Ensuring respect of the rights of prisoners under the European Convention on Human Rights as part of their reintegration process

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Summary

The European Court of Human Rights has held that prisoners in general continue to enjoy all the fundamental rights and freedoms guaranteed under the Convention save for the right to liberty. For example, in addition to being protected from ill-treatment, prisoners continue to enjoy the right to respect for family life, the right to freedom of expression, the right to practise their religion, the right of effective access to a lawyer or to court for the purposes of Article 6, the right to respect for correspondence and the right to marry. Any restrictions on these rights require to be justified (although such justification is frequently to be found in considerations of security). The Court is developing case-law in this field which emphasises that the protection of prisoners' fundamental rights, particularly those which tend to maintain or create links for the prisoner with the outside world, can be seen as assisting the prospects for prisoners to reintegrate into society following release.

INTRODUCTION

The Court has an extensive case-law regarding the human rights of prisoners. It has held that prisoners in general continue to enjoy all the fundamental rights and freedoms guaranteed under the Convention save for the right to liberty. In response to the applications which have been lodged before it, and in accordance with its policy of giving priority to complaints which raise allegations of the most serious breaches of human rights, there is now a vast body of case-law aimed at protecting prisoners from serious ill-treatment in prison. In this context, the Court has considered issues such as conditions of detention, including over-crowding and lack of access to basic hygiene facilities, medical treatment and adequate food. I think that it is fair to say that this is one area where the European Convention system has made a significant difference across Europe, with improvements being made to prison conditions in a number of States, for example Russia, Italy and Poland.

This afternoon, however, I'm not going to talk about conditions of detention. Instead I would like to focus on the case-law regarding the possibility for prisoners to reintegrate into society.

THE REHABILITATIVE AIM OF IMPRISONMENT AS REFLECTED IN THE EUROPEAN PRISON RULES AND THE COURT'S CASE-LAW

There is a considerable amount of "soft law" on this topic, in particular, the European Prison Rules 2006. The Prison Rules are recommendations of the Committee of Ministers to member States of the Council of Europe as to the minimum standards to be applied in prisons. States are encouraged to be guided by the Rules in their legislation and policies and to ensure wide dissemination of the Rules to their judicial authorities and to prison staff and inmates. Various provisions of the European Prison Rules have been influenced by judgments of the Court, and in turn the Court frequently refers to the Rules as evidence of support amongst the Member States of the Council of Europe for a particular policy stance.

An example of this is Rule 6 of the European Prison Rules, one of the "basic principles" that underlie the Rules as a whole. It states:

> 6. All detention shall be managed so as to facilitate the reintegration into free society of persons who have been deprived of their liberty.

In addition, Rule 102.1, headed "Objective of the regime for sentenced prisoners", provides:

> 102.1 In addition to the rules that apply to all prisoners, the regime for sentenced prisoners shall be designed to enable them to lead a responsible and crime-free life.

The European Court of Human Rights, also, has stated in various judgments that, while punishment remains one of the aims of imprisonment, the emphasis in European penal policy is now on the rehabilitative aim of imprisonment, particularly towards the end of a long prison sentence.[1]

This principle found expression in the recent case of *Vinter and Others v. the United Kingdom* [GC], nos. 66069/09, 130/10 and 3896/10, ECHR 2013 (extracts), about whole-life sentences in the United Kingdom. The Court explained that, in order for a life sentence to remain compatible with the prohibition on inhuman punishment under Article 3 ECHR, there must be both a prospect of release and a possibility of review. A prospect of release is necessary, because human dignity requires that there must be a chance for a prisoner to atone for his offence and move towards rehabilitation. A review system is also needed because, over the course of a very long sentence, the balance between the grounds of detention (punishment, deterrence, public protection and rehabilitation) can shift to the point that detention can no longer be justified.

PRACTICAL ASPECTS OF THE REINTEGRATION PROCESS

A number of cases brought before the Court by prisoners illustrate the more practical aspects of the goal of eventual reintegration on the prisoner into society once released.

In a case from September 2012, *James, Wells and Lee v. the United Kingdom*, nos. 25119/09, 57715/09 and 57877/09, the Court examined aspects of a statutory scheme involving indeterminate sentences of imprisonment for the public protection ("IPP sentences") in the United Kingdom. IPP sentencing was initially mandatory where a future risk existed of further offending, and risk was assumed where there was a previous conviction for violent or sexual offences, unless the sentencing judge considered it unreasonable to make such an assumption. A minimum term, known as the "tariff", was fixed by the sentencing judge. After the expiry of the tariff, IPP sentences required the Parole Board's decision that the prisoner was no longer dangerous before he could be released. Following the entry into force of this new legislation, large numbers of IPP prisoners swamped the system. The applicants in *James, Wells and Lee* were sentenced to IPP and recommended to take part in a number of rehabilitative courses. However, by the time their respective tariffs expired, all three applicants remained in their local prisons, and were not transferred to prisons where they would have access to the relevant courses until many months later.

The Court found that indeterminate detention for the public protection could be justified under Article 5 § 1 of the Convention (**right to liberty**), but that it could not be allowed to open the door to arbitrary detention. Where a prisoner was in detention solely on the ground of the risk that he was perceived to pose, regard had to be had to the need to encourage his rehabilitation. In the applicants' cases, this meant that they had to be given reasonable opportunities to undertake courses aimed at addressing their offending behaviour and the risks they posed. Experience had shown that courses were necessary for dangerous prisoners to cease to be dangerous. While Article

[1] See, for example, *Dickson v. the United Kingdom* [GC], no. 44362/04, § 75, ECHR 2007-V; and *Boulois v. Luxembourg* [GC], no. 37575/04, § 83, ECHR 2012, with further references therein.

5 § 1 did not impose any absolute requirement for prisoners to have immediate access to all courses they might require, any restrictions or delays due to resource considerations had to remain reasonable. It was therefore significant that the Secretary of State had failed to anticipate the demands which would be placed on the prison system by the introduction of IPP sentencing, despite the relevant legislation having been premised on the understanding that rehabilitative treatment would be made available to IPP prisoners. Indeed, this failure had been the subject of universal criticism in the domestic courts and resulted in a finding that the Secretary of State had breached his public law duty. The Court therefore found a violation of Article 5 § 1 in this case.

In a case against Italy, *Mastromatteo v. Italy* [GC], no. 37703/97, ECHR 2002-VIII, the applicant's son was murdered by two prisoners who had been granted prison leave and had taken advantage of it to abscond. The Court observed that:

> "One of the essential functions of a prison sentence is to protect society, for example by preventing a criminal from re-offending and thus causing further harm. At the same time the Court recognises the legitimate aim of a policy of progressive social reintegration of persons sentenced to imprisonment. From that perspective it acknowledges the merit of measures – such as temporary release – permitting the social reintegration of prisoners even where they have been convicted of violent crimes."

It held that the safeguards built into the Italian system, for example the need for the prisoner to have a substantial record of cooperation and good behaviour, and the system of risk assessment by a judge in consultation with the prison authorities, provided sufficient protection for society. There was, therefore, nothing to suggest that the system of reintegration measures applicable in Italy at the material time was in itself in breach of the obligation to protect life under Article 2 ECHR. Nor was there anything in the material before the national authorities to alert them to the fact that the release of the two prisoners would pose a real and immediate threat to life, still less that it would lead to the tragic death of the applicant's son as a result of a chance sequence of events.

Successful rehabilitation can sometimes depend on the extent to which a prisoner is able to maintain ties to the outside world, so that when he is released he does not find himself isolated and excluded from mainstream society. The question has arisen whether there is a right under Article 8 ECHR (the **right to family life**) for prisoners to maintain contact with their families through family and conjugal visits. At the present time, the position is not entirely clear. In *Aliev v. Ukraine* (no. 41220/98, §§ 186-90, 29 April 2003) the Court found a statutory ban on long-term visits (which would allow conjugal visits to persons convicted to death) to be compatible with Article 8. Moreover, it recently confirmed that the Convention does not require the Contracting States to make provision for long-term or conjugal visits (see *Epners-Gefners v. Latvia*, no. 37862/02, § 62, 29 May 2012). On the other hand, in a recent judgment the Court has found a violation of Article 8 in very similar context (see *Trosin v. Ukraine*, no. 39758/05, 23 February 2012). It held that the restrictions for family visits were disproportionate as not involving the assessment of their necessity in the light of particular circumstances of each prisoner. The issue should be resolved by a case which has recently been referred to the Grand Chamber of the Court, *Khoroshenko v. Russia* [GC] (no. 41418/04). The case is a challenge to provisions of the Russian Penitentiary Code, which state that life-sentenced prisoners are excluded from long-term family visits during the first ten years of imprisonment. During this period they are entitled to one short-term visit (four hours) every six months in conditions excluding any privacy (glass partition, presence of guards). The hearing before the Grand Chamber is scheduled for 3 September 2014.

The possibility for prisoners to learn new skills to assist them with working life on the outside can also have an impact on reintegration. In a case from May of this year, *Velyo Velev v. Bulgaria*, no. 16032/07, the Court considered the question whether there was a right for a prisoner detained on remand to attend a prison school. In earlier cases the Court had held that the **right to education**

under Article 2 of Protocol No. 1 did not place an obligation on State authorities to take action to enable a person to pursue an education while in prison.[2] In Velyo Velev's case, however, there was a pre-existing school in the prison. The Court found that the Government had provided neither practical reasons, for example based on lack of resources at the school, nor a clear explanation as to the legal grounds for excluding the applicant.

It can be hard for an offender to access work when he or she has a criminal record which can be disclosed to prospective employers. In *MM v. the United Kingdom* no. 24029/07, the Court found that there had been a violation of Article 8 of the Convention (right to respect for private life) aring out of arrangements for the indefinite retention of data relating to a person's caution in a criminal matter and for the disclosure of such data in criminal record checks. The applicant had disappeared with her grandson for three days because of fears that the child's parents would move with him to Australia. She was arrested for child abduction and subsequently agreed to be cautioned for this offence by the police. She was informed by the police that the caution would remain on-record for five years. However, some six years later when she was offered a job as a family support worker, the existence of the caution was confirmed by the Criminal Records Office and the offer of employment was withdrawn.

Although the Court recognised that there might be a need for a comprehensive record of data relating to criminal matters, the indiscriminate and open-ended collection of criminal record data was unlikely to comply with Article 8 in the absence of clear and detailed statutory regulations clarifying the safeguards applicable and governing the use and disposal of such data, particularly bearing in mind the amount and sensitivity of the data.

CONCLUSION

As I mentioned at the beginning, the main focus of the Court's judgments on prisoners has been to ensure that prisoners are not placed in health-threateningly bad conditions, enjoy access to medical care and are protected from other forms of serious ill-treatment. However, the Court is also, increasingly, focussing on the need to ensure that the rehabilitative aim of sentencing is met. The case-law shows that the Court does not want to place too great a burden on national authorities, since it is aware that resources are tight and that there may sometimes be a tension between rehabilitation and the other purposes of imprisonment, notably protection of the public and punishment. However, where restrictions on prisoners' possibilities to prepare for release appear arbitrary or unreasonable, the Court will find violations of the relevant Convention rights.

[2] See, for example, *Epistatu v. Romania*, no. 29343/10, § 63, 24 September 2013.