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## Taking Prison Law Cases; a Practical Approach.

Mary Rogan

*Technological University Dublin, mary.rogan@tudublin.ie*

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# TAKING PRISON LAW CASES: A PRACTICAL APPROACH

*Dr. Mary Rogan BL*

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## **TAKING PRISON LAW CASES: A PRACTICAL APPROACH**

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This publication seeks to raise awareness of prison law and prisoners' rights jurisprudence amongst legal professionals, and to increase their research capacity in these areas. It is part of a series of three papers, one of which examines accountability structures and the law regulating Irish prisons; the other explores the law on aspects of prison conditions.

The topic of this paper is 'taking prison law cases: a practical approach'. It seeks to address some practical aspects of taking prison law cases such as the causes of action available, matters relating to evidence, the possible role of interested agencies, and the effect of the release or transfer of a prisoner on a claim.

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This paper seeks to state the law as of June 2012. No liability is accepted for any errors or omissions or for how this document is used. It is intended as a form of research assistance for legal practitioners and not to act as a substitute for legal advice. All errors and omissions are the responsibility of Dr. Mary Rogan. Those using this document are encouraged to submit any corrections and/or supplementary information to Dr. Mary Rogan at [mary.rogan@dit.ie](mailto:mary.rogan@dit.ie).

The full text of relevant international legal instruments on prisons and prisoners' rights, along with reports of the Council of Europe's Committee for the Prevention of Torture, the Inspector of Prisons, and other bodies, can be found at [www.iprt.ie/prison-law](http://www.iprt.ie/prison-law).

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## STRUCTURE OF THE PAPER

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This paper first gives a brief examination of the possible causes of action when a prisoner has an issue with respect to aspects of his or her detention. Secondly, matters practitioners may wish to consider regarding disclosure are explored. The paper then discusses questions of evidence and how a prisoner might record details relevant to his or her claim. The paper then examines discussion of the role of potentially interested parties and the use of international human rights standards and commentary. The paper concludes with an examination of the rules on mootness, of particular relevance when a prisoner is released or transferred out of the impugned conditions.

Practitioners may also find the resources at [www.iprt.ie/prison-law](http://www.iprt.ie/prison-law) of assistance. There you will find sources of the law regarding prisons and academic material. Links to the reports of the Committee for Prevention of Torture and other human rights bodies, reports of the Inspector of Prisons, Visiting Committees, and other reports on Irish prisons can also be found here.

## CONSIDERING POSSIBLE CAUSES OF ACTION

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Practitioners will be familiar with the usual avenues pursued on behalf of prisoners such as *habeas corpus* applications, judicial review of e.g. a Governor's decision or an action of the Irish Prison Service, and plenary proceedings.

On the question of whether to proceed by way of *habeas corpus* or judicial review, the following summary of the relevant considerations was given by Edwards J in the case of *Devoy v. Governor of Portlaoise Prison* (hereinafter *Devoy*).

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1. Convicted prisoners, as human beings and citizens, have rights under the Constitution, including a right of access to the courts.
  2. Many of these rights are abrogated, suspended or limited by reason of the prisoner's conviction and sentence.
  3. A prisoner lawfully convicted and sentenced has lost his right to personal liberty for the period of his sentence. Therefore, *habeas corpus* is not an appropriate procedure in which to investigate his complaints.
  4. Exceptionally, however, the conditions under which a prisoner is detained may be such as to make his detention unlawful, notwithstanding the existence of a valid warrant. In such case, *habeas corpus* will lie.
  5. Lesser legitimate complaints of prisoners fall to be investigated in other forms of legal proceedings.
  6. The prisoners' subsisting rights can often be ascertained from the Prison Rules themselves, read in the light of the Constitution.<sup>1</sup>
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The relative merits of judicial review, plenary proceedings and *habeas corpus* applications in terms of speed, publicity, and overall aim of the client are obviously relevant factors for practitioners considering the most effective cause of action.

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<sup>1</sup> [2009] IEHC 288, at p. 55.

As discussed in more detail in the paper on aspects of the law relating to prison conditions, the Irish courts have proven themselves reluctant to release a prisoner on the basis that the conditions in which s/he is detained are in breach of constitutional rights. The case of *Kinsella v. Governor of Mountjoy Prison*<sup>2</sup> (hereinafter *Kinsella*) also indicates that the courts may take a pragmatic approach to the question of release even if a breach of constitutional rights has been found. There, Hogan J found that the right of Mr. Kinsella to bodily integrity had been breached because of the conditions of his detention. However, because the prison authorities were found to have been acting with the best of intentions in keeping Mr. Kinsella in these conditions, Hogan J held that the prisoner could not, at that time, be said to be in unlawful custody. Hogan J considered this practical approach was an example of constructive engagement between the Executive and the judiciary in constitutional actions. The prisoner was transferred to another prison the following day. Hogan J also found that the applicant might have other causes of action in e.g. mandamus or negligence.

A similarly practical approach to a remedy was adopted in *Devoy*, where the right of a prisoner to association was at issue. In the course of the proceedings the prison authorities stated that there were fears for the safety of others should the association be granted. Edwards J held:

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In the circumstances I am satisfied that the first named respondent's decision to restrict the applicant's association other than in accordance with Rule 62 was unlawful and I will grant a declaration to that effect. However, in the exercise of my discretion I will not grant *certiorari* to quash that decision. Although in most circumstances an applicant for judicial review who has established that a decision which he has sought to impugn was unlawful will be entitled *ex debito justitiae* to an order of *certiorari*, it would be wholly inappropriate to grant that relief to this particular applicant in the circumstances of this case. The State, and its agencies, have a duty to protect life. This Court, although part of the judicial arm of government, is nonetheless an agency of the State and is equally bound by that duty. In circumstances where the evidence suggests that the perceived threat to life persists, and where the right of the applicant that is being breached is a statutory right only, and not a constitutional or human right, it would be inappropriate for the Court to immediately quash the impugned decision.<sup>3</sup>

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Practitioners might also note that the usual test for deciding whether a prisoner's rights under the Constitution have been breached is whether the prisoner can establish 'evil intent' on the part of the prison authorities. This has been most recently restated in *Mulligan v. Governor of Portlaoise Prison*.<sup>4</sup> This is a high hurdle faced by any prisoner applicant. However, in *Kinsella*, Hogan J, while not explicitly overruling the usual test, found a breach of a prisoner's rights in the absence of a finding of evil intent.

2 [2011] IEHC 235.

3 [2009] IEHC 288, at p. 88.

4 [2010] IEHC 269.

The decision of the High Court in *Foy v. Governor of Cloverhill Prison* also indicates the difficulties faced by prisoners seeking to challenge decisions of the prison authorities. There, Charleton J held:

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It is only possible to mount a challenge to the decision of a governor where it is shown to both infringe a right and, as to the balance of the exercise of that right with the duty of the governor to ensure proper order within the prison, to fly in the face of fundamental reason and common sense. Such cases are, of their nature, difficult to prove. A prison governor is entitled to some measure of latitude in judgment as to the decision which he or she makes.<sup>5</sup>

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As well as the more traditional routes in prison law matters, practitioners might, however, also consider other causes of action. Tort claims such as negligence, trespass to the person, and false imprisonment are potential avenues. These torts may well be at issue if there are concerns about the negligence of prison staff or medical staff, or arising out of the actions of other prisoners, or from dangerous or defective premises. The tort of misfeasance in public office involves the deliberate abuse of power by an agent of a public body. It might also be considered for an appropriate case.

## DISCLOSURE

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As the authors in Livingstone et al's *Prison Law* make clear:

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In prison cases more than most, disclosure and inspection is frequently a vital stage in the process of establishing a winning claim. This is mainly because, until a prisoner obtains access to the documents in the hands of the prison authorities, he will have few, if any, contemporaneous records relating to the matter in dispute.<sup>6</sup>

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The authors also suggest using third party disclosure e.g. from the police if they have interviewed people in relation to claims of assault.

Livingstone et al, writing in the context of England and Wales, also suggest documents which the Prison Service may disclose. These include the prisoner's full personal record, including disciplinary record, any transfers, security information, suicide attempts, special medical problems etc. The prisoner's medical records may clearly be relevant. Reports concerning any periods of segregation, the use of force, or injuries to the prisoner may also be of interest.

The difficulty is that prisons in England and Wales are obliged to keep records using uniform forms and uniform procedures. It is far from clear as to whether that such consistency is present across the penal estate in Ireland. However, seeking such documents from the Irish Prison Service is important, and may yield results. If the prison authorities are unable to provide records of a person's complaint or medical records, issue might be taken with this in the proceedings. As discussed in the second paper in this series, the European Prison Rules call on prison authorities to document all complaints properly.

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<sup>5</sup> [2010] IEHC 529, at paragraph 22.

<sup>6</sup> Livingstone, Owen and Macdonald, *Prison Law* (Oxford, Oxford University Press, 2008), at p. 128.

## PREPARING EVIDENCE IN PRISON ACTIONS

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Prisoners face several difficulties in gathering evidence necessary to bring an action. Seeking independent medical advice may be difficult and costly, or delayed. It may be difficult to obtain statements from witnesses. Prisoners may end up being transferred or released.

Livingstone et al state that: "in these circumstances it is essential that a prisoner who believes that he or she is the victim of any form of injustice should take as many steps as possible to strengthen any subsequent legal action by following a number of basic rules". It is worth quoting these in full:

1. Take steps at the earliest moment to write a clear, chronological account of the relevant incident or sequence of events. If a prisoner has difficulty in reading or writing, he or she should seek assistance from a fellow prisoner or sympathetic member of staff. Sign and date the statement and ask someone (preferably a member of the prison staff such as a probation officer or the chaplain) to countersign and date it. If the statement is made sufficiently soon after the incident in dispute, it can be used as a memory-refreshing document in court. It will be bound to be more reliable than a statement given to a solicitor many months later. Make sure that the statement is not vague and generalized. It is no good in an assault claim merely to say 'Prison officers X and Y viciously attacked me'. The statement must record, as much as possible, who did what, giving details of what blows were landed where, whether they were kicks or punches, and how many were delivered. Where the identify of any assailant is unknown, give as detailed a description as possible. . .
2. Establish at the earliest possible moment the identities of any witnesses and try to obtain written statements from them while memories are fresh. These too should be dated, signed, and preferably countersigned. Where the prison authorities make it difficult to obtain such statements, make a formal complaint and keep a record of it. Follow up the complaint with a letter to an MP if that does not produce results.
3. Where any injury whatsoever is sustained, demand access to any medical report compiled by the prison medical officer. If it does not fully record all the complaints made and the injuries sustained ask for the report to be amended. If this is refused, ask that the request is formally recorded. Failing this, make an immediate complaint about the quality of the medical report and follow it up with a letter to an MP. In actions for assault, the prison medical officer's report will normally be the only one available to support (or destroy) the prisoner's claim and now that a medical report which supports all injuries pleaded must be. . . .A complaint two years after the incident that the medical report is inaccurate will carry far less weight than an immediate, formal objection to its content.
4. Where the complaint relates to a lengthy course of conduct such as persistently poor medical treatment or long-term segregation in intolerable conditions, keep a contemporaneous diary of events (preferably countersigned each day). Such a document can be a vital weapon in establishing credibility, accuracy, and reliability as well as being an important counter to the records maintained by the prison authorities.
5. Contact a solicitor as soon as possible whenever legal action is contemplated. A solicitor will be able to provide advice on how to preserve and collect evidence relevant to the claim but he or she cannot remedy any failures to follow steps 1–4 above, which all rest on immediate action by the potential prisoner-claimant.<sup>7</sup>

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<sup>7</sup> Livingstone, Owen and Macdonald, *Prison Law* (Oxford, Oxford University Press, 2008) at pp. 130–131.



The European Court of Human Rights has commented on the standard of proof in cases alleging breaches of Article 3 of the Convention and the nature of evidence which a prisoner might be expected to provide. While accepting that the burden lies on the prisoner to produce sufficient evidence of treatment amounting to a breach of Article 3, the Court has also taken a pragmatic approach to the difficulties faced by prisoners in proving their claims. In *Ananyev v. Russia* the Court noted that while ‘beyond reasonable doubt’ was the standard adopted, this was not to be taken as a straightforward application of those terms within national legal systems.<sup>8</sup> The ‘level of persuasion’ depends on the nature of the facts and the rights at stake. The Court also noted that it was mindful of the difficulties faced by applicants seeking to collect evidence to support their claims. The Court held that prisoners could not realistically be expected to, for example, have photographs of their cells or precise measurements of the cells. The Court also stated that the principle of ‘he who asserts must prove’ is not always rigorously applied in such cases as it will usually be the Government rather than the prisoner who will have access to information capable of corroborating or refuting the allegations of prisoners. However, the Court also held “an applicant must provide an elaborate and consistent account of the conditions of his or her detention”.<sup>9</sup>

### EXPERT EVIDENCE

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Practitioners will be familiar with the usual sources of expertise such as medical practitioners and psychologists in prison law actions. Outside of these, it is notable that *Napier v. Scottish Ministers*<sup>10</sup> involved expert evidence given by experts in architecture, environmental psychology, and building regulations.

In this regard, it is also useful to note that damage to a prisoner’s physical or mental health is not a prerequisite to a successful claim under Article 3 of the European Convention on Human Rights, though the treatment must reach a minimum level of severity. Examples of cases where the Court has explained that damage to physical or mental health is by no means essential include *Peers v. Greece*<sup>11</sup> and *Dougoz v. Greece*.<sup>12</sup>

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<sup>8</sup> 10 January 2012, no. 4525/07, 60800/08, at paragraph 121.

<sup>9</sup> 10 January 2012, no. 4525/07, 60800/08, at paragraph 122.

<sup>10</sup> [2004] UKHRR 881.

<sup>11</sup> 19 April 2001, no. 28524/95.

<sup>12</sup> 6 March 2001, no. 40907/98.

## THE ROLE OF INTERESTED AGENCIES

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The Irish Human Rights Commission (IHRC), under the Human Rights Commission Act 2000, can offer its expertise in human rights law to the High Court or the Supreme Court in suitable cases involving human rights issues. In such cases, the IHRC acts as an *amicus curiae* or ‘friend of the court’ and is a neutral third party in the case.

The question of standing for interested non-governmental organisations has been considered in *Irish Penal Reform Trust, Lennon and Carroll v. Governor of Mountjoy Prison*.<sup>13</sup> There, the Irish Penal Reform Trust (IPRT) had sought to be a party to a case involving the treatment of two prisoners with psychiatric illnesses in Mountjoy prison. The standing of IPRT was challenged by the State.

In the High Court, Gilligan J held that he was “of the view that *Cahill v. Sutton* would support a relaxation of the personal standing rules, provided the relevant person or body is genuine, acting in a bona fide manner, and has a defined interest in the matter in question”.<sup>14</sup>

Furthermore, the court held:

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It is almost indisputable that prisoners with psychiatric problems are amongst the most vulnerable and disadvantaged members of society. Indeed, many prisoners are ignorant of their rights and might fear retribution if they challenge the prison authorities. Furthermore, prisoners might not be aware of the fact that they have a constitutional right to receive a better standard of treatment. This puts this particular category of persons in an extremely disadvantaged position and their willingness and ability to adequately assert their constitutional rights may suffer as a result.

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As such:

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The I.P.R.T., being a human rights organisation established to campaign for the rights of people in prison and the progressive reform of the Irish penal policy, has a certain expertise and the financial ability necessary to mount an effective challenge to alleged systematic failings in the Irish prison system. I am of the opinion that the claim can be more effectively litigated by the I.P.R.T. who is in a position to identify and analyse systematic failings in the system.”<sup>15</sup>

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The State appealed to the Supreme Court, which appeal failed. There is no written judgment from the Supreme Court, which ruled that the question of standing should be heard in the substantive proceedings, which has yet to happen.<sup>16</sup>

<sup>13</sup> [2005] IEHC 305.

<sup>14</sup> [2005] IEHC 305, at p. 12.

<sup>15</sup> [2005] IEHC 305, at p. 14.

<sup>16</sup> See further, Herrick, “Obstacles to Litigation for Prisoners: Case Study of IPRT, Lennon and Carroll v. Governor of Mountjoy Prison, paper delivered at PILA Seminar, February 12<sup>th</sup> 2012.

The more recent decision of *Digital Rights Ireland v. The Minister for Communications, Marine and Natural Resources*<sup>17</sup> (hereinafter *Digital Rights Ireland*) gave detailed consideration to the issue of standing. There, the court held it was appropriate to deal with the question as a preliminary one. The court held:

It would thus seem to me that, in principle, a company should not be prevented from bringing proceedings to protect the rights of others where, without otherwise being disentitled, it has a bona fide concern and interest, taking into account the nature of the right which it seeks to protect or invoke.<sup>18</sup>

In the view of McKechnie J, the court should also examine whether the plaintiff was a ‘crank’, or a meddlesome or vexatious litigant. *Digital Rights Ireland* followed the High Court decision in *Irish Penal Reform Trust Ltd v. Governor of Mountjoy Prison* in this regard. McKechnie J also held that the court should keep in mind that it had a duty to prevent the unconstitutional abuse of public power. If it was clear that an act of a public body could adversely affect an individual’s rights or society as a whole, a more relaxed approach to standing might be called for.

### **USING INTERNATIONAL HUMAN RIGHTS INSTRUMENTS AND COMMENTARY**

Though not incorporated into Irish law, the usefulness of referring to instruments such as the European Prison Rules, the UN Minimum Standards for the Treatment of Prisoners and reports of the Council of Europe for the Committee for the Prevention of Torture lies in the fact that they are all regularly cited by the European Court of Human Rights when it is examining the application of the Convention and the content of its guarantees.

The Scottish courts have also explicitly stated that in prison cases they must: “take account of the case law of the ECtHR, but also (a) commonly accepted international standards in member states of the Council of Europe; (b) the work of the CPT; (c) international standards under the auspices of the United Nations; and (d) any consensus of learned and informed opinion within the United Kingdom on the acceptability or otherwise of the conditions complained of”.<sup>19</sup>

### **THE PRISONER WHO IS RELEASED OR TRANSFERRED: MOOTNESS**

If a prisoner obtains early release or is transferred to another prison, the argument may be made that the proceedings have become moot and there is no longer a live issue between the parties.

The general principles regarding mootness are that when there is no longer a dispute, the Court will not proceed with a purely academic analysis of the issue. Nor will the Court offer advisory judgments. In particular, judicial review is a discretionary remedy and will not be granted if the matters raised are merely hypothetical or abstract.

In *Goold v. Collins and others*<sup>20</sup> the Court held that a matter was moot if it will not have the effect of resolving some controversy affecting or potentially affecting the rights of the parties. Such a live controversy must be present, not only when the action or proceedings is commenced, but also when the Court is called upon to reach a decision.

Proceedings may not be considered moot, however, if the matters raised concern issues which have future ramifications for the parties involved. A finding of mootness may also be avoided if it can be argued that an issue is bound to recur.

<sup>17</sup> [2010] 3 IR 251.

<sup>18</sup> [2010] 3 IR 251, at paragraph 35.

<sup>19</sup> *Re Greens and others* [2011] CSOH 79, at paragraph 208.

<sup>20</sup> [2004] IESC 38.

For example, in *O'Brien v. Personal Injuries Assessment Board*<sup>21</sup> PIAB was found to have acted unlawfully. PIAB appealed, but during the appeal the substantive issue between the parties had been resolved by agreement. The Supreme Court held the matter was not moot because PIAB had a real and current interest in the issues pending the appeal regarding the exercise of its statutory powers. The respondent had an interest in the case regarding how it should exercise its statutory functions with respect to many applications.

In *PV (a minor) v. Courts Service*<sup>22</sup> the High Court held that the starting point in any consideration of mootness is a determination of whether the issue sought to be litigated is still alive in any meaningful sense. Furthermore, there may be circumstances in which a matter should be determined even though, strictly speaking, it is moot. The court held, further, that if the same issue was likely to arise in very many cases, the rules on mootness might be relaxed. There may also be cases where, practically speaking, it may be impossible to have a final determination on important legal issues unless the courts are prepared to relax a strict application of a mootness rule. The court held that, nonetheless, it is clear that the cases where the court should depart from the general rule should be limited and the discretion to entertain moot proceedings should be sparingly exercised. Hogan and Whyte state further, with regard to constitutional actions:

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There are, however, definite limits to the mootness doctrine. Thus, a case will not generally be moot where the statute has already actually or potentially affected a plaintiff's rights or interests, even though the course of conduct has come to an end or even where the statutory provision in question has expired. The application of the doctrine is, in any event, subject to the over-riding consideration of doing justice between the parties.<sup>23</sup>

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The kinds of remedies sought in judicial review proceedings in particular should be considered in this regard, particularly declarations and damages.

<sup>21</sup> [2008] IESC 71.

<sup>22</sup> [2009] 4 IR 264.

<sup>23</sup> Hogan and Whyte, Kelly, *The Irish Constitution*, (Dublin, Butterworths, 2003).

