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Mary Rogan
Technological University Dublin, mary.rogan@tudublin.ie

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Prisoners' rights and the separation of powers: comparing approaches in Ireland, Scotland and England and Wales

Introduction

The decision of Hogan J in *Kinsella v. Governor of Mountjoy Prison* [2011] IEHC 235 (hereinafter *Kinsella*) is an important development in the protection of prisoners' constitutional rights in Ireland. The decision, which found that a prisoner's right to have his person protected had been breached by his detention in a padded cell with a cardboard box for use as a toilet in conditions amounting to a form of sensory deprivation, may represent a new direction for prison law jurisprudence. The judgment is also of significance for its analysis of the circumstances in which conditions of detention can give rise to an order for release under Article 40.4 of the Irish Constitution, which allows for the immediate release of a person found to be detained otherwise in accordance with law.

Though of particular interest in the Irish context, the judgment in *Kinsella* is of relevance beyond Ireland, in the areas of prison litigation as well as for its analysis of the delicate interplay between the Executive and the courts in the area of prison administration.

This note examines the implications of the decision in *Kinsella* and compares the response of the courts of Scotland and England and Wales to the claims of prisoners that their rights have been breached. The note examines the innovative way judges have responded to the breach of constitutional rights when there are strong countervailing interests of the Executive, and argues that the difficult position in which courts are placed in such cases has been precipitated by a failure at the policy-making level.

The facts in Kinsella

The applicant was at the time of his application under Article 40.4.2, a prisoner in Mountjoy Prison. The application was made on the grounds that his constitutional rights had been infringed due to the prison conditions he was required to endure such that his detention

had become unlawful. The right to liberty in Ireland is constitutionally guaranteed and the remedy of *habeas corpus* is also enshrined within the Constitution itself.[1]

The applicant was on protection, meaning that his life would be in danger if he were to be allowed to mix freely with the majority of other prisoners. He had been detained in an observation cell in the basement of the prison. The cell was entirely padded and contained nothing other than a mattress, and was approximately three metres by three metres, with a small window providing some natural light. The window had a shutter but there was a dispute in evidence as to whether the shutter was working at the time of detention. The applicant further maintained that he was provided with no reading material and had no access to a radio or television. Regarding toilet arrangements, Hogan J stated: "the sanitation facilities – if this is really the correct term in the circumstances – simply consist of a cardboard box".[2]

All parties agreed that the applicant had spent "virtually all" of the eleven days prior to the application confined to this padded cell. Mr. Kinsella had the opportunity to make one telephone call of six minutes duration every day. The Deputy Governor of the prison agreed in evidence that the applicant was also entitled to one hour's recreational exercise each day as well as an opportunity to shower. The applicant gave evidence that these facilities had not been afforded to him and the Deputy Governor could not controvert this as he had been away on official business. Hogan J held that even if the applicant were to have received this period of recreation, "this would have only marginally ameliorated these conditions".[3]

The cell in which the applicant was detained was designed to act as temporary accommodation for disturbed prisoners requiring protection from self harm or who pose an immediate threat to other prisoners. Mr Kinsella did not fall into either of those categories. Hogan J held that it was "clear that the prison authorities are wholly motivated by a desire to protect Mr Kinsella from harm and that they bear him no ill-will".[4] In Hogan J's words, "the real problem is the shortage of single cells within the prison system given that,

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[1] On the right to liberty in Ireland *see, inter alia* GW Hogan and GF Whyte, *JM Kelly: The Irish Constitution* (4th edition, Dublin, Lexis Nexis Butterworths, 2003), Chapter 7.4; J Casey, *Constitutional Law in Ireland* (3rd edition, Dublin, Sweet & Maxwell, 2000); On the remedy of *habeas corpus* see K Costello, *Habeas Corpus in Ireland* (Four Courts Press, Dublin, 2006).

[2] *Kinsella v. Governor of Mountjoy Prison* [2011] IEHC 235, page 3.

[3] *Ibid*.

[4] *Ibid*.

unfortunately, Mr Kinsella is not the only prisoner who needs to be protected in this fashion".[5] Hogan J accepted the evidence of the Deputy Governor that the authorities had regularly and consistently sought alternative accommodation for the applicant.

The compliance of the conditions of detention with the Constitution

Hogan J considered the application of Article 40.3.2 of Bunreacht na hÉireann, the Constitution of Ireland, which requires the State by its laws to "protect as best it may from unjust attack and, in the case of injustice done, to vindicate the life, person, good name and property rights of every citizen". Hogan J accepted that the right to life may be engaged by the conditions, but it was the State's duty to protect and vindicate the person of the applicant which was principally engaged in the application, noting "it is undeniable that detention in a padded cell of this kind involves a form of sensory deprivation.[6] Hogan J noted he was using the term "a form of sensory deprivation" advisedly as the conditions were still very far removed from the five techniques condemned by the European Court of Human Rights in *Ireland v. United Kingdom.*[7]

Hogan J considered that the protection afforded by Article 40.3.2 was not simply the integrity of the human body, "but also the integrity of the human mind and personality"[8] and that extended detention in such circumstances gave rise to the risk of psychiatric disturbance.

The nature of the conditions

Hogan J considered that even making all due allowances for the exigencies of prison life and the difficulties faced by the prison authorities in making complex arrangements for a wide variety of prisoners with different needs who often require protection, such detention "compromises the essence and substance of this constitutional guarantee, irrespective of the crimes he has committed or the offences with which he is charged".[9]

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[5] *Ibid*.
[6] *Ibid*.
[7] (1978) 2 EHRR 25. For in-depth analysis of the rights of prisoners under Article 3 of the European Convention on Human Rights, see: Foster, S.H. (2005) 'Prison conditions, human rights and Article 3'. *Public Law*, 33-42.
[8] *Kinsella*, p. 5.
[9] *Ibid*.

Hogan J held that it was not the case that such a cell could never be used, and different considerations might arise in the case of disturbed prisoners or where there was a need for temporary accommodation on an emergency basis, "but detention in such conditions for well over a week fails to meet the minimum standards of confinement pre-supposed" by Article 40.3.2. Accordingly, Hogan J found that the conditions under which the applicant was detained constituted a violation of his constitutional right to the protection of the person.

Breach of rights and release

The next question for the court was whether the violation was such as to entitle him to immediate and unconditional release. Hogan J noted that the court may enjoy "some residual jurisdiction" for the purposes of making its orders effective, short of full release. In this regard, Hogan J referred to the judgment of O'Higgins CJ in *The State (McDonagh) v. Frawley*[10] which held that an application for *habeas corpus* is not a suitable means for the judicial investigation of complaints regarding conditions of detention which fall short of rendering that detention 'not in accordance with law'. Such conditions should be investigated under other forms of proceedings, particularly judicial review.

Hogan J also considered *Brennan v. Governor of Mountjoy Prison*[11] in which Budd J held that the intentional violation of a prisoner's right might be a ground for ordering the release of a convicted prisoner under Article 40.4.2. Furthermore, Hogan J relied on the guidance given by Clarke J in *H v. Russell*,[12] which concerned detention under the Mental Health Act 2001. Clarke J held there that "a complete failure to provide appropriate conditions or appropriate treatment" was the only situation in which a lawful detention could be rendered unlawful, relying on *The State (Richardson) v. Governor of Mountjoy Prison.*[13]

Regarding the application of these principles to the case of Mr Kinsella, Hogan J held: "in the present case I cannot *presently* say that the applicant's continued detention has been rendered entirely unlawful by the breach of his constitutional rights or that the authorities have completely failed in their duties and obligations towards him*".*[14] Hogan J declared that

[10] [1978] IR 131.
[11] [1999] 1 ILRM 190.
[12] [2007] IEHC 7.
[13] [1980] ILRM 82.
[14] Emphasis in original.

he had reached this conclusion in light of what the learned judge considered to be the "real and genuine concern" for the applicant's safety on the part of the prison authorities as well as "the substantial difficulties which they have hitherto encountered in finding suitable accommodation for him".[15]

Hogan J held that decisions such as *The State (Richardson) v. Governor of Mountjoy Prison*[16] showed that "absent something akin to an intentional violation or manifest negligence on the part of the authorities (which is not the case here), it would be only proper to give them a fair opportunity to remedy the situation in the light of this decision".[17] Hogan J considered that this salutation was not only in accordance with the decisions on the nature of the remedy under Article 40.4.4, but was also "perhaps the one which is most apt having regard to the principles of the separation of powers".

Hogan J's analysis in this regard is most interesting, not only for those concerned with prisoners' rights and principles of administrative law, but also for scholars of judicial decision making. In Hogan J's view, "the present case may yet prove to be an example of a constructive engagement of this kind between the executive and judicial branches which achieves a just solution in line with appropriate separation of powers concerns without the immediate necessity for a coercive or even a declaratory court order".[18] However, Hogan J also issued a warning to the authorities that such a holding was not to give rise to delay, noting that if the guarantee provided in Article 40.3.2 is to be rendered meaningful for the applicant "then this further opportunity can really only be measured in terms of days" and "with each passing day, the present case would inch ever closer to the point whereby this Court could stay its hand no longer" and order release.[19]

In a postscript to the judgment it was revealed that after the judgment had been delivered the prison authorities had informed the court that it was intended to transfer the applicant to an available space in Cloverhill prison the following morning and that this had been carried out that day.

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[15] *Kinsella,* paragraph 14.
[16] [1980] ILRM 82.
[17] *Kinsella*, paragraph 14.
[18] *Kinsella,* paragraph 15.
[19] *Ibid*.

The decision in *Kinsella* and prisoners' rights

The judgment of Hogan J is a significant one in a number of respects. First, the declaration that the constitutional rights of a prisoner have been breached is most consequential. It is rare to find an applicant who has successfully argued that prison conditions breach the Irish Constitution.[20] The Irish courts have held that a prisoner does have a right to bodily integrity and a right not to have his or health exposed to risk or danger.[21] However, it has also been held that both such rights must be subject to limitations of practicality, the common good or the protection of the prisoner him or herself.[22]

Moreover, while the courts have held that prisoners have a right not to be exposed to inhuman or degrading treatment, they has also held that in order to establish a violation of that right it would be necessary to establish an 'evil purpose' on the part of the prison authorities or that the restrictions and privations on detention were punitive or malicious.[23] Not only must there be 'evil' consequences of detention, but here must be an evil purpose, "most commonly inspired by revenge, retaliation, the creation of fear or improper interrogation".[24]

In the most recent and most extensive discussion of prisoners' rights by an Irish court in the context of a judicial review application, *Mulligan v. Governor of Portlaoise Prison,*[25] the High Court declined to hold that the conditions in which the applicant was imprisoned breached the Constitution. There, the applicant contended that the absence of in-cell sanitation, unhygienic conditions and the need to 'slop out' breached his rights under the Constitution or the European Convention on Human Rights, seeking declarations and damages. MacMenamin J considered that the applicant's case was reliant on asserting constitutional

[20] Regarding conditions, a breach was found in *The State (Richardson) v. Governor of Mountjoy Prison* On prisoners' rights in Ireland see: PA McDermott, *Prison Law* (Dublin, Thomson Round Hall, 2000); R Byrne, G. Hogan and PA McDermott, *Prisoners' Rights: A study in Irish prison law* (Dublin, Co-op Books, 1981); the Irish Penal Reform Trust, www.iprt.ie and L Herrick, "Prisoners' Rights" in U Kilkelly ed, *The ECHR and Irish Law* (Bristol, Tottel, 2009) 325-352. On the history of prison policy in Ireland see M Rogan, *Prison Policy in Ireland: Politics, Penal-Welfarism and Political Imprisonment* (Abingdon, Routledge, 2011).
[21] *The State (C) v Frawley* [1978] IR 365.
[22] *Mulligan v. Governor of Portlaoise Prison,* [2010] IEHC 269, paragraph 93 (hereinafter *Mulligan*).
[23] *Ibid*, at p. 374.
[24] *Ibid*.
[25] [2010] IEHC 269.

rights in tort form and as a corollary the defendant was entitled to rely on defences in the law of torts such as causation, consent and foreseeability.

As has been common in cases involving assertion of a breach of the constitutional rights of prisoners, MacMenamin J held that there was no evidence that the purpose or intention of the restrictions on the regime were punitive, malicious or evil in purpose, still less was there evidence that the authorities were taking advantage of the detention to violate the applicant's constitutional rights or to subject him to inhuman or degrading treatment. The learned judge accepted that the facilities fell significantly below the standards to be expected as regards ventilation, hygiene and slopping out, but the regime as a whole, involving a single cell, out of cell time and good access to workshops and other facilities outweighed the negative aspects of the conditions.[26] Moreover, though the conditions were demeaning they were not such as to endanger life or health seriously and the applicant was not required to 'double up', meaning there was no breach of privacy. Regarding the right to bodily integrity, the court found that the applicant had not taken steps to remedy the physical injury he alleged had occurred as a result of slopping as he had not given adequate notice of this to the authorities nor request individual arrangements to accommodate him. MacMenamin J also noted that the allocation of resources in order to remedy the conditions through replacing the facility was a matter for the Executive and the courts should be slow to become involved.[27]

The court in *Mulligan* further examined the application of Articles 3 and 8 of the European Convention on Human Rights. The Convention has been incorporated into Irish law by the European Convention on Human Rights Act 2003, which allows for declarations of incompatibility with the Convention and the possibility of *ex gratia* payments by the Government.

In analysing this aspect of the claim, the court in *Mulligan* laid emphasis on the fact that Mr Mulligan did not have to share a cell, did not make significant complaints about the sanitation arrangements, had an adequate supply of soap, disinfectant and bleach and was able to purchase air fresheners. Taken both individually and cumulatively, there was no

[26] *Mulligan*, paragraph 110.
[27] *Ibid,* paragraph 123.

breach of the applicant's rights under the Convention by virtue of the conditions of his detention.

In *Mulligan* MacMenamin J appears to leave open the possibility that the outcome of a case taken under the European Convention on Human Rights may be different where a prisoner is required to slop out in overcrowded conditions with minimal out of cell time and with poor arrangements for hygiene. Nonetheless, the *dicta* in *Mulligan* that a prisoner arguing that his or her constitutional rights have been breached is still required to show evidence of 'evil intention' on the part of the prison authorities means that any such claim under the Constitution would have difficulty in succeeding. In this regard *Kinsella* is particularly significant.

In *Kinsella*, Hogan J had no hesitation in finding that the authorities were acting from the best of motives towards the applicant and as such no malicious or punitive intent could be found in the manner of his detention. However, the court also found that Mr Kinsella's constitutional rights had been breached. This seems to be, at least in effect, at some variance with earlier jurisprudence which held that in order to establish a breach of constitutional rights, quite apart from justifying release, such malicious intention would have to be established.

It is submitted that examining the attitude of the authorities when making the decision whether to release the prisoner or not is a more sensible way of taking note of the intention of the prison authorities than in earlier caselaw, which set too high a hurdle for prisoners to succeed in such claims. Prison authorities tend to be dealing with multiple competing priorities and engaged in difficult questions of the distribution of resources and may be acting with the best of motives. However, the results of their action or inaction, however well intentioned, can certainly give rise to breaches of constitutional rights which must be addressed and remedied.

The amount of delay which will be tolerated by the court gives considerable flexibility both to the courts and the prison service in balancing the difficult questions of the distribution of resources, the administration of the prison system, the separation of powers and the need to vindicate the rights of prisoners. There is no doubt, however, that this does not give a

great deal of specific guidance either to prison administration or to prisoners and their lawyers considering a *habeas corpus* application. Moreover, where breaches of constitutional rights occur, their remedy must be the priority over and above the convenience of the prison authorities or the extension of leniency to them on the basis that they are well intentioned. An overly deferential approach to the authorities in this regard is to be avoided.

Flexible remedies in Irish law

It is undoubtedly unusual for a court to find a breach of a detained person's constitutional rights, but to hold further that the individual is not in unlawful custody. There have, however, been some previous examples in Ireland of courts finding a breach of constitutional rights but making no order. In *District Justice McMenanim v. Ireland*[28] Hamilton CJ stated that such a position was possible because of the respect which the separate organs of government have traditionally shown each other.[29]

In *Doherty v. Government of Ireland*[30] the applicant sought a declaration that there had been unreasonable delay in moving the writ for a by-election. Other relief, including an order directing the Government not to oppose any motion to move the by-election, was also sought. The High Court agreed that there had been an unreasonable delay and decided to make a declaration to this effect, but did not impose any other relief.[31] Kearns J stated, however, that he hoped "any clarification provided by this judgment would have that effect" [of prompting the moving of the writ or declining to oppose it]. As Hogan J warned in *Kinsella*, Kearns J cautioned that if there was continual refusal over an unreasonable period of time to move the writ, the court might, in another case, "feel constrained to take a more serious view".[32]

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[28] [1996] 3 IR 100.
[29] *Ibid.,* at p. 136.
[30] [2010] IEHC 369.
[31] Article 16.1 states that all citizens and other persons in the State as may be determined by law shall, with certain exceptions, have the right to vote. Article 16.2 also imposes a requirement that the total numbers of members of Dáil Éireann (the lower house of Parliament) shall not be fixed at less than one member for each thirty thousand of the population, or at more than one member for each twenty thousand of the population. No time limits were laid down in either the Constitution or in statute regarding the maximum length of time before which a by-election must be called. In *Doherty* the vacancy arose in June 2009 and judgment was delivered in November 2010.
[32] [2010] IEHC 369.

There is also a precedent for finding that a person was not detained in lawful custody but without an order for release. In *AM v. Kennedy*,[33] the applicant contended that he was unlawfully detained in the Central Mental Hospital, Dublin, on the basis that an order for the renewal of his detention had expired prior to the issue of a further renewal. This was accepted by the High Court. All available medical opinion was of the view that the further detention of the applicant was needed for his own safety and that of others. Peart J refrained from making any order for release until the parties have had an opportunity to decide how, in the best interests of the applicant, his further detention until his sufficient recovery could be achieved in accordance with law.

Courts are understandably wary of stepping too far over the separation of powers, or of the release of a mentally ill person or a prisoner. Hogan J's reasoning in *Kinsella* represents an attempt to fashion a pragmatic and reasonable solution to the competing interests involved.

Prisoners' rights: Comparing Ireland, Scotland and England and Wales

There is a clear distinction between the law in Ireland and that of England and Wales regarding the availability of *habeas corpus* in cases of poor conditions. It is clear since the decision of *Hague v. Deputy Governor of Parkhurst Prison*[34] that detention will not be rendered unlawful because of prison conditions. The House of Lords held: "an alteration of his [a prisoner's] conditions deprives him of no liberty because he has none already".[35] The position of the Irish courts regarding the availability of *habeas corpus* also appears not to be required under the European Convention on Human Rights. In *Ashingdale v. UK*[36] it was held that Article 5, the right to liberty, does not apply to the conditions or type of detention but deals only with the initial decision to detain. Claims regarding prison conditions must therefore be brought under Article 3.

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[33] [2007] IEHC 136.
[34] [1992] 1 AC 179.
[35] [1992] 1 AC 130. In an earlier case, *Middleweek*, Ackner LJ held that it was possible to conceive of hypothetical cases in which the conditions of detention are so intolerable as to render the detention unlawful and thereby provide a remedy to the prisoner in damages for false imprisonment. A person lawfully detained in a prison cell were such as to be so seriously prejudicial to his health if he continued to occupy it eg because it became and remained seriously flooded or contained a fractured gas pipe allowing gas to escape into the cell. We do not therefore accept as an absolute proposition that if detention is initially lawful it can never become unlawful by reasons of changes in the conditions of confinement". In *Weldon* Lord Ackner stated this dictum had been erroneous. *See further* S Livingstone, T Owen, A Macdonald, B Ní Ghrálaigh and H Law, *Prison Law* (4th edition, Oxford, Oxford University Press, 2008).
[36] (1985) EHRR 528.

While the Irish courts may be somewhat unusual in allowing *habeas corpus* in cases of prison conditions, the Scottish courts have proven to be less reluctant to find breaches of the European Convention on Human Rights regarding prisoners, to engage in analysis of its caselaw and indeed to award damages than those in Ireland.

The case of *Napier v. Scottish Ministers*[37] involved prison conditions in which prisoners were confined two to a cell for at least 20 hours on average per day. The cells were found by the court to be "cramped, stuffy and gloomy"[38] Prisoners had no access to a toilet during the night and for extended periods at the weekend and were required to slop out. There was no structured activity other than walking in the yard for one hour and recreation for ninety minutes per week. Examining the effect of the conditions on the prisoner, the court held that they induced feelings of worthlessness and disgust, as well as avoidance of using the chamber pot. The petitioner had eczema, which was considered to be of "crucial importance" to the determination. The court held that the petitioner's serious outbreak of eczema resurged and persisted because of the conditions of detention; the eczema was of itself a source of acute embarrassment and humiliation and he believed that the infection of the eczema was caused by the conditions of detention, particularly slopping out, which belief the court described as reasonable and held to be felt acutely. The petitioner had, therefore, been exposed to conditions which, taken together, meant that he had been subjected to degrading treatment in infringement of Article 3.[39]

In 2011, three former prisoners at HMP Peterhead took judicial review proceedings complaining, *inter alia*, that the conditions of their incarceration subjected them to inhuman or degrading treatment and were also an unjustified interference with the right to respect for private life.[40]

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[37] [2004] U.K.H.R.R. 881.
[38] Para 75.
[39] The decision in *Napier* led to the Scottish Prison Service issuing a statement acknowledging that, where two prisoners had been detained in a relatively small cell for a significant part of the day, and had to use a chamber pot or similar arrangement to perform bodily functions in one another's presence in that shared cell, their rights under Article 3 of the European Convention on Human Rights had been breached and they would, in general, be entitled to payment in satisfaction of the breach. More recently, it was held that claims made by prisoners that the conditions in which they were detained in HMP Barlinnie breached their rights under Articles 3 and 8, were not statute barred ('prescribed'). *Docherty and others v. The Scottish Ministers* [2001] ScotCS CSIH 58.
[40] *Green & Ors, Re Application for Judicial Review* [2011] SLT 549.

No integral sanitation exists at Peterhead and each cell was equipped with a chemical toilet known as a 'porta potti'. The petitioners claimed that the use of these toilets, the lack of hand washing facilities within the cells, the lack of ventilation and the practice of 'bombing', whereby prisoners defecated into newspapers or other items or urinated into jars and threw them out of the window, breached Article 3.

The court accepted that it is not necessary to establish damage to physical or mental health for a breach of Article 3 to be established, but treatment of "some severity" must nonetheless be established.[41] Examining the jurisprudence of the European Court of Human Rights, the court held that single cell slopping out *per se* had not been found to amount to a breach of Article 3 but that the European Court had repeatedly found a violation of Article 3 in situations where a prisoner has been required to relieve himself into a bucket in the presence of others, and having to be present when others did the same.[42] The court in *Greens* specifically rejected the contention that Article 3 requires the use of a screened and flushing toilet. The court considered that the finding in *Napier* was based on the triple vices of overcrowding, slopping out and an impoverished regime. By contrast, the court held the petitioners in *Greens* based their cases very strongly on the slopping out process itself.

The court rejected evidence from the petitioners regarding the nature of the slopping out process and the extent of the smell and placed a great deal of emphasis on the fact that the prisoners involved did not have to share a cell, that work was available and there were many opportunities for out-of-cell time. The fact that the prison was not overcrowded was also important. The court considered the privacy of the single cell and the accepted practice of blocking the spy hole when using the chemical toilet (despite being a breach of the regulations) to be very important factors and also rejected the prisoners' evidence that they felt stressed and humiliated. The court noted that there were differences between the use of buckets and chamber pots and the use of chemical toilets. Taken together, the court did not consider that the petitioners' human dignity was diminished by the conditions.

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[41] Paragraph 257.

[42] In one case, *Malechkov v. Bulgaria*, App No. 57830/00, 28 June 2007, the Court had concluded that people in single cells should not be required to relieve themselves into buckets, but this was not a breach of Article 3 *per se*, with the breach consisting in the totality of the conditions. In *Radkov v. Bulgaria*, App No. 18382/05, 10 February 2011, the Court appeared to say the use of a bucket, even in a single cell, constituted a breach of Article 3. The court in *Greens* considered that *Radkov* was the only case in which using a bucket in single cell accommodation constituted a breach of Article 3 of the many authorities cited and care must therefore be taken with regard to the decision.

The court did, however, find a breach of Article 8. In its view, the scope of 'private life' can include the activities of discharging bodily waste and maintaining a standard of cleanliness. The court was keen to point out that it was not laying down a general principle that requiring a person to defecate into a bucket which must be slopped out was a breach of Article 8. Assessing the facts before the court, it held that there was no human right to a screened and flushing lavatory and the use of a chemical toilet in a single cell where a sanitation work party empties such toilets is not a breach of Article 8. However, when prisoners were required to slop out the chemical toilets themselves and queue to do so, there had an interference with their private lives. To be forced to queue in a line of others with a receptacle of one's own waste and to have to empty it in the presence of others constituted an infringement of Article 8. The Court therefore awarded damages in the sum of £500.

The courts in England and Wales have taken a somewhat less expansive approach to prisoners' rights. One case bears some resemblance to *Kinsella*. In *R (on the application of BP) v. Secretary of State for the Home Department*[43] a 17 year old male was detained in a young offenders institution. He had a history of self-harm and attempted suicide. The prisoner contended that on the first occasion of his segregation there was no heating provided and he was not given anything to do. He said he felt odd and paranoid as a result. It was held that the prison authorities had breached the Prison Rules, but, considering the facilities in the cell, the length of time he was there and the number of visits he had, there had been no breach of Article 3. The Court also held that there was no evidence that his physical and psychological integrity had been violated in breach of Article 8.

Regarding sanitation, in *Broom v. Secretary of State for the Home Department*[44] a prisoner was transferred between cells every three months and was not provided with an in-cell privacy screen, which was exacerbated by the dirty nature of some of the toilets and the presence of female prison officers. The court rejected the claim that there had been a breach of Article 8, holding that imprisonment was of itself humiliating and his conditions were no worse than ordinary prison regimes.[45]

[43] [2003] EWHC 1963.
[44] [2002] EWHC 2041.
[45] [2002] EWHC 2041.

The separation of powers and the need for policy change

The decision in *Kinsella* and those of the Scottish courts indicate that when conditions in prisons are very poor, the judiciary will put aside its usual qualms about stepping into the realm of administering prisons to afford claimants relief. However, as the cases analysed above all indicate, the remedies which are given are often limited and give wide latitude to prison authorities.

The difficult positions in which both the prison authorities and the judiciary are placed when dealing with decisions about accommodating prisoners who need protection when inadequate accommodation is available arise, however, from failures of policy and politics. In such cases in Ireland, the courts are placed in the unenviable position of choosing between the release of a prisoner lawfully sentenced by a court and allowing conditions which breach the Constitution to continue. These delicate balancing acts are rendered necessary by a lack of adequate attention or action at a policy level to such matters which is where such decisions should be made and indeed such cases averted in all jurisdictions. The constructive engagement between the prison authorities and the judiciary envisaged by Hogan J has been necessitated, and indeed is likely to be repeated in Ireland and elsewhere, as the result of the action and inaction of governments in the treatment of prisoners.