 3 where the authorities have imposed penalties or practices on a disabled prisoner which are inappropriate given that prisoner's needs and status. Thus in *Keenan*, above, the imposition on that prisoner of a serious disciplinary punishment, including the imposition of 28 additional days some nine days before his expected release, was found to have threatened his moral and physical resistance and was not compatible with the standard of treatment required in respect of a mentally ill person. Further, in *Grori v Albnania*, above, it found that the segregation of a serious ill prisoner from the outside world and his representatives had the effect of intensifying the mental anxiety a prisoner would feel about his illness and its consequences.

The use of handcuffs for security purposes on prisoners receiving medical treatment has also given rise to issues under article 3. In *R (Graham and Allen) v Secretary of State for Justice*,[21] the High Court held that the use of handcuffs on prisoners who posed an adequately founded risk of escape was not in breach of article 3 simply because the prisoner was ill, and that initially at least the prison authorities would be left to make the necessary assessment and balance. In that case it was held that it was not unlawful for the authorities to assess a 73-year-old prisoner serving a life sentence for the murder of his wife and children four years previously, as posing a sufficient risk of escape and of harm to the public during his hospital treatment. Further, there were no health reasons why he should not be restrained. However, it was held that there *had* been a violation of article 3 when another prisoner receiving treatment for Hodgkin's lymphoma while serving a sentence of three years for drug offences had been handcuffed to officers during his medical treatment and placed in handcuffs

18. Decision of the European Court 11 July 2006.
19. (2006) 42 EHRR 4.
20. (2000) 29 EHRR 50.
21. [2007] EWHC 2490 (Admin).

during subsequent visits to receive chemotherapy treatment. The court held that because the prisoner was felt to be a serious risk to the public if he escaped, the initial decision to handcuff the prisoner did not violate article 3 (although it came perilously close to do doing so). However, when the prison authorities became aware of the full facts of his illness and of the unlikelihood of him escaping, and recommended the removal of the restraints, the subsequent use of handcuffs during further hospital treatment and out-patient visits constituted both degrading and inhuman treatment. Notwithstanding this ruling the courts have subsequently upheld decisions to handcuff such prisoners, provided the medical problems are not so extreme as to outweigh any risk issues.[22]

On the other hand, the European Court is prepared to find a breach of article 3 in cases where the prisoner has been deliberately mistreated and the prisoner's age and state of health have exacerbated that situation. Thus, in *Henaf v France*[23] it was held that there had been a violation of article 3 when a 75-year-old prisoner had been handcuffed on his way to hospital to undergo an operation and had been chained to the bedpost the night before the operation. Having regard to his health, age and the absence of any previous conduct suggesting that he was a security risk, the restrictions on his movement were disproportionate to any security requirements. The Court also noted in this case that on its visit to France in May 2000 the European Committee for the Prevention of Torture had recommended that the practice of attaching prisoners to hospital beds should be outlawed.

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Elderly and infirm prisoners

The detention of elderly and infirm prisoners may give rise to claims under article 3 and the case law thus far suggests that the courts will attempt to conduct a pragmatic and proper balance between the functions of the criminal justice system and the human rights of the prisoners. The European Court adopted a 'hands off' approach in *Papon v France*,[24] where the applicant had argued that because of his age and the state of his health his incarceration constituted a violation of article 3. It was held that although the Court did not exclude the possibility that in certain conditions the detention of an elderly person over a lengthy period might raise an issue under article 3, in the instant case the applicant's general state of health and his conditions of detention and treatment had not reached the level of severity required to bring it within article 3. In coming to that conclusion the Court noted that none of the member states had an upper age limit for detention. Similarly, in *Matencio v France*[25] the Court held that there had been no violation of article 3 when a prisoner suffered a stroke in prison and claimed that his detention and conditions of detention violated the Convention. In the Court's view he was offered adequate medical assistance and thus the threshold in article 3 had not been reached.

This approach was followed by the domestic courts in *R (Spink) v Home Secretary*,[26] where it was held that the refusal of the Secretary of State to grant compassionate release to a prisoner serving a life sentence and who had been diagnosed with terminal cancer, and whose life expectancy was estimated at between three and six months, was not in breach of article 3. The Home Secretary had refused his request for two reasons because the prisoner represented a real risk of reoffending, and had not satisfied him that there were exceptional circumstances to justify release. The Court of Appeal held that it was important to bear in mind that the claimant was a serving prisoner and that it is in general in the public interest that the allotted sentence is served. Equally, the risk of reoffending was a material factor for the Secretary of State to consider. The Court of Appeal noted that there had been no recommendation to move the claimant to a hospital, and he had, despite his condition, remained reasonably fit and mobile. Further, although he had been handcuffed when in hospital, this was after a suitable risk assessment had been carried out with respect to the risk of him committing acts of violence.

22. *R (Faizovas) v Secretary of State for Justice, The Times*, May 25 2009.
23. (2005) 40 EHRR 44.
24. (2004) 39 EHRR10.
25. Application No 58749/00.
26. [2005] EWCA Civ 275.

However, the European Court is more likely to find a violation of article 3 when such prisoners cannot be guaranteed adequate medical and other care while serving their sentence. For example, in *Mouisel v France*[27] the Court held that the failure to release a seriously ill prisoner from prison amounted to a violation of article 3 of the Convention. In that case the prisoner had contracted leukaemia and complained of the standards of his treatment before his ultimate release. The European Court noted that the prisoner was suffering from permanent asthenia and fatigue, that he was waking up in pain in the night and that there was a psychological impact of stress on his life expectancy. Further, the Court noted that the prison was scarcely equipped to deal with illness, and had failed to transfer him to another institution. Consequently, the Court found that the authorities had failed to take sufficient care of the prisoner's health to ensure that he did not suffer treatment contrary to article 3.[28]

The case law of both the European and domestic courts in this area remains cautious and highly dependent on the individual facts and it is clear that exceptional circumstances need to be present to find a violation of article 3. For example, in *Sawonuik v United Kingdom*,[29] the European Court held that the imprisonment of a 79-year-old war criminal was not, in the absence of other evidence of ill treatment or exceptional hardship, in violation of article 3, provided the prisoner was in receipt of appropriate medical care.

What little domestic case law there is in this area suggests that the courts will take a cautious approach before ruling that imprisonment would amount to inhuman or degrading punishment.

Article 3 and the sentencing of disabled prisoners

Given that the courts are 'public authorities' under s.6 of the Human Rights Act, and thus have a duty not to breach Convention rights, it is clear that when carrying out their sentencing functions they have some power to rule on the question of whether the custodial sentence of a disabled prisoner would be in violation of article 3. This will impose a duty on the courts to carry out their functions consistently with article 3, both at the initial sentencing stage and when asked to consider release or deferral.[30] For example, in *Kupczak v Poland*[31] the European Court found a violation of article 3 when the domestic courts continued to extend the prisoner's pre-trial detention despite his ill health and the lack of availability of a morphine pump to aid his chronic back problems.

What little domestic case law there is in this area suggests that the courts will take a cautious approach before ruling that imprisonment would amount to inhuman or degrading punishment. Thus as with prison conditions, the court is primarily concerned with whether the prison has the necessary facilities to cope with the prisoner's disability rather than the more general question whether imprisonment would be an inhumane option for a person with such a disability. For example, in *R v Hetherington*,[32] the Court of Appeal held that although, following the European Court's ruling in *Price v United Kingdom* (above), the prison authorities had a duty to cater for a prisoner's disabilities, on the facts there was sufficient evidence that Winson Green Prison could cater for the claimant's physical disabilities and that accordingly his sentence of 18 months for possession of indecent photographs did not contravene article 3.

Moreover, in *R v Qazi*,[33] the Court of Appeal provided cautious guidance as to when it would be appropriate to rule that a sentence of imprisonment would be in breach of article 3. In this case the prisoner suffered from a genetic disorder which required blood transfusions every three to four weeks together with infusions of medication and appealed against his sentence of five years and six months' imprisonment following his conviction for fraud. He had been sent to a category B prison where arrangements were made to deal with his complex medical problems, but it became apparent that it was very difficult to provide him with

27. (2004) 38 EHRR 34.
28. The Court also took into account the fact that the prisoner had been handcuffed to and from chemotherapy sessions, of which the European Committee for the Prevention of Torture had been very critical. See also *Farbthus v Latvia*, decision of the European Court, 2 December 2004.
29. Application No 63719/00, declared inadmissible on 29 May 2001.
30. See *Taddei v France*, note 15, above.
31. Decision of the European Court, 25 January 2011, application No. 2627/09).
32. [2009] EWCA Civ 1186.
33. [2010] EWCA Civ 2579.

the necessary care at that prison and his condition deteriorated. Accordingly, he was re-categorised as a category D prisoner on exceptional medical grounds so that he would be eligible for release under temporary licence for medical outpatient appointments, and a care plan was put into place. He was eventually transferred to an appropriate prison and then appealed on the basis that the continuation of his imprisonment breached article 3.

Although the Court of Appeal reduced the length of his sentence, in providing guidance on when it would be in violation of article 3 for a court to impose a custodial sentence on a prisoner with a serious medical condition, it stressed that a custodial sentence was not necessarily in breach of article 3 and that the sentencing court would only order release if that was the only way to comply with that article. Further, it stated that once satisfied that arrangements were in place to care for the prisoner, a court need not enquire into the allocation of a prisoner to a specific prison or the facilities available at such. Thus, it was only when the fact of imprisonment itself would expose the prisoner to a real risk of a breach of article 3 that the court would enquire as to whether a custodial sentence would breach article 3. Finally, any breach of the rules with respect to medical treatment and conditions by the Secretary of State was a matter for civil redress and not for the Criminal Division of the Court of Appeal. The decision reflects the courts' reluctance to dictate policy in this area or to establish and monitor minimum standards with respect to the incarceration and care of prisoners with specific needs; preferring to apply the broad principles of article 3 and the case law of the European Court in protecting the prisoner from inhuman and degrading treatment.

Conclusions

Although a legal framework exists both in domestic law and under the European Convention on Human Rights to challenge the incarceration and conditions of imprisonment of disabled prisoners on human rights grounds, it is clear that such challenges are limited to questions of general and broad compatibility with article 3. With respect to prison conditions, although the courts are willing to impose a specific duty on the authorities to provide adequate and specialist health care to disabled prisoners, they are not willing to rule on the moral and legal compatibility of incarceration of disabled prisoners. Equally, the approach taken by the Court of Appeal in *Qazi*, above, confirms that the main responsibility for securing humane treatment of such prisoners lies with the prison authorities, subject to judicial control using the broad principles of article 3.