

## Recent developments in the case-law of the European Court of Human Rights relating to the European Prison Rules of 2006

### *Introduction*

The purpose of the report is to give an overview of the developments in the Court's case-law regarding prisoners' rights in order to assist the Council for Penological Cooperation (PC-CP) in its task of revising the 2006 Prison Rules. It will also highlight the main difficulties and issues identified by the Court with respect to a particular country.

It should be noted that the Court is confronted with a considerable number of complaints coming from prisoners raising not only standard but also novel issues of general importance under the Convention, as demonstrated by the increasing number of Grand Chamber cases concerning prisoners' rights.<sup>1</sup>

In examining prison issues, the Court has stated that it attaches considerable importance to the European Prison Rules and other recommendations of the Committee of Minister dealing with specific aspects of penitentiary policy, despite their non-binding character.<sup>2</sup> The rules constitute a valuable guide for the Court which refers to them regularly and at length, when necessary,

The report will follow the structure of the Prison Rules and examine the main cases and new developments section by section.

### **Part I: Basic principles**

“2. Persons deprived of their liberty retain all rights that are not lawfully taken away by the decision sentencing them or remanding them in custody.

3 Restrictions placed on persons deprived of their liberty shall be the minimum necessary and proportionate to the legitimate objective for which they are imposed. “

The Court has set out the general principles regarding the rights of prisoners in two relatively recent Grand Chamber judgments. In *Hirst v. the United Kingdom (no. 2)* [GC], no. 74025/01, 6 October 2005, ECHR 2005-IX, a case concerning a general and automatic disenfranchisement of convicted prisoners (see also below), the Court underlined that

*69. ... that prisoners in general continue to enjoy all the fundamental rights and freedoms guaranteed under the Convention save for the right to liberty, where lawfully imposed detention expressly falls within the scope of Article 5 of the Convention. ...*

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<sup>1</sup> *Hirst v. the United Kingdom (no. 2)* [GC], no. 74025/01, 6 October 2005, ECHR 2005-IX; *Ramirez Sanchez v. France* [GC], no. 59450/00, 4 July 2006, ECHR 2006-IX; *Dickson v. the United Kingdom* [GC], no. 44362/04, 4 December 2007, ECHR 2007-XIII; *Kafkaris v. Cyprus* [GC], no. 21906/04, 12 February 2008, ECHR 2008-...; *Salduz v. Turkey* [GC], no. 36391/02, 27 November 2008; *Léger v. France (striking out)* [GC], no. 19324/02, 20 March 2009, ECHR 2009-...; and *Enea v. Italy* [GC], no. 74912/01, 17 September 2009, ECHR 2009-...

<sup>2</sup> *Rivière v. France*, no. 33834/03, § 72, 11 July 2006; *Dybeku v. Albania*, no. 41153/06, § 48, 18 December 2007

*Any restrictions on these other rights must be justified, although such justification may well be found in the considerations of security, in particular the prevention of crime and disorder, which inevitably flow from the circumstances of imprisonment ...*

*70. There is no question, therefore, that a prisoner forfeits his Convention rights merely because of his status as a person detained following conviction.”*

*In Dickson v. the United Kingdom [GC], no. 44362/04, 4 December 2007, ECHR 2007-XIII (the refusal of artificial insemination facilities in prison), it added that*

*“68. ... a person retains his or her Convention rights on imprisonment, so that any restriction on those rights must be justified in each individual case. This justification can flow, inter alia, from the necessary and inevitable consequences of imprisonment (§ 27 of the Chamber judgment)<sup>3</sup> or (as accepted by the applicants before the Grand Chamber) from an adequate link between the restriction and the circumstances of the prisoner in question. However, it cannot be based solely on what would offend public opinion.”*

## **Part II: Conditions of imprisonment**

### *Allocation and accommodation*

18.1 The accommodation provided for prisoners, and in particular all sleeping accommodation, shall respect human dignity and, as far as possible, privacy, and meet the requirements of health and hygiene, due regard being paid to climatic conditions and especially to floor space, cubic content of air, lighting, heating and ventilation.

18.4 National law shall provide mechanisms for ensuring that these minimum requirements are not breached by the overcrowding of prisons.

### Overcrowding:

Overcrowding continues to be a widespread problem in some countries, notably in Russia, Romania (*Florea v. Romania*, no. 37186/03, 14 September 2010), Moldova (*Ciorap v. Moldova*, no. 12066/02, 19 June 2007), Ukraine (*Malenko v. Ukraine*, no. 18660/03, 19 February 2009; *Visloguzov v. Ukraine*, no. 32362/02, 20 May 2010), and Poland.

In *Orchowski v. Poland*, no. 17885/04, 22 October 2009 the Court found that for many years, namely from 2000 until at least mid-2008, the overcrowding in Polish prisons and remand centres revealed a structural problem arising out of the malfunctioning of the administration of the prison system, amounting to “a practice that is incompatible with the Convention.”

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<sup>3</sup> The Chamber held in that para. as follows: “27. It nevertheless remains the case that any measure depriving a prisoner of liberty by definition has some effect on the normal incidents of liberty and inevitably entails limitations and controls on the exercise of Convention rights, including a measure of control on prisoners’ contacts with the outside world and, more particularly for present purposes, on the possibility of begetting a child. The fact of such control is not, in principle, incompatible with the Convention ... The key issue is whether the nature and extent of that control can be considered compatible with the Convention.”

The Court considered that the solution of the problem of overcrowding of detention facilities was closely linked to the solution of another structural problem, namely the excessive length of pre-trial detention, identified in the case of *Kauczor v. Poland*, no. 45219/06, § 58 *et seq.*, 3 February 2009.

It was 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 or logistical difficulties. If the State was unable to ensure that prison conditions comply with the requirements of Article 3 of the Convention, it should abandon its strict penal policy in order to reduce the number of incarcerated persons or put in place a system of alternative means of punishment.

The authorities had tried to alleviate the problem of overcrowdings by transferring prisoners from one detention facility to another. The Court however cautioned that too frequent transfers of detainees could 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. 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 detainee who is held in conditions which fall short of the Convention.

### Accommodation and safety

#### *Safety*

52.1 As soon as possible after admission, prisoners shall be assessed to determine whether they pose a safety risk to other prisoners, prison staff or other persons working in or visiting prison or whether they are likely to harm themselves.

52.2 Procedures shall be in place to ensure the safety of prisoners, prison staff and all visitors and to reduce to a minimum the risk of violence and other events that might threaten safety.

A noteworthy case under this section is *Rodić and 3 Others v. Bosnia and Herzegovina*, no. 22893/05, 27 May 2008, which concerns the detention of war criminals in a common prison. The applicants complained that they had been persecuted by their fellow prisoners because of their Serb and Croat origin and the nature of their offences (war crimes against Bosniacs). The Government argued in favour of the official policy of integration of those convicted of war crimes into the mainstream prison system.

The Court, for its part, did not consider that this policy as such was problematic. However, it cautioned that the implementation of the policy might raise issues under Article 3.

Because of all the atrocities committed during the war, inter-ethnic relations were still strained and serious incidents of ethnically motivated violence directed against prisoners of Serb and Croat origin were reported in the prisons. Taking into consideration also the ethnic composition of the population of Zenica Prison (approximately 90 per cent of prisoners are Bosniacs) and the nature of the applicants' offences (war crimes against Bosniacs), it was clear that the applicants' detention in Zenica Prison entailed a serious risk to their physical well-being.

Despite this, the applicants were placed in ordinary cell blocks where they had to share a cell with up to twenty other prisoners and share communal facilities with an even larger number of prisoners. Furthermore, Zenica Prison was experiencing at that time a serious shortage of staff. Although the

Government argued that that the relevant authorities had no real choice but to place the applicants in ordinary cell blocks in Zenica Prison, given that the prison was the only maximum-security prison in that part of the country and lacked facilities for separate accommodation of vulnerable prisoners, the Court considered that such structural shortcomings were of no relevance to the obligation of the respondent State to adequately secure the well-being of prisoners.

Notwithstanding the existence of a serious risk to the applicants' physical well-being, of which the prison administration was aware, no specific security measures were introduced for several months. The applicants' physical well-being was not adequately secured in the period from their arrival in Zenica Prison until they were provided with separate accommodation in the prison hospital unit (a period which lasted between one and ten months depending on the applicant).

Furthermore, the Court considers that the hardship the applicants endured, in particular the constant mental anxiety caused by the threat of physical violence and the anticipation of such went beyond the threshold of severity under Article 3 of the Convention.

#### Passive smoking:

The Court has recently adopted a judgment in the case of *Florea v. Romania*, no. 37186/03, 14 September 2010 where it examined the issue of passive smoking. A convicted prisoner suffering from various illnesses was confined for twenty-three hours daily, for nearly three years, in cells he shared with smokers and also had to endure his fellow inmates smoking in a prison infirmary and a prison hospital, despite medical recommendations to the contrary.

It observed that no consensus existed among the member States of the Council of Europe with regard to protection against passive smoking in prisons and examined the applicant's individual circumstances. The applicant had never had an individual cell and had to put up with his fellow prisoners' smoking even in a prison infirmary and on the wards for chronically ill patients of the prison hospital, against his doctor's advice. However, a law enacted in June 2002 prohibited smoking in hospitals and the Romanian courts had frequently held that smokers and non-smokers should be detained separately.

The Court distinguished this case from an earlier case concerning also passive smoking, *Aparicio Benito v. Spain*, no. 36150/03, 13 November 2006, where the applicant did have an individual cell and the only place where smoking was allowed was a television room. This, together with other elements (very cramped living conditions, lack of exercise, deplorable hygienic conditions) led the Court to find a violation of Art. 3.

#### *Nutrition*

22.1 Prisoners shall be provided with a nutritious diet that takes into account their age, health, physical condition, religion, culture and the nature of their work.

22.2 The requirements of a nutritious diet, including its minimum energy and protein content, shall be prescribed in national law.

22.4 There shall be three meals a day with reasonable intervals between them.

A violation of Article 3 on account of the insufficient diet provided to the applicant during his detention was found in *Moisejevs v. Latvia*, no. 64846/01, 15 June 2006. The applicant had regularly

suffered from hunger on the days of the court hearings. His lunch had been limited to a slice of bread, an onion and a piece of grilled fish or a meatball and in the evening he had received only a bread roll instead of a full dinner. The Court considered that such a meal was clearly insufficient to meet the body's functional needs, especially in view of the fact that the applicant's participation in the hearings by definition caused him increased psychological tension.

Insufficient diet was also a factor in the finding of a violation in *Jeronovičs v. Latvia*, no. 547/02, 1 December 2009, where the applicant had been deprived of food and sleep for 27 hours continuously.

#### *Legal advice*

23.1 **All prisoners are entitled to legal advice**, and the prison authorities shall provide them with reasonable facilities for gaining access to such advice.

23.2 Prisoners may consult on any legal matter with a legal adviser of their own choice and at their own expense.

23.4 **Consultations and other communications including correspondence about legal matters between prisoners and their legal advisers shall be confidential.**

23.5 A judicial authority may in exceptional circumstances authorise restrictions on such confidentiality to prevent serious crime or major breaches of prison safety and security.

23.6 **Prisoners shall have access to, or be allowed to keep in their possession, documents relating to their legal proceedings.**

The question of access to a lawyer in police custody was examined by the Grand Chamber in the case of *Salduz v. Turkey* [GC], no. 36391/02, 27 November 2008. Under Turkish law in force at the material time, the restriction imposed on the right of access to a lawyer was systematic and applied to anyone held in police custody, regardless of his or her age, in connection with an offence falling under the jurisdiction of the state security courts. In 2005 the law was changed so that all detained persons have the right of access to a lawyer from the moment they are taken into police custody.

The Court considered the right to a fair trial requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right.

In the circumstances of the case the Court did not rule on whether a suspect should be granted access to legal advice already from the moment he is taken into police custody or pre-trial detention, although several judges in their concurring opinion were of the view that the Court should have stated so in clear terms.

The restrictive interpretation of the *Salduz* judgment was ruled out in the subsequent case of *Dayanan v. Turkey*, no. 7377/03, 13 October 2009, ECHR 2009-... where the Court held that an accused must be able to benefit from the assistance of a lawyer as soon as he is deprived of liberty, regardless of any questioning. The fairness of proceedings against an accused person in custody required that he be able to obtain the whole range of services specifically associated with legal assistance: discussion of the case, organisation of the defence, collection of evidence, preparation for questioning, support to an accused in distress, and checking of the conditions of detention. The applicant, under the law then in force, had not had legal assistance while in police custody. That systematic restriction, on the basis of

the relevant statutory provisions, was sufficient for a violation of Article 6 to be found even though the applicant had remained silent when questioned in police custody.

Access to a lawyer from the very outset of deprivation of liberty constitutes also a fundamental safeguard against the ill-treatment of detained persons (*Türkan v. Turkey*, no. 33086/04, 18 September 2008)

As regards *consultations and other communications between prisoners and their legal advisers*, the Court has confirmed its case-law that confidential communication with one's lawyer is protected by the Convention as an important safeguard of one's right to defence. It has added that an interference with the lawyer-client privilege and does not necessarily require an actual interception or eavesdropping to have taken place. A genuine belief held on reasonable grounds that their discussion was being listened to might be sufficient to limit the effectiveness of the assistance which the lawyer could provide as it would inevitably inhibit a free discussion between a lawyer and a client.

The issue has arisen in a number of Moldovan cases where moreover a detainee was separated in a meeting room from his lawyer by a glass partition. The partition was a general measure affecting indiscriminately everyone in the remand centre, regardless of their personal circumstances. The Court was not convinced by the security reasons invoked by the Government and considered that visual supervision of the lawyer-client meetings would be sufficient for such purposes. It accordingly found a violation of Articles 5 § 4 or 34 of the Convention on account of the impossibility for the applicants to have unhindered discussions with their lawyers of issues relevant to challenging their detention on remand or to their petitions to the Strasbourg Court (*Oferta Plus S.R.L. v. Moldova*, no. 14385/04, 19 December 2006; *Castravet v. Moldova*, no. 23393/05, 13 March 2007; *Istrath and Others v. Moldova*, no. 8721/05, 8705/05 and 8742/05, 27 March 2007; *Modarca v. Moldova*, no. 14437/05, 10 May 2007).

A violation of the applicant's defence rights was also found in *Rybacki v. Poland*, no. 52479/99, 13 January 2009, where the applicant could not for over five months of his detention communicate with his lawyer out of earshot of the prosecutor or a person appointed by him.

Since 2006 the Court has also dealt with cases relevant to Rule 23.6, i.e. *prisoners' access to documents relating to their legal proceedings*. In particular, the issue has been the refusal of the authorities to provide the applicants with copies of documents relevant to their application before the Court. Such a refusal could render the substantiation of their applications before the Court deficient and thus impair the effectiveness of the exercise of their right of individual petition (*Chaykovskiy v. Ukraine*, no. 2295/06, 15 October 2009). An obligation to provide applicants with copies of documents necessary for examination of their applications will arise in the situations of particular vulnerability and dependence of applicants who are unable to obtain documents needed for their files, for example, because of the lack of a representative or contacts with a family.

A violation of Article 34 was found in cases where the documents were provided with a delay of more than one year (*Iambor v. Romania*, no. 64536/01, 24 June 2008) or where the prison authorities had required an applicant to pay for the copies of the needed documents in the knowledge that he had no resources and knowing also what the consequences of failure to send the documents to the Court would be (*Gagiu v. Romania*, no. 63258/00, 24 February 2009).

There seems to be a general issue with access to documents in Ukraine, where the authorities have found that there is no obligation to send to interested persons copies of documents from the case- files,

except for court decisions, following the completion of criminal proceedings (*Naydyon v. Ukraine*, no. 16474/03).

#### *Contact with the outside world*

**24.1 Prisoners shall be allowed to communicate as often as possible by letter, telephone or other forms of communication with their families, other persons and representatives of outside organisations and to receive visits from these persons.**

24.2 Communication and visits may be subject to restrictions and monitoring necessary for the requirements of continuing criminal investigations, maintenance of good order, safety and security, prevention of criminal offences and protection of victims of crime, but such restrictions, including specific restrictions ordered by a judicial authority, shall nevertheless allow an acceptable minimum level of contact.

24.3 National law shall specify national and international bodies and officials with whom communication by prisoners shall not be restricted.

**24.4 The arrangements for visits shall be such as to allow prisoners to maintain and develop family relationships in as normal a manner as possible.**

24.5 Prison authorities shall assist prisoners in maintaining adequate contact with the outside world and provide them with the appropriate welfare support to do so.

**24.10 Prisoners shall be allowed to keep themselves informed regularly of public affairs by subscribing to and reading newspapers, periodicals and other publications and by listening to radio or television transmissions unless there is a specific prohibition for a specified period by a judicial authority in an individual case.**

**24.11 Prison authorities shall ensure that prisoners are able to participate in elections, referenda and in other aspects of public life, in so far as their right to do so is not restricted by national law.**

#### Correspondence:

As regards prisoner's correspondence, the Court has confirmed that that some measure of control over this correspondence is called for and is not of itself incompatible with the Convention. However, the systematic monitoring of the entirety of the detainee's incoming and outgoing correspondence, as was the case in *Petrov v. Bulgaria*, 22 May 2008, 22 May 2008, cannot be considered as corresponding to a pressing social need or proportionate to the legitimate aim of the prevention of disorder and crime.

In line with its consistent case-law, the Court has also found a violation of Article 8 in cases where the monitoring of prisoners' correspondence was not "in accordance with the law", given that the relevant regulations did not indicate with reasonable clarity the scope and manner of exercise of the discretion conferred on the prison authorities in respect of screening prisoners' correspondence or regulate either the duration of measures monitoring prisoners' correspondence or the reasons capable of justifying such measures (see, for example, *Enea v. Italy* [GC], no. 74912/01, 17 September 2009, ECHR 2009-...; and *Onoufriou v. Cyprus*, no. 24407/04, 7 January 2010). It has emphasised that where measures interfering with prisoners' correspondence are taken, it is essential that reasons be given for the interference, such that the applicant and/or his advisers can satisfy themselves that the law has been correctly applied to him and that decisions taken in his case are not unreasonable or arbitrary (*Onoufriou*, § 113).

### Telephone:

The Court has previously held that Article 8 cannot be interpreted as guaranteeing prisoners the right to make telephone calls, in particular where the facilities for contact by way of correspondence are available and adequate (*A.B. v. the Netherlands*, no. 37328/97, §§ 92 and 93, 29 January 2002).

In a recent case of *Davison v. the United Kingdom*, no. 52990/08, 2 March 2010, the applicant complained that cost of a telephone call from a prison telephone was higher than the cost of a call from a public payphone if the call lasted more than two minutes and 45 seconds. A 15 minute call from prison cost more than five times the public rate. The Court did not need to decide whether prisoners should now be regarded as having a right under the Convention to use a phone, as the issue in the present case was not access to a telephone as such but rather the cost of the calls.

While acknowledging the limited financial means available to the applicant and the drawbacks associated with written correspondence, the Court nevertheless observed that the applicant was able to enjoy regular telephone contact with his family, albeit not as freely or as economically as he might have preferred. Moreover, even if the State authorities' policy of applying a higher rate for longer telephone calls from prison in order to subsidise the cost of shorter calls could be said to have given rise to an interference with the applicant's Article 8 rights, the Court considers that this policy pursued a "legitimate aim" and was "necessary in a democratic society."

The Court also rejected the applicant's complaint regarding discrimination due to his status as a prisoner, considering that he could not claim to be in an analogous situation to telephone users outside prison in view of his distinct legal situation as a convicted prisoner.

A further case of note concerning discriminatory treatment is *Petrov v. Bulgaria*, 22 May 2008, 22 May 2008, where the applicant was not allowed to use the telephone in prison to call his long-term partner with whom he had a child. Domestic law authorised calls only to spouses, parents, brothers and sisters and children.

In finding a violation of Article 14, the Court failed to see any difference between the situations of inmates who wish to have telephone conversations with their spouses and inmates who wish to have such conversations with their unmarried partners with whom – like the applicant – they have an established family life. While the Contracting States had a certain margin of appreciation to treat differently married and unmarried couples in the fields of taxation, social security or social policy, it was not readily apparent why married and unmarried partners who had an established family life were to be given disparate treatment as regards the possibility to maintain contact by telephone while one of them is in custody.

### Family contacts and visits:

In addition to cases where domestic law was found to lack the required quality (*Wegera v. Poland*, no. 141/07, 19 January 2010; *Gradek v. Poland*, no. 39631/06, 8 June 2010; *Onoufriou v. Cyprus*, no. 24407/04, 7 January 2010) or where the restriction on family visits was unjustified (*Kucera v. Slovakia*, no. 48666/99, 17 July 2007; *Ferla v. Poland*, no. 55470/00, 20 May 2008), the Court has recently examined cases concerning the prisoners' right to marry - *Frasik v. Poland*, no. 22933/02, 5 January 2010 and *Jaremowicz v. Poland*, no. 24023/03, 5 January 2010 – an area where is limited case-law.



In *Frasik*, the applicant was a remand prisoner who had been detained on charges of rape and battery of a woman. Subsequently the two reconciled and wanted to get married. Their request was refused, *inter alia*, on the grounds that there was doubt as to the sincerity of the couple's intention and that the remand centre was not an appropriate place for a marriage ceremony.

For the Court, personal liberty is not a necessary pre-condition for the exercise of the right to marry. It reiterated that a prisoner continues to enjoy fundamental human rights and freedoms that are not contrary to the sense of deprivation of liberty, including the right to marry. Detained persons do not forfeit their right guaranteed by Article 12 merely because of their status.

It is obvious that detention facilities are neither designated, nor freely and normally chosen for that purpose. What needs to be solved in a situation where a detained person wishes to get married is not the question of whether or not it is reasonable for him to marry in prison but the practical aspects of timing and making the necessary arrangements, which might, and usually will, be subject to certain conditions set by the authorities. Otherwise, they may not restrict the right to marry, unless there are important considerations flowing from such circumstances as danger to security in prison or prevention of crime and disorder. In the present case there was no indication that such circumstances existed.

The case of *Jaremwicz* concerned a prisoner serving a sentence. His request to marry a woman whom he had met in prison was refused on the grounds that they had become "acquainted illegally in prison" and in any event their relationship had represented nothing but "a very superficial and unworthy contact."

The Court accepted that in deciding whether or not to grant leave to marry to a prisoner, the authorities could have regard to such factors as the maintenance of good order, safety and security in prison. Furthermore, the aims of imprisonment, which necessarily encompass the rehabilitative elements, are considerations that are relevant in this context.

The authorities dealing with the applicant's request for leave to marry justified their refusal by reference to grounds which were in no way linked to prison security or prevention of disorder, but related to the assessment of the nature and the quality of the applicant's relationships with the woman concerned. Like in *Frasik*, the Court concluded that the Polish authorities' decisions were arbitrary and failed to strike a balance among various public and individual interests at stake in a manner compatible with the Convention,

The Court acknowledged that some administrative arrangements must be made by the prison authorities before a prisoner can marry. However, the same applies to other Convention rights, such as the right of access to a court, the right to vote and the right to respect for family life and correspondence, the exercise of which in prison requires, by the nature of things, a positive action on the part of the authorities to make the enjoyment of those rights effective.

Another important judgment relating to prisoners' family life is *Dickson v. the United Kingdom* [GC], no. 44362/04, 4 December 2007, ECHR 2007-XIII, which concerned the refusal of access to artificial insemination facilities to a couple, the husband serving a prison sentence and the wife living at liberty. The Court did not find that the grant of artificial insemination facilities would involve any security issues or impose any significant administrative or financial demands on the State. It also underlined the evolution in European penal policy towards the increasing relative importance of the rehabilitative aim of imprisonment, particularly towards the end of a long prison sentence. Although the grant of artificial

insemination facilities was possible in exceptional cases, the threshold established by the official policy was set so high against them from the outset that it did not allow a balancing of the competing individual and public interests and prevented the required assessment of the proportionality of a restriction, as required by the Convention.

The Court also noted that that more than half of the Contracting States allowed for **conjugal visits for prisoners**. However, while it has expressed its approval for the evolution in several European countries towards conjugal visits, it has not yet interpreted the Convention as requiring Contracting States to make provision for such visits. Accordingly, this is an area in which the Contracting States could enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention with due regard to the needs and resources of the community and of individuals

**24.10 Prisoners shall be allowed to keep themselves informed regularly of public affairs by subscribing to and reading newspapers, periodicals and other publications and by listening to radio or television transmissions**

Internet:

The Court has also received complaints concerning the lack of access to internet in prison. So far no public decision has been taken on this issue. The Court has recently (September 2010) communicated to the respondent Government a case under Article 10 of the Convention where the applicant, who was seeking information about enrolling at university, was refused access to internet.

**24.11 Prison authorities shall ensure that prisoners are able to participate in elections, referenda and in other aspects of public life, in so far as their right to do so is not restricted by national law.**

According to the Commentary on the Prison Rules this rule is an innovation and was inserted following a judgment by the Chamber of 30 March 2004 in the case of *Hirst (No. 2) v. the United Kingdom*. The case was subsequently examined also by the Grand Chamber which confirmed a violation of Article 3 of Protocol No. 1 on account of a law which imposed a blanket voting ban in parliamentary elections on all convicted prisoners in prison. It applied automatically to such prisoners, irrespective of the length of their sentence and irrespective of the nature or gravity of their offence and their individual circumstances.

Although there was no common European approach to the problem, such a general, automatic and indiscriminate restriction on a vitally important Convention right fell outside any acceptable margin of appreciation.

The Court pointed out that the Convention did not exclude that restrictions on electoral rights could be imposed on an individual who has, for example, seriously abused a public position or whose conduct threatened to undermine the rule of law or democratic foundations. The principle of proportionality requires a discernible and sufficient link between the sanction and the conduct and circumstances of the individual concerned. An independent court, applying an adversarial procedure, provides a strong safeguard against arbitrariness.

As regards the situation in member states that Court noted that in 14 other states all prisoners were barred from voting and in 12 states the right to vote of prisoners could be limited in some way. It is obvious that the *Hirst* judgment has thus implications for a number of countries.

Recently, the Court found a violation of Article 1 of Protocol No. 1 in an Austrian case - *Frodl v. Austria*, no. 20201/04, 8 April 2010 - where the provided for disenfranchisement to a more narrowly defined group of persons than in the UK, applying only in the case of a prison sentence exceeding one year and only to convictions for offences committed with intent. It nevertheless considered that the provisions of the National Assembly Election Act did not meet all the criteria established in *Hirst*. Under the *Hirst* test, besides ruling out automatic and blanket restrictions it is an essential element that the decision on disenfranchisement should be taken by a judge, taking into account the particular circumstances, and that there must be a link between the offence committed and issues relating to elections and democratic institutions.

The essential purpose of these criteria is to establish disenfranchisement as an exception even in the case of convicted prisoners, ensuring that such a measure is accompanied by specific reasoning given in an individual decision explaining why in the circumstances of the specific case disenfranchisement was necessary, taking the above elements into account. The principle of proportionality requires a discernible and sufficient link between the sanction and the conduct and circumstances of the individual concerned. However, no such link exists under the provisions of law which led to the applicant's disenfranchisement.<sup>4</sup>

#### *Work*

26.1 Prison work shall be approached as a positive element of the prison regime and shall never be used as a punishment.

26.17 As far as possible, prisoners who work shall be included in national social security systems.

Currently, a case is pending before the Grand Chamber – *Stummer v. Austria* (no. 37452/02) – which concerns precisely the issue of affiliation of working prisoners to social security and in particular to pension system. In that case the applicant had spent 28 years in prison, but was not affiliated to the old-age pension system for work performed as a prisoner.

#### *Transfer of prisoners*

32.1 While prisoners are being moved to or from a prison, or to other places such as court or hospital, they shall be exposed to public view as little as possible and proper safeguards shall be adopted to ensure their anonymity.

32.2 The transport of prisoners in conveyances with inadequate ventilation or light, or which would subject them in any way to unnecessary physical hardship or indignity, shall be prohibited.

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<sup>4</sup> In the light of these developments, it might be questioned whether Rule 24.11 – which refers broadly to national law - corresponds to the rather strict criteria applied by the Court to the disenfranchisement of prisoners.

Since 2005, the Court has examined the compatibility of transport conditions with the requirements of Article 3 of the Convention. Since this was a novel issue, it sought guidance from the findings of the CPT regarding the size of compartments suitable for transport.

The issue has arisen mainly in cases concerning Russia and Ukraine. The Court has found a violation in several such cases on account of the cramped conditions of transport, the number and frequency of transfers in such conditions (see *Khudoyorov v. Russia*, no. 6847/02, 8 November 2005, ECHR 2005-X; *Yakovenko v. Ukraine*, no. 15825/06, 25 October 2007; *Vlasov v. Russia*, no. 78146/01, 12 June 2008; *Starokadomskiy v. Russia*, no. 42239/02, 31 July 2008; *Moiseyev v. Russia*, no. 62936/00, 9 October 2008) and the use of a standard prison van to transport a post-operative patient from one hospital to another (*Tarariyeva v. Russia*, no. 4353/03, 14 December 2006, ECHR 2006-... ).

#### *Detained children*

35.1 Where exceptionally children under the age of 18 years are detained in a prison for adults the authorities shall ensure that, in addition to the services available to all prisoners, prisoners who are children have access to the social, psychological and educational services, religious care and recreational programmes or equivalents to them that are available to children in the community.

35.4 Where children are detained in a prison they shall be kept in a part of the prison that is separate from that used by adults unless it is considered that this is against the best interests of the child.

11.1 Children under the age of 18 years should not be detained in a prison for adults, but in an establishment specially designed for the purpose.

11.2 If children are nevertheless exceptionally held in such a prison there shall be special regulations that take account of their status and needs.

In *Güveç v. Turkey*, no. 70337/01, 20 January 2009, the Court found for the first time that the imprisonment of a minor in an adult prison amounted to inhuman and degrading treatment. The detention of the 15-year-old adolescent, in breach of domestic law, had lasted more than five years and had caused him severe physical and psychological problems resulting in three suicide attempts, without appropriate medical care being provided by the authorities.

In several judgments concerning Turkey, the Court has expressed its concern about the practice of detaining children in pre-trial detention (see *Selçuk v. Turkey*, no. 21768/02, § 35, 10 January 2006; *Koşti and Others v. Turkey*, no. 74321/01, § 30, 3 May 2007; *Nart v. Turkey*, no. 20817/04, 6 May 2008, § 34) and found violations of Article 5 § 3 of the Convention. For example, in *Selçuk* the applicant had spent some **four months** in pre-trial detention when he was sixteen years old and in *Nart* the applicant had spent **forty-eight days** in detention when he was seventeen years old. In *Güveç v. Turkey*, the applicant was detained from the age of fifteen and was kept in pre-trial detention for a period in excess of **four and a half years**.

In examining these cases, the Court took into account a number of international texts (including CM recommendations on juvenile delinquency, the UN Convention on the rights of the child) and recalled that the pre-trial detention of minors should be used only as a measure of last resort; it should be as short as possible and, where detention is strictly necessary, minors should be kept apart from adults. It appeared that the authorities never took the applicant's age into consideration when ordering

their detention or considered alternative methods. Furthermore, in some cases, the applicant was kept in a prison together with adults (*Nart, Güveç*).

#### *Foreign nationals*

37.4 **Specific information about legal assistance shall be provided to prisoners who are foreign nationals.**

A case of relevance under this section is *Diallo v. Sweden*, no. 13205/07, 5 January 2010 which the concerned the conviction of a foreign national – a French woman– for drug trafficking. The Court applied to interpreters the principle established in *Salduz* with regard to access to a lawyer, considering that the assistance of an interpreter should be provided at the investigation stage as from the first interrogation unless it is demonstrated that there are compelling reasons to restrict that right.

### **Part III Health**

#### *Health care*

39. Prison authorities shall safeguard the health of all prisoners in their care.

#### *Organisation of prison health care*

40.1 Medical services in prison shall be organised in close relation with the general health administration of the community or nation.

40.2 Health policy in prisons shall be integrated into, and compatible with, national health policy.

40.3 Prisoners shall have access to the health services available in the country without discrimination on the grounds of their legal situation.

40.4 Medical services in prison shall seek to detect and treat physical or mental illnesses or defects from which prisoners may suffer.

40.5 All necessary medical, surgical and psychiatric services including those available in the community shall be provided to the prisoner for that purpose.

#### *Medical and health care personnel*

**41.5 The services of qualified dentists and opticians shall be available to every prisoner.**

#### *Duties of the medical practitioner*

42.3 When examining a prisoner the medical practitioner or a qualified nurse reporting to such a medical practitioner shall pay particular attention to:

**a. observing the normal rules of medical confidentiality;**

In addition to the material conditions of detention, the question of adequate medical care in prison is the subject of frequent complaints before the Court. As a result, there is vast case-law on the subject dealing with a variety of medical conditions and the duty of the State to provide the requisite medical

assistance. A lack of appropriate medical care and, more generally, the detention in inappropriate conditions of a person who is ill may in principle amount to treatment contrary to Article 3.

In a number of recent cases (concerning in particular Russia, Azerbaijan, Ukraine, Moldova, and Georgia) the Court has emphasised that the mere fact that a detainee was seen by a doctor and prescribed a certain form of treatment does not automatically mean that the medical assistance was adequate. The authorities must also ensure that a comprehensive record is kept concerning the detainee's state of health and the treatment he underwent while in detention, that the diagnoses and care are prompt and accurate, and that where necessitated by the nature of a medical condition, supervision is regular and systematic and involves a comprehensive therapeutic strategy aimed at curing the detainee's diseases or preventing their aggravation, rather than addressing them on a symptomatic basis. In addition, the authorities must show that the necessary conditions were created for the prescribed treatment to be actually followed through.<sup>5</sup>

In *Poghosyan v. Georgia*, no. 9870/07, 24 February 2009, the Court noted the systemic nature of the lack of medical care in Georgian prisons, particularly with regard to the treatment of viral hepatitis C. Consequently, under Article 46 it invited Georgia to take legislative and administrative steps, without delay, to prevent the transmission of viral hepatitis C in prisons, to introduce screening arrangements for this disease and to ensure its timely and effective treatment.

It made a similar finding about the necessary general measures in a subsequent judgment in *Ghavitadze v. Georgia*, no. 23204/07, 3 March 2009, but with respect to infectious diseases in general, including tuberculosis, inviting the respondent State to introduce screening arrangements for these diseases.<sup>6</sup> It also considered that, as an individual measure, the State should transfer the applicant to an establishment capable of providing him with adequate medical care for his diseases, viral hepatitis C and TB.

The lack of adequate care for TB has been found to constitute a breach of Art. 3 also in cases against Ukraine (*Melnik v. Ukraine*, no. 72286/01, 28 March 2006; *Yakovenko v. Ukraine*, no. 15825/06, 25 October 2007; *Pokhlebin v. Ukraine*, no. 35581/06, 20 May 2010), Russia (*Gorodnitchev v. Russia*, no. 52058/99, 24 May 2007), Azerbaijan (*Hummatov v. Azerbaijan*, nos. 9852/03 and 13413/04, 29 November 2007) and Bulgaria (*Staikov v. Bulgaria*, no. 49438/99, 12 October 2006).

Inadequate treatment of prisoners suffering from HIV infection and AIDS have also been at the origin of violations of Art. 3 (*Artyomov v. Russia*, no. 14146/02, 27 May 2010, *Aleksanyan v. Russia*, no. 46468/06, 22 December 2008, and *Yakovenko v. Ukraine*, no. 15825/06, 25 October 2007).

The Court has also dealt with some novel aspects of medical care in prison, relating to dental and eye care, as well as medical confidentiality.

In *Slyusarev v. Russia*, no. 60333/00, 20 April 2010, upon the applicant's arrest, the authorities took away his glasses and procured new ones to him only 5 months later. As a result he could not read or write normally, and experienced a feeling of insecurity and helplessness during this long period. The Government did not provide any explanation for the delay of two and half months before the

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<sup>5</sup> See *Malenko v. Ukraine*, no. 18660/03, 19 February 2009 for this summary with further references.

<sup>6</sup> By contrast, in *Gavrilita v. Romania*, no. 10921/03, 22 June 2010, the Court considered that the authorities could not be criticised for not carrying out systematic tests for TB on the arrival of each inmate.

applicant was examined by a specialist doctor or why it took a further two months to have the new glasses made. For the first time in such a situation the Court found that there had been degrading treatment, while marking its agreement with the case-law of the Commission (which found no ill-treatment as a result of being deprived of glasses for a few days).

The case of *V.D. v. Romania*, no. 7078/02, 16 February 2010 concerned the refusal to provide dentures to an impoverished and toothless prisoner on the ground that he was unable to contribute to the cost. This had serious consequences for the applicant's health, as he was incapable of feeding himself correctly. The Court dealt for the first time with this particular aspect of the medical care to be provided to impoverished prisoners. It found that the regulations on social cover for prisoners were ineffective, in that they were frustrated by administrative obstacles (particularly the absence of agreements between the social insurance fund for prisoners and dental surgeries in prisons).

The Court dealt for the first time with medical confidentiality in prison in *Szuluk v. the United Kingdom*, no. 36936/05, 2 June 2009 concerning the monitoring by a prison medical officer of "medical" correspondence between a convicted prisoner, who had undergone brain surgery twice, and a neuroradiology specialist, who was supervising his hospital treatment. The judgment in which the Court found a violation of Article 8, is important in that the Court refused, in substance, to make a distinction in this connection between patients who were in prison and those who were at liberty. It also accepted that a prisoner with a life-threatening medical condition might wish to seek confirmation outside the prison that he was receiving adequate medical treatment.

On the standard of medical care to be provided for prisoners, the Court has stated that it does not always adhere to the principle of the equivalence of health care in prison with that in the outside community, advocated by the CPT. It has held on several occasions that Article 3 of the Convention cannot be interpreted as securing to every detained person medical assistance of the same level as "in the best medical institutions for the general public" It has also accepted that "in principle the resources of medical facilities within the penitentiary system are limited compared to those of civil[ian] clinics" (see *Isayev v. Ukraine*, no. 28827/02, 28 May 2009; *Aleksanyan v. Russia*, no. 46468/06, 22 December 2008; *Okhrimenko v. Ukraine*, no. 53896/07, 15 October 2009). The Court reserves sufficient flexibility in defining the required standard of health care, deciding it on a case-by-case basis. That standard should be "compatible with the human dignity" of a detainee, but should also take into account "the practical demands of imprisonment" (*ibidem*). The practical demands of detention may impose restrictions a prisoner will have to accept. Article 3 cannot be interpreted as requiring a prisoner's every wish and preference regarding medical treatment to be accommodated (*Mathew v. the Netherlands*, no. 24919/03, 29 September 2005).

As regards general preventive measures (with respect to risks which do not raise Art. 2 or 3 issues), the Court considers that they are in principle within the margin of appreciation of the domestic authorities who are best placed to assess priorities, use of resources and social needs. It has found that the difference in preventive policy applied in prisons where needle exchange programs for combating drug use were not available as they were in the community was justified (*Shelley v. the United Kingdom* (dec), no. 23800/06, 4 January 2008). It was relevant in this context that the risk of infection primarily flew from conduct by the prisoners themselves which they know, or should know, is dangerous to their own health, a situation that can be contrasted with damage to health flowing from conditions for which the authorities themselves are directly responsible.

### *Mental health*

47.1 Specialised prisons or sections under medical control shall be available for the observation and treatment of prisoners suffering from mental disorder or abnormality who do not necessarily fall under the provisions of Rule 12.

47.2 The prison medical service shall provide for the psychiatric treatment of all prisoners who are in need of such treatment and pay special attention to suicide prevention.

12.1 Persons who are suffering from mental illness and whose state of mental health is incompatible with detention in a prison should be detained in an establishment specially designed for the purpose.

12.2 If such persons are nevertheless exceptionally held in prison there shall be special regulations that take account of their status and needs.

A structural problem with providing adequate medical care to mentally ill prisoners was observed in Albania in case of *Dybeku v. Albania*, no. 41153/06, 18 December 2007, where the applicant was treated like the other inmates, despite the fact that he had been suffering from chronic paranoid schizophrenia. Although he had regular visits to the prison's hospital, this could not be viewed as a solution since the applicant was serving a sentence of life imprisonment.

Ruling under Article 46, the Court considered that the State should taken the necessary measures as a matter of urgency in order to secure appropriate conditions of detention and adequate medical treatment, in particular, for prisoners, like the applicant, who need special care owing to their state of health.<sup>7</sup> The judgment is important as it is the first case in which Article 46 has been applied in relation to detention conditions.

The Court was faced with a similar problem in *Slawomir Musial v. Poland*, no. 28300/06, 20 January 2009. In that case the applicant was suffering from epilepsy, schizophrenia and other mental disorders, but was detained in various detention facilities designed for healthy prisoners. For the Court, detaining him in establishments not suitable for incarceration of the mentally-ill, raised a serious issue under the Convention.

It showed the failure of the authorities' commitment to improving the conditions of detention in compliance with the recommendations of the Council of Europe. In particular, the Court noted that the recommendations of the Committee of Ministers to the member States, namely Recommendation No. R (98) 7 concerning the ethical and organisational aspects of health care in prison and Recommendation on the European Prison Rules provide that prisoners suffering from serious mental disturbance should be kept and cared for in a hospital facility which is adequately equipped and possesses appropriately trained staff.

Applying Article 46, the Court considered that necessary legislative and administrative measures should be taken rapidly in order to secure appropriate conditions of detention of detained persons, in particular, adequate conditions and medical treatment for prisoners, who, like the applicant, need special care owing to their state of health.

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<sup>7</sup> See also *Rivière v. France*, no. 33834/03, 11 July 2006 where the conditions of detention were not appropriate for a person with a mental disorder.



As an individual measure, it further requested Poland to secure, at the earliest possible date, the adequate conditions of the applicant's detention in an establishment capable of providing him with the necessary psychiatric treatment and constant medical supervision.

#### Suicide prevention:

Prisoners known to be suffering from serious mental disturbance and to pose a suicide risk require special measures geared to their condition. The case of *Renolde v. France*, no. 5608/05, 16 October 2008, concerned the suicide of a man in pre-trial detention who had been punished by confinement for forty-five days in a disciplinary cell, despite the fact that he suffered from an acute psychotic illness and had attempted suicide three days prior to the confinement. The Court found that the authorities had failed in their positive obligation to protect the detainee's right to life by not considering at any point his placement in a psychiatric institution, by not supervising the administration of his medication (given for several days at a time), and by imposing the heaviest disciplinary sanction without taking into account his condition. It held, for the first time in this type of situation, that there had been a violation of Article 2.

### **Part IV Good order**

#### *Special high security or safety measures*

- 53.1 Special high security or safety measures shall only be applied in exceptional circumstances.**
- 53.2 There shall be clear procedures to be followed when such measures are to be applied to any prisoner.**
- 53.3 The nature of any such measures, their duration and the grounds on which they may be applied shall be determined by national law.
- 53.4 The application of the measures in each case shall be approved by the competent authority for a specified period of time.
- 53.5 Any decision to extend the approved period of time shall be subject to a new approval by the competent authority.
- 53.6 Such measures shall be applied to individuals and not to groups of prisoners.
- 53.7 Any prisoner subjected to such measures shall have a right of complaint in the terms set out in Rule 70.

#### *Discipline and punishment*

- 56.1 Disciplinary procedures shall be mechanisms of last resort.
59. Prisoners charged with disciplinary offences shall:
- a. be informed promptly, in a language which they understand and in detail, of the nature of the accusations against them;**
  - b. have adequate time and facilities for the preparation of their defence;**
  - c. be allowed to defend themselves in person or through legal assistance when the interests of justice so require;**
  - d. be allowed to request the attendance of witnesses and to examine them or to have them examined on their behalf; and**
  - e. have the free assistance of an interpreter if they cannot understand or speak the language used at the hearing.**

60.2 The severity of any punishment shall be proportionate to the offence.

60.4 Punishment shall not include a total prohibition on family contact.

60.5 **Solitary confinement** shall be imposed as a punishment only in exceptional cases and for a specified period of time, which shall be as short as possible.

61. A prisoner who is found guilty of a disciplinary offence shall be able to appeal to a competent and independent higher authority.

### Special prison regime

The extension of the application of the special prison regime (to an applicant was in issue in *Enea v. Italy [GC]*, no. 74912/01, 17 September 2009. The applicant had been convicted for membership of a Mafia-type organisation, drug trafficking and illegal possession of firearms and a special prison regime involving a number of restrictions (section 41 bis of the Prison Administration Act) was imposed on him during a period of 11 years.

The Court accepted that the extended application of certain restrictions may place a prisoner in a situation that could amount to inhuman or degrading treatment. However, it could not define a precise length of time beyond which such a situation attains the minimum threshold of severity required to fall within the scope of Article 3. On the contrary, the length of time must be examined in the light of the circumstances of each case; this entails, *inter alia*, ascertaining whether the renewal or extension of the restrictions in question was justified or not.

In finding no violation of Art. 3, the Court considered that the restrictions imposed as a result of the special prison regime were necessary to prevent the applicant, who posed a danger to society, from maintaining contacts with the criminal organisation to which he belonged. There was no evidence showing that the extension of those restrictions was patently unjustified.

### Solitary confinement

One of the most important cases in this area is the Grand Chamber case of *Ramirez Sanchez v. France*, no. 59450/00, 4 July 2006, where the applicant – a convicted terrorist – was held in solitary confinement for a period of 8 years and 2 months.<sup>8</sup> The Court referred at length to the 2006 prison rules and found that the physical conditions in which the applicant was detained were proper and complied with those rules. It also considered that applicant was not in complete sensory isolation or total social isolation. His isolation was partial and relative. The main issue in this case was the length of such confinement.

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<sup>8</sup> As regards the application of special confinement measures to terrorists, see also *Babar Ahmad, Haroon Rashid Aswat, Syed Tahla Ahsan and Mustafa Kamal Mustafa (Abu Hamza) v. the United Kingdom*, application nos. 24027/07, 11949/08 and 36742/08, decision of 6 July 2010. paras. 126-131.

While accepting that a prisoner's segregation from the prison community does not in itself amount to inhuman treatment, the Court emphasised that in order to avoid any risk of arbitrariness, substantive reasons must be given when a protracted period of solitary confinement is extended. The decision should thus make it possible to establish that the authorities have carried out a reassessment that takes into account any changes in the prisoner's circumstances, situation or behaviour. The statement of reasons will need to be increasingly detailed and compelling the more time goes by.

Furthermore, such measures, which are a form of "imprisonment within the prison", should be resorted to only exceptionally and after every precaution has been taken. A system of regular monitoring of the prisoner's physical and mental condition should also be set up in order to ensure its compatibility with continued solitary confinement.

The Court also underlined that solitary confinement, even in cases entailing only relative isolation, cannot be imposed on a prisoner indefinitely. Moreover, it is essential that the prisoner should be able to have an independent judicial authority review the merits of and reasons for a prolonged measure of solitary confinement.

It would also be desirable for alternative solutions to solitary confinement to be sought for persons considered dangerous and for whom detention in an ordinary prison under the ordinary regime is considered inappropriate.

Although the Court found no violation of Article 3 (having regard to the physical conditions of the applicant's detention, the fact that his isolation is "relative", the authorities' willingness to hold him under the ordinary regime, his character and the danger he poses) it did voice concern about the particularly lengthy period the applicant has spent in solitary confinement and considered that the applicant who had now been held under the ordinary prison regime should not in principle be confined to a solitary cell in the future.

*In Onoufriou v. Cyprus*, no. 24407/04, 7 January 2010, it further expanded on the requirement of procedural safeguards which must accompany a decision to place a prisoner in solitary confinement in order to guarantee the prisoner's welfare and the proportionality of the measure.

The Court pointed to a lacuna in the Prison regulations of Cyprus as regards the guarantees to be afforded to those placed in solitary confinement.

In particular, it noted the lack of an adequate justification for the applicant's detention in solitary confinement, the uncertainty concerning its duration, the failure to put in place a reliable system to record solitary confinement measures and to ensure that the applicant was not confined beyond the authorised period, the absence of any evidence that the authorities carried out an assessment of the relevant factors before ordering his confinement and the lack of any possibility to challenge the nature of his detention or its conditions.

The proportionality of a punitive measure imposed upon a prisoner is an important factor when assessing whether or not the unavoidable level of suffering inherent in detention has been exceeded. Issues under 3 have arisen when a prison administration has chosen to apply the most severe disciplinary sanction, without considering such facts as the nature of the wrongdoing, the prisoner's personality and the fact that it was his first such breach. (*Ramishvili and Kokhreidze v. Georgia*, no.

1704/06, 27 January 2009). Solitary confinement of a mentally ill has also been considered as excessive sanction (*Renolde v. France*, no. 5608/05, 16 October 2008).

59. Prisoners charged with disciplinary offences shall:
- a. be informed promptly, in a language which they understand and in detail, of the nature of the accusations against them;
  - b. have adequate time and facilities for the preparation of their defence;
  - c. **be allowed to defend themselves in person or through legal assistance when the interests of justice so require;**
  - d. be allowed to request the attendance of witnesses and to examine them or to have them examined on their behalf; and
  - e. have the free assistance of an interpreter if they cannot understand or speak the language used at the hearing.

As regards the procedural guarantees afforded to prisoners the Court has found, in the case of *Gülmez v. Turkey*, no. 16330/02, 20 May 2008, a structural problem in Turkey where prisoners could not have a public hearing when challenging a disciplinary sanction imposed on them (such as a ban on visiting rights), the competent judges examining their complaints only on the basis of the case-file.

The Court considered that the violation of Article 6, on account of the lack of public hearings during the proceedings, revealed a systemic problem arising out of the legislation itself and invited the respondent State to bring it into line with the European Prison Rules of 2006, including Rule 59c.

It appears that the defect in the legislation may have been cured by a new law adopted on 22 July 2010.

#### *Use of force*

64.1 Prison staff shall not use force against prisoners except in self-defence or in cases of attempted escape or active or passive physical resistance to a lawful order and always as a last resort.

64.2 The amount of force used shall be the minimum necessary and shall be imposed for the shortest necessary time.

66. Staff who deal directly with prisoners shall be trained in techniques that enable the minimal use of force in the restraint of prisoners who are aggressive.

67.1 Staff of other law enforcement agencies shall only be involved in dealing with prisoners inside prisons in exceptional circumstances.

Under this section a few drastic cases should be mentioned, involving the use of force against prisoners by a group of special forces.

First, in *Davydov and Others v. Ukraine*, nos. 17674/02 and 39081/02, 1 July 2010, special forces had conducted training exercises in a prison during which the applicants had been injured and humiliated. They were all in a vulnerable position, unable to defend themselves or to protect themselves from excessive use of force or humiliating searches. They were being treated as objects in the course of these trainings. The applicants were unable to complain against abuses in the course of the training sessions as they could not identify masked perpetrators or lodge their complaints through the legally available to them channels as these channels involved censorship of their correspondence by the alleged perpetrators and specific personal negative consequences such as imposing administrative sanctions on

them for their complaints. . The system in force had enabled penitentiary officials not to record injuries and not to react to medical complaints.

Excessive force was used against the prisoners, without any justification or lawful grounds. The force and special equipment were used without any reasonable grounds and contrary to international standards for use of force and special equipment.

The Court accepted as legitimate the need to train and keep staff prepared for possible unexpected conduct of prisoners, including conduct related to mass riots or taking of hostages, for which the special forces were being trained.

There was however a positive obligation on the State to train its law enforcement officials in such a manner as to ensure their high level of competence in their professional conduct so that no-one is subjected to torture or treatment that runs contrary to Article 3 of the Convention. This also presupposes that the training activities of law enforcement officials, including officials of the penitentiary institutions, are not only in line with that absolute prohibition, but also aim at prevention of any possible treatment or conduct of a State official, which might run contrary to the absolute prohibition of torture, inhuman or degrading treatment or punishment.

In *Artyomov v. Russia*, no. 14146/02, 27 May 2010, a group of officers of the special purpose unit carried out certain operations in the correctional colony where the applicant was detained. Those operations included, in particular, searches of all premises within the colony and body searches of the detainees. All officers wore balaclava masks and carried rubber truncheons. The operation had been accompanied by repeated and severe beatings as a consequence of which a number of inmates, including the applicant, sustained multiple injuries. The Court did not discern any circumstance which might have necessitated the use of violence against the applicant. Since the applicant fully complied with the orders of the officers, the use of force was intentional, retaliatory in nature and aimed at debasing the applicant and forcing him into submission.

In another incident in the same case, a rubber truncheon had been used against the applicant in response to the unruly conduct of detainees. The Court was mindful of the potential for violence that exists in penitentiary institutions and of the fact that disobedience by detainees may quickly degenerate into a riot. It therefore accepted that the use of force may be necessary on occasion to ensure prison security, to maintain order or to prevent crime in penitentiary facilities. Nevertheless, such force may be used only if indispensable and must not be excessive. Recourse to physical force which has not been made strictly necessary by the detainee's own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3 of the Convention. In the present case, the use of rubber truncheons against the applicant was grossly disproportionate to the applicant's conduct, i.e. his refusal to leave his cell, and retaliatory in nature.

A violation of Art. 3 was also found in *Dedovskiy and Others v. Russia*, no. 7178/03, 15 May 2008 on account of the systematic, indiscriminate and unlawful use of rubber truncheons by members of a special prison security unit on convicted prisoners serving their sentences, by way of retaliation or punishment.

*Instruments of restraint*

68.2 **Handcuffs**, restraint jackets and other body restraints shall not be used except:

- a. if necessary, as a precaution against escape during a transfer, **provided that they shall be removed when the prisoner appears before a judicial or administrative authority** unless that authority decides otherwise; or
- b. by order of the director, if other methods of control fail, in order to protect a prisoner from self-injury, injury to others or to prevent serious damage to property, provided that in such instances the director shall immediately inform the medical practitioner and report to the higher prison authority.

68.3 **Instruments of restraint shall not be applied for any longer time than is strictly necessary.**

Under the Court's case law, the use of handcuffs or other instruments of restraint does not normally give rise to an issue under Article 3 of the Convention where the measure has been imposed in connection with a lawful detention and does not entail the use of force, or public exposure, exceeding what is reasonably considered necessary.

No justification for the use of handcuff has been found in the following circumstances:

1) handcuffing of a mentally ill prisoner for a period of 7 days around the clock during his solitary confinement without any psychiatric opinion or justification (*Kucheruk v. Ukraine*, no. 2570/04, 6 September 2007);

2) mandatory handcuffing during force feeding, regardless of any resistance (*Ciorap v. Moldova*, no. 12066/02, 19 June 2007; see also *Nevmerzhitsky v. Ukraine*, no. 54825/00, 5 April 2005).

3) handcuffing of a sick prisoner to a wall heater in a hospital while waiting for his operation (*Istratii and Others v. Moldova*, no. 8721/05, 27 March 2007);

4) handcuffing of a prisoner suffering from cancer to his bed in a hospital (*Okhrimenko v. Ukraine*, no. 53896/07, 15 October 2009);

5) handcuffing during court hearings (*Gorodnichev v. Russia*, application no. 52058/99, 25 May 2007).

#### *Requests and complaints*

70.1 Prisoners, individually or as a group, shall have ample opportunity to make requests or complaints to the director of the prison or to any other competent authority.

70.2 If mediation seems appropriate this should be tried first.

70.3 If a request is denied or a complaint is rejected, reasons shall be provided to the prisoner and the prisoner shall have the right to appeal to an independent authority.

70.4 Prisoners shall not be punished because of having made a request or lodged a complaint.

70.5 The competent authority shall take into account any written complaints from relatives of a prisoner when they have reason to believe that a prisoner's rights have been violated.

70.6 No complaint by a legal representative or organisation concerned with the welfare of prisoners may be brought on behalf of a prisoner if the prisoner concerned does not consent to it being brought.

70.7 Prisoners are entitled to seek legal advice about complaints and appeals procedures and to legal assistance when the interests of justice require.

In *Enea v. Italy* [GC], no. 74912/01, 17 September 2009 the Court stressed that any restriction affecting these individual *civil rights* must be open to challenge in judicial proceedings, on account of the nature of the restrictions (for instance, a prohibition on receiving more than a certain number of visits from family members each month or the ongoing monitoring of correspondence and telephone calls) and of their possible repercussions (for instance, difficulty in maintaining family ties or relationships with non-family members, exclusion from outdoor exercise). By this means it is possible to achieve the fair balance which must be struck between the constraints facing the State in the prison context on the one hand and the protection of prisoners' rights on the other.

While it is essential for States to retain a wide discretion with regard to the means of ensuring security and order in the difficult context of prison, the Court reiterated that justice cannot stop at the prison gate and there is no justification for depriving inmates of the safeguards of Article 6, in particular the right of access to a court.

It also observed that the great majority of member states recognise that prisoners enjoy most of the rights set out in the Council of Europe Prison Rules and provide for avenues of appeal against measures restricting those rights.

I should be noted that the Convention (Article 6) requires access to judicial authorities with complaints concerning prisoners' *civil rights*, for example, concerning a prisoner's family visits or correspondence or his pecuniary rights. Not all prisoners' rights fall into that category.

More recently, in a Portuguese case – *Stegarescu and Bahrin v. Portugal*, no. 46194/06, 6 April 2010, the Court found a violation of Art. 6 on account of the fact that the applicants could not challenge the orders by which they had been placed in a high security cell. Their placement in the cell had had a number of consequences affecting their “civil rights and obligations”: restriction on receiving visits to one hour a week and the inability to continue studies and take exams. However the applicants never received the orders and there were also doubts about the jurisdiction of the administrative courts in such matters.

## **Part VIII**

### *Objective of the regime for sentenced prisoners*

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.

102.2 Imprisonment is by the deprivation of liberty a punishment in itself and therefore the regime for sentenced prisoners shall not aggravate the suffering inherent in imprisonment.

### *Release of sentenced prisoners*

107.1 Sentenced prisoners shall be assisted in good time prior to release by procedures and special programmes enabling them to make the transition from life in prison to a law-abiding life in the community.

107.2 In the case of those prisoners with longer sentences in particular, steps shall be taken to ensure a gradual return to life in free society.

107.3 This aim may be achieved by a pre-release programme in prison or by partial or conditional release under supervision combined with effective social support.

107.4 Prison authorities shall work closely with services and agencies that supervise and assist released prisoners to enable all sentenced prisoners to re-establish themselves in the community, in particular with regard to family life and employment.

107.5 Representatives of such social services or agencies shall be afforded all necessary access to the prison and to prisoners to allow them to assist with preparations for release and the planning of after-care programmes.

Recently the Court has dealt with several cases concerning lengthy or life prison sentences, taking into account both the Prison Rules and the specific recommendations of the CM (2003) on conditional release and the management of life sentence and other long-term prisoners.

In *Léger v. France*, no. 19324/02, 11 April 2006, the applicant who had received a life sentence was released only after 41 years of imprisonment, a period which in the Court's view raised serious questions about the management of life prisoners in France.

The Court observed that there was no uniform parole system in the member States of the Council of Europe, but considered that the criteria applied for granting conditional release was somewhat vague under the discretionary parole system in France. It was also of the view that significant progress was still required in order to encourage the return of prisoners to the community through personalised assistance programmes involving supervision from the start of their detention.

The Court, in its Chamber formation, found no violation of either Article 3 or 5 of the Convention, although these findings were not unanimous. The case was then referred to the Grand Chamber, but before it could rule on it, the applicant and his lawyer died. The case was therefore struck out of the list of cases on 20 March 2009, the Grand Chamber noting that the relevant law had in the meantime changes and that the issues raised in that case had been resolved in other cases before it, in particular in *Kafkaris v. Cyprus* of 2008.

In the *Kafkaris v. Cyprus*, no. 21906/04, 12 February 2008 the Grand Chamber examined the question whether a life sentence is compatible with Article 3 of the Convention. It found that while the imposition of a sentence of life imprisonment on an adult offender is not in itself prohibited by the Convention, an issue under Article 3 could arise if that sentence was irreducible, that is if a prisoner has no prospect, hope or possibility of release. Where national law affords the possibility of review of a life sentence with a view to its commutation, remission, termination or the conditional release of the prisoner, this will be sufficient to satisfy Article 3. A life sentence is not "irreducible" merely because the possibility of early release is limited nor because, in practice, the sentence may be served in full.

The applicant criticised the lack of a parole board system in Cyprus, but the Court considered that matters relating to early release policies, including the manner of their implementation, fall within the power member States have in the sphere of criminal justice and penal policy.

The Court had nevertheless regard to the standards prevailing amongst the member States of the Council of Europe in the field of penal policy, in particular concerning sentence review and release arrangements. It also took into account the increasing concern regarding the treatment of persons



serving long-term prison sentences, particularly life sentences, reflected in a number of Council of Europe text

In the Court's view, at the present time there is not yet a clear and commonly accepted standard amongst the member States of the Council of Europe concerning life sentences and, in particular, their review and method of adjustment. Moreover, no clear tendency can be ascertained with regard to the system and procedures implemented in respect of early release.

In the circumstances of the case the Court considered that the applicant was not deprived of any prospect of release and that his continued detention as such, even though long, did not constitute inhuman or degrading treatment. It was conscious of the shortcomings in the procedure currently in place<sup>9</sup> and noted the recent steps taken by the Government for the introduction of reforms.

The Court has also recently examined the issue of preventive detention, that is a system to protect the public against dangerous offenders after they had already served their sentences. The system exists in about 9 member states.

In *M. v. Germany*, no. 19359/04, 17 December 2009, the applicant had been sentenced to 5 years of imprisonment and 10 years of preventive detention, which was the maximum term under the law then in force. During the period of his preventive detention, a new law entered into force which abolished the 10-year time limit, and the applicant continued to be held in detention after the 10 year point. The issue before the Court was the lawfulness of the applicant's continued detention under Article 5 and the retrospective extension of his preventive detention from a maximum period of ten years to an unlimited period of time under Article 7 of the Convention (prohibiting the imposition of a heavier penalty than the one applicable at the time of the offence).

In determining whether the applicant's preventive detention amounted to a penalty, the Court examined the nature of the measure of preventive detention in Germany. It noted that persons subject to preventive detention are detained in ordinary prisons, albeit in separate wings and there was no substantial difference between the execution of a prison sentence and that of a preventive detention order. There appeared to be no special measures, instruments or institutions in place, other than those available to ordinary long-term prisoners, directed at persons subject to preventive detention and aimed at reducing the danger they present and thus at limiting the duration of their detention to what is strictly necessary in order to prevent them from committing further offences.

The Court endorsed the view of the CPT and the Human Rights Commissioner that persons subject to preventive detention are in particular need of psychological care and support. They must be afforded such support and care as part of a genuine attempt to reduce the risk that they will reoffend, thus serving the purpose of crime prevention and making their release possible.

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<sup>9</sup> In particular, there was no obligation to inform a prisoner of the Attorney-General's opinion on his application for early release or for the President to give reasons for refusing such an application. In addition, there was no published procedure or criteria governing the operation of the applicable provisions. Consequently, a life prisoner was not aware of the criteria applied or of the reasons for the refusal of his application. Lastly, a refusal to order a prisoner's early release was not amenable to judicial review.

However, currently there was an absence of additional and substantial measures – other than those available to all long-term ordinary prisoners serving their sentence for punitive purposes – to secure the prevention of offences by the persons concerned.

The Court also noted that the suspension of preventive detention on probation is subject to a court's finding that there is no danger that the detainee will commit further (serious) offences, a condition which may be difficult to fulfil. It was concerned about the length of the applicant's continued preventive detention which had been more than three times the length of his prison sentence.

Although the Court has thus recognised the legitimate aim of a policy of progressive social reintegration of persons sentenced to imprisonment, it is equally clear that States have a duty under the Convention to take measures for the protection of the public from violent crime. The obligation to afford general protection to society against potential danger from a person who had been convicted for a violent crime was at issue in *Maiorano and Others v. Italy*, no. 28634/06, 15 December 2009. In that case, a dangerous criminal who was serving a life sentence committed a double murder while being on day release from prison. The Court could not find fault in general with the arrangements in Italy for the resettlement of prisoners. The system had a legitimate aim and provided for sufficient safeguards. However, the manner in which that system had been applied in this case was questionable.

The Court took the view that the granting by the sentence execution court of day release to the prisoner, despite his criminal record and behaviour in prison, together with the failure by the public prosecutor's office to forward information on his criminal activities to the sentence execution judge, had constituted a breach of the duty of care required by Article 2 of the Convention.

### ***Conclusion***

The above overview demonstrates that there have been a number of important developments in the Court's recent case-law regarding the situation of prisoners. In the last five years it has examined unprecedented cases raising new issues under the Convention while confirming the existing case-law in standard cases.

It has identified general problems with overcrowding in Moldova, Poland, Romania and Russia as well as with the lack of adequate medical care in Albania, Azerbaijan, Georgia, Moldova, Russia and Ukraine. This has prompted it to indicate to the respective Governments the general measures to be taken and requested in certain cases the transfer of the applicants to appropriate conditions.

There have also been problems with the quality of law which served as a basis for interfering with prisoners' rights<sup>10</sup> or with complying with domestic law.<sup>11</sup>

The Court views unfavourably blanket or systematic restrictions on prisoners' rights resulting from a law, policy or practice which do not allow for the balancing of the individual and public interests

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<sup>10</sup> See Art.8 cases (correspondence and visits) against Cyprus, Italy and Poland.

<sup>11</sup> See, inter alia, Turkish cases concerning detention of children; and the Romanian passive smoking case.

involved<sup>12</sup>. The failure of the national authorities to carry out such balancing exercise in a concrete case is bound to lead to the violation of the Convention<sup>13</sup>

The Court has further identified problems with procedural safeguards available to the prisoners in respect of measures restricting their rights<sup>14</sup> as well as with the proportionality of the measures imposed.<sup>15</sup> Excessive use of force against prisoners and unjustified use of handcuffs continues to be a source of concern in respect of some countries.<sup>16</sup>

As regards rehabilitation programs for long-term prisoners and their conditional release, the Court has considered that in France progress needed to be made in order to encourage the return of prisoners to the community through personalised assistance programmes involving supervision from the start of their detention. Persons in preventive detention in Germany lacked the necessary psychological care and support to help reduce the risk that they will reoffend and thus making their release possible. In Cyprus, shortcomings were found in the procedure for early release.

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Toomas Sillaste  
Registry of the European Court of Human Rights  
Research and Library Division

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<sup>12</sup> See, for example, the UK cases of *Hirst* and *Dickson* and also *Petrov v. Bulgaria* and Moldovan cases concerning a glass partition in the lawyer/client meeting room.

<sup>13</sup> See, for example, the Polish marriage cases.

<sup>14</sup> For example cases concerning disciplinary proceedings in Turkey and solitary confinement in Cyprus.

<sup>15</sup> See, inter alia, cases involving excessive disciplinary sanctions against Georgia and France.

<sup>16</sup> Such as Russia, Ukraine and Moldova.

