

# PAROLE IN IRELAND The way forward

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## *EVOLVING RIGHTS?*

- ▶ Rehabilitation - the right to dignity?
- ▶ Refusal of a discretionary grant/reasons
- ▶ Family members' rights

*Vinter v. United Kingdom*  
*ECtHR (Grand Chamber), 17<sup>th</sup> July, 2013*

- ▶ Reliance on International and comparative law
- ▶ European Prison Rules 2006
  - ▶ Rule 6: “All detention shall be managed so as to facilitate the reintegration into free society of persons who have been deprived of their liberty.”
  - ▶ Rule 102.1 provides that the regime for sentenced prisoners shall be designed to enable them to lead a responsible and crime-free life. The commentary on the 2006 Rules (prepared by the European Committee on Crime Problems) states that Rule 102 is in line with the requirements of key international instruments including Article 10(3) of the International Covenant on Civil and Political Rights.

*Vinter v. United Kingdom*  
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- ▶ Rule 103.2: As soon as possible after such admission [to prison], reports shall be drawn up for sentenced prisoners about their personal situations, the proposed sentence plans for each of them and the strategy for preparation for their release...
- ▶ 103.4: Such plans shall as far as is practicable include:
  - a. work;    b. education;    c. other activities; and
  - d. preparation for release.
- ▶ 103.8: Particular attention shall be paid to providing appropriate sentence plans and regimes for life sentenced and other long-term prisoners.
- ▶ Rule 107 (on release of sentenced prisoners) provides inter alia that, in the case of those prisoners with longer sentences, steps shall be taken to ensure a gradual return to life in free society (Rule 107.2); and that 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 (Rule 107.4).

***Vinter v. United Kingdom***  
***ECtHR (Grand Chamber), 17<sup>th</sup> July, 2013***

- ▶ German Constitutional Court in the *Life Imprisonment* case, 21<sup>st</sup> June, 1977
  - ▶ Article 1 of the Basic Law of the Federal Republic of Germany provides that human dignity shall be inviolable and that to respect and protect it shall be the duty of all state authorities.
  - ▶ the State could not turn the offender into an object of crime prevention to the detriment of his constitutionally protected right to social worth. Respect for human dignity and the rule of law meant the humane enforcement of life imprisonment was possible only when the prisoner was given “a concrete and realistically attainable chance” to regain his freedom at some later point in time; the State struck at the very heart of human dignity if it stripped the prisoner of all hope of ever earning his freedom (para. 69).

***Vinter v. United Kingdom***  
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- ▶ German Constitutional Court in the *Life Imprisonment* case
  - ▶ rehabilitation was constitutionally required in any community that established human dignity as its centrepiece. An offender had to be given the chance, after atoning for his crime, to re-enter society. The State was obligated - within the realm of the possible - to take all measures necessary for the achievement of that goal. Prisons had a duty to strive towards the re-socialisation of prisoners, to preserve their ability to cope with life and to counteract the negative effects of incarceration and the destructive changes in personality that accompanied imprisonment (para. 69).
  - ▶ the court recognised, however, that, for a criminal who remained a threat to society, the goal of rehabilitation might never be fulfilled; in that case, it was the particular personal circumstances of the criminal which might rule out successful rehabilitation rather than the sentence of life imprisonment itself (para. 69).

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- ▶ The Italian Constitution: Article 27(3) provides that punishments may not be inhuman and shall aim at rehabilitating the convicted.
- ▶ The Italian Constitutional Court has held that, on the basis of Article 27(3) of the Constitution, rehabilitation was the aim of every sentence and the right of every prisoner. As such, there should be review of the sentence, carried out by a judge rather than a member of the executive, to determine whether, given the time served, rehabilitation had been achieved. The court also emphasised that, subject to appropriate conditions, parole was essential to achieving the aim of rehabilitation. (para 72)

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- ▶ The International Covenant on Civil and Political Rights ('the ICCPR') is cited by the ECtHR at paras. 80 and 81 of its judgment.
- ▶ Article 10 of the ICCPR provides:
 

*"1.All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person ...*

*3.The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation...*

In its General Comment No. 21 (1992) on Article 10, the Human Rights Committee stated inter alia that no penitentiary system should be only retributory; it should essentially seek the reformation and social rehabilitation of the prisoner (see paragraph 10 of the Comment).



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“113. Furthermore, as the German Federal Constitutional Court recognised in the Life Imprisonment case (see paragraph 69 above), it would be incompatible with the provision on human dignity in the Basic Law for the State forcefully to deprive a person of his freedom without at least providing him with the chance to someday regain that freedom. It was that conclusion which led the Constitutional Court to find that the prison authorities had the duty to strive towards a life sentenced prisoner’s rehabilitation and that rehabilitation was constitutionally required in any community that established human dignity as its centrepiece. Indeed, the Constitutional Court went on to make clear in the subsequent War Criminal case that this applied to all life prisoners, whatever the nature of their crimes, and that release only for those who were infirm or close to death was not sufficient (see paragraph 70 above).

“Similar considerations must apply under the Convention system, the very essence of which, as the Court has often stated, is respect for human dignity (see, *inter alia*, *Pretty v. the United Kingdom*, no. 2346/02, § 65, ECHR 2002-III; and *V.C. v. Slovakia*, no. 18968/07, § 105, ECHR 2011 (extracts))”.

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“114. Indeed, there is also now clear support in European and international law for the principle that all prisoners, including those serving life sentences, be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved.

“115. The Court has already had occasion to note that, while punishment remains one of the aims of imprisonment, the emphasis in European penal policy is now on the rehabilitative aim of imprisonment, particularly towards the end of a long prison sentence (see, for instance, *Dickson v. the United Kingdom* [GC], no. 44362/04, § 75, ECHR 2007-V; and *Boulois v. Luxembourg* [GC], no. 37575/04, § 83, ECHR 2012, with further references therein). In the Council of Europe’s legal instruments, this is most clearly expressed in Rule 6 of the European Prison Rules, which provides that all detention shall be managed so as to facilitate the reintegration into free society of persons who have been deprived of their liberty, and Rule 102.1, which provides that the prison regime for sentenced prisoners shall be designed to enable them to lead a responsible and crime-free life (see para. 77 above).”

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*“116. The relevant Council of Europe instruments set out in paragraphs 60-64 and 76 above also demonstrate, first, that commitment to rehabilitation is equally applicable to life sentence prisoners; and second, that, in the event of their rehabilitation, life sentence prisoners should also enjoy the prospect of conditional release.*

*Rule 103 of the European Prison Rules provides that, in the implementation of the regime for sentenced prisoners, individual sentence plans should be drawn up and should include, inter alia, preparation for release. Such sentence plans are specifically extended to life sentenced prisoners by virtue of Rule 103.8 (see para. 77 above).”*

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► Partly Dissenting Opinion of Judge Villiger - use of Article 3

► Concurring Opinion of Judge Power-Forde

*“...what tipped the balance for me in voting with the majority was the Court’s confirmation, in this judgment, that Article 3 encompasses what might be described as “the right to hope”. It goes no further than that. The judgment recognises, implicitly, that hope is an important and constitutive aspect of the human person. Those who commit the most abhorrent and egregious of acts and who inflict untold suffering upon others, nevertheless retain their fundamental humanity and carry within themselves the capacity to change. Long and deserved though their prison sentences may be, they retain the right to hope that, someday, they may have atoned for the wrongs which they have committed. They ought not to be deprived entirely of such hope. To deny them the experience of hope would be to deny a fundamental aspect of their humanity and, to do that, would be degrading.”*

## EU CITIZENS & REMOVAL ORDERS

- ▶ Article 27 of Directive 2004/38 - high threshold
- ▶ Importance of rehabilitation: *Tsakouridis*, Case C-145/09, at para. 50:

*“In the application of Directive 2004/38, a balance must be struck more particularly between the exceptional nature of the threat to public security as a result of the personal conduct of the person concerned, assessed if necessary at the time when the expulsion decision is to be made (see, inter alia, Joined Cases C-482/01 and C-493/01 Orfanopoulos and Oliveri [2004] ECR I-5257, paras.77 to 79), by reference in particular to the possible penalties and the sentences imposed, the degree of involvement in the criminal activity, and, if appropriate, the risk of reoffending (see, to that effect, inter alia, Case 30/77 Bouchereau [1977] ECR 1999, para.29), on the one hand, and, on the other hand, the risk of compromising the social rehabilitation of the Union citizen in the State in which he has become genuinely integrated, which, as the Advocate General observes in point 95 of his Opinion, is not only in his interest but also in that of the European Union in general.”*

## FAIR PROCEDURES & RIGHTS

*Mallak v. Minster for Justice*, Sup. Ct., 6<sup>th</sup> Dec. 2012 - duty to give reasons.

*“65. ... it is not possible for the appellant, without knowing the Minister’s reason for refusal, to ascertain whether he has a ground for applying for judicial review and, by extension, not possible for the courts effectively to exercise their power of judicial review.*

*“66. In the present state of evolution of our law, it is not easy to conceive of a decision-maker being dispensed from giving an explanation either of the decision or of the decision-making process at some stage. The most obvious means of achieving fairness is for reasons to accompany the decision. However, it is not a matter of complying with a formal rule: the underlying objective is the attainment of fairness in the process. If the process is fair, open and transparent and the affected person has been enabled to respond to the concerns of the decision-maker, there may be situations where the reasons for the decision are obvious and that effective judicial review is not precluded.”*

## ***FAMILY LIFE RIGHTS***

- ▶ European Arrest Warrants and the balancing of family life rights: Article 8 ECHR
- ▶ see *Minister for Justice v. Egharveba*, High Court, 21<sup>st</sup> June, 2013
- ▶ *Minister for Justice v. B.H.*, High Court, 25<sup>th</sup> Sept. 2013.

Includes (at p.23): “where the article 8 rights of a child or children are engaged by a proposed extradition measure the best interests of the child or children concerned must be a primary consideration. They may be outweighed by countervailing factors, but they are of primary importance.”